

Our Ref: 19-0089

MEMORANDUM

DATE: 13 August 2020
TO:
FROM: John Steenhof
RE: **Sexual and Gender Identity Conversion Practices Bill 2020 (ACT)**

1. This memorandum considers the likely legal implications of the ACT government's proposed bill to criminalise sexual orientation and gender identity conversion practices titled the *Sexuality and Gender Identity Conversion Practices Bill 2020 (Conversion Bill)*.

Executive Summary

2. We consider that the Conversion Bill is fundamentally flawed. It goes far beyond its stated purpose of banning coercive conversion treatments for sexual orientation and gender identity issues.
3. The key failures of the Conversion Bill are:
 - 3.1. Because of its imprecise and ambiguous drafting, the Conversion Bill will potentially criminalise parents, guardians, teachers and pastors who provide moral, ethical and religious care and formation for children.
 - 3.2. The Conversion Bill contravenes fundamental rights and freedoms under international law and the *Human Rights Act 2004 (ACT)* in an unreasonable and disproportionate manner.
 - 3.3. The Bill violates fundamental principles of good legislative drafting, particularly in relation to the imposition of criminal liability.
4. If passed, the Conversion Bill will be amongst the most extreme laws banning conversion therapy in the world. The flaws of the Bill cannot be remedied by amendment.

Criminalisation risk to Parents, Guardians and Teachers

5. The Conversion Bill imposes criminal sanctions on anyone who performs a sexuality or gender identity conversion practice on a "protected person" – a child or a person with an impairment (clause 8(1)), regardless of whether there is consent or not (clause 8(2)).
6. The definition of what constitutes "conversion practices" in clause 7(1) is vague and imprecise. As a result, the Conversion Bill will potentially criminalise behaviour far beyond the coercive practices that are the focus of this legislation. Anyone who is in a position of trust and authority in the life of a child (including parents, guardians, teachers, counsellors and pastors) are disproportionately targeted and are directly at risk.

- 6.1. The criminal sanctions apply to any “treatment” or “practice”, which on its plain meaning will include virtually any activity, not just professional or therapeutic services of a coercive nature.
 - 6.2. Any practice to “change” to a “person’s sexuality or gender identity” will be criminal. This is so undefined that it could criminalise parents who provide advice directed at abstinence or celibacy¹ or who encourage their child to love the body they were born with.
 - 6.3. The only qualifications of the definition of “conversion practices” in clauses 7(2) and (3) of the Conversion Bill are to protect those persons counselling gender transition or providing gender transition services (including prescriptions of puberty blockers, hormones and performance of body-invasive surgeries). There is no protection of body-affirming counsel and loving guidance from parents or spiritual and wellbeing guidance and advice by parents, guardians, teachers, religious leaders and health professionals which is not coercive.
7. Examples of conduct that could be criminal include:
- 7.1. **Parents.** If a 5-year old biological girl tells her parents that she wants to be a boy, criminal proceedings could be brought against her parents, school, teachers and doctors if they continue to treat her as a girl, counsel her to love the body she was born with, explore alternative reasons other than gender confusion for this expressed desire, or if they adopt a “watchful waiting” approach in relation to these desires. These are potential practices that seek to change this young girl’s gender.
 - 7.2. **Teachers.** Criminal proceedings for conversion practices could be brought against a Christian school that teaches the orthodox Christian belief that sexuality should only be expressed between a man and a woman within the confines of heterosexual marriage, and that this is normative for Christians.
 - 7.3. **Religious Leaders.** A Christian pastor leading a Sunday School class of 13-year olds and explaining the Bible’s teaching that homosexual practice is not consistent with Biblical doctrine and that all Christians are called to abstinence and celibacy outside of heterosexual marriage could be criminalised.
 - 7.4. **Counsellors.** A psychologist examining whether a 14-year old biological girl’s desire to transition to a boy might be related to their autism or arise as a result of sexual trauma would be at risk of criminal sanctions.
8. The criminal provisions of the Conversion Bill are wider in scope than most international comparators. There are comparatively few examples of jurisdictions where conversion therapy has been banned. In most other jurisdictions, conversion therapy bans extend only to

¹ In the 2018 *Report on the Inquiry into Conversion Therapy* under the Health Complaints Act 2016 (Vic), the Victorian Health Complaints Commissioner states “The main aims of conversion therapy/practices are generally to suppress or eliminate a person’s sexual orientation or gender identity, **including through celibacy or abstinence...**” (emphasis added)

mental health practitioners² or generally to health care practitioners³ or to services provided for commercial gain.

9. The criminal provisions of the Conversion Bill are too wide and could have unintended dangerous consequences. Any criminal sanctions should be carefully defined to apply to coercive and aversive clinical therapies only. The category of potential offenders should be narrowed to remove the threat to parents and teachers and religious leaders. The definition of conversion practices needs to be radically overhauled to prevent the criminalisation of parents, teachers, mentors, counsellors and religious leaders engaged in non-coercive advice, guidance and teaching.

The Conversion Bill is inconsistent with fundamental rights

10. The Conversion Bill is inconsistent with the following fundamental freedoms under the *Human Rights Act 2004* (ACT):
 - 10.1. **Section 8 – Recognition and equality before the law:** The Conversion Bill gives unequal protection to persons promoting a single controversial practice in relation to issues of sexual orientation and gender identity and discriminates in favour of gender transition treatments that involve chemicals and hormones and invasive surgical practices.
 - 10.2. **Section 11 - Protection of the family and children:** The potential criminalisation of parents and guardians for provision of moral and ethical teaching and formation of a child on sexual orientation and gender identity issues is a breach of the fundamental rights of the family.
 - 10.3. **Section 12 – Privacy and reputation:** The family has the right not be interfered with arbitrarily. The Conversion Bill will allow unjustifiable interference with this right to privacy with a disproportionate invasion of privacy by the state.
 - 10.4. **Section 13 – Freedom of movement:** Parents and others will be criminalised where a journey outside of ACT is considered to be for the purpose of conversion practices. This is a limitation on freedom of movement.
 - 10.5. **Section 14 – Freedom of thought, conscience, religion and belief:** Any teaching by parents to children of body affirmation beliefs or the teaching of orthodox religious beliefs on sexual orientation or gender identity could be criminal “conversion practices”.
 - 10.6. **Section 16 – Freedom of Expression:** Parents and teachers will be restricted from sharing and imparting information and ideas about sexual orientation and gender identity.
 - 10.7. **Section 27A – Right to Education:** Parents will be restricted in ensuring the religious and moral education of their children in conformity with their convictions including in relation to issues of ethics, morality and personal identity.

² Eg State of California, USA – Senate Bill 1172, Washington State, SB5722

³ Eg Canada – Ontario (2015) Manitoba (2015), Nova Scotia (2018)

11. The far-reaching effects of the Conversion Bill are disproportionate to the harms that the Conversion Bill seeks to prevent. Thus, the requirements of section 28 of the Human Rights Act (which sets out the reasonable limits that can be imposed on rights) are not satisfied. The Conversion Bill places unjustifiable limits on fundamental rights and freedoms that are completely unnecessary to achieve whatever legitimate aims the bill might have.
12. The rights of parents and the family and those who have the primary position of care for the wellbeing of children are of fundamental importance. A law which would criminalise parents who exercise those rights must meet a very high threshold. The real target of the Conversion Bill is not parents, teachers or pastors but those who practice coercive clinical therapies. The broad reach of the Conversion Bill is unnecessary and less restrictive means are available to achieve its intended purpose.

Conversion Bill is contrary to the principles of good legislative design

13. The Conversion Bill is poorly designed and fails to meet the basic principles of good legislative design⁴ such as:
 - 13.1. Legislation should be fit for purpose. The Conversion Bill extends criminal sanction far beyond what is necessary for its stated purpose.
 - 13.2. Legislation should give certainty as to its effect. The definitions of conversion practices under the Bill are vague and ambiguous.
 - 13.3. Legislation should ensure that criminal offences are drafted clearly. The Conversion Bill fails this test.
 - 13.4. Legislation should not overreach and should not inhibit freedoms or undermine important values or institutions of Australian society. The Conversion Bill intrudes unnecessarily and disproportionately with fundamental freedoms of individuals, parents, teachers and religious leaders and undermines the rights of family, rights of freedom of religion and rights of freedom of expression in a disproportionate way.
14. Giving these failings in drafting design, it is likely that the Conversion Bill will not achieve its goals, will give rise to significant unintended consequences and is likely to impose unnecessary costs. For these reasons, the Conversion Bill is bad law and should be rejected.

Amendments to the Human Rights Commission Act

15. The Conversion Bill also includes amendments to the *Human Rights Commission Act 2005* to allow complaints by adults about conversion practices to the ACT Human Rights Commission.
16. This memorandum does not expressly deal with these provisions, except to observe that the fundamental flaws identified in the definitions of conversion practices above apply equally to these proposed changes.

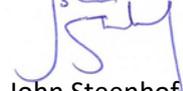
⁴ E.g Queensland https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Clear_meaning.pdf and New Zealand <http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

17. Because of this poor drafting we consider that there are additional risks to ACT residents where Human Rights Commission procedures have the potential to be weaponised by activists to complain about teachings by parents, guardians, teachers, counsellors and religious leaders in relation to sexual orientation and gender identity issues that are consistent with genuinely held beliefs or their sincere religious convictions.
18. Because the definition of “conversion practices” is so poorly defined and the threshold for a complaint to proceed under the Human Rights Commission Act 2005 is so low, it is likely that the Conversion Bill would allow schools and churches to be subjected to harassment with claims of conversion therapy which go far beyond the intended purpose of the Bill which is to prohibit coercive and aversion therapy.

Conclusion

19. For the reasons set out in this memorandum, we consider that the proposed ACT Conversion Bill is fundamentally flawed, exposes families, schools and religious organisations to significant danger. For this reason, we consider that the Conversion Bill should be rejected.
20. Please contact us if you would like us to expand on any of the advice above.

Yours sincerely,



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