Concepts of Liability – Female Genital Mutilation and Negligent Barristers

by

Mr. Julian Burnside QC

An address delivered at a meeting of the Medico-Legal Society held at the Athenaeum Club on 28 May 1994. The Chairman of the meeting was Dr. Peter Renou.

I start with two questions. Consider the case of a twelve year old child. An adult inflicts a knife wound on the child without anaesthetic, it causes great pain and possible medical complications later. The parents of the child consent to the procedure. Question: Is any of the adults legally liable? And the answer is: It all depends. Second question: Imagine a professional who's engaged to undertake a task within the scope of his profession, things are going pretty well before lunch and he goes out, has a pleasant lunch, a few drinks, comes back seriously worse for wear and in the afternoon performs so badly that the professional task on which he's bent miscarries to the great cost of the person who engaged him. Question: Is he liable? And the answer is: It all depends. All depends on what, you might ask. That insouciant question gives rise to some fascinating difficulties in the area of jurisprudence and for those of you who are doctors, I'll just divert for a moment to discuss what "jurisprudence" is.

Many people over a long time have tried to work out what is the nature of law and where does law come from. We'll talk about law as if it's a concrete object which is of known dimension and characteristics, but many very clever people have wondered for a long time what it actually is and how it arises. Austin and his followers said that law is ultimately the dictates of a sovereign backed up by sanctions and whatever the sovereign says becomes the law by virtue of it being said.

Jeremy Bentham and the Utilitarians said that what you had to do in order to derive concepts of law, liability and the like was to assess the net benefit of the behaviour in question and weigh against it the net detriment of that behaviour and if, on balance, it was beneficial then it would be legally tolerated and give rise to rights and if it wasn't well then it would be legally banned and give rise to liabilities. And the instrument used for that fascinating process was called the philosophic calculus or the method of calculating happiness.

Dorkin says that law and morality are indistinguishable and that law really bubbles up from the moral feelings of a community and those moral feelings are to be assessed by an analysis of its constitution and institutional organs. Hart's concept of law is that rules translate into rights, they become rights and liabilities are the correlative of rights.

Then there is the area of natural law, which doesn't belong to any particular individual but which has been regarded by many as being the foundation of law and the essence of natural law is that there are over-arching moral principles which precede any education or analysis and those over-arching principles in turn by exegesis and development

crystallise into a legal structure. And so, according to natural law, the rules of society are ultimately an expression of the morality of society. There's a difficulty, of course, because no two schools of natural law agree on what the underlying moral principles are and so they develop different legal superstructures.

Musing about jurisprudence immediately runs you into one fascinating question, which is of importance tonight. That is, is it possible for law to be invalid? That is to say, can you have a law which is at least within the parameters of the legal system a valid law and yet in some larger sense invalid. Consider for a moment the case of Hitler's final solution for the Jews.

All the laws which ultimately translated into the mass exterminations in concentration camps, all those laws were duly passed by the Reichstag and they were enforced by the courts. All the organs of the Wehrmacht were properly constituted and set up and their internal lines of command were operated in accordance with proper military principle. And so, from the original source of law through to the final execution of orders, the chain of command and authority was unbroken and therefore valid. But when the defendants at the Nürnberg trials in 1946 called in aid the defence that they were acting on superior orders, the International Tribunal had no difficulty in saying that did not amount to a defence.

No one can doubt the moral correctness of the findings of the International Tribunal but if it was also a legally correct finding then you have a curious circumstance that laws which were in every respect valid laws turn out, on examination after the event, to be invalid and it's difficult to see exactly why. This is not an unknown phenomenon. In times of peace this form of invalidity is usually dealt with by international sanctions and any member of the international community who introduces apparently valid laws which offend prevailing morality will be frozen out. Of course, in times of war it's generally the victor who says what laws are valid and what laws are not.

There are, as I say, many theories of jurisprudence and without aligning myself with one school or another let me declare my biases. First, I hold it as axiomatic that a law is capable of being a bad law. That is to say, the fact that it is law does not make it right. Second, if a law offends some instinctive sense of justice or fairness or morality then that law is probably a bad law. And, third, if a law compels a person to act contrary to the dictates of their conscience or their moral beliefs then that law is probably a bad law. You will see from that that

I think law and morality have common foundations although I do not align myself with the natural law school.

These considerations are for the most part utterly irrelevant in practice. They rarely trouble the practising lawyer. We are rather like the motor mechanic who isn't much interested in production control or design faults but are simply there to do the best you can within the constraints that those things impose. It is very often the case that bad or perverse laws, although difficult for the client, can be very beneficial for the lawyers. But on an occasion like this, the mere mechanic can for a moment - at least in imagination - take control of the design process and step into the factory and fiddle with the production line in order to see what different results might be brought about if things were otherwise.

I choose those questions not randomly or out of a sense of mischief but because those questions test questions of jurisprudence at their very boundaries and if you don't think that that's right, wait a little.

Female genital mutilation. If you don't mind, I'll abbreviate it FGM because it is a bit of a mouthful to say. It is illegal in France and Britain and several other countries around the world. At the moment there is a substantial body of opinion that it ought to be illegal in Australia. When I say "illegal" you have to bear in mind that as a matter of law some actions which amount to an assault, and are therefore illegal, can be consented to.

So, a boxer who goes into the ring and gets his head punched in is taken to have consented to that and what would otherwise be an assault is a lawful activity. The footballer who gets knocked around on the field has undoubtedly suffered what would be an assault except for the fact that he, by implication, consents to the treatment he gets. If the treatment goes beyond the bounds of what is reasonably incident to the game, well then his consent doesn't operate and it remains an assault.

But there are limits on the extent to which you can validly consent to that sort of behaviour. So, it has been found that you cannot consent to being shot and being shot is an assault whether you say, "Do it" or not. Equally, the House of Lords just late last year held that it was not a valid defence to assault charges that the so-called victims had consented to the extreme sadomasochistic torture that they were voluntarily subjected to.

When I say that people think FGM ought to be illegal, what that really means is that the consent of the individual or of the individual's parents will not be a valid consent and what starts as an assault will remain an assault.

FGM has many forms and it's fairly nasty in its worst forms but it's important to remember that it covers a continuum of behaviour. In its least aggressive but most common form, FGM amounts to no more than a ritual nicking of the clitoral hood and that is sometimes referred to as female circumcision. The next most extreme form and slightly less common is clitoridectomy in which the entire clitoris is removed and sometimes parts of the labium minora. The least common and most extreme form is infibulation, which involves the removal of the labia and of the clitoris and then a suturing of the vaginal opening so that all that remains is an opening about the size of a matchstick just sufficient to enable menstruation and micturition. And when I say, "just allowing it", micturition can take 15 minutes. When the woman marries the vulva is opened either by her mother or by the husband and that is sometimes done with a knife. It is, on any view, a pretty appalling process. It is practised in 40 countries around the world, 27 African countries alone practise FGM in some form or another. Infibulation is practised widely in the Horn of Africa where approximately 85 per cent of women are infibulated and, would you believe, 83 per cent of women approve it as a practice and 88 per cent of men approve it as a practice.

The problem came to light in Australia in August 1993 when a solicitor became aware that a couple of Somali girls who were her clients had apparently been infibulated. The solicitor drew this to the attention of Community Services Victoria who said that they did not regard that as an aspect of child abuse and were not really interested. It also turned out that the girls' doctors knew that they had been infibulated but, once again, did not regard it as a matter that they needed to take any action about.

A body that was interested in the case intervened in it and as a result CSV changed its policy and it now regards infibulation or, in fact, FGM generally as a cause for a care and protection order. It's easy to nod and say "Well, that's a very good thing", a care and protection order, of course, involves the prospect of the child being taken away from the parents on the footing that the child is at risk. I mention that simply because the idea of taking a child away from its parents strikes me as relatively extreme, albeit that it's provoked by relatively extreme behaviour.

Africans who come to Australia might be entitled to say, "You're a multicultural society. We bring our culture with us and this is a deeply embedded aspect of our culture. In what sense is it wrong for us to practise our culture in this new country?" And then, of course, the

absolutists might say, "We're multicultural, certainly, but only to a point and there is a point beyond which we are not prepared to tolerate this sort of behaviour." The relativists would answer, "It's we who are doing it to ourselves. We don't propose to do it to you who disapprove" and then the absolutists would no doubt respond, "There are some forms of behaviour for which there is no justification and which we will not tolerate in any circumstances."

You might say, "What if it was my daughter who is going to be infibulated, the thought appals me", of course. "But there's no suggestion that any orthodox Somali is going to try and infibulate my daughter, but it is the fact that his daughter will feel unclean if she's not infibulated." So, a dilemma. Let me tease out the problem a little bit more. In its most minimal form FGM is indistinguishable from male circumcision in terms of its extremity, if anything it's probably less extreme than male circumcision.

You may not be aware, but Australian Aborigines practise FGM, including in limited cases infibulation, most commonly clitoridectomy. The Australian Aborigines also practise something called subcision which sounds particularly nasty. It involves making a slit in the urethra on the underside of the penis as an initiation rite. Not only is this not consented to, the initiate is hunted down through the camp before it's done and if he can get away so much the better for him. I don't know how many Dayaks there are in Australia but the Dayak male inserts a 4-centimetre pin through the glans of the penis. He does it because it is thought to enhance the sexual pleasure of the female. I can only think of three positive things to say in relation to this Dayak practice. One is that it is culturally valued and therefore presumably valuable, at least amongst Dayaks. Second, it is obviously altruistic in its origins and, third, it is apparently not as debilitating as it sounds, because the Dayaks survive.

So much for genital mutilation. How can the argument sensibly stop at genital mutilation? There are many other forms of mutilation practised all around the world. Deforming the skull is widely practised. It involves placing great pressure on the skull in young children and the result is a grossly deformed skull which is regarded as a mark of social esteem. The perforation of tongue and lips is very common in many countries around the world, including amongst the Australian Aborigines who tear thorns through the underside of the tongue as part of initiation rites.

Fiddling with the ears is a widely practised form of body mutilation in its minimalist forms: ear piercing, it's almost universal and we don't think it's a bad thing because we do it ourselves. In other countries outside Europe earlobe stretching is widely practised. We don't think it's so good because we don't do it ourselves. In Micronesia in South America decorative objects are placed through the nose. In many countries around the world, including of course Australia, ritual scarring is widely practised and the raised decorative scars on the chest of the Aborigine have got a great deal in common with the duelling scars of the German aristocracy which only died out shortly after Bismarck's time.

The teeth are also frequently the subject of mutilating practices, especially in Indonesia where they drill holes in the teeth and insert gems as a mark of social elevation or they file low relief patterns on the surface of the teeth, once again, as a decorative mark and they then fill the filed channels with dyes so as to make the effect more prominent. Chipping and drilling and removal of teeth are also widely practised as a cosmetic effect.

Speaking purely for myself and although I was circumcised I can't remember it, if I had to make a choice between having my teeth filed for a few hours without anaesthetic or a swift circumcision, I think I would probably go for the latter.

The question returns. Should these forms of behaviour be lawful or not? And if they're not to be lawful, what is our reasoning for making them unlawful? The cultural absolutists would say, "Multiculturalism is all very well but that sort of behaviour is just not our thing and we won't have a bar of it." The difficulty with that is, of course, that it reeks of cultural superiority and the days of cultural imperialism I think are probably dead. It is no longer fashionable, for example, to interfere with Aboriginal culture and it would be interesting to see whether those who presently think that FGM should be made illegal would extend it generally so as to include the Aboriginal community as well as the Somalis living in Australia. But the fact that Aborigines perform it merely heightens the point that any banning of cultural practices is a form of cultural imperialism and until we grasp that nettle it's difficult to reach any common ground for the discussion to proceed.

Then how does one get out of the difficulty that this is a revolting practice - and, believe me, I think it is a revolting practice. How do we get around the fact that it's a revolting practice which is valued

by societies who come to live here? There is, of course, an argument which for want of better expression could be called "the greater good argument".

The greater good argument goes something like this: True it is that these practices are done consensually within cultural groups who bring it with them when they come to our country, but the existence of brutal behaviour within a society is itself a brutalising effect on the whole of society and society suffers as a result.

It's a very appealing argument, the greater good argument, for two reasons: First, it gets around the problem which besets all victimless crimes. Victimless crimes are a serious difficulty for legislators because it is an attempt to impose the will of the majority on a minority who perform practices amongst themselves to the detriment of no one who's not interested.

How then do you justify interfering with private behaviour of that sort? Well, it's simple. You say, "For the greater good of society we'll remove this brutalising influence." The difficulty with that is that there's an a priori assumption that this sort of behaviour is brutalising. If you ask the Somalis whether FGM is a brutalising influence they'll say "Of course it's not, it's what we've been doing for thousands of years and we think it's perfectly right and we think you're revolting people for not doing it yourselves." So, plainly enough, that line is nothing more than the cultural imperialist argument in disguise.

The other attraction of the greater good argument is that it is ultimately to be justified by society in a sort of parens patriae role protecting the weak. It is society collectively through its parliaments saying, "We will protect these innocents from behaviour which they're going to be subjected to unless we intervene." Now, of course, that sort of approach ranks alongside patriotism and motherhood as being wonderful things and it therefore escapes without any close analysis.

However, the difficulty with the argument of protecting the weak is that it involves saying there is a remote and general good to be obtained by protecting society at large and the innocents amongst it which outweighs the obvious detriment to the individuals whose behaviour is being suppressed against their will. And so what is this but the Utilitarians' philosophic calculus being brought into play and the algebra is not closely analysed. Indeed, I have always doubted that the philosophic calculus could ever be analysed in a way that was satisfactory. So, you may or may not have a view about the greater good argument. I hope my prejudices haven't shown too strongly. But

if you have a tentative view about the greater good argument, suspend judgment for just a minute.

Remember the second problem with which I began. A professional engaged to do his professional task, doing very well during the morning, goes to lunch, comes back, he's half whacked, does a terrible job after lunch, the client goes down the river, it's hopeless. Question: Is he liable? All depends. Depends on what? If he's a barrister and the engagement was a court engagement the answer is no, he's not liable. On 13 October 1988 the High Court decided Gianarelli's case. Gianarelli's case, in short, said that a barrister cannot be sued for negligence in the performance of his/her work in court. Now, like all barristers, I regard this as a very sound application of ancient and honourable principle which, along with most of the utterances of the High Court, I regard as being next to holy writ. I only pause to question is for a moment for polemical reasons.

Gianarelli's case offered an interesting analysis of why it is that barristers ought to be immune from suit and I think it's desirable that I should tell you what the court said. Mason CJ in the crucial part of his judgment said that, "The barrister's immunity rests explicitly on the proposition that to expose counsel to liability and negligence would create a real risk of adverse consequences for the administration of justice. Litigation would tend to become more lengthy, more complex and more costly."

Wilson J said, "The public interest in the administration of justice remains a valid unifying theme for the various issues of public policy canvassed by the House of Lords in Rondel v. Worsley. Five distinct grounds of public policy were advanced in Rondel in support of immunity. The concern that if counsel could be sued for negligence they would be tempted to prefer the interests of their clients and would be deflected from observing their duty to the court. The adverse effect that the fear of litigation may have on the barrister's efficient conduct of court proceedings; the cab rank principle whereby a barrister is not free within his field of practice to choose whether or not to act for a person who desires his services and can pay his fee; the special character of the judicial process wherein judges, jurors and witnesses are immune from civil action; lastly, the threat to the public interest centred in the finality of litigation."

His Honour dealt with each of those five considerations in little detail and acknowledged that they were not all of equal weight. I want to discuss only one of them and before I do so I'll mention two brief

points about the others. First is that the occasions where counsel's duty to his client conflicts with his duty to the court are pretty rare and there is no doubt at all that the conflict is to be resolved in favour of following your duty to the court. So that in the rare occasions where a conflict arises your course is clear and it's difficult to see how that possibility would give rise to any great problems because you wouldn't be liable and you wouldn't be liable merely because you properly preferred your duty to the court over your duty to the client.

Secondly, if it is true that the threat of litigation is likely to have an adverse effect on a professional person's performance of their professional duty, that seems to be a powerful argument for exempting airline pilots and brain surgeons (to take two at random) from civil liability but I have not heard any such suggestion advanced in any quarter. Personally, I would rather be dealt with by a negligent barrister than by a negligent airline pilot.

The point of Their Honours' judgments, which I do want to take up, is their consideration that the finality of litigation is an overwhelmingly important factor. What is meant by that is that the court does not want to see or permit the possibility of a collateral attack on the judgment of the court. Take an example: A person is charged with a criminal offence, they're found guilty and they appeal but the appeal fails. The defendant then sues her barrister saying that he handled the case negligently. In the negligence action you get, in effect, a re-run of the original criminal trial and the court agrees - yes, the case was handled negligently and the defendant shouldn't have been found guilty. So, you have two quite inconsistent and embarrassing decisions of the court: one on appeal that's held that the conviction was proper and the other the conviction should never have happened because the barrister was negligent. That is a collateral attack on a judgment of the court and that's what the courts don't like to see.

There's another twist on it and that is that in the nature of things, a collateral attack on a case can involve re-running the litigation over and over. I mean in the nightmare scenario the case is run and lost, the disappointed litigant sues again and alleges the case was handled badly so the whole case is rerun as part of the second action. Disappointed again, re-runs that one by suing the second lot of lawyers and so on *ad infinitum*. Only a wealthy person could do it but this is the fear. This is what the courts fear and this is the public policy consideration that makes people like me able to stand up in court and be negligent without being sued.

At the risk of being heretical, let me tell you that there are already collateral attacks on the judgments of court and litigation is not really quite as final as we like to tell ourselves it is. The Chamberlain case is a recent and striking example of litigation that looked as though it would never come to an end, litigation where after the ultimate affirmation by the High Court of the correctness of the verdict the whole thing was ultimately re-litigated and an opposite result was achieved. The Guildford Four is another recent example of a case that was, in effect, re-litigated. Before that, the Pelizzioni case in 1869, the Thornton case in 1817, Adolf Beck in 1904 and Oscar Slater in 1908 are all examples of cases where collateral attacks were ultimately mounted on final convictions with the result that the convictions were set aside.

Of all of those cases, the one I would like to deal with briefly is Adolf Beck. Adolf Beck was a genuinely unlucky man. Adolf Beck was standing outside 135 Victoria Street, London in 1896 and as he stood, minding his own business, a woman came up to him and she said "You tricked me out of my jewellery" and he said "Be off with you, Madam" or similar words. She insisted that he had defrauded her of some jewellery and he, foolishly, made a dash for it, but he didn't just dash off into the wild blue, he dashed up to a policeman and the woman, Otilié Meissonier, gave chase. They had a bit of a chat to the policeman, she repeated her charges and he said that she was a prostitute accosting him. They all went down to the police station.

At the police station the police asked each of them what was going on. Otilié Meissonier repeated her charges that he had swindled her out of various bits of jewellery and described in detail how he had done it and he repeated that he'd never seen her before in his life. Imagine, if you will, the nightmare he must have been experiencing if his story was true. To his horror, the police believed her and he was charged with the offence disclosed by her tale. Within the next few days a number of other women came forward and they all identified him as the man who had defrauded them out of items of jewellery in identical circumstances to those described by Otilié Meissonier. Adolf Beck was in serious trouble.

I should explain perhaps the method he was said to have used. Each of the women independently told this story, that his technique was unvarying. What they told was this: That this gentleman, Adolf Beck, had bumped into them in the street in London and had said "Ah, it is Lady Rainsford, is it not?" and they would say "No, just Mrs Smith" and he would say "I'm terribly sorry and identify himself as

Lord Wilton de Willoughby and then he'd get into a conversation with her and with a combination of blandishment and rodomontade would persuade her to hand over some jewellery in exchange for a worthless cheque, always drawn on the same non-existent bank and all cheques in the same handwriting. Each of them told this story and each of them said that Adolf Beck was the man.

He was duly brought up before a committal hearing and at the committal a police officer called Elliss Spurrell gave this evidence: Spurrell said "In 1877 I was in the Metropolitan Police Reserve. On May 7, 1877 I was present at the Central Criminal Court where the prisoner in the name of John Smith was convicted of feloniously stealing earrings and a ring and 11 shillings of Louisa Leonard and was sentenced to five years' penal servitude. I produce the certificate of that conviction. The prisoner is that man." And then in answer to cross-examination, "There is no doubt whatever. I know quite well what is at stake on my answer and I say without doubt he is the man." He was sent for trial.

The trial came on before Sir Forrest Fulton as judge, prosecuting him was Sir Horace Avery (later a judge himself) and Guy Stephenson. Appearing for Adolf Beck was Charles Gill and Percival Clarke. The defence was simple: mistaken identity. The evidence that they sought to rely on was that Smith had been sentenced in 1877 in the circumstances that Burrell had identified. Between 1875 and 1882 Beck had lived permanently in Peru. Not a bad alibi.

Unfortunately, at the trial Elliss Spurrell was not called to give evidence and the Crown strenuously resisted any attempt by the defence to adduce any evidence about the original conviction in 1877. Sir Forrest Fulton, the presiding judge, refused to admit that evidence. Adolf Beck was found guilty and was sentenced to seven years' hard labour. Whilst he was in prison his prison number was DW523 and under the prison system that operated in those days the D signified a conviction in 1877 and the W signified a conviction in 1896.

He stayed in gaol for the next seven years. But whilst he was in gaol a journalist called Sims got interested in Adolf Beck's plight. He was troubled because although the prosecution had proceeded on the unstated premise that Smith and Beck were the same person they had failed to lead any evidence and had actively excluded any evidence about the circumstances of the 1877 conviction. Significant, because the 1877 offences had been identical in every detail with the offences Beck was charged with.

Now, of course, if it were true that the person Smith had committed identical offences in 1877 then it would prove the existence of another person in England who was so like Beck that Spurrell was confused and who was known to have committed offences of identical character: a defence of mistaken identity was bound to succeed if the evidence of Smith and his convictions had been put before the court. Sims began to agitate and progressively public feeling began to swing around in favour of the view that Beck might have been wrongly convicted.

Ultimately, an enquiry was called after the pressure on the government became so great. It became so great that the government agreed that they would enquire into the matter. And evidence was called from Sir Horace Avery and from his junior and from the judge and from the other counsel who appeared in the case. The nightmare scenario that we're so concerned to avoid and which thus leads to my immunity. All of those people gave evidence and the committee of inquiry reported in 1904 that "There is no shadow of foundation for any of the charges made against Mr Beck or any reason for supposing that he had any connection whatever with them." Only limited solace for him since he had at that time served his full seven years.

There are three other things to comment on about that case. The first is that in 1904 whilst public anxiety about the matter was at its height and whilst the public inquiry was proceeding Beck was arrested again and charged with offences committed in identical circumstances and he was convicted and sentenced to gaol. He was released three months later when John Smith was arrested and charged with those very offences under the alias William Thomas and also the alias William Wyatt.

The second: Counsel who had prosecuted Smith back in 1877 was none other than Forrest Fulton who later as the judge in the 1896 trial refused to allow any evidence of those convictions to be put before the jury. And, finally, the decisive evidence which satisfied the committee of inquiry that Beck and Smith were not the same man and this fact had been known to the prosecuting authorities for six years, the fact which was decisive in demonstrating that Smith and Beck were different people was that Smith was Jewish and had been circumcised and Beck had not.

And so by that odd symmetry I'm brought back to the first subject and I suspect that if Adolf Beck had turned his mind to the topic of genital mutilation he would've proved to be an ethical relativist. He would've said, "Well, it's all right for some people but not for me." And

I must say that's a position with which I have some sympathy although more for philosophical reasons than self-interest.

It seems to me that the absolutist view has no place in a multicultural society and if we hold ourselves truly to be a multicultural society well then we have to face the fact that it excludes necessarily any moral absolutism, because any moral absolutism by definition involves a subordination of one culture to another, because by definition if the moral values of the several cultures are not the same the absolutists have no mechanism for adjusting the differences between them and, ultimately, the majority prevails and suppresses the minority's cultural views, however valued they may be for that minority.

I do not for a minute support or approve of mutilation of any sort or genital mutilation, in particular. It is important, I think, to bear in mind in this context that FGM is not a single form of behaviour but a continuum and the question I think should not be "Do we allow FGM or do we not?" but rather, "Should we draw the line at some point or do we allow the entire range of behaviour in?" And if the question is, "Do we draw the line at some point and, if so, where?" we will then be forced to identify rationally the basis on which we are imposing our cultural beliefs over those of other people.

It seems to me that in questions of the clash between any two cultures one will find problems of this sort and I suggest to you that there are profound questions of culture and philosophy and jurisprudence between moral disapproval and prohibition and you can't take the step of prohibiting until you've decided what are your cultural and moral and philosophical views in imposing the liability that's under discussion.

QUESTION: DR MARUM. I just wonder, allowing your points, what part of the community is prepared to pay for the medical treatment of these people who have had these self-induced problems?

MR BURNSIDE. I suppose society at large does, as it pays for many other self-induced problems such as people with lung cancer from smoking, people with alcohol-related problems, all the people who knock themselves around in cars; these are self-inflicted injuries for which society generally pays. I would say also on a pragmatic level, that if FGM is tolerated without being embraced it may be that that will induce people to have it performed in more hygienic circumstances less likely to lead to medical consequences than will be the case if it is done despite the prohibition and therefore done in more difficult circumstances.

QUESTION: DR MARUM. I would add at this point that this is being discussed or has been discussed amongst my obstetric and gynaecological colleagues and this is currently the view of our college which is at variance from the AMA, for instance, and this is a matter that worries me personally, greatly, and I think we'll end up with saying "Okay, these practices can go so far". Inevitably, we've got to question circumcision in the male and I've had great difficulty with that topic for 15 years, in fact refused to do it for 15 years. But, clearly, there's no way we could ban circumcision in our community because such a large portion of the community practise it.

MR BURNSIDE. I think the big difficulty that people are going to face if they try and ban FGM generally is that by exactly the same moral process of revulsion you will have to interfere with Aboriginal culture, for example, in a way that is just not socially acceptable any more. I think most people say that the Aborigines have suffered enough at our hands and that our imposition of culture on them was not justified at the time and it won't be justified any longer. But if that's right, why should we treat Somalis any differently or Dayaks, if there are any?

QUESTION: MS LEEDWELL. You've made me feel uncomfortable with the law. The problem with discussing culture and using words in the language which you've used is to deny what is actually going on and people are harmed. It's not just a matter of tolerance for culture and religion and worship, it's harming people, it's injuring people, it's actually killing people. I don't think that we can just pass it off as ours being a mature multicultural society. I think we've got think if we're harming people and we are harming people, we're allowing it. We're killing Aborigines, we're not tolerating Aborigines with that procedure. There's a death rate.

MR BURNSIDE. Let me meet that with one proposition and one question. The proposition: Were you aware that in the last few months in the Northern Territory a judge of the Supreme Court of the Northern Territory took into account in sentencing an Aboriginal offender the certainty that that Aboriginal offender would be speared ritually in the thigh three times by the relatives of his victim and he not only took that into account in sentencing but he had a court officer go and supervise the spearing. Now that seems to me on one level at least to be a justifiable tolerance of one culture's behaviour notwithstanding that it offends our culture's behaviour. You would not have that happen if the offender was a white, it just wouldn't be allowed, it would be an unlawful assault

without any question. But that was actually sanctioned by a judge and I have to say that I think what he did was right.

Accepting what you say that people hurt each other and kill each other by practising FGM, I would ask you this: I want you to imagine that you're now in Somalia and you've been touched with that wand which gives you limitless power to do anything you like. Will you ban FGM in Somalia?

The answer was yes, because she has seen people who have been injured and harmed. The point is you would be doing that against the wishes of 85 per cent of the people whose will you were overbearing and I think that that must give you cause to say, "Well, true it is they're hurting themselves but they're doing it because they find it culturally important." I mean the reality is that Somali girls think themselves unclean if they're not infibulated. It's not of present relevance to say well, that's an absurd belief. Society is full of absurd beliefs. But if it's a belief then you have to deal with it as a fact of life and I suggest that a much more appropriate course, if you had this ability of absolute control in Somalia, would be to educate society so that progressively the practice ceased to culturally desirable. But to ban it seems to me to be unwarrantably heavy handed. And if that's true there then why is it not true here?

QUESTION: I'm only one person with one opinion, but would you say then that perhaps it was unreasonable in the last century to ban burning witches? Everyone in the society would have said at the time "These women practise evil, they should have been burned." When does a society move out of that primitive behaviour and when is it acceptable and when will judges accept that it's acceptable?

MR BURNSIDE. First of all, that's a difficult example, because that was the legal system itself. That was not society giving vent to its feelings but it was the legal system actually imposing sentences of burning for witchcraft and so I think that raises a quite different problem. I agree that as societies mature their attitudes and values change. The laws of a society, in my view, ought to reflect the prevailing attitudes and morality of that society. So that you would have been ludicrously out of step 200 years ago saying that no one should be flogged with cat-o'-nine-tails any more. Dreadful though that is it was not a sensible option to suggest that was shocking. We've matured as a society. We see it as shocking now. You don't change people's morality by prohibiting things. You change their morality by educating them and once you've educated them then you can safety

prohibit to stop the rearguard. But I don't think the right response to a cultural form of behaviour is simply to prohibit it. And if you do prohibit FGM then you've got to prohibit male circumcision of Jews. I mean, really. And you would have to prohibit all sorts of other forms of behaviour in Aboriginal society in a way that I think most people would find unacceptable for quite different reasons. The point about talking of it is that it is a very difficult problem. It is a very serious difficulty stepping from disapproval to prohibition.

QUESTION: Do you think a few deaths and a lot of harm a long the way is acceptable until education catches up?

MR BURNSIDE. I don't think that's a fair way of putting it. By the same logic you would ban the automobile. Society implicitly says "We know that people are going to be killed in cars, we know they're going to be killed in factory accidents, we know that every time a city building goes up on average there'll be one or two people killed." Are we therefore saying that it's acceptable to have a few deaths in order to get the building or to have cars or whatever the case may be? I don't think it's quite the right way of analysing the problem. It doesn't reflect my attitude to it. All I'm saying is that we accept all sorts of behaviour that have unpleasant consequences.

QUESTION: MS SYMES. In New Guinea culture cannibalism was probably in this century still acceptable and also in the Pacific Islands. I went to school with an Indian from Fiji and her grandparents went to Fiji from India and they were practising cannibalism in Fiji when her grandparents were there. Do you accept that that is acceptable? That was a cultural thing. Cannibalism was acceptable.

MR BURNSIDE. I think it's a very good question and I don't have an adequate answer for it. It's luckily a hypothetical question.

QUESTION: MS SYMES. (Off mic) It wasn't in Fiji in the - - -

MR BURNSIDE. Are we taking the debate even further and saying not only will we impose our will on people who want to live here, we'll go and impose our will on all the other cultures if we disapprove of them? That's a very big step to take.

QUESTION: DR MARUM. There's a problem I have with this. If you go to the United States of America to live and be part of their culture the first thing you want to do there is become an American citizen. In Australia we have this immature social approach to the whole matter where we're just prepared to pander - dare I use the word - to any culture that wants to come here and we're just glad to have them here. They don't have to become a member - they can still vote, damn it, but

the thing is that they have no really shared equality with anyone who is an Australian - dare I use that word. I can't see the difference between someone coming in here and wanting to be part of Australia. Why the hell can't Australia say "Listen, buddy, you want to be in this country and have a say in the community you'd better become a citizen." I believe this would become part of this thing which you describe.

MR BURNSIDE. I'm not sure that I accept the underlying premise that to be a citizen you have to share all of the views of the majority in your society. I think that that very quickly leads to social oppression of a sort that I wouldn't want to be part of. That's the sort of attitude that gripped America in the early 50s to the regret of many. Just what extent of social conformity you demand is very much a matter of personal philosophy and that's really what this whole subject is about. It's a matter of personal philosophy: if I disapprove should I therefore prohibit if I have the power to, or should my disapproval be tempered with tolerance to acknowledge the existence of alternative views. That's what the debate is about and I think people can legitimately differ about the answer.

QUESTION: DR MARUM. May I just say briefly, yes, I don't disagree with that point. They should become part of the voting process which would regulate their activities.

MR BURNSIDE. Yes, but I think that's a little different. I mean in reality the voting process leads to the election of one of two alternatives and neither party sensibly reflects the views of minority groups. By definition they reflect the views of the two substantial majority groups. I think that one is entitled to be concerned for the views of minority groups as well. If we let people come and if we do pretend to be multicultural and to value diversity then we have to take the cost of that along with the benefits. I remember distinctly when I was a kid going along St Kilda pier and hearing people deriding the Italians and the Greeks who were fishing for squid. There was nothing more revolting that I could think of than eating squid. Of course, attitudes have changed.

The first wave of migrants from Central Europe after the Second World War received terrible treatment because they were regarded as different and they wouldn't conform and they dressed in black and they didn't learn our language and this was regarded as a terrible affront to us. I think that it's a side of our maturity that at least the European migrants here are welcomed with open arms and their different cultural values are regarded as enhancing our culture. We've been a little

slower to do it with Vietnamese migrants but the process is happening. It's just that FGM is an example of a cultural value that is so far out of reach that we immediately respond against it and think that we can't possibly tolerate it in our society. But it's the same process of cultural imperialism that's at work.

QUESTION: I really want to take issue at a much more fundamental level with what you've said. I see absolutely nothing wrong with moral absolutism. Indeed, I think it's thoroughly desirable. I think it is quite immoral to have an attitude of moral relativism. And, indeed, if you go back into India in the 19th Century you can see two very prime examples of that. When the British came to India and effectively took responsibility for Indian affairs there were two practices which were entirely hallowed both by time and by cultural custom.

The first was the practice of sati and the second was the practice of thuggism. Sati involves, as you know, the practice of burning the widow and it may be socially desirable, it may be economically desirable and, indeed, in many cases the widow enjoyed it, or was said to enjoy it. Thuggism was perhaps less desirable but nevertheless was a practice that had gone on for at least 100 years and probably a good deal longer. The British regarded it as two of their great glories in India for they abolished both of those practices. I am not sure whether you would say that they certainly were being cultural imperialists in doing that.

I'm not sure whether you would go so far as to say that they were wrong or evil or immoral, but it seems to me that what they did was both right and desirable and I see no reason why we in a Christian society - and perhaps it's only marginally that we are a Christian society - why we should do anything other than impose our beliefs on those who wish to live in our society. There's something quite wrong about us if we have so little confidence in what we do and what we believe that we can say to any Tom, Dick or Harry "Your belief is as good as ours", that's quite wrong.

MR BURNSIDE. Until about 30 years ago, the descendants of those same British cultural imperialists would take Aboriginal children away from their parents so as to remove them from the brutalising influence of their society and give them the benefit of a decent white upbringing. I assume that you would regard that as right.

QUESTION: No, I wouldn't regard that as right but I think you are paying far too much attention to logical consistency which is quite unnecessary. There are lines that can be drawn at all sorts of points.

MR BURNSIDE. Yes, exactly so. And I think the real question is where do we draw the line. Let me say I wouldn't tolerate Indians here burning their widows and I think if I had to draw the line I would say I did not approve and would prohibit infibulation although it would need to be dealt with carefully. I certainly wouldn't allow cannibalism even if it were confined to those members of the immigrant group who believed it was a good thing. But there are many forms of less extreme cultural behaviour which I disapprove of but certainly would not prohibit.

I think that probably if you don't approve of taking Aboriginal kids away from their parents then you are also an ethical relativist but it's just that you're further towards one end of the scale than I am.

I'd point out that we'd all want to ban foot binding and it has been abolished it. Foot binding is not all that different in terms of pain and suffering for the rest of life to infibulation.

QUESTION: Just to start off with, I'd like to say how much I agree with Dr Marum. Basically, we are an Anglo-Saxon society and by and large when people come here they should abide by our rules and regulations, just as much as you would expect to abide by any Muslim rule and regulation when in such a country. But I would like to take issue with some of the issues that you raise concerning Aborigines. The issue of urethral transection or cutting into the urethra, that was done many, many years ago, and if you read "The Golden Bower" and many other tomes on the issue of Aboriginal rites, in many cases the Aborigines weren't aware at the time as to how procreation occurred and so the issue of circumcision, and cutting the urethra didn't then have any effect on their propagation and so it was a totally different issue altogether.

Regarding female circumcision and male circumcision, they can't be really considered in the same breath. There are many arguments these days for why male circumcision should be continued. There is no argument beyond that of religious or male domination over females as to why female circumcision should be continued.

There are a lot of comments at the moment suggesting that sexually transmitted diseases, particularly that of AIDS and other diseases, are more likely to be contributed or carried by the uncircumcised, but that's not the case with females. And so to bring together both what happens in Aboriginal societies and what happens in the male population is not really relevant to what happens in the female population and by and large what happens in the female population is purely genital mutilation for no good reason.

MR BURNSIDE. No good reason except the cultural belief that it's a good thing and I would suggest that male circumcision practised by Jews is no longer done because it is considered to be beneficial to the health, it is done for religious cultural reasons. I think to deny that would be to fly in the face of reality. If you will allow one practice - which, although you might be able to justify it by reference to other considerations, and there's a debate about that, obviously - they are not the reasons for which it is done. If a person does it because they think it's a good thing religiously, do you discount that altogether or do you allow it some weight, if you think it's all right?

Let me take it back to a more fundamental level. I think that it's fair to say circumcision is the sort of procedure which can be validly consented to and thus doing it with the consent of the individual or parents of the individual prevents it from being an assault. You said, "Well, if people come to our country they've got to abide by our laws". Most forms of female genital mutilation would be within the range of assaults that can be effectively consented to, so they don't break our laws by doing it. The question is whether we put it beyond their reach legally to consent to what is being done. I suspect that infibulation probably is beyond what can be validly consented to although it's very unclear and it may be that infibulation when consented to is lawful. So you then have to say, "Well, I have a good valid reason for making it unlawful because I don't like it" when it starts off being lawful.

I'd just like to put in my oar. There's very little data to support the validity of reasons for circumcision. There's quite a good and quite a fair article in "The Age" today on circumcision, but really the sexually-transmitted disease argument is mostly supposition. I know of no data at the moment that supports it.

QUESTION: DR TANGE. Like yourself, sir, I have some ambivalence about your address this evening. Initially, it was plain and unvarnished legal liability. This is something most of us would understand but to which we're all liable and which is imposed upon us by your profession. I thought tonight that you might possibly talk about the liability and responsibility of the legal profession to the community and you did touch on this in the judgment of the court protecting the unwary and the injudicious about the consequences of their consent.

What I am suggesting is that perhaps there is a wide responsibility on both our professions to the community and is the community in fact able to support the full luxury of the legal profession? With mounting costs and the consequences of this, not to the litigants but to the community as a whole. Perhaps here so far it has not been a problem but in the

States it is different. It is a matter of economic concern. It is a matter, for instance, for an editorial of the "New York Times", dealing with an issue of corruption saying "Look, why should we have an inquiry? Why do we wish to involve the lawyers? This will make it worse."

If you look, for instance, in the Yellow Pages in the States you will find, in a city like San Francisco, 50 pages of doctors. You will find 110 pages of attorneys. It may be arguable that either profession does not contribute to the riches of the community, but certainly I think both professions have a duty to consider the consequence of their actions to the community and in economic terms.

MR BURNSIDE. That's quite a big question. I'll respond briefly. You may have misunderstood the title to my paper. It was mischievous. I was not talking about legal liability as such. The title was "Concepts of liability". My endeavour was to explore how it is that legal liability is brought into existence by those organs of our society that are capable of creating laws, namely the Parliament and the courts. It is my contention that to impose liability where you disapprove is a natural response but it should be tempered with a bit of thought, because disapproval cannot lead automatically to prohibition without causing all sorts of harm and without offending most people's philosophy except those of the ones who are doing the imposing. In a pluralists' society the problem is extremely difficult to solve, as I think the discussion tonight demonstrates.

All I want people to think about tonight is that all of us should be philosophers: lawyers, doctors, everyone should think about their philosophy of life and bear it in mind when seeking to prohibit something which they don't like because underlying all law is the question of philosophy.

QUESTION: DR MEDLEY. I found that what you've said has been somewhat chilling for me, I would have to say, because you have a pathway of logic which is quite mathematical really, and they say that mathematics is the basis of law. I can't actually flaw what you're saying along your pathway but on the level of belief and morality and judgment it seems totally flawed and I think this is where there is a huge cultural gap between the legal profession and the medical profession and I suppose that it's only by listening to each other on evenings like this that we've got any chance of trying to bridge that gap and I think in a way it's like a leap of faith which I haven't been able to make, but I'm glad you're making us listen to it.

MR BURNSIDE. I understand entirely what you say and I agree with it, because I didn't know what I thought until I saw what I wrote. What the process of thinking about this did was to reveal to me that if any system of law is going to have any claim to the respect of the society that it governs it must have some rational underlying philosophical basis.

If all law is simply the product of someone's instinctive revulsion to things and there is no other thought than "I dislike it, therefore I ban it" you'll live in a tyranny. It's very easy to say, "Female genital mutilation is a terrible thing, just do away with it, we don't know want to know about it." But if you follow that through to its consequences you'd be appalled at the results. And I would ask when you find all of this so chilling to try and imagine yourself just for one moment as a Somali living quietly in our society, simply wanting to do what you think is right and someone comes along and says "You mustn't do it". "Why not?" "Because I don't like it." "Well, why don't you like it?" "Well, I just don't like it." Not very satisfactory and it does not command respect from people who are bound by it. You won't have a problem with the rest of us, we won't even try and break it, you don't need the law for us. I don't think any of us are into infibulation but the people you would ban, they wouldn't like it at all, and if you can't justify it to them in some satisfactory way then I doubt your justification in banning it.

QUESTION: DR UPJOHN. I think you've sort of made it fairly clear that you're permitting introduction of strange customs that we don't approve of. I trust that you're not going to approve of laws that we don't approve of. I mean we'll have cutting off of hands and stoning for adultery. But, unfortunately, my friends who have lived in the Middle East say that the custom has been sort of modified in modern times. They don't throw stones at the unfortunate women, they tip a dump truck load of gravel on her and that's the end.

But I have comment to make about the honourable judge in the Northern Territory permitting spearing. I'm just waiting for the day when the Aborigine who was doing the spearing doesn't autoclave his spear and introduces this nasty streptococcus with the spear.

MR BURNSIDE. No comment. What can I say? I don't say the cutting off hands or introducing of stoning.

QUESTION: At what age are these girls circumcised in Somali and various places?

MR BURNSIDE. Twelve or 13.

QUESTION: Well, I don't see the problem as being nearly so much moral or philosophical as a practical one, given the scenario that, say, a Somalian family moves to Australia, the woman is already circumcised, her bits are cut off, you can't put them back, we just have to accept that. But her little daughter comes to Australia and goes to school, say, from the age of four, five, six, she gets to 12 and she's an Aussie, she talks like you and I do and she grows up with her Australian school friends. Meanwhile Mum and Dad have managed to import aunty and uncle and grandma and grandpa and nieces and nephews as our Australian immigration system tends to encourage, and now she's got a cultural surround, they decide that they want to do this to the 12 year old. Now she doesn't want it done because she's grown up an Australian and all her friends are not having it done so why should she? Suddenly it becomes her right and no longer is it a cultural issue on the part of her and her family, it's an individual thing. Surely we could say that no, we're not going to ban it. What we're going to do is let her wait until she's 18 and she can decide for herself.

MR BURNSIDE. I agree with almost all of that. If at the age of 12, whatever age, when it's going to be done she doesn't want, that is the end of it and it's done it's an unlawful assault. But if she wants it and if she's going to feel unclean if it's not done then I don't think the answer is quite so obvious.

QUESTION: How can this be tested?

MR BURNSIDE. It's difficult to test many things, but I would've thought a 12 or 13 year old would be capable of indicating that she did not consent to the procedure.

QUESTION: Before the event or after, that's the worry.

MR BURNSIDE. Before.

QUESTION: DR. HACKER. I was the psychiatrist who was the medical adviser to the feminist lawyers against genital mutilation that took this case to the Children's Court. The difficulty, as we see it, is that the children involved are not of that age and the children about whom this case was brought were not of that age. My research indicates that many of the children both in Africa and coming to this country are infibulated prior to their coming here and they are, of course, much younger and that situation doesn't apply in most cases.

QUESTION: Julian, if I may also take you up on one or two of those points. You expressed the view in broad terms that FGM was really a victimless crime and raised issues of consent. The problem

seems to me to be that it's not a victimless crime. Arguably, there are children who are victims of it and those children are not able themselves to give consent to that sort of procedure, particularly younger children that even at the age of 13 for cultural or other reasons may be quite incapable of expressing their own views or their own beliefs. The High Court has recently told us that there are certain things that parents can't consent to and has given us in the area of sterilisation of intellectually disabled girls the requirement that court approval be sought. That has since been extended to a growing range of other areas where the courts see a need to intervene and, surely, this sort of procedure could quite legitimately come within that ambit. We as a society have a duty through the legal system to protect children from a whole range of unauthorised assaults on them or potential assaults, even if it is a recognised medical procedure in various instances. I'd like your comments on that, please.

MR BURNSIDE. First, I agree that the capacity of the parents to consent validly on behalf of the child is a vexed problem. It would be fascinating to see how the High Court dealt with Aboriginal spearings. I doubt that they would say that that could not be validly consented to. The High Court's views about Aboriginal culture are fairly well known. I feel as though I keep coming back to that quite a lot, but it tests the problem nicely because when you bring in reference to Aboriginal culture a whole range of our cultural and social attitudes come to bear on the problem which are not present when the people we're concerned with are Somalis or nameless people from some other nameless place.

I doubt that the High Court would say, for example, that the parents couldn't validly consent to male circumcision. In fact I think there's a reference in Dawson's judgment that clearly acknowledges that that and similar practices are within the range of parents' right to consent. Just how far that goes we don't know. I'm not really so much concerned tonight with what the law presently is. I'm more concerned with the process by which we determine what the law should be and the process, I think, is one which must take proper account of differing cultural values amongst those who are affected by the law, in fact, who are the only ones affected by the law.

Could I correct one thing you said. I didn't say in terms that FGM is a victimless crime. I tested the greater good argument by reference to victimless crimes. I think in many instances FGM probably is a victimless crime in the sense that there is a valid consent to it and the parties involved all think that it's a good thing even though it hurts, or

even though it has later consequences that we would all think terrible, but it's a victimless crime in the sense that everyone involved supports it.

If you will allow me to use the expression "victimless crime" for that sort of behaviour, I think you have to accept that there are some non-trivial philosophical issues in saying, "Well, victimless or not, we're going to stamp it out." I don't think it's all that easy. It may be your ultimate result but I think that you've got to be able to justify it on some sound philosophical principle rather than by an intuitive revulsion against the conduct. Once you've decided what the law shall be, if you say, "Well, as a matter of cultural diversity we will say that FGM is okay as long as it's consented to" then you'll have to address the question "In what circumstances can parents consent on behalf of their children?"

QUESTION: Julian, what is the age of consent for sexual intercourse?

MR BURNSIDE. I think it's 16.

QUESTION: So a girl is vulnerable and it's against the law to have intercourse with her under the age of 16. Well, this is far more than that because it's something that can't be reversed once they've been surgically abused.

MR BURNSIDE. Would you include ritual nicking within that broad statement?

QUESTION: Yes. And also what about child abuse? There are parents that abuse their children sexually. Now that is against the law, so where do you stop this sort of thing?

MR BURNSIDE. Child abuse isn't cultural.

QUESTION: The kings used to have rights against their serfs on the marriage night, that was a cultural thing.

MR BURNSIDE. Yes, sure. But child abuse is not culturally accepted and it remains an offence. It's not really open for debate on cultural grounds.

QUESTION: We're talking about cultural standards. I assume that we all agree that a major principle behind our own society is the dignity of the individual woman in Australian society and it's taken as a given in civilised western societies. I don't know too much about the position of a woman in Aboriginal society although I gather she's not quite the drudge that we might ignorantly think she is. She's considered to be a hard working and valuable person. But I do know that genital infibulation and this sort of female circumcision is mostly

identified with Muslim cultures in Islamic society, where a woman has no position of dignity whatsoever. It seems to me that this is something that just hasn't been discussed in this context, that if women, whether they're Muslim women or Greek women or Aboriginal women are going to be part of Australian society that this is a principle that ought to be asserted to be of importance to them and that we ought to be justifying the illegality of female circumcision on that basis. This sort of interference is a crime against women because it's part of a whole structure of practices that are designed to keep women absolutely down in a way that we know is to be the case in Somalian society, in Saudi Arabian society and so forth.

MR BURNSIDE. I'm glad you asked that question. Can I correct one misapprehension? Although FGM is associated with Muslim groups it is not a Muslim religious practice. It is a coincidence that a number of the societies which approve FGM also happen to be Muslim, but that is no more than the fact that a lot of Christians eat chicken. Eating chicken just isn't a Christian practice.

QUESTION: Where does this come from, just as a point of information?

MR BURNSIDE. I don't know. I have not been able to find out. But your question raises another interesting proposition. You say that it's part of the oppression of women and that may be right. I mean that's obviously a fairly loaded proposition but from our standpoint it's undeniably right, but what I'm saying is that our standpoint may not be the right standpoint from which to judge their cultural behaviour. That's the whole point. We've got to try and put ourselves in their place.

QUESTION: It depends what your standpoint is, doesn't it? It's obvious from their position that women don't have much of a position at all.

MR BURNSIDE. No, no, hang on. Don't forget the statistic.

QUESTION: And do they want women to have a more assertive position? We know that they don't.

MR BURNSIDE. They don't. And in Somalia 83 per cent of women support female genital mutilation and if they aren't infibulated they feel unclean. Now you can say with great justification I'm sure that all that is part of a longstanding plot to oppress women, but I'm not sure that knowing that actually changes anything very much and I don't think it is going to help the women to say, "Well, in the name of liberating you we're going to make you feel unclean." I don't think that they'll thank you for that.

QUESTION: They might, in due course.

MR BURNSIDE. Their granddaughters might thank you, yes. All I'm saying is, don't get too hung up about our cultural perspectives, try and adopt their cultural perspective before you come to a final view.

QUESTION: I don't want to. I don't want to join them at all.

MR BURNSIDE. I don't mean adopt it. Just borrow it. Just have a look at it from their standpoint.

QUESTION: If I can make a comment on that. I don't think we can assume just because someone is Somalian that they would necessarily agree to infibulation. I appreciate what I'm saying is very anecdotal but from patients that I see, a lot of these young women are actually quite angry about what's been done to them. They were infibulated as young children, ten years of age, in their own country, they come here and they're very strong in their beliefs about what they don't want to see happen to their daughters.

MR BURNSIDE. The proposition is that a lot of young Somali women that this lady sees in her practice are very angry about the fact that they were infibulated many years ago when they were in Somalia or wherever they happen to come from. That is a pretty good reflection of the fact that as people go into a different culture and take on different cultural values so they reappraise their earlier cultural values. Of course, I understand that, that is not at all surprising. In fact, it does help you to remember that people do have their own sets of cultural values which whilst they have them are entitled to recognition. Now I think the way to deal with the problem is to educate them out of the cultural value that makes it a valued practice. I do not think that the right approach is simply to stamp down on them and say, "We don't like it therefore you won't do it." I really think that understanding and education is a much better course to follow.