

29 June 2021

Attorney-General

BORA Vet: Conversion Practices Prohibition Legislation Bill (PCO 23471/8.0)
Our Ref: ATT395/326

1. We have assessed this Bill for its consistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). The Bill causes a significant limitation on freedom of expression, and a lesser limitation on manifestation of religion, but in our opinion, the limitations are justified, and the Bill is consistent with the Bill of Rights Act.

What the Bill will do

2. By this Bill the Government asks Parliament to ban what are known throughout the world as conversion practices. These are practices based upon two assumptions. The first is that any diverse sexual orientation, gender identity or gender expression is deviant or abnormal. The second is that sexual orientation, gender expression or gender identity can be altered by treatment. A law is called for because these conversion practices have potentially severe consequences for the health and well-being of the person who is subject to them, the more so when the subject is particularly vulnerable to harm by reason of their age or state of health. Under the Bill conversion practices will be criminalised. The Bill proposes one offence for performing a conversion practice on a person under 18 or lacking decision-making capacity, punishable by up to 3 years' imprisonment and another where the conversion practice causes serious harm, punishable by up to 5 years' imprisonment. The Bill also proposes civil remedies be available under the Human Rights Act 1993.
3. The definition of conversion practice is critical to its efficacy and to its consistency with the Bill of Rights Act. A conversion practice is defined as a practice that is directed towards an individual because of their sexual orientation, gender identity or gender expression, and which is performed with the intention of changing or suppressing it. The Bill goes on to detail specific activities that will not constitute conversion practices in order to prevent it applying to genuine therapeutic interventions or the expression only of a religious principle or belief. The definition is broad. The Government apprehends, based upon international experience, that precisely defining conversion practices would encourage and enable those who wish to perform them to make minor modifications to escape the definition. There is no doubt that as expressed the prohibition will extend to activities and communications that occur within families and within religious groupings.

Freedom of expression

4. Section 14 of the Bill of Rights Act guarantees protection for the freedom to seek, receive and impart information and opinions of any kind in any form. Recently in *Moncrief-Spittle v Regional Facilities Auckland Ltd* the Court of Appeal restated that freedom of expression is recognised as one of the essential foundations of a democratic society.¹ It has also been recognised that the freedom is worth little if it excludes the expression of ideas that are offensive or controversial.²
5. The constitutional protection that should be given to the expression involved in the conversion practices themselves is capable of justified limitation, but the broad definition of those practices creates the risk that it could extend further, to the exchange of thoughts or opinions about sexuality and gender that occur within the family/whānau or religious groups that do warrant protection and where the limitation could not easily be justified.

Manifestation of religious belief

6. The Bill of Rights Act protects both the right to have religious or conscientious beliefs (s 13) and the manifestation of those beliefs (s 15). The Bill does not engage s 13 because it is not purporting to criminalise any person for believing that diverse sexual orientation or gender identity or expression is deviant, abnormal or sinful or that it is capable of conversion or suppression. It is only the conversion practice that is to be criminalised. It is possible that the conversion practice itself is properly to be seen as a manifestation of the religious belief just described. For the reasons given by the House of Lords in *R (Williamson) v Secretary of State for Education and Employment*, neither Parliament nor the Court should enquire into the validity of that belief, however strongly it is disagreed with.³ As long as it is genuinely held it warrants the protection of s 15. As Henchy J said in *McGrath & O'Riarc v Maynooth College*: “Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognise and buttress them”.⁴

Justified limitation

7. Although there is a potential chilling effect on legitimate expressions of opinion within families/whānau about sexuality and gender, it is substantially mitigated in three important ways:
 - 7.1 The Bill is clearly expressed to ban only practices that are intended to change or suppress rather than merely confront or reject the individual's sexual orientation, gender identity or gender expression.
 - 7.2 One of the purposes of the Bill is expressed to be the promotion of respectful and open discussions regarding sexuality and gender.
 - 7.3 Attorney-General consent is required for any prosecution.

¹ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142 at [65].

² *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375 at 382–383.

³ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

⁴ *McGrath & O'Riarc v Maynooth College* [1979] ILRM 166 at 187.

8. The same provisions will address the risk of an overbroad intrusion into religious expression about sexuality and gender that should be protected. Further, it applies only to practices aimed at an individual rather than a group and therefore excludes the principal means of religious communication. Stating a religious belief about sexuality or gender in the course of a sermon would not be criminalised by the Bill.
9. The conversion practices could themselves constitute the manifestation of a genuinely held religious or other belief. To the extent that they do given the profound harm they cause to the individuals that are subject to them, their prohibition is demonstrably justified in a free and democratic society.
10. The offence of carrying out a conversion practice on a person under 18 or lacking decision-making capacity can be committed without serious harm being caused but the coercion of a vulnerable person to change or suppress their sexuality or gender identity or expression is inherently harmful. The protection of those persons is a pressing social objective and the prohibition is rationally connected to it. The limitation on manifestation of a religious belief is confined to this particular practice and given the vulnerability of the persons who require the law's protection, Parliament is entitled to regard criminalising the practices as a necessary step to deter them.

Review of this advice

11. In accordance with Crown Law's policies, this advice has been peer reviewed by Matt McKillop, Crown Counsel.



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Encl.

Noted / Approved /Not Approved

Hon David Parker
Attorney-General
/ /2021