
Conversion Practices Prohibition Legislation Bill 2021

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Submission on the Conversion Practices Prohibition Legislation Bill 2021

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Conversion Practices Prohibition Legislation Bill 2021 (the **Bill**).
- 1.2 The purpose of the Bill is to prevent harm caused by conversion practices, and to promote respectful and open conversations regarding sexuality and gender.
- 1.3 In relation to the first purpose, the Bill proposes to make it a criminal offence to:
- i. perform conversion practices on a person under 18 or who lacks capacity (carrying a maximum penalty of three years imprisonment); and/or
 - ii. perform conversion practices on a person where it causes serious harm to that individual (a maximum penalty of five years imprisonment).
- 1.4 The Bill also creates a civil redress scheme which will allow the Human Rights Commission to receive and deal with complaints. Accordingly, the Bill will amend the Human Rights Act 1993.
- 1.5 The Law Society supports the Bill in principle. This submission relates to aspects of the Bill that we consider require further clarification.
- 1.6 The Law Society notes, as does the Ministry of Justice Policy Group in its Regulatory Impact Statement,¹ that the short timeframe for passing this legislation has limited the opportunity for public consultation on the proposals. There are aspects of the Bill that may have benefited from deeper consideration, and it is clear that public interest in the Bill is high.
- 1.7 The Law Society wishes to be heard in relation to this submission.

2 Summary and recommendations

- 2.1 In summary, the Law Society recommends that:
- 2.1.1 The definition of “conversion practice” in clause 5(1) is reconsidered to ensure that it is not unnecessarily vague;
 - 2.1.2 Clause 5(2)(f) is extended to clarify that the mere expression of opinion does not need to be grounded in a religious principle or belief for it to be excluded from the definition of a conversion practice.
 - 2.1.3 A definition of ‘gender identity’ is provided.

¹ Regulatory Impact Statement, *Prohibiting Conversion Practices – 14 April 2021*
<https://www.treasury.govt.nz/sites/default/files/2021-07/ria-justice-pcp-apr21.pdf>

2.1.4 Further consideration is given to the level of protection clause 8 will provide and whether it would be more appropriate to make the offence, in relation to those under the age of 18 or who lack capacity, a strict liability offence.

3 Definition of ‘conversion practice’

3.1 Clause 5(1) defines ‘conversion practice’ as any practice that:

- a) is directed towards an individual because of the individual’s sexual orientation, gender identity, or gender expression; and
- b) is performed with the intention of changing or suppressing the individual’s sexual orientation, gender identity, or gender expression.

3.2 Clause 5(2) then provides that a ‘conversion practice’ does not include:

- a) a health service provided by a health practitioner in accordance with the practitioner’s scope of practice; or
- b) assisting an individual who is undergoing, or considering undergoing, a gender transition; or
- c) assisting an individual to express their gender identity; or
- d) providing acceptance, support, or understanding of an individual; or
- e) facilitating an individual’s coping skills, development, or identity exploration, or facilitating social support for the individual; or
- f) the expression only of a religious principle or belief made to an individual that is not intended to change or suppress the individual’s sexual orientation, gender identity, or gender expression.

3.3 Clause 5(1) is a broad and intentionally open-ended definition of “conversion practice.” It would be somewhat exceptional amongst criminal offences in not giving a reasonably clear description of exactly what conduct is prohibited.

3.4 We acknowledge the view of Crown Law “...that *precisely defining conversion practices would encourage and enable those who wish to perform them to make minor modifications to escape the definition.*”² That is an important point, but not one that tells against striving for precision in the definition. The definition should be able to capture the substance of practices that the legislation is designed to prohibit, with the result that “minor modifications” should not be able to defeat the intention of the statute.

3.5 The Law Society recommends adopting the approach of similar legislation in Australia, where statutes include examples of what constitutes a conversion practice. A schedule of examples used in the Queensland and Victorian statutes is attached as in **Appendix 1**.

3.6 The imprecision of clause 5(1) is only partially compensated for by clause 5(2), which contains a list of actions that are explicitly *not* included in the definition. In some respects, that list serves to highlight the vagueness of the primary definition in cl 5(1). The stipulation that conversion practice does not include “assisting an individual to express their gender identity”, or “providing acceptance, support or understanding” might be taken to suggest that omissions to provide that assistance, acceptance, support and understanding *do count*

² Crown Law advice to the Attorney-General, 29 June 2021

as a conversion practice in some contexts, or that the positive expression of views that are not supportive is such a practice.

- 3.7 Given that a conversion practice as defined by clause 5(1) is often likely to be, or will involve, some form of expression, the proposed offences will impose restrictions on the right to freedom of expression as affirmed by section 14 of the New Zealand Bill of Rights Act 1990. Of course, restrictions that are no more than reasonable limits are permitted.
- 3.8 To some extent, the safeguards against the offences being applied in a manner that would constitute an unreasonable limit on freedom of expression are likely to be found in the practical operation of the law. Prosecutorial discretion and the requirement of the Attorney-General's consent to a prosecution will provide some safeguards to ensure that the criminal law is reserved for only those practices that are plainly conversion practices.
- 3.9 Even so, it is well recognised that prohibitory laws that are expressed imprecisely tend to inhibit or discourage the legitimate conduct. As it stands, the message of clause 5(2) could be that the expression of anything less than support and acceptance is or may well be unlawful.
- 3.10 Further, prosecutorial discretion and the requirement for the Attorney-General's consent do not apply to the complaints process to the Human Rights Commission provided for in clause 13. It is more likely that complaints will be in this forum, and individuals will be required to submit to a legal process commencing with mediation, with the possibility of proceedings before the Human Rights Review Tribunal.
- 3.11 As to what an improved definition of conversion practice might look like, the Law Society suggests that a key aspect may well lie in the requirement that it is a "practice" that is "performed" by someone. That suggests some sort of deliberate and conscious deployment of some programme or modus operandi that is directed to a person's "conversion," and not the simple expression of opinions.
- 3.12 The Law Society recommends further consideration be given to developing a more precise definition, or including examples of prohibited conduct.

4 Extend clause 5(f)

- 4.1 Section 13 of the New Zealand Bill of Rights Act provides that '*everyone*' has 'the right to freedom of thought, conscience, religion, and belief including the right to adopt and to hold opinions without interference'.
- 4.2 Clause 5(f) should therefore be amended. While expressing a religious view about sexuality would not be caught by the offences created in the legislation, there are other groups and individuals who have beliefs that are not religious, and the expression those beliefs would also not amount to a conversion practice.

5 Definition of 'gender identity' to be provided

- 5.1 The meaning of 'gender identity' has not been included in clause 4. A definition should be provided so that it is clear what characteristics are targeted by the prohibition of conversion practices.

5.2 We note that there is no definition of gender identity in any other New Zealand legislation. There will therefore be no domestic guidance for interpretation of the legislation when seeking to determine if this element of the charge is met. Gender identity has been defined in legislation overseas - the definition contained in the Equal Opportunity Act 2010 in Victoria Australia may provide guidance.

6 Further consideration should be given to clause 8

6.1 Clause 8 will make it an offence for a person to perform a conversion practice on an individual where they “know that or is reckless” as to whether that person is under the age of 18 or lacks capacity. The Law Society is concerned that the mens rea requirement in the current drafting of clause 8 contains an evidential hurdle that will be too difficult to overcome in many cases and, consequently, the Bill may not achieve the intended protection for those who are under 18 years old or who lack capacity.

6.2 Clause 8 should be considered in more depth and thought given to framing the clause as a strict liability offence with an absence of fault clearly set out, as it is for sections 134 and 134A of the Crimes Act 1961 – sexual conduct with a young person under 16.³ This would require the person who performed the conversion practice to prove on the balance of probabilities that they took reasonable steps to find out whether the individual was over 18 or had capacity to understand the nature and consequences of decisions in respect of matters relating to their welfare.



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³ There are similar protective strict liability offences for contracting with or receiving commercial sexual services from a person under 18 years of age contained within the Prostitution Reform Act 2003 and dealing with a person under 18 for the purpose of sexual exploitation under s 98AA of the Crimes Act 1961.

Appendix 1

1. Section 213F of Queensland's Public Health Act 2005 provides:

213F Meaning of conversion therapy

- (1) **Conversion therapy** is a practice that attempts to change or suppress a person's sexual orientation or gender identity.

Examples—

a practice attempting to change or suppress a person's sexual orientation or gender identity by—

- inducing nausea, vomiting or paralysis while showing the person same-sex images
- using shame or coercion to give the person an aversion to same-sex attractions or to encourage gender-conforming behaviour
- using other techniques on the person encouraging the person to believe being lesbian, gay, bisexual, transgender or intersex is a defect or disorder

2. Section 5(3) of Victoria's Change or Suppression (Conversion) Practices Prohibition Act 2021 provides:

- (3) For the purposes of subsection (1), a practice includes, but is not limited to the following—
 - a. providing a psychiatry or psychotherapy consultation, treatment or therapy, or any other similar consultation, treatment or therapy;
 - b. carrying out a religious practice, including but not limited to, a prayer based practice, a deliverance practice or an exorcism;
 - c. giving a person a referral for the purposes of a change or suppression practice being directed towards the person.