CHANGE OR SUPPRESSION (CONVERSION) PRACTICES PROHIBITION BILL 2020 (VIC)

MAJOR PROBLEMS AND PROPOSED AMENDMENTS

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A. Summary of Issues with the Bill

The Bill's bans are far too broad and make beneficial conduct and practices illegal

This Bill has been introduced in response to reports by people of practices they experienced as harmful and traumatic (at the time or later) which were intended to change their sexual orientation or sexual behaviour from same-sex attracted to opposite sex attracted or suppress the expression of same-sex orientation or behaviour.

Historical practices included invasive and non-consensual medical and psychiatric aversion therapies which were abusive and are no longer practised. According to Attorney-General Jill Hennessy, contemporary change or suppression practices include: counselling or psychology; formal behaviour-change programs; residential camps; support groups; and religious-based approaches like prayer and deliverance.[1] These contemporary practices are usually sought and consented to by a person who, at the time, wishes to change or manage their sexual desires.

But the Bill is not limited to these historical or contemporary practices. The Bill proposes to ban *any* conduct (including a conversation) by *any* person directed towards *any* second person on the basis of the second person's sexual orientation (or gender identity) where the conduct is intended to "suppress or change" the second person's sexual orientation (or gender identity) or induce the second person to suppress or change their sexual orientation (or gender identity).[2] Instead of trying to define and ban "harmful" conduct and practices, the Bill makes illegal all practices and conduct (including a conversation or family discussion, counselling, pastoral care, prayer) engaged in for the purpose of "suppressing or changing" a person's sexual orientation or gender identity, *even if the conduct was requested and consented to by the person and even if that person experienced the conduct as beneficial rather than harmful.*

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[1] Attorney-General Jill Hennessy, *Statement of Compatibility of the Bill with the Charter of Human Rights and Responsibilities* Assembly Hansard 26 November 2020 page 3718.

[2] Clause 5(1) provides that a ***change or suppression practice*** means a practice or conduct directed towards a person, whether with or without the person's consent—

(a) on the basis of the person's sexual orientation or gender identity; and

(b) for the purpose of—

(i) changing or suppressing the sexual orientation or gender identity of the person; or

(ii) inducing the person to change or suppress their sexual orientation or gender identity.

The **first major problem** with the Bill then is that it bans far too broad a range of conduct by any person – ranging from non- consensual aversion therapy (which should be banned) to consensual counselling which people are free to join and leave, and even a simple conversation within a family or between friends.

The **second major problem** with the Bill is that it assumes that no person can ever benefit from the contemporary practices and conduct it bans and no person (including an adult) can be trusted to make the decision for themselves whether to start or stop engaging in such practices.

Yet there is significant evidence (such as a recent Australian study of 78 ex-LGB people) that *some* same sex oriented people who were unhappy in that orientation freely chose to engage in some practices the Bill would ban (such as secular and religious counselling) and experienced them as highly beneficial (even preventing suicidal ideation) and as helping them move to what they describe as a contented heterosexual orientation and relationship (a change practice under the Bill) or a celibate life (a suppression practice under the Bill).[3] (This is not a claim that every same-sex oriented person is unhappy in that orientation or can change or ought to change.) There is also significant self-reported evidence that *some* same-sex attracted people who engaged in practices the Bill would ban have experienced them as very harmful, including causing them significant trauma and depression.[4]

Both sets of accounts (including the pain of people in each group) can be taken at face value. Different people can react very differently to the same psychotherapy or counselling approaches on any issue – some might find it traumatic and others find it healing. Rather than ban a vast range of conduct, some of which some people have found beneficial and some of which some people have found harmful, the Bill should confine the banned conduct much more narrowly to that which the evidence shows *always* causes harm to *everyone*. For all other practices, the Bill should let adults freely choose whether or not to engage in them and make up their own minds about what is beneficial or harmful for them.

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[3] See for example the testimonies of 78 ex-LGB people (the majority of whom are Australian) who say they benefited greatly from some of the practices made illegal by the Bill) at www.freetochange.org – explanatory video at https://media.freetochange.org/Video/CAUSE_data_video_updated_results_REV001.mp4 and the report on the 2020 survey of 70 of these people at https://www.freetochange.org/wp-content/uploads/Free-To- Change-2020-Conversion-Therapy-Report-V4F.pdf Updated interim data for 78 people is also available.

[4] See for example the La Trobe University/HRLC report *Preventing Harm Promoting Justice* (2018) which describes the experiences of 15 LGBT people (14 experiences in Australia) who experienced some of the practices to be banned by the Bill as very harmful and traumatic - https://www.hrlc.org.au/reports/preventing-harm

The only possible case for regulating those other practices is for minors and those who cannot judge benefit or harm for themselves.

The Victorian Bill is vastly broader and harsher than all other conversion ban laws

There has been a campaign over the last 10 years by LGBT groups across Western countries to ban Sexual Orientation Change Efforts (SOCE) or more broadly Sexual Orientation and Gender Identity Change Efforts (SOGICE).

This has mainly succeeded in parts of North America and in 2020 draft legislation was introduced to Australia.

As at December 2020, there are legislative bans on "conversion therapy" (variously defined) in 5 countries covering 27 jurisdictions: Queensland, the ACT, Germany, Malta, 20 of the 50 USA States, 3 of the 9 Canadian provinces[5] (the "ban jurisdictions"). There is a proposed federal ban in Bill C-6 in Canada. Similar legislation has failed to pass in Ireland[6] and several US States, including Colorado, New Hampshire, Maryland and Virginia. In the USA, one Federal Circuit Court of Appeal has declared some State conversion therapy bans to be unconstitutional restrictions on free speech[7], but challenges in two other Circuit Courts of Appeal have failed.[8]

Compared with all other ban jurisdictions, the Victorian Bill would create the broadest and harshest ban in the world.

Every other ban jurisdiction in the world has limited the ban in one or both of the following two ways:

(a) In every ban jurisdiction except Queensland,[9] the person who is subject to the conversion practice must be under 18 (in some Canadian provinces 16) or have diminished mental capacity or be made to participate in the practice without their

[5] Quebec does not criminalise simple conversion therapy but makes the provider liable for any injury caused.

[6] https://www.oireachtas.ie/en/bills/bill/2018/39/?tab=debates

[7] Otto et al v City of Boca Raton, Florida et al, 11th U.S. Circuit Court of Appeals, No. 19-10604; https://www.usnews.com/news/top-news/articles/2020-11-20/us-appeals-court-voids-south-florida-bans-on-conversion-therapy-for-children

[8] Sometimes other jurisdictions are erroneously reported as having legislation banning conversion practices. For example, Ecuador makes torture a crime under its Criminal Code and adds an extra penalty if the torture was to change sexual orientation but the crime is torture, not conversion therapy. In Brazil, the federal psychology council has instructed psychologists not to engage in conversion therapy and in Albania the order of psychologists has done the same but these are a professional body rules or guidelines, not laws passed by a parliament attracting state-sanctioned criminal and civil penalties.

[9] The Queensland ban only applies to conduct by health practitioners. However, these practitioners can still engage in clinically appropriate treatment, so its application to conduct affecting adult patients has limited practical effect.

consent (in other words, adults of sound mind are not banned from receiving any advice, counselling, therapy or prayer they freely consent to). But under the Bill in Victoria, adults of sound mind will not be able to consent to such advice, counselling, therapy or prayer, which will be illegal.

(b) In 23 of the 27 ban jurisdictions in the world (including Queensland) the only people who are banned from engaging in conversion practices (e.g. advice, counselling, therapy) are health professionals, so in most ban jurisdictions there is no restriction on parents, relatives, friends, religious and community leaders providing advice, counselling, therapy or prayer to people in relation to sexual orientation or gender identity.[10]

But under the Victorian Bill parents, relatives, friends, religious and community leaders providing advice, counselling, therapy or prayer to people in relation to sexual orientation or gender identity can find themselves committing an illegal act and be subject to a range of civil enforcement by the Human Rights Commission and a criminal prosecution.

The Victorian Bill has the harshest criminal penalties of any legislation in the world – for "change or suppression" conduct causing psychological harm 5 years' imprisonment or a $100,000 fine or for serious psychological harm 10 years imprisonment or a $200,000 fine. Most other laws provide for at most 1 years' imprisonment.

The Victorian Bill also gives enormous investigation and enforcement powers to the Victorian Equal Opportunity and Human Rights Commission ("Commission") to act on anonymous complaints from third parties not affected by the practice, investigate on its own motion and compel production of evidence and issue its own enforcement notices, enforceable as VCAT orders. The Commission is both investigator and judge of breaches. The Commission does not have these powers in relation to sex, age, disability or any other discrimination, which are much bigger issues in terms of the number of Victorians affected by them.

[10] In Germany the ban applies to all persons but they must engage in "guided treatments" so it is unlikely to catch unconnected conversations or advice. The ACT and Malta bans apply to conduct by all persons but only in relation to minors. The Nova Scotia ban applies to health professionals and any person in a position of trust or authority towards a young person.

The gender identity provisions in the Bill are incoherent and will cause harm by pushing an unqualified affirmation approach to body transitioning

The Bill also prohibits any conduct intended to "suppress or change" a second person's *gender identity,* but excludes from the ban any assistance to a person considering or undergoing a *gender transition*. The term *gender transition* is unhelpfully not defined, but presumably means changing a person's physical body so it looks more like, and has the anatomical features of, the person's self-determined gender identity. For example, a biological female with a self-determined gender identity as male may seek to gender transition by changing their body through hormones and surgery to develop facial hair, breast binding or removal of breasts and uterus.

There is no evidence about practices intended to "suppress or change" a second person's *gender identity* in the reports on which the government relies. The La Trobe/HLRC report described 14 stories of gay conversion practices in Australia (and one hearsay account of a foreign country practice concerning a trans person). The Health Complaints Commissioner Report (of which only a 2 page summary was ever made public) looked only at gay conversion practices.[11]The Department of Justice and Community Safety conducted a consultation on the best way/s to implement a ban of conversion practices but in its outcomes summary[12] only described 4 stories – all of gay conversion practices.

There is no evidence base put forward by the government for banning practices relating to change or suppression of gender identity. Remarkably, the government's documents are silent on the controversies about gender (body) transition therapies.

Despite the serious concerns about young people being pushed too quickly into *gender transition of their bodies*, the government has provided no evidence for its ban on cautious approaches to body transition (which would be "suppression" practices).

The Attorney-General asserted in her second reading speech that there is no evidence that

[11] https://www2.health.vic.gov.au/about/publications/researchandreports/report-on-inquiry-into-conversion-therapy-executive-summary

[12] https://engage.vic.gov.au/changeorsuppression

gender identity can change. But that must be wrong. For many people, gender dysphoria does not begin as a young child but develops closer to puberty. At some point, those persons who had identified as their birth gender may begin to feel they are more like the opposite gender and identify as the opposite (or in theory another) gender. That is a change in gender identity. In addition, more and more people who underwent a change of gender identity from their birth gender and transitioned their body to match have later regretted doing that and have de-transitioned by changing their gender identity (and, to the extent they can, their bodies) back to their birth gender. That is a change in gender identity.

In gender theory, gender identity is self-determined by the individual and fluid (the individual can change their self-determination). How then can anyone who is counselling or assisting a person with gender confusion tell whether, under the Bill, they were illegally inducing the person to change their gender identity (clause 5(1)) or legally assisting the person to express their gender identity (clause 5(2)(a)(ii))? The answer won't be known until the person arrives at (or changes) their self-determined gender identity. But that is no help to the clinician or counsellor who faces imprisonment and civil sanctions if it turns out (retrospectively) that they were inducing a change in gender identity. With respect, these provisions are hopelessly confused yet criminal liability turns on them.

The Bill also exposes a bizarre contradiction in government policy. In 2019, the current Victorian government legislated to allow people to change their birth certificate gender *once each year* to reflect their gender identity – clearly this implies that people can change their gender identity at least annually.[13] So how can the same government now propose a law to ban people from helping others to change their gender identity, when annual change is expressly contemplated by the birth certificate legislation?

These provisions about changing or suppressing gender identity are so incoherent that they should be dropped altogether or withdrawn and redrafted.

But there is a real practical harm in these provisions as well. The Bill prohibits everyone from inducing a person to "suppress" their gender identity. Take an adolescent with gender dysphoria who believes they are in the wrong body and wants to take puberty blockers, sex

[13] Births, Deaths and Marriages Registration Amendment Act 2019

hormones and eventually undergo surgery to transition their body to fit their self-determined gender identity. It will be an illegal gender identity "suppression" practice for a parent or doctor advising the adolescent to induce them to defer taking the drugs until after puberty or until after other co-existing conditions like depression or conditions relating to autism spectrum disorder have been treated. A cautious approach in considering whether to proceed to body transition is the prudent medical course for people presenting with gender dysphoria – especially in childhood or adolescence.[14] Many gender dysphoria cases present with other conditions like depression or factors arising from being on the autism spectrum and those issues need to be worked through to discover the real cause of the person's sense of being in the wrong body and whether body transition is appropriate.

At least half a dozen medical studies cited by Dr Philip Morris and Professor Patrick Parkinson in an open letter to the Victorian Attorney-General of 7 January 2021 show that a large percentage of children presenting with gender-related distress were reconciled to their natal sex before adulthood without body transition:

> *The overwhelming evidence is that the great majority of children who attend gender clinics because they experience serious discordance between natal sex and gender identity tend to resolve these issues when they go through puberty as long as a cautious therapeutic approach is adopted.[15]These consistent clinical findings have been contested on theoretical grounds.[16] However, no clinical studies have been conducted that contradict these findings.*

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[14] See the principles on this formulated by the National Association of Practising Psychiatrists on the Management of Gender Dysphoria at https://napp.org.au/2020/11/management-of-gender-dysphoria/

[15] M. Wallien, & P. Cohen-Kettenis, 'Psychosexual Outcome of Gender-dysphoric Children' (2008) 47 *Journal of the American Academy of Child and Adolescent Psychiatry* 1413; J. Ristori and T. Steensma, 'Gender Dysphoria in Childhood' (2016) 28 *International Review of Psychiatry* 17; Entwistle K. 'Debate: Reality check – Detransitioner's Testimonies require us to Rethink Gender Dysphoria'. *Child & Adolescent Mental Health*, 2020. doi:10.1111/camh.12380.

[16] Julia Temple Newhook and others, 'A Critical Commentary on Follow-Up Studies and "Desistance" Theories About Transgender and Gender-Nonconforming Children' (2018) 19 *International Journal of Transgenderism* 212; see also the responses from Kenneth Zucker, Thomas Steensma & Peggy Cohen-Kettenis in the issue.

There is a recent trend in some gender clinics to always affirm the "wrong body" feelings of an adolescent and quickly move them to body transition. This approach has been criticised by the High Court of England as "experimental" in the Keira Bell case.[17] In that case a 16 year old girl consented to a course of body transition treatments including hormone therapy, which potentially rendered her infertile. She later had a double mastectomy. In her early 20s she greatly regretted her decision and sought to de- transition her body to match her female birth gender. Bell and another person made a claim for judicial review of the policy and practice of the Tavistock and Portman NHS Foundation Trust of prescribing puberty-suppressing drugs to persons under the age of 18 who experience gender dysphoria. The claimants' case was that children and young persons under 18 are not competent to give informed consent to the administration of these drugs.

The Court gave the following guidance in respect of children under 16:

> A child under 16 may only consent to the use of medication intended to suppress puberty where he or she is competent to understand the nature of the treatment. That includes an understanding of the immediate and long-term consequences of the treatment, the limited evidence available as to its efficacy or purpose, the fact that the vast majority of patients proceed to the use of cross-sex hormones, and its potential life changing consequences for a child.
>
> There will be enormous difficulties in a child under 16 understanding and weighing up this information and deciding whether to consent to the use of puberty blocking medication. It is highly unlikely that a child aged 13 or under would be competent to give consent to the administration of puberty blockers. It is doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty blockers.

Different guidance was given for young persons aged 16 and over. The legal position in respect of such persons:

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[17] *R (on the application of) Quincy Bell and A v Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin).

> …. is that there is a presumption that they have the ability to consent to medical treatment. Given the long-term consequences of the clinical interventions at issue in this case, and given that the treatment is as yet innovative and experimental, we recognise that clinicians may well regard these as cases
>
> where the authorisation of the court should be sought prior to commencing the clinical treatment.

Expert evidence in that case showed that body transition drugs are themselves harmful, for example by producing infertility and reduction in bone density. Natal sex girls transitioning to boys were encouraged to have their eggs harvested and choose a sperm donor (because a frozen embryo fares better than a frozen egg). The Economist[18] has described a Western world trend among some clinics of hastening people into body transition, with increasing numbers of such people desisting from the treatment or later regretting and attempting to de-transition their bodies back to their birth sex. **None of this is addressed in the government case for this Bill.**

The number of referrals of cases of childhood gender dysphoria to the Melbourne Royal Children's Hospital Gender Clinic per year has increased forty-fold from 8 in 2011 to 336 in 2019, after being stable for the prior 8 years.[19] Referrals to the London Tavistock NHS Gender Clinic have increased 30 fold from 2011 to 2019 (there were 2700 in 2019). Both clinics use the affirmation approach.

The Bill will effectively force clinicians to affirm a person's desire for body transition and prescribe the drugs for body transition because to do otherwise will leave them open to the accusation of engaging in a "suppression" of gender identity inviting criminal investigation, VEOHRC investigation and compliance notices and presumably professional sanctions. (Clinicians have a defence under the Bill, but only if they can show that their advice and treatment was "necessary" to provide a health service. "Necessary" is too high a standard. The Queensland Bill was amended following representations by the Queensland AMA and the

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[18] After the Keira Bell verdict - An English ruling on transgender teens could have global repercussions *The Economist* 12 December 2020

[19] https://www.smh.com.au/lifestyle/health-and-wellness/staying-on-her-feet-how-michelle-telfer-won-gender-clinic-battle-20200416-p54kjf.html

Queensland Law Society to use a better standard of whether the treatment was “clinically appropriate”, which recognises that there is often a range of appropriate treatment choices.)

The treatment of gender dysphoria involves complex and delicate judgments specific to the person. They are not judgments that the Parliament should be determining by threatening criminal prosecution or civil sanctions for parents or doctors simply because they are not uncritically affirming and facilitating a child’s desire to transition their body to a different gender. Appropriate medical decisions for a particular child are a matter for the child, the parents and the health practitioner, not for blanket rules set by the Parliament. This part of the Bill risks rushing young people with gender dysphoria into body transition, leading to more regret and de-transitioners and more litigation over the next 10 years.

Overall, this Bill is motivated by a good intention of protecting people from some demonstrably abusive practices. But its incredible overbreadth in definition and scope causes more harm than it remedies. The Bill needs significant amendments or a rewrite to avoid creating that harm. **The proposals in the Bill have never had a transparent public inquiry (rather, government consultations have occurred behind closed doors with very limited reports). A fully transparent parliamentary inquiry would be very welcome.**

B. Background to the Bill – Sexual Orientation Change Efforts

In the last 30 years Western countries have greatly changed their attitude to homosexual orientation and sexual conduct including decriminalising these, introducing discrimination law protections and, most recently, legalising same sex marriage. As part of the same trend, practices starting in the early 20th century to convert the sexual orientation or behaviour of same sex attracted people have been questioned, resiled from by some professional bodies and made illegal in some places.

It is important to distinguish different types of such practices.

The worst of these practices were abusive ***physical therapies*** like surgery, hormonal therapy and aversion therapies (creating an association for the person between same sex attraction and physical pain - e.g. electric shocks or enemas - so the person developed an aversion to the same sex attraction). These physical therapies were performed by medical and psychiatric professionals, were relatively rare in Australia and are long since discredited and discontinued.

Other practices involved ***secular psychotherapy or counselling*** (usually consensual) in which the person's same sex attraction and sexual activity was unwanted by the person and treated as an illness by the therapist or counsellor with the aim of changing sexual orientation or modifying sexual behaviour. Homosexuality was treated as a mental illness up until 1973 in the USA (and up until 1990 by the World Health Organisation). From 2009, many associations of psychiatrists in Western countries have said there is no scientific evidence (in the sense of reliable, controlled studies) showing the clinical success of psychotherapy to change sexual orientation.[20] There have been many contrasting reports of benefit or harm from such therapies and in 2012 "a significant minority" of mental health professionals continued to offer hope for sexual reorientation.[21] This debate has become entangled with the heated scientific, political and moral controversies as to whether sexual orientation is fixed or variable for some people or all people.

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[20] E.g. Royal Australian and New Zealand College of Psychiatrists Victoria Branch submission to DJCS consultation 21 November 2019

[21] Beckstead, A.L. "Can We Change Sexual Orientation?" *Archives of Sexual Behaviour Journal* February 2012 accessed at https://www.researchgate.net/publication/221847417_Can_We_Change_Sexual_Orientation

Religious conversion practices in relation to same sex attracted people mainly consist of consensual pastoral care, counselling and prayer. The content of these practices will vary according to the desires and religious background of the person seeking help and the religious background and the skills and sensitivity of the religious person providing the practice. They may include pastoral care, an assurance of God's love and prayers for wisdom and guidance and self-control for the person to live in what they consider to be a godly manner, but in some cases they may contain words of condemnation, not freedom, and induce shame.

It is apparent that psychotherapy, counselling and religious conversion practices use discussion, instruction and psychology and are qualitatively different to historical physical therapies.

The La Trobe/HLRC report on harms of change practices

In 2018 La Trobe University and the Human Rights Legal Centre published *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*.[22] That report has become the basis of the policy behind the Bill. The report is particularly directed at religious conversion practices in relation to same sex attracted people, especially the "ex-gay movement", which it presents entirely negatively. It also criticises the "welcoming but not affirming" pastoral posture of traditional churches towards LGBT people (welcoming them to the community but not affirming any sexual behaviours contrary to the religion) as an "insidious development" which "positions LGBT people to repress and reject their LGBT characteristics and to seek reorientation".

The report is based on the testimonies of 15 (self-selected) participants in a study (35 of the original 50 respondents were not included). Of those 15 testimonies, the 14 which reported actual experiences in Australia of religious practices all related to negative experiences (sometimes negative only in retrospect) of gay conversion practices. These stories are often part of a wider story of feeling rejected and hurt or shamed by family and peers. The pain reported is real and the stories need to be listened to. They report harms from the expectations of their families and religious communities, religious practices and their own dissonance in trying unsuccessfully to reconcile "following God and being gay" including self-hatred, shame, loneliness, thoughts of suicide, grief, loss of faith, loss of community and depression.

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[22] Report available at https://www.hrlc.org.au/reports/preventing-harm

Evidence of benefits of change practices from ex-LGBT people

By contrast, some 78 ex-LGBT people who are (self-selected) respondents to a 2020 Australian survey, report very positive outcomes from religious and secular counselling and prayer which helped many of them to change to a heterosexual orientation and enjoy lasting heterosexual sexual relationships or a celibate same-sex oriented life.[23] Some of them reported great happiness and relief and freedom from thoughts of suicide. These people's stories also need to be heard.[24]

There are additional testimonies on both sides. Taking both sets of testimonies of harm and success at face value suggests that religious counselling, prayer and pastoral care and secular psychotherapy and counselling have been experienced by some people with unwanted same sex attraction as significantly helpful and healing and by other people as significantly harmful. That does not provide a case for a broad legal ban on all such practices for adults and mature minors who choose to engage with such practices and are free to leave them.

The Bill needs significant amendment to limit its harmful overreach while preserving a targeted harm minimisation.

[23] The survey results are reported at https://media.freetochange.org/Video/CAUSE_data_video_updated_results_REV001.mp4 Individual testimonies are also available at that site.

[24] In 2011 Jones and Yarhouse published their ''evidence that successful change of sexual orientation occurred for some individuals concurrent with involvement in the religiously mediated change methods of Exodus Ministries'' - see Jones, S. L., &Yarhouse, M. A. (2011). A longitudinal study of attempted religiously mediated sexual orientation change. *Journal of Sex and Marital Therapy*, 37, 404–427.

C. PROPOSED AMENDMENTS TO THE BILL

1. ONLY BAN "CONVERSION PRACTICES" DIRECTED TO A CHILD OR TO A PERSON WITH IMPAIRED CAPACITY, BUT NOT TO AN ADULT WHO HAS CONSENTED TO THE PRACTICE

The Bill makes illegal consensual practices and conduct (including conversations, advice, counselling, medical treatment and prayer) *requested and consented to by an adult* for the purpose of changing or suppressing the sexual orientation or gender identity *of the adult* or encouraging that person to do so. It is fundamentally illiberal and paternalistic for the State to dictate to an adult what conversations, advice, counselling, medical treatment and prayer the adult can request about the adult's own sexual orientation or gender identity.

Of the 27 jurisdictions in 5 countries which have banned conversion practices, **none** prohibit conversion practices in relation to adults who consent to the practice (except for Queensland and the Queensland law only applies to health practitioners and it permits the provision of a health service that the health practitioner reasonably considers appropriate). So, in practice, Victoria will be the only jurisdiction which bans "change or suppression" practices for a consenting adult.

Because the Bill makes it illegal to provide these services to adults:

- Any person, including health service providers, counsellors, parents, relatives, friends, community and religious leaders, must not, on pain of civil and criminal penalties, engage in any conversation, counselling, therapy, treatment, advice or prayer with an adult who requests it, unless it is totally supportive and affirming of the adult's sexual orientation or gender identity. Even if the adult is insistent and pays for the counselling, treatment or therapy, the Bill makes the person's conduct illegal. If the conduct is later shown to have caused injury (which under the Crimes Act includes psychological harm) the conduct is criminal.
- Adults of sound mind are effectively prevented from getting counselling or therapy or advice or prayer to deal with unwanted feelings or confusion they have about their sexual orientation or gender identity unless it is totally supportive and affirming of the adult's sexual orientation or gender identity.
- Those who would usually provide counselling, therapy, advice or prayer in good faith to an adult requesting them to do so will be frightened off by the risk of complaints,

civil investigation and compliance notices from the VEOHRC, discipline by health practitioner regulatory bodies, loss of insurance cover for engaging in an illegal act and criminal prosecution. Under the Bill the consent of the adult seeking the service is irrelevant to all of these consequences.

Why are Victorian adults less able to look after their own interests and walk away than adults anywhere else in the world? Why do they need the State to restrict their freedoms with threats of 10 year jail terms for those whom they have approached for counsel and assistance?

Example:

Tom, a 40 year old man in a heterosexual marriage with children experiences increasing feelings of same sex attraction which, at the time, he does not want.

He discusses these feelings with a trusted friend and with his religious leader who both advise him to put those feelings aside and focus on expressing his attraction for his wife and refer him to a counsellor. The religious leader also prays for Tom that he will find divine help to put the same sex attraction aside and focus on expressing his attraction for his wife.

In discussions, Tom tells the counsellor he is still sexually attracted to his wife and wants to be faithful to her and doesn't want to do anything to develop the same sex attraction feelings. The counsellor provides Tom with cognitive behaviour therapy and self-talk strategies to focus on and emphasise his opposite sex attraction to his wife.

Assuming Tom has a same sex or bisexual orientation, the friend, the religious leader and the counsellor have all contravened the law by inducing Tom to "change or suppress" his sexual orientation. **It is irrelevant that Tom asked for and consented to their counselling and prayer.**

Perhaps Tom is able to focus on his attraction to his wife and women and over time the same sex attraction feelings wane. Or perhaps Tom finds the same sex attraction becomes more insistent and he later comes out as gay. If Tom later says he suffered psychological harm from the advice, prayer or counselling, the friend, religious leader and counsellor can be prosecuted and if found guilty jailed for up to 5 years and in the case of the counsellor probably disqualified. **It is irrelevant that at the time Tom**

asked for and consented to their counsel and prayer.

Proposed Amendment

As in the ACT and all other jurisdictions (except for Queensland), the definition in clause 5(1) of conversion and suppression practices should be limited to those directed to ***protected persons,*** being minors and those with impaired decision making capacity. This will allow adults of sound mind to freely choose to engage in counselling or other such practices if they wish. Clause 5(1) as amended would read:

> 5 (1) In this Act, a ***change or suppression practice*** means a practice or conduct directed towards a person who is a ***protected person***, whether with or without the person's consent—
>
> (a) on the basis of the person's sexual orientation or gender identity; and
>
> (b) for the purpose of—
>
> (i) changing or suppressing the sexual orientation or gender identity of the person; or
>
> (ii) inducing the person to change or suppress their sexual orientation or gender identity; and

And add to clause 4 (definitions) the following definition of **protected person**

> ***protected person*** means—
>
> (a) a person under the age of [18/16][25] years; or
>
> (b) a person who has impaired decision-making ability in relation to a matter relating to the person's health or welfare.

2. THE BILL SHOULD NOT BAN CONDUCT BY FAMILY AND COMMUNITY MEMBERS BUT RESTRICT THE BAN TO CONDUCT BY HEALTH SERVICES PROVIDERS

Of the 27 jurisdictions which have laws banning conversion practices, 23 limit the ban to

[25] 18 years if the policy is to ban the practices for all minors. Some Canadian provinces permit conversion practices for consenting minors 16 years and over who have the capacity to consent.

health practitioners. By contrast, the Victorian Bill prohibits *everyone* from engaging in change or suppression conduct or practices including parents and grandparents, friends, community leaders, teachers and coaches.

If a child expresses same sex attraction or gender dysphoria (feelings of being in the wrong body and wanting to body transition) and the family or community reaction is "don't act on it", or "wait to see if this persists but don't act on it yet" or *anything other than affirmation*, that is a "suppression" practice which is illegal under the Bill.

The consequences for family, friends and community members who give that advice are potential criminal charges, complaints (which can be anonymous and made by anyone, such as another relative, a teacher or a neighbour) to the VEOHRC with quasi-compelled conferences and registered agreements at VCAT and an investigation and compliance notices from the Commission. Moreover, clauses 64 and 65 of the Bill insert examples in family violence and intervention order legislation to the effect that if the parents' or community members' conduct amounts to "psychological bullying" of the child, the child or their supporters could get family violence or intervention orders against the parents or community members.

Example

> Samira, a 13 year old natal sex girl, tells her parents she feels more like a boy and wants to identify as a boy and look like a boy. Her parents discuss it with her and a therapist and they all ask Samira to hold off any changes to see if the feelings persist through and after puberty. Under the Bill, the conduct of the parents and the therapist is suppressing or inducing the child to suppress gender identity and is illegal. If Samira complains to the school or a social worker or relative who supports her desire to express a male gender identity now, an example in the Bill indicates that the parent's conduct can be "emotional or psychological abuse" justifying a family violence order against the parents.
>
> In addition, the VEOHRC can respond to complaints about the parents' conduct and "facilitate" a resolution by registering an enforceable agreement with VCAT. If the Commission believes the conduct is serious and persisting and affecting a group of persons (for example several children), it can compel the parents to answer questions and issue them with a "compliance notice" to take, or refrain from taking, specified

action. If the parents don't contest the notice within 28 days in VCAT, the Commission can get a VCAT order compelling the parents to comply with the notice. And if it is proved that Samira suffered sustained psychological harm the parents and therapist can be charged with criminal offences.

Intruding the blunt instrument of these legal sanctions (including the criminal law) into family dynamics and the dynamics of ethnic and religious communities is not a sensible way to deal with sensitive and difficult issues for teenagers in relation to gender identity and sexual orientation. It is more likely to cause family and community to close ranks against the person experiencing the same sex attraction.

There are a number of options to achieve this. The first best option is that Victoria should follow the example of 24 of the 27 jurisdictions which have banned conversion practices (including Queensland) by restricting that ban to health service providers (subject to such providers having a defence of clinically appropriate treatment).

Proposed Amendments

Option 1 (preferred) *– Restrict the ban to health service providers only and thereby exclude family, friends, teachers, community members*

Amend all references which make it illegal or an offence for a person or organisation to engage in a change or suppression practice to instead prohibit "conduct or practices by a health service provider in the course of providing a health service" (e.g. clauses 9 to 15).

Option 2 *– Restrict the ban to professionals including health service providers and thereby exclude family, friends and community members*

Amend all references which make it illegal or an offence for a person or organisation to engage in a change or suppression practice to instead prohibit "conduct or practices by health service provider in the course of providing a health service or by another professional the course of providing professional services" (e.g. clauses 9 to 15).

Option 3 *– Exclude family members only*

Add a new clause 5(5) as follows:

5(5) For the purposes of sub-section (1), a change or suppression practice does not include a practice or conduct by a person directed toward any member of the first person's family.

3. PROTECT CONDUCT BY HEALTH SERVICE PROVIDERS WHICH IN THEIR REASONABLE PROFESSIONAL JUDGMENT IS CLINICALLY APPROPRIATE

Currently the Bill only protects conduct by health service providers which is "necessary" to provide a health service. That is too high a standard. When a young person presents with gender dysphoria and wants body transition, the clinically appropriate course is very much dependent on the individual, their age, history and conditions and may involve examining and helping the person to manage various other presenting issues such as depression before considering whether it is appropriate to help with a transition of the body features. But what is clinically appropriate may not be considered "necessary" to deliver a health service to a person with gender dysphoria who wants a body transition.

The Queensland Bill originally also used the phrase "necessary to provide the health service". But on the basis of representations by the AMA and the Queensland Law Society about unintended consequences of liability for health service providers acting in good faith, the Queensland government amended its Bill and the Queensland Act provides that:

> *Conversion therapy does not include a practice by a health service provider that, in the provider's reasonable professional judgement—*
>
> *(a) is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or*
>
> *(b) enables or facilitates the provision of a health service for a person in a manner that is safe and appropriate; or*
>
> *(c) is necessary to comply with the provider's legal or professional obligations*.

This gives the health services provider latitude to do what is clinically appropriate (which may be waiting to see what develops or a more cautious intervention first) whether or not that is "necessary".

Proposed Amendment

Adopt the Queensland drafting and amend clause 5(2)(b) of the Bill to provide:

> (2) For the purposes of subsection (1), a practice or conduct is not a change or suppression practice if it—
>
> (b) is a practice or conduct of a health service provider that, in the

health service provider's reasonable professional judgement, —

(i) is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or

(ii) enables or facilitates the provision of a health service for a person in a manner that is safe and appropriate; or

(iii) is necessary to comply with the provider's legal or professional obligations.

4. THE PROVISIONS DEALING WITH CHANGE OR SUPPRESSION OF GENDER IDENTITY SHOULD BE REMOVED BECAUSE THEY ARE INCOHERENT AND THEY WILL PUSH CLINICIANS INTO AN UNCRITICAL AFFIRMATION APPROACH TO GENDER TRANSITION

The Bill also prohibits any conduct intended to "suppress or change" a second person's gender identity. There is no evidence of problematic gender identity change practices that need to be banned.

In gender theory, gender identity is self-determined by the individual and this Victorian government has already legislated to allow people to change their birth certificate gender once each year as they change gender identity. So on what basis can the government let people change their gender identity once a year on their birth certificate but ban people from helping others to change their gender identity?

If gender identity is entirely self-determined by the person and people can change their gender identity throughout their lives, how can anyone (including a clinician) who is approached to help a person with gender confusion know for sure whether they are:

- lawfully assisting a person to express their gender identity (clause 5(2)); or
- illegally inducing a person to change or suppress their gender identity (clause 5(1))?

The Bill prohibits inducing someone to "change "or "suppress" a gender identity as defined in clause 5(1). But the Bill permits assistance to a person who is considering or undergoing a "gender transition" (see clause 5(2). There is no definition of a "gender transition". Probably it means a body transition using drugs and surgery so the birth gender body comes to

resemble the self-determined gender identity. But if 10 years in jail turns on understanding the meaning of these provisions, Victorians are entitled to far clearer policy and drafting.

As in Samira's example above, "suppression" includes a parent or doctor advising a child who believes they are in the wrong body to delay the drugs or surgery they want for a gender (body) transition until after other conditions are treated or until after puberty – that would be suppressing the expression of their gender identity. But since the Bill exempts "gender transition", moving the child into body transition drugs and surgery is not illegal.

The Bill therefore effectively mandates an uncritical affirmation approach encouraging gender (body transition) by making illegal any "suppression" of gender identity through deliberate delay in order to do careful clinical assessment of all the person's conditions over time or (where relevant) waiting through puberty, in circumstances where the person wants to transition their body immediately.

Yet that delay will be the right medical course for some children (not all) with gender dysphoria. This is an area where there is disagreement among clinicians and in practice – see The Economist Report of 12 December 2020[26] .

Expert evidence the case brought by Keira Bell against the Tavistock NHS Gender Clinic. included the following,

> *"Prof Levine, an American expert in the field of gender treatment, said puberty suppression medicine – also used for infertility, prostate cancer and to 'chemically castrate' violent sex offenders – was 'experimental' and the injections had not been scientifically established as a 'safe and effective intervention in the short or long term'.*
>
> *He said 'there was no other field of medicine where such radical interventions are offered to children with such a poor evidence base'. And warning of 'life-long consequences', he said the vast majority of females on puberty blockers for two years had lower bone density than their peers.*
>
> *Prof Levine also said there were reports of impaired brain development and 'negative effects on IQ for gender- dysphoric children'."*[27]

These are complex and delicate judgments as to what is right for the specific person. These are not judgments that the Parliament should be trying to drive by threatening criminal

[26] After the Keira Bell verdict - An English ruling on transgender teens could have global repercussions *The Economist* 12 December 2020.

[27] https://www.dailymail.co.uk/news/article-9130157/The-physicians-testimony-led-High-Court-judge-ban-child- puberty-blocker-drugs.html

prosecution or civil sanctions for parents or doctor who are not uncritically affirming and facilitating a person's desire to transition their bodies to a different gender. Appropriate medical care is a matter for the health practitioner looking at the specific individual patient, not the Parliament criminalising one valid treatment option.

The number of people regretting their body transition and desisting from it or de-transitioning is increasing. The decisions by some to desist or body de-transition does not invalidate the experience of others who body transition and are happy having done so and vice versa. But the phenomenon of desisting and de- transitioning is a clear warning to clinicians, parents and children to proceed with caution because the effects of body transitioning and de-transitioning are major and often irreversible. The recent English High Court decision,[28] referred to above, serves as an example. A young woman, Keira Bell, was encouraged by the Tavistock NHS Gender Clinic to body transition to a transgender male at 16-17 and, to that end, was given puberty blockers, hormone therapy and, later, a double mastectomy. She consented to the procedures but later regretted the changes and the likely lifelong infertility caused by the hormones. This case, and the increasing number of desisters and de-transitioners, shows the dangers of damaged lives and potential legal liability in an uncritical affirmation approach to body transition which this Bill will effectively mandate.

The Bill does not contemplate regret or desisting or de-transition. It is not clear whether the Bill's permission to assist a person to undergo a gender (body) transition includes assisting a person to undergo a gender (body) de-transition. If it does not, people who regret their transition and wish to de-transition will be stranded by the Bill without any possibility of getting (legal) help in Victoria to do so.
None of the government inquiries or consultations leading up to this Bill or the LaTrobe/HLRC report consider any of these issues.

Gender dysphoria is a complex and difficult issue which is very fact specific to the person involved. The clinicians are divided. There may be temporary harms for those who delay transition and lifelong harms for those who are pushed into transition too early and then regret. There is now legal liability in the UK for commencing body transition for young

[28] *R (on the application of) Quincy Bell and A v Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin).

people under 16 and sometimes older without court approval. It is extremely unwise for the government to use legislation to exclude one treatment approach to gender dysphoria for all people on gender ideology grounds. Gender transitioning is best left out of this legislation altogether. Clinically, it is a completely different topic to sexual orientation.

As a second-best, if that approach of removing the gender identity provisions is not adopted, at the least the Bill needs to clearly permit clinicians and counsellors and family to assist people with the full range of appropriate treatments of gender dysphoria and to help people desist or de-transition if they regret their prior choices.

Proposed Amendment

Option 1 (preferred) Remove all references to changing or suppressing gender identity in the substantive provisions of the Bill.

Option 2 If option 1 is not adopted, at the very least amend clause 5(2) as follows **(replacement text in bold)**:

> "5 (2) For the purposes of subsection (1), a practice or conduct is not a change or suppression practice if it—
>
> (a) **assists a person to understand and express the person's gender identity or sexual orientation from time to time** and the including, but not limited to, a practice or conduct for the purposes of—
>
> **(ia) advising a person on clinically appropriate treatment options for gender dysphoria or gender confusion and providing clinically appropriate treatment options for gender dysphoria or gender confusion**;
>
> (i) assisting a person who is undergoing a gender transition **or stopping, modifying or reversing a gender transition**; or
>
> (ii) assisting a person who is considering undergoing **or stopping, modifying or reversing** a gender transition; or
>
> (iii) assisting a person to express their gender identity; or
>
> (iv) providing acceptance, support or understanding of a person; or
>
> (v) facilitating a person's coping skills, social support or identity exploration and development; or"

5. PERMIT COMMUNICATION OF RELIGIOUS BELIEFS TO ALL PEOPLE AND PERMIT RELIGIOUS COUNSELLING, PASTORAL CARE AND PRAYER FOR PEOPLE OVER 16 WITH INFORMED CONSENT AND THE RIGHT TO LEAVE

The Bill expressly makes illegal certain religious practices like prayer. No other conversion practice ban legislation in the world singles out religious practices for inclusion. The laws in the US States of Washington and Utah (which, like most laws, only apply to health services providers) also expressly exempt pastoral care and religious counselling under the auspices of a religious organisation.

Some people say they have been significantly harmed by these religious practices, while others claim they have been greatly helped by them (including avoiding suicide**).** Neither the LaTrobe/HLRC report (which contained 14 Australian stories) nor the Department of Justice consultation summary (which contained 4 stories) acknowledged or appeared to have consulted with people who benefited from experiences of religious counselling and prayer in relation to confusion about or unwanted sexual orientation. Yet in a 2020 survey, 78 people (majority Australians) describe how they were greatly helped by religious (and secular) counselling and prayer to deal with unwanted same sex attraction and move to opposite sex attracted orientation and relationships or living single but celibate.

Rather than ban a broad range of religious conduct, some of which some people have found beneficial and some of which some people have found harmful, the Bill should confine the banned conduct much more narrowly to that which the evidence shows *always* causes harm to *everyone*.

For religious counselling, pastoral care and prayer, the Bill should let adults (and mature minors 16 and over) freely choose whether or not to engage in them as long as they give informed consent and know they are free to leave at any time.

For minors under 16 and those without capacity to judge benefit or harm for themselves, the informed consent may be given by a parent or guardian but the child must be free to leave at any time.

In addition, the teaching of the doctrine, tenets, beliefs and practices of a religion even if directed to a particular person or group of persons, including a person known or suspected to be same sex attracted, should not be illegal. Such teaching or communication is a fundamental aspect of religious liberty and freedom of expression.

Proposed Amendments

Amend sub-section 5(3) and add new sub-section 5(3A) as follows

(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.

(3A) The following are not a practice or conduct for the purposes of subsection (1):

(a) the teaching or communication of the doctrines, tenets, beliefs or practices of a religion whether directed to a person or not;

(b) any religious counselling, pastoral care or prayer with or directed towards a person aged 16 or over who has the capacity to consent to the practice or conduct if that person gave their informed consent to the practice or conduct and was free to cease engaging with the practice or conduct at any time and was informed that they could do so;

(c) any religious counselling, pastoral care or a prayer with or directed towards a person aged under 16 if the parent or guardian of the person gave their informed consent to the practice or conduct and the person was free to cease engaging with the practice or conduct at any time and was informed that they could do so.

Note that (3A) may not be needed if the Bill's ban is restricted to health service providers.

6. VEOHRC'S POWERS UNDER THE BILL SHOULD BE THE SAME AS UNDER THE EQUAL OPPORTUNITY ACT IN DEALING WITH DISCRIMINATION AND EXCLUDE NEW COMPULSORY POWERS AND ISSUING ENFORCEMENT NOTICES

The Bill gives the VEOHRC extensive new compulsory powers of own motion investigation based on anonymous complaints, the power to issue compliance notices and seek enforcement of them. These powers (especially in Part 3 Division 3 and 4) are much greater than the Commission has under its own Act, the *Equal Opportunity Act 2010*, to receive complaints and facilitate the resolution of disputes under that Act. They also make the Commission both conciliator and police and enforcer in determining whether there is a breach and issuing an enforcement notice and then enforcing agreements and notices through VCAT. These roles do not fit in the one body and will lead to breaches of natural justice and the right against self- incrimination.

No case has been made for the Commission to have greater powers in relation to the relatively rare practice of change and suppression practices than it has in relation to the much more common practices of discrimination on the grounds of gender, race, age, disability, sexual orientation, religion etc. It is proposed to remove the Bill's extensive new compulsory powers for the Commission in Part 3 and instead give it the same powers to deal with change and suppression practices as it has to deal with discrimination under the *Equal Opportunity Act 2010*.

Proposed Amendment

Remove Part 3 of the Bill (Civil Response Scheme) and in its place provide:

17 Functions and powers of Commission

(1) The Commission has the following functions—

(a) to develop and provide education in relation to change or suppression practices;

(b) to receive complaints about change or suppression practices from a person affected by a change or suppression practice;

(c) to request further information regarding complaints of change or

suppression practices from persons who make a complaint and persons or organisations alleged to be engaging in change or suppression practices;

(d) to offer education to persons and organisations engaged in change or suppression practices;

(e) to offer services designed to facilitate resolution of disputes between persons who make complaints and persons or organisations alleged to be engaging in change or suppression practices;

(2) The Commission has all the powers necessary to enable it to perform its functions. In relation to resolution of disputes under sub-section (1)(e), Part 8 of the Equal Opportunity Act 2010 applies to the Commission and the dispute as if the dispute were a dispute under that Act.

Mark Sneddon, Executive Director, Institute for Civil Society
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