

MEMORANDUM

DATE: 2 December 2020
FROM: The Human Rights Law Alliance
RE: ***Updated Advice on the Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic)***

1. This memorandum analyses the threat to religious freedom posed by the Victorian government's proposed *Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic)* (**Conversion Bill**) that aims to ban sexual orientation and gender identity "conversion therapy".

Executive Summary

2. The Conversion Bill is a serious threat to religious freedom. If the Bill passes, churches, religious organisations, Christian schools and individuals will face coercion, investigation, hefty jail terms and large fines for teaching and practicing Biblical sexual ethics in relation to sexual orientation and gender identity (**SOGI**) issues as believed, taught and practiced by many Christian churches in Australia (**Christian sexual ethics**).
3. The Bill explicitly targets Christian sexual ethics. It puts in place various social engineering tools and powers of compulsion to facilitate a wide-ranging repudiation of Christian sexual ethics which includes:
 - 3.1. a blanket ban on vaguely defined "change or suppression practices" (**COS Practices**) which expressly extends to consensual religious practices, including prayer and Christian teaching on SOGI issues;
 - 3.2. the creation of criminal offences under which any person – pastors, leaders, teachers, parents, counsellors – could be criminalised if complaints are made about Christian sexual ethics that might be considered COS Practices;
 - 3.3. an extension of role of the Victorian Equal Opportunity and Human Rights Commission (**Commission**) to grant broad powers to find, investigate, re-educate, censure and punish anyone who holds to and teaches Christian sexual ethics;
 - 3.4. a complaints regime administered by the Commission which will encourage hostile activist harassment of Christians, and secrecy provisions that allow the antagonisation of churches, religious organisations and individual Christians who believe and practice Christian sexual ethics;
 - 3.5. a Commission-run programme on COS Practices that will create and distribute one-sided material attacking Christian SOGI convictions;
 - 3.6. the replacement of previous definitions for "gender identity" and "sexual orientation" with new definitions that entrench in law contentious and extreme SOGI ideology.

4. The Conversion Bill is an extremely concerning legal initiative and should be rejected in its entirety. However, there are potential amendments that could mitigate some of the flaws of the Bill, the simplest of which is to limit the prohibition of “change or suppression practices” to only cover coercive therapeutic practices which all parties condemn.

Legal Analysis

Definition of Change of Suppression Practices

5. The Conversion Bill contains a great deal of ideological language, and an objects clause that extends far beyond the protection of individuals from invasive aversion therapies:
 - 5.1. to “denounce”, “prohibit” and “eliminate” “change or suppression practices”;
 - 5.2. to ensure all people in Victoria can “live authentically and with pride”;
 - 5.3. to affirm that every SOGI identity is “not broken and in need of fixing”; and
 - 5.4. to affirm that COS Practices are deceptive and harmful.
6. The definition of COS Practices to be banned in the Conversion Bill is broad and imprecise, and specifically targets Christian sexual ethics to expressly include (clause 5(3)(b)):

*“carrying out a **religious based practice**, including but not limited to, a prayer based practice, a deliverance practice or an exorcism”.*
7. Practices include any “practice or conduct directed towards a person, whether with or without the person’s consent”. On its plain meaning, this could include virtually anything directed towards a person, not just professional or therapeutic services, even if consented to or requested by someone struggling with unwanted desires.
8. The COS Practice must be for the purpose of changing or suppressing a person’s “sexual orientation” or “gender identity”. These terms are so vaguely defined that the prohibition can be applied to almost all Christian teachings on SOGI issues short of complete affirmation of all sexual behaviours and anything related to gender identity and expression.
9. For example, “gender identity” may include a person’s “personal sense” of their body and other expressions, and “sexual orientation” can relate to a person’s “emotional, affectional and sexual attraction”. The potential for pastors, parents and teachers who assist people with unwanted feelings of sexual attraction or encourage people to love the body they were born with to be criminally punished for so doing is clear.
10. Clause 5(2) of the Conversion Bill extends one-sided ideological protection. Practices that “affirm” an individual’s sexual interests, impulses and behaviours and/or encourage the expression and development of a gender identity incongruent with biological sex are protected. There is no equivalent protection for body-affirming counsel. The encouragement of celibacy is equally prohibited. Loving, non-coercive spiritual and wellbeing guidance and advice to those who struggle with unwanted desires will also be criminally punishable – in fact, this is expressly included as a COS Practice in the Bill and mischaracterised as inherently deceptive and harmful.
11. This definition of COS Practices directly attacks religious freedoms and will prohibit non-coercive practices. The Explanatory Notes to the Conversion Bill state that the examples are “intended to capture a broad range of conduct” including “informal practices” such as

“conversations with a community leader that encourage change or suppression” and “more formal practices” such as “behaviour change programs and residential camps”.

Online Practices

12. COS Practices also include, by virtue of clause 5(4), practices or conduct “directed towards a person remotely (including online)”, not just those conducted in person.
13. This also further broadens the potential application of the provisions. For example, online activity (such as on social media, websites or blogs) by parents, teachers, counsellors, pastors and religious leaders may also be captured.

Application outside Victoria

14. Clause 8 of the Conversion Bill allows Victorian police and the Commission to pursue anyone in Australia for Practices if there is a “real and substantial” link between the conduct and Victoria.
15. This will allow activists to target non-Victorians using these extreme Victorian laws and subject them to draconian powers and the risk of severe sanction for conduct which is not prohibited in their own State.

Criminal Provisions

16. Part 2 of the Conversion Bill creates criminal offenses for COS Practices which will impose significant jail time and/or fines for both “injury” and “serious injury” which will have the same meanings as in section 15 of the *Crimes Act 1958* (Vic) and will extend to temporary mental harms. For example, “injury” may mean both physical injury or “harm to mental health” (which is further defined) “whether temporary or permanent”.
17. For a person, the penalties could be as much as 10 years’ imprisonment and a \$500,000 fine. These are potentially very serious penalties for something that could be as benign as the teaching of traditional Christian sexual ethics.

Equal Opportunity and Human Rights Commission

18. Part 3 of the Bill establishes a “civil response scheme” (**Scheme**) within the Commission. The new functions and powers given to the Commission under the Scheme will enable it to pursue, investigate, sanction, re-educate, punish and suppress churches, organisations and individuals who teach and practice Christian sexual ethics.
19. The Commission will also receive and investigate complaints about COS Practices. Concerningly, the Conversion Bill has a very low bar for allowing the Commission to receive and investigate reports. For example, sections 17(1)(b), 21 and 24 make it clear that the Commission may receive reports “from any person”, even those who are not affected by the relevant COS Practices. These complainants can make anonymous reports and there are very strict secrecy provisions in the Conversion Bill that can be used to obscure these investigations from public scrutiny.
20. As has occurred in other Commissions and Tribunals around Australia, this flawed design with only encourage anti-religious activists to weaponise the complaints regime to harass and seek to silence churches, organisations and individuals with religious convictions on SOGI issues they do not agree with.

21. A targeted person may then be subject to long, stressful and costly processes, including potential referral to the Health Complaints Commissioner, the Australian Health Practitioner Regulation Agency, the Ombudsman and Victoria Police, being compelled to provide information or documents or appear before the Commission, remedies (such as enforceable undertakings and compliance notices), associated applications to the Victorian Civil and Administrative Tribunal, and proceedings for any offences.
22. Such provisions pose significant additional risks to ordinary Victorian residents, including:
 - 22.1. **Pastors.** A pastor who counsels a member of his congregation over unwanted same-sex attraction is at risk of a complaint even if the person asked for help.
 - 22.2. **Teachers.** A teacher at a Christian school who promotes the Biblical teaching of celibacy and abstention from sexual conduct except in marriage between a man and a woman may be guilty of COS Practices and face Police investigation or being dragged before the Commission.
 - 22.3. **Counsellors.** A Christian counsellor who counsels fellow Christians in accordance with orthodox Biblical teaching on sexuality is at risk of a complaint.
 - 22.4. **Parents.** A parent who struggle with their 13-year old daughter’s sudden presentation of gender confusion and who oppose chemical and surgical practices to transition appearance to that of a male, could be made criminals and face jail time.

Inconsistency with fundamental rights

23. The Victorian Attorney General has produced a disingenuous “statement of compatibility” that considers how the Conversion Bill will interact with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**). This statement obscures the Bill’s threats to fundamental rights and freedoms that are supposedly protected by the Charter.
24. The Conversion Bill is inconsistent with the following fundamental freedoms under the Charter:
 - 24.1. **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 experimental chemical and hormone treatments and invasive surgical practices.
 - 24.2. **Section 10 – Protection from torture and cruel, inhuman or degrading treatment:** The disproportionate protection of gender transition treatments in the Conversion Bill fails to protect children from being exposed to the dangerous effects of these procedures at a time when they are incapable of giving informed consent.
 - 24.3. **Section 12 – Freedom of movement:** Parents and others may be criminalised where a journey outside of Victoria is considered to be intended for change or suppression practices to be directed towards a person. This is a limitation on freedom of movement.

- 24.4. **Section 13 – 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, enabling the State to police communications between a parent and child.
- 24.5. **Section 14 – Freedom of thought, conscience, religion and belief and Section 19 – Cultural Rights:** 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 “change or suppression practices”.
- 24.6. **Section 15 – Freedom of Expression:** Parents and teachers may be restricted from sharing and imparting information and ideas about sexual orientation and gender identity.
- 24.7. **Section 17 - Protection of families and children:** The potential criminalisation of parents and guardians for providing moral and ethical teaching and formation of a child on sexual orientation and gender identity issues may breach of the fundamental rights of the family.
25. The far-reaching effects of the Conversion Bill are disproportionate to the harms that it seeks to prevent. Thus, the requirements of section 7 of the Charter (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 legitimate aims.
26. The above rights are central to a healthy and functioning free society. Any law that violates them would need to have a compelling rationale.
27. However, no actual need for a Conversion Bill has been established by reliable evidence. The Conversion Bill is also exceptionally vague and broad, and imposes extensive limitations on the rights of individuals, families, parents, teachers, counsellors, health professionals and clergy that have no connection with the purpose of preventing serious harm. There are clearly less restrictive means available to effect that purpose.

Ancillary amendments to other Acts

28. The Conversion Bill also makes other concerning amendments to the EOA, including replacing the definitions of “gender identity” and “sexual orientation” with broader definitions. Section 60 also inserts “sex characteristics” (with a corresponding definition) as a new protected attribute on the basis of which discrimination is prohibited in section 6(o) of the EOA.
29. It also amends the *Family Violence Protection Act 2008* (Vic) and *Personal Safety Intervention Orders Act 2010* (Vic), inserting examples relating to SOGI in the meanings of “emotional or psychological abuse” and “harassment” thus widening the legislative capacity to attack Christian sexual ethics.

Potential amendments to somewhat lessen the above risks

30. In our view, the Conversion Bill should be rejected in its entirety. However, if it were to be passed, then some key amendments could be made to somewhat lessen the above risks, including to:

- 30.1. Limit the application of the provisions to coercive and aversive clinical therapies (carried out in clinical settings for profit) only, including by extensively amending the definition of “change or suppression practice” and the included/excluded practices and conduct to ensure that everyday people and activities, including religious practices, are not caught.
- 30.2. The criminal sanctions should also be amended to narrow the category of potential offenders, and to remove clauses regarding extra-territorial, advertising and travel offences.
- 30.3. Remove provisions creating the civil response scheme within the Commission, or at the very least create a much higher threshold for complaints and limit the functions and powers of the Scheme to those relating to coercive and aversive clinical therapies only.
- 30.4. Remove the ancillary changes to the EOA and other Acts.

Conclusion

31. For the reasons set out in this memorandum, we consider that the proposed Conversion Bill is fundamentally flawed and completely inconsistent with the Charter. It exposes people such as parents, teachers, counsellors, pastors and religious leaders to risk and should not be passed.
32. Please contact us if you would like us to expand on any of the advice above.

Yours sincerely,



John Steenhof
Principal Lawyer