



Submission on the Conversion Practices Prohibition Legislation Bill

8 September 2021

Equal Justice Project (EJP) is a non-partisan pro bono charity operating out of the University of Auckland. We apply Law students' legal training and knowledge to promote social equality, inclusivity and access to justice in our local and wider community.

Members of the EJP Communications Team (Alexander Campbell, Hannah Ko, Hannah Talbot and Samantha Putt), as authorised and edited by the Communications Team Managers (Bronwyn Wilde and Sam Meyerhoff) and Editors (Kate MacKay, Max Pendleton and Tulsi Khanna) have considered the Conversion Practices Prohibition Legislation Bill. *We broadly support the passage of this Bill, with more detailed commentary below.*

Contents

NZBORA Considerations	2
Overseas Jurisdictions.....	4
Recommendations	8
Mechanics of the Bill.....	9
Recommendations	13
Addressing Common Concerns	13
Recommendations	16

NZBORA Considerations

- 1.1 Inherent in the Bill is a clash between rights. LGBTQIA+ individuals have a right to be free from discrimination.¹ Other individuals have the right to express their religious beliefs.² Furthermore, families are entitled to act with privacy and autonomy in raising their children.
- 1.2 Conflicting rights are resolved through application of ss 4, 5, and 6 of the New Zealand Bill of Rights Act (NZBORA).³

¹ The right to be free from discrimination is in s 19(1) of New Zealand Bill of Rights 1990 (NZBORA). Sexual orientation is a prohibited ground of discrimination under s 21(1)(m) of the Human Rights Act 1993.

² NZBORA 1990, s 14.

³ *R v Hansen* [2007] 3 NZLR 1 at [61].

1.3 *Freedom of Expression*

1.3.1 Any limitations on NZBORA rights must be “demonstrably justified in a free and democratic society”.⁴ The Bill outlaws suppressing LGBTQIA+ identities, not religious discourse that may run counter to LGBTQIA+ identities.⁵ Given the proven harm of conversion practices, it is proportionality justified in limiting freedom of expression.

1.4 *Privacy and autonomy*

1.4.1 The Opposition criticized this Bill on the grounds that it would make it illegal for parents to explore sexuality and gender with their children.⁶ Families have privacy and autonomy rights with regards to raising their children—the privacy to exclude others from family affairs, and the autonomy to make decisions about their children’s experiences.

1.4.2 However, parents also have a duty to provide for the physical and emotional needs of their children, and to protect them from harm. The state may and should intervene within the private parenting sphere in order to protect the child from harm.⁷ Conversion practices are harmful. They reject the individual’s true self as shameful, and impose another identity from the socio-cultural environment.

1.4.3 It is inaccurate to assume that parents do not involve their children in conversion practices. A 2018 study from the United States interviewed 245 LGBTQIA+ participants. 53% of individuals said that their

⁴ Per s 5.

⁵ Cl 5(2)(f).

⁶ (5 August 2021) 753 NZPD (Conversion Practices Prohibition Legislation Bill - First Reading, Simon Bridges).

⁷ Per Ministry of Social Development "United Nations Convention on Rights of the Child" <www.msd.govt.nz>.

parents/caregivers had tried to change their sexual orientation.⁸ Those who experienced parent-initiated conversion practices were associated with significantly worse mental health results. Such individuals were more likely to have suicidal thoughts, reported higher levels of suicide attempts, and experienced higher levels of depression overall.

- 1.4.4 There is a distinction between parental guidance and abuse. The wording of the Bill makes it clear that the Bill focuses on the latter. The limitations upon parental privacy and autonomy in the Bill are justified in a free and democratic society.

Overseas Jurisdictions

- 2.1 The purpose of the Bill is to “prevent harm caused by conversion practices,”⁹ and “promote respectful and open discussions regarding sexuality and gender”.¹⁰ It must be ensured that the Act provides that protection through impactful offences, scope, application, definition, fines, punishment and deterrence.
- 2.2 Comparison with current and proposed overseas bans on conversion practices can identify areas of improvement in the existing Bill. Currently, there are only five countries with a national ban on conversion practices and only a handful more with regional/provincial or partial bans, highlighting the need for countries to pave the way forward.

⁸ Caitlin Ryan, Russell B Toomey, Rafael M Diaz and Stephen T Russell "Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment" (2018) 67 *Journal of Homosexuality* 159.

⁹ Conversion Practices Prohibition Legislation Bill, cl 3(a).

¹⁰ Conversion Practices Prohibition Legislation Bill, cl 3(b).

2.3 Definition

- 2.3.1 The definition of conversion practices under Malta’s legislation includes “any treatment, practice or sustained effort that aims to change, repress and/or eliminate a person’s sexual orientation, gender identity and/or gender expression”.¹¹ In comparison, the current Bill’s definition only includes a “practice” coupled with the intention of “changing or suppressing”.
- 2.3.2 The words “sustained effort” should be added to the definition in order to recognise that an intention to change or suppress a person’s sexual orientation, gender expression or gender identity can manifest in broad and somewhat creative ways, by both professionals and everyday people. This will strengthen the protections provided by the Bill.
- 2.3.3 The definition of conversion practices in Victoria’s ban also includes “*inducing* the person to change or suppress their sexual orientation or gender identity”.¹² While most definitions of conversion practices observe that many people are forced into it, this inclusion gets to the core of the issue where people are led to believe that they *should* change or suppress this important part of their identity, and that sometimes there is not necessarily force.

¹¹ Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016, s 2 (Malta).

¹² Change or Suppression (Conversion) Practices Prohibition Act 2021, s 5(b)(ii) (Vic).

2.4 Example of Conversion Practices

2.4.1 It may also be helpful to have examples of what is a conversion practice. Such examples are present in the Australian legislative schemes.¹³ This could make it explicitly clear that conversion practices can be found in religious and health care settings or be undertaken by parents. This breadth is entirely appropriate given the high bar of the definition of a conversion practice, and also the extra requirements in the offences.

2.5 Advertising

2.5.1 The Bill should also include an offence for the advertising of conversion practices. Advertising conversion practices is included as a criminal offence in several overseas bans, including Victoria, Canada,¹⁴ Malta, and Germany.

2.5.2 By criminalising conversion practices, there is the potential implication that a type of black market may develop where conversion practices operate under a guise. The addition of criminalising any advertising of conversion practices would capture those circumstances in particular.

2.5.3 This is especially so if the offence includes provisions such as “the advertisement or other notice indicates, or could reasonably be understood as indicating, that the person [...] intends to engage in one or more change/suppression practices other than for the purpose of warning of the harm caused by such practices,”¹⁵ as seen in Victoria’s legislation.

¹³ Public Health Act 2005 (Qld), s 213F(1); and Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic), s 5(3).

¹⁴ While there are several provincial bans on conversion practices in Canada, including Ontario, Nova Scotia and City of Edmonton, passing of the Bill banning conversion practices nationally has been delayed until late September when the Senate of Canada reconvenes.

¹⁵ Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic), s 13(1)(b).

2.6 *Punishment*

- 2.6.1 There is also a marked difference between this Bill and overseas bans in terms of punishment.
- 2.6.2 In Germany, breaching any of the offences carries a fine of up to €30,000 (approx. \$50,000+ NZD).¹⁶ Under Malta's legislation, a breach by any person carries a fine of between €1,000 - €5000 (approx. \$1,6000 - \$8,3000 NZD),¹⁷ and a breach by a professional carries a fine of between €2,000 - €10,000 (approx. \$3,300 - \$16,600 NZD).¹⁸ The City of Edmonton's ban in Canada carries a fine of up to \$10,000 (approx. \$11,200 NZD).¹⁹ The most equivalent ban in Victoria (AU) includes 'level 5' fines (which have a monetary value of around approximately \$227,000 NZD),²⁰ and lowers to a level 7-9 fine for offences such as advertising (approx. \$11,300 NZD).²¹
- 2.6.3 Fines are used by overseas jurisdictions as effective deterrents and to recognise the seriousness of the crime. In turn, considerable fines should be added to the punishment under the Bill alongside the imprisonment terms.

2.7 *Miscellaneous*

- 2.7.1 There are various other minor overseas provisions which ought to be considered for incorporation into the New Zealand Bill.

¹⁶ Acts to Protect against Conversion Treatments, 'What happens in a case of violation?' (May 7 2020, Federal Ministry of Health, Germany)

<<https://www.bundesgesundheitsministerium.de/en/press/2020/conversion-treatments.html>>.

¹⁷ Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016, s 2 (Malta)

¹⁸ Above n 17, s 4 (Malta).

¹⁹ The City of Edmonton Bylaw 19061: Prohibited Businesses Bylaw (2019), Article 8.

²⁰ Change or Suppression (Conversion) Practices Prohibition Act 2021, s 10.

²¹ Change or Suppression (Conversion) Practices Prohibition Act 2021, s 13.

- 2.7.2 Victoria has included a subsection to clarify that a practice may be undertaken in person or remotely.²²
- 2.7.3 The Regulatory Impact Statement noted that the proposals would include the creation of an offence for the removal from New Zealand of a person for the purposes of receiving conversion practices overseas.²³ This does not appear to be in the Bill as it stands but would be beneficial. The legislation in Victoria has similar provisions.²⁴
- 2.7.4 Victoria has also included a section dealing with extraterritorial application of offences.²⁵ Where a significant part of the practice occurs in Victoria or the effects of the practice occur entirely or partially in Victoria, the rest of the Act applies as if the practice was wholly engaged in Victoria.²⁶ This may be useful in conjunction with provisions on remote practices and removal to ensure there are no gaps in the legislation.

Recommendations

- Add the words “sustained effort” to the definition of conversion practice
- Include a non-exhaustive list of examples of what constitutes conversion practice
- Create an offence for the advertising of conversion practices
- Expand punishment to include fines as well as imprisonment
- Consider addition of a section on extraterritorial application

²² Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic), s 5(4).

²³ Ministry of Justice *Regulatory Impact Assessment - Prohibition of Conversion Practices* (30 July 2021) at 14.

²⁴ Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic), s 12.

²⁵ Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic), s 8(3).

²⁶ Section 8(3).

Mechanics of the Bill

3.1 *Clause 9 Mens Rea*

- 3.1.1 Clause 9 requires that the offender know, or be reckless as to whether, the conversion practice would cause serious harm. We recommend that this mens rea requirement is removed. The definition of “conversion practice” in clause 5 already contains a mens rea element, the “*intention* of changing or suppressing the individual’s sexual orientation, gender identity, or gender expression”.
- 3.1.2 The additional knowledge/recklessness requirement goes against the purpose of the Bill which is to “prevent harm caused by conversion practices”.²⁷ This purpose indicates the focus should be on the commission of the harmful act itself, irrespective of the offender’s knowledge of the harm. This is especially because people performing conversion practices, guided by religious or personal beliefs, often think they are helping, not harming.
- 3.1.3 To achieve the purpose of the Bill, it is enough that the person intended to perform the conversion practice. The actus reus requirement that serious harm be caused is a sufficient check on any concerns raised by removing the knowledge/recklessness element.

3.2 *Serious Harm*

- 3.2.1 The requirement for serious harm in the actus reus of clause 9 is a prime example of how freedom of religion and expression are not being infringed unreasonably by this Bill. It is hard to imagine anyone in good faith arguing

²⁷ cl 3.

clause 9 is an unjustified limit when there is this requirement. (Clause 8 is clearly deserving of different treatment as it involves minors).

3.2.2 However, we are concerned that the actus reus requirement reflects an overall blind spot in the Bill. The Bill as it stands seems to only denounce conversion practices based on the harm they cause. This overlooks the fact that conversion practices are inherently harmful. While the degree of harm may serve as a check on prosecution, it does not affect the moral character of the barbaric practices.

3.2.3 We strongly recommend that the Bill acknowledge this fact, potentially in the purpose section or a new section. It is important the Government's position is clear that conversion practices are morally wrong in and of themselves.

3.3 *Consent as a Defence*

3.3.1 Clause 10 states that consent is not a defence to charges under clauses 8 and 9. Previous New Zealand case law states that the level of harm which can be consented to in this country is dependent on the social utility of the harm being consented to.²⁸ Conversion practices carry no social benefit and actively go against the morals and values of a free and democratic society.

3.3.2 Additionally, the nature of conversion practices is that they often involve religious and cultural pressure placed on victims. This can lead them to consent but under immense coercion. It will be very difficult to distinguish these cases from genuine consenting matters. Therefore, we support the removal of consent as a defence.

²⁸ R v Lee [2006] 3 NZLR 42 (CA) per Glazebrook J.

3.4 *Attorney-General Consent*

- 3.4.1 Numerous offences require consent of the Attorney-General for prosecution, usually because they involve extra-territorial or international issues, but also occasionally because freedom of expression issues are engaged.²⁹ The clause 12 requirement falls into this latter category.
- 3.4.2 However, in this case it is questionable whether the power is appropriate given the potential for politicisation. It is unclear how Attorneys-General have approached the exercise of equivalent powers, but it is clear that legal accountability mechanisms are limited. This is because it is unlikely a Court would allow a judicial review to encroach on prosecutorial discretion, especially when it is framed so broadly in legislation.³⁰ The exception to this may be in situations where a blanket policy is imposed.³¹ However, judicial review is nonetheless undesirable given it is time consuming and expensive. This leaves political accountability alone to prevent the undermining of the purpose of the legislation.
- 3.4.3 One possible solution is the removal of the clause 12 requirement. It is not present in the equivalent Australian Acts so is perhaps unnecessary, especially given the high bar for what is a conversion practice and the even higher bar for the offences.³² However, given the political rhetoric emphasising the clause 12 requirement this may not be possible.
- 3.4.4 Alternatively, mandatory relevant considerations could be inserted into clause 12 to constrain the Attorney-General's discretion. This would make

²⁹ Crown Law *Statutory Offences Requiring the Consent Of The Attorney-General* (1 July 2013).

³⁰ Sean McIntyre "Can I help you with that? Assisted Suicide in New Zealand" (LLB(Hons) Dissertation, University of Otago, 2016) at 35.

³¹ *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118.

³² Public Health Act 2005 (Qld), ch 5B; Sexuality and Gender Identity Conversion Practices Act 2020 (ACT); and Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic).

decisions more predictable and hopefully protect victims from partisan politics. These considerations should focus on the balancing of rights in the particular case, to de-emphasise personal political opinions of future Attorneys-General. These considerations could also be placed in guidelines issued by Crown Law should it prove not possible to include them within the Bill itself.

3.5 Filing of Charging Documents of Clause 8 Offences

- 3.5.1 We recommend that clause 8 be changed to avoid limitation issues. Clauses 8 and 9 of the Bill lay out crimes which would be considered category 3 offences under the Criminal Procedure Act 2011.³³ There is no limitation period on when a charging document can be filed for such offences, except when the offence calls for a term of imprisonment not exceeding 3 years.³⁴
- 3.5.2 Clause 8 carries a punishment of imprisonment not exceeding 3 years, meaning that any charging document would have to be filed within 5 years of the offence being committed. This is problematic given clause 8 deals with acts performed on minors who may take years to even realise what happened to them was a crime, and the harm it caused.
- 3.5.3 The easiest way to remedy this would be to increase the penalty to five years or more. However, another potential solution is to borrow from the law regarding the tort of battery in matters of sexual abuse. Canadian courts have ruled that their statute of limitations only begins counting when the damage inflicted by an action becomes known to the future plaintiff.³⁵

³³ s 6(1).

³⁴ Criminal Procedure Act 2011, s 25(2)(a).

³⁵ *K(M) v H(M)* (1992) 96 DLR (4th) 289 (SCC).

Adding such a is necessary to ensure that crimes under clause 8 can be effectively prosecuted even after many years.

- 3.5.4 Finally, it would also be appropriate for all offences created to be included in Schedule 3 of the Accident Compensation Act 2001 so that victims can access mental health support.³⁶

Recommendations

- Remove the knowledge/recklessness mens rea in clause 9
- Retain the “serious harm” threshold in clause 9, but update the purpose section to morally denounce all conversion practices, irrespective of the degree of harm
- Retain the current clause 10 which states consent is not a defence
- Remove the requirement for Attorney-General consent in clause 12 or insert mandatory relevant considerations to constrain discretion.
- Amend clause 8 to make the limitation period for filing charging documents begin only once the plaintiff becomes aware of the harm caused by the practice

Addressing Common Concerns

4.1 *Parental Exception*

- 4.1.1 We do not recommend that a parental exception be added to the Bill. The Honourable Judith Collins has expressed concerns that the Bill could prevent parents from advising their children against certain medical

³⁶ Accident Compensation Act 2001, s 21.

practices, such as puberty blockers.³⁷ This is an unnecessary concern, as the current Bill defines “conversion practices” as an action to suppress gender identity or sexual orientation. Advice or discussion between parents and children would not constitute a suppressive action. Therefore, it is unnecessary to amend the Bill for this purpose.

4.1.2 Additionally, it is important that the prosecution of parents be allowed under the Bill with its current definition. A vast majority of conversion practice is due to parents subjecting their children to undergo practices against their will.³⁸ Parents should be held liable for actively contributing to the forced suppression of their child’s gender identity or sexual orientation. In this regard, we recommend leaving the Bill in its current form.

4.2 *Medical Practitioners*

4.2.1 Concerns regarding the liability of medical practitioners are unjustified.³⁹ Medical practitioners have a current exemption within the Bill. All medical professionals are held to account by the Medical Council of New Zealand; this body can take away practicing rights.⁴⁰ Anything constituting conversion practices would constitute malpractice.⁴¹ The current exemption is adequate given doctor-patient privilege and the presence of an independent governing body for medical professionals.

³⁷ Zane Small “National leader Judith Collins declares Government 'anti-parents' over law banning conversion therapy” Newshub (online ed, Auckland, 9 August 2021).

³⁸ Eddie Clark “Why the proposed conversion therapy ban is so unlikely to criminalise parents” Radio New Zealand (online ed, Auckland, 12 August 2021).

³⁹ Above n 38.

⁴⁰ Medical Council of New Zealand “Standards” < <https://www.mcnz.org.nz/our-standards/>>.

⁴¹ Above n 40.

4.3 *Religious Exemption*

4.3.1 We recommend that the Bill should remain the same regarding religious exemptions. The ACT Party has raised concerns that the banning of conversion practices limits religious freedom.⁴² The current version of the Bill does not suppress religious expression or freedom. The religious exemption allows for anyone to express their religious beliefs freely to another person, so long as they do not intend to change or suppress anyone's identity while doing so.⁴³ This means that anyone can express their religious beliefs as long as they do not try to coerce others into conversion practices.

4.3.2 This is a reasonable restraint on religious freedom. To broaden this exemption would make the Bill redundant; a vast majority of conversion practices are religious, and this exemption is necessary to prohibit dangerous conversion practices.⁴⁴

4.4 *Misuse of Parliamentary Process*

4.4.1 The entirety of concerns raised by those who voted against the Bill regard definitions, exemptions, and other small matters within the Bill. All parties in Parliament have agreed that conversion practices are harmful and should be banned in Aotearoa New Zealand.⁴⁵ To vote against a bill entirely when agreeing with its overall principle is a poor use of the Parliamentary process, overly contrarian, and is in bad faith. This is especially in poor taste given

⁴² Above n 38.

⁴³ cl 5(2)(f).

⁴⁴ Above n 38.

⁴⁵ Above n 38.

the serious public policy element to this Bill, the vulnerability of the survivors of conversion practices, and the ongoing stigmatisation of the LBGTQIA+ community. This should be considered when addressing the concerns of those who voted against the Bill.

Recommendations

- Maintain existing medical practitioner and religious exemptions
- Create no additional exemptions for parents or religious expression