

This response was submitted to the call for evidence issued by the Nuffield Council on Bioethics' Working Party on Cosmetic procedures. Responses were gathered from 11 January to 18 March 2017. The views expressed are solely those of the respondent(s) and not those of the Council.

## **Response to a call for Evidence by the Nuffield Council on Bioethics' working party on cosmetic procedures: ethical issues.**

***Professor Dennis J. Baker***

### **1. Definitions of “cosmetic procedures”, and the aim of such procedures**

The legal definition of cosmetic surgery differs from the medical definition, just as the legal definition for insanity is different from the medical definition.<sup>1</sup> The courts define all surgery as criminal assault,<sup>2</sup> if it is not with valid consent.<sup>3</sup> Grossly negligent medical treatment can result in criminal liability, if it causes a person's death,<sup>4</sup> but not otherwise. Hence, there is not crime of negligent assault, because the fault required is intention or subjective recklessness. Other form of grossly negligent cosmetic surgery could result in the patient using the civil law to sue the surgeon for damages.

### **2. Issues surrounding increasing demand for cosmetic procedures**

The core issue is that most of this surgery is nontherapeutic. It is provided for cosmetic purposes only and much of the stimulus is ageism in society, vanity and media images of the perfect human. What is particularly worrying is that very young children are being allowed to have harmful cosmetic surgery that serves no therapeutic or medical benefit. People want a quick fix for everything and surgery is even used (liposuction) as a substitute for exercise - and is routinely used by doctors for people who are stressed about their appearance (particularly their body appearance) when psychological counseling or exercise would provide a better non-harmful remedy.<sup>5</sup>

### **3. How cosmetic procedures are provided, and regulated?**

There seems to have been little scrutiny on the provision of these services. They are readily available privately and also on the NHS and little to no medical justification is required, because the medical professional have medicalized many harmful cosmetic procedures by dressing them up as therapeutically necessary or as reasonable medicine. These procedures have often used to cater to psychological wants, rather than to correct a growth or congenital

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<sup>1</sup> See for example the discussion in Dennis J. Baker, *Glanville Williams Textbook of Criminal Law*, (London: Sweet & Maxwell, 2015) at Chapter 30.

<sup>2</sup> The *mens rea* required is intention or subjective recklessness, objective recklessness (negligence) is not enough: See Dennis J. Baker, *Glanville Williams Textbook of Criminal Law*, (London: Sweet & Maxwell, 2015) at page 1041 et seq.

<sup>3</sup> See Dennis J. Baker, “Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?” (2014) 17(4) *New Criminal Law Review* 587–630.

<sup>4</sup> Dennis J. Baker, *Glanville Williams Textbook of Criminal Law*, (London: Sweet & Maxwell, 2015) at pages 512-526.

<sup>5</sup> Dennis J. Baker, “Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?” (2014) 17(4) *New Criminal Law Review* 587–630.

abnormality or the physical effect of a medical condition, illness or trauma. The reality is most of these cosmetic procedures serve no medical purpose either physically or psychologically.<sup>6</sup> In some jurisdictions, the State has criminalized this sort of surgery when it is performed on minors. It has been criminalized because it causes long-term physical harm and it is not aimed at providing medical treatment. Many of the procedures are harmful because they cause long-term physical and psychological damage. The inherent risks in the surgery are not counterbalanced by any medical necessity. Often the surgery itself has the effect of psychologically pressuring other children and women into having surgery to conform with the artificial image created by cosmetic surgery.<sup>7</sup>

#### **4. Whether, and if so why, cosmetic procedures on different areas of the body elicit a diverse range of responses.**

The main example I use to make a contrast in my research is between that of female genital mutilation and labiaplasty. Both result in long-term harm (admittedly to different degrees) to the same bodily part, but only one is criminalized. In particular, in my research (see attached paper), I have raised concerns about children as young as eleven having labiaplasty for non-medical purposes, because there is research that shows it can cause long-term damage. Coupled with that, if it is totally unnecessary because it serves no therapeutic or medical purpose, then it is difficult to fathom why children should be subjected to the unnecessary risk of having it. It appears the impetus for girls and women demanding this procedure is the increase of pornographic material online and their desire to conform to the norms set by the pornography industry. I show in my research that procedures that are not medical and have been performed routinely for many decades take on the appearance of being medical procedures and have therefore escaped proper government scrutiny and thus have avoided being criminalized, notwithstanding lesser harms that have not been medicalized have been regulated through the use of criminal law.

Members of Parliament are so used to some procedures being medicalized, that they resist calls for criminalization and instead argue that the profession should be left to regulate itself through its own ethical codes of practice. See attached a letter on behalf of David Cameron and other key ministers, telling me that there was no case for debating whether some criminalization was necessary to protect minors from having unnecessary cosmetic surgery and that it was sufficient for the profession to regulate itself through its own code of practice.

As I show in my research attached, other jurisdictions have invoked the criminal law to protect minors from non-therapeutic cosmetic surgery. My research on this is fairly thorough, so I will attach it to this email rather than try to give a fuller account here.

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<sup>6</sup> Dennis J. Baker, "Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?" (2014) 17(4) *New Criminal Law Review* 587–630.

<sup>7</sup> See further the attached paper, Dennis J. Baker, "Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?" (2014) 17(4) *New Criminal Law Review* 587–630.