

Consultation Response

Ending conversion practices in Scotland

April 2024

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee, Constitutional Law and Human Rights Sub-Committee, Equalities Law Sub-Committee and Child and Family Sub-Committee welcome the opportunity to consider and respond to the Government consultation: Ending Conversion Practices in Scotland. The Committees have the following comments to put forward for consideration.

General Comments

In principle, we welcome the proposals defined in the consultation paper. There may be circumstances in which the existing criminal law is not adequate to address the precise nature of the conduct constituting the conversion practice, and so the creation of the new offences is required. However, any new criminal legislation must be shown to be necessary and be a fair and a proportionate response to address the identified mischief. Criminal legislation should be clear and be drafted in such a way as to avoid the inadvertent criminalisation of innocuous conduct that would ordinarily be considered to fall far below the threshold of criminality; or so-called net widening.

As we elaborate in our responses below, we have concerns that the the draft legislation contained in the consultation is too broad and risks capturing some circumstances which the consultation states the Scottish Government does not intend to include. We are of the view that considerations ‘for the avoidance of doubt’ are a reflection of the lack of clarity in the definition of the criminalised behaviours. We consider it crucial that the Scottish Government drafts the legislation precisely and narrowly enough to address the problem that they have identified in the consultation paper, excluding perfectly lawful behaviours.

We noted that the consultation proposes criminal and civil measures to eliminate conversion practices in Scotland. While we agreed with the approach, we consider that the focus should be on the use of civil provisions in the first instance to prevent the occurrence of those behaviours. A preventive perspective could be more effective to eliminate those practices in the long term.

Consultation Questions

Question 1 - Do you support our approach to defining conversion practices which focuses on behaviour motivated by the intention to change or suppress a person's sexual orientation or gender identity?

Yes

No

Don't know

Question 2 - Please give the reason for your answer to Question 1.

Yes. However, we have some reservations on whether the approach that was taken to define those practices is restrictive enough to exclude lawful behaviours described in the consultation document such as providing advice, guidance or support for an individual to explore their thoughts, feelings and options.

The [British Psychological Society \(BPS\) has taken a similar stance](#), as, whilst being a signatory to the Memorandum of Understanding on Conversion Therapy, they were very clear that this should not include therapies to help people address conflictual feelings over sexual identity, highlighting that the memorandum suggests it is: *"not intended to discourage clients with conflicted feelings around sexuality from seeking help. For anyone who is unhappy about their sexual orientation – whether heterosexual, homosexual or bisexual – there are therapeutic options to help them live more comfortably with it, reduce their distress and reach a greater degree of acceptance of their sexual orientation."*

While the consultation document explains that non-directive or non-coercive discussions, questioning, guidance or general parental direction or guidance will not be considered conversion practices, we have doubts on whether this is reflected in the definition itself. Presumably, there are cases in which the intention to change or suppress someone's sexual orientation or gender identity is clear, but we also think that there can be situations where that intention is not easy to identify.

We are of the view that the distinction between entirely ethical therapies to address feelings related to sexuality and conversion practices -in the terms of the bill- is clear. However, very appropriate therapies designed to help individuals understand their sexuality might be less easy to distinguish.

Paragraph 46 of the consultation indicates that the legislation does not apply to non-directive discussion, questioning, or guidance. We have concerns about the use of the term 'non-directive' as there are therapies that are both ethical and 'goal focused', for example, cognitive behavioural therapy (CBT). Those therapies would also be included within the term 'directive'. We consider that this aspect of legislation needs to be re-phrased to be clear that goal focused therapies where the clients' goals could be linked to their sexual orientation must be excluded from this legislation, and not inadvertently criminalised within the definitions.

We note that with the focus on intention of changing sexual orientation, some of the forensic interventions for sexual abusers (there are child sexual offenders who claim that paedophilia is a legitimate sexual orientation) might also fall within this legislation.

We are of the view that the definitions as they currently stand which suggest a person of expertise might engage in coercive activities to realign sexual orientation, and causing distress or harm, would cover much of the provision for sexual offenders. For instance, in some cases offenders need to engage with interventions to reduce risk to be able to qualify for consideration for release by the parole board.

Additionally, despite the consultation paper indicating that the proposed provisions exclude psychological therapies conducted ethically, they might include psychological therapies with young people who are experiencing gender dysphoria.

The idea that directive therapies, such as CBT that is the most highly recommended therapy by the National Institute for Healthcare Excellence (NICE) for many conditions, can be included in the definition of conversion practices suggests the need to reword it.

We want to add that while the consultation paper collected important anecdotal evidence, we would welcome empirical evidence on the occurrence of conversion practices that are not covered in the current legislation. We appreciate that obtaining empirical evidence on sensitive matters can be challenging, but in our view, it would provide insight on how to restrict as much as possible the definition to exclude lawful behaviours such as the ones mentioned in the consultation document.

Question 3 - Do you think that legislation should cover acts or courses of behaviour intended to 'suppress' another person's sexual orientation or gender identity?

[It should be covered](#)

[It should not be covered](#)

[Don't know](#)

Question 4 - Please give reasons for your answer to Question 3.

It should be covered. However, we replicate the comments made on questions 1 and 2.

Paragraph 50 of the consultation paper includes as an example of the types of acts that could be motivated by the intention to suppress another person's sexual orientation or gender identity "prescribing medication to suppress a person's sex drive". We have some concerns on that example which is linked with a prior reference to "acts that could be motivated by a desire to change someone's sexuality". We have identified that medication to suppress sex drive can be appropriate, helpful, and entirely ethical for some people in some situations. We are of the view that this is problematic and could criminalise those medical practices as it can be interpreted that they are motivated by changing sexuality.

Question 5 - Do you support or not support an approach which uses a package of both criminal and civil measures to address conversion practices in legislation?

Support

Do not support

Don't know

Question 6 - Please give reasons for your answer to Question 5.

Support. This approach seems consistent with the measures implemented for other offences such as domestic violence. We agree that a combination of criminal and civil measures could be more effective in eliminating conversion practices in Scotland.

Question 7 - What are your views on the proposal that the offence will address the provision of a service?

Support

Do not support

Don't know

Question 8 - Please give reasons for your answer to Question 7.

Support. While we understand that the proposal aims to exclude medical or psychological care that does not have a pre-determined outcome or preference, we consider that proving the purpose of the service can be quite difficult in many cases.

Paragraph 74 of the consultation paper indicates that some forms of talking therapy could be considered a conversion practice in the terms of the bill. We consider that any reference to 'talking therapy' should be taken out or greatly qualified as this phrase opens the door to the criminalisation of 'genuine' talking therapies.

We also have some concerns about the requirement of causing psychological harm stated in subsection 1(c) of the section 1 of the draft legislation and its interpretation stated in subsection (c) of the section 3. It is proposed that physiological harm includes distress. However, we have identified that there is a risk that well intentioned ethical goal-directed therapies touching on sexuality or seeking to reduce or realign sexual interest for good cause, but where there is distress caused, might be criminalised under the proposed legislation.

We are of the view that the provisions should be defined in a more restrictive way to allow people to identify that services taken ethically are not criminalised. We appreciate that those considerations are explained in the consultation paper but, they are not necessarily reflected in the proposed provisions.

Question 9 - What are your views on the proposal that the offence will address a coercive course of behaviour?

Support

Do not support

Don't know

Question 10 - Please give reasons for your answer to Question 9.

Support. We have similar views on this provision to those provided in Question 8. In our view, there are cases in which defining if a behaviour is coercive or not is challenging. Those cases usually involve interactions in hierarchical relationships such as parenting or religion advice in which genuine advice or guidance without the purpose of suppressing or changing an individual's sexual orientation or gender identity, can be perceived as so simply by the nature of the relationship.

Question 11- What are your views on the requirement that the conduct of the perpetrator must have caused the victim to suffer physical or psychological harm (including fear, alarm or distress)?

Agree

Do not agree

Don't know

Question 12- Please give reasons for your answer to Question 11.

Agree. We consider that in this context, causing physical or psychological harm to the subject of the conversion practice is the appropriate parameter to identify whether or not a conduct is serious enough to be criminalised.

Question 13 - Do you agree with the inclusion of a defence of reasonableness?

Agree

Do not agree

Don't know

Question 14 - Please give reasons for your answer to Question 13.

Agree. We consider that is sensible to include the defence of reasonableness. However, we are not quite sure if 'reasonable' means what the consultation paper suggests. Paragraph 119 indicates that the test would be in whether the accused's behaviour was "reasonably objective". If the behaviour was objective, the offence should not exist in the first place as its existence requires the intention to change or suppress someone else's sexual orientation or identity.

This reflects the problem that we have found in the definition of the offences. As the definition of the behaviour is not clear enough, it is difficult to identify whether a lawful behaviour can be perceived as a neutral behaviour or as an offence. Even when the defence of reasonableness is provided, we can expect cases in which it is not clear if the offence existed or not or if it existed, but the behaviour allows the defence of reasonableness.

Question 15- Do you agree with the proposed penalties for the offence of engaging in conversion practices?

Agree

Do not agree

Don't know

Question 16- Please give reasons for your answer to Question 15.

Agree. Proposed penalties seem reasonable and consistent with comparable behaviours.

Question 17- Do you agree that there should be no defence of consent for conversion practices?

Yes

No

Don't know

Question 18- Please give reasons for your answer to Question 17.

Yes. We have some reservations on this point. While we recognise the importance of criminalising harmful behaviour, we are not sure if the consent given under coercion in imbalanced power dynamics can be valid as a defence. It seems sensible that people would not be able to consent to be involved in harmful practices, however, consent should be valid for its existence in first place.

Question 19 - Do you have any other comments regarding the criminal offence as set out in Parts 8 and 9?

Yes, we do. We are of the view that the drafted provisions are problematic in terms of definition. They don't reflect all the rationale explained in the consultation paper and we are apprehensive in respect of criminalised behaviours that are not clearly defined. We are aware that the consultation paper excludes many behaviours such as healthcare conducted ethically, or advice and guidance by religious leaders or parents that are not coercive, but we are not sure that those exclusions are comprehensible in the draft provisions.

Question 20 - What are your views on it being a criminal offence to take a person out of Scotland for the purpose of subjecting them to conversion practices?

Support

Do not support

Don't know

Question 21 - Please give your reasons for your answer to Question 20.

Support. We agree that taking a person outside Scotland for conversion practices is a very serious behaviour that can be addressed with criminal measures. We recognise that legislation varies overseas, and very distressful and harmful activities related to conversion practices can be allowed in other jurisdictions. However, we refer to our comments related to the clarity of the behaviours criminalised as they seem relevant in terms of the draft provision presented in the consultation paper.

Question 22 - What are your views on the proposed penalties for taking a person outside of Scotland for the purposes of conversion practices?

Support

Do not support

Don't know

Question 23 - Please explain your answer to Question 22.

Support. As mentioned in Question 16, proposed penalties seem consistent with comparable behaviours.

Question 24 - What are your views on the proposal that conversion practices should be an aggravating factor for existing offences?

Support

Do not support

Don't know

Question 25 - Please explain your answer to Question 24.

Support. We agree that not all existing offences motivated by changing or suppressing the sexual orientation or gender identity of the potential victim are covered under existing aggravations. Its inclusion seems consistent with comparable provisions. We replicate the concerns about the demonstration of the intention, that in some situations can be quite challenging.

Question 26 - Do you have any views on the steps we have taken to ensure the proposals are compatible with rights protected by the European Convention of Human Rights?

We are of the view that the proposed legislation has issues in relation to freedom of religion in terms of the Article 9 of the European Convention of Human Rights. The definitions in the legislation must be such that religious organisations do not feel there is any risk of prosecution for lawful activities carried out by under the charitable purpose of advancement of religion (worship, teaching, prayer, counselling, hearing confessions etc).

Question 27- What are your views on the purposes of the proposed conversion practices protection order?

Support

Do not support

Don't know

Question 28 - Please explain your answer to Question 27.

Support. As we mentioned in Question 6, the use of civil orders seems reasonable for the purpose of the consultation paper. They are also consistent with the approach taken in comparable offences.

Question 29 - Do you agree or disagree with the proposals for who should be able to apply for a conversion practices civil order?

Agree

Do not agree

Don't know

Question 30 - Please explain your answer to Question 29.

Agree. We echoed the comments in Question 28.

Question 31 - Do you have any other comments regarding the civil order as set out in Parts 13 – 15?

Yes, we do. Our comment partially replicates what we mentioned when defining the sexual offences. Paragraph 182 of the consultation paper excludes from the scope of the civil measures “advice, guidance and support for an individual to explore their thoughts, feelings or manage any distress and which does not direct a person towards a particular pre-determined outcome”. It also excludes healthcare services delivered ethically and lawfully. However, we have some doubts on whether those exclusions can be inferred from the drafted provisions.

Question 32 - Do you have any views on the potential impacts of the proposals in this consultation on equality by:

- a) Age
- b) Disability
- c) Gender reassignment
- d) Civil partnership
- e) Pregnancy and maternity
- f) Race
- g) Religion and belief
- h) Sex
- i) Sexual orientation

Yes, we do. The proposals have a great deal of relevancy for those with the protected characteristic of gender reassignment and will impact on those of certain sexual orientations. The proposals should therefore aim to strike a balance between protection of those with these protected characteristics from harmful practices whilst allow them to benefit from genuinely therapeutic practices. It is hoped that our comments in relation to the definition above should assist in this regard.

The protected characteristic of religion and belief is also highly relevant, particularly in relation to those with beliefs that may be protected under Article 9 ECHR but the manifestation of which may fall within the definition of the offence as currently drafted. We refer to our comments at question 19 and 26 above.

Question 33 - Do you have any views on the potential impacts of the proposals in this consultation on children and young people, as set out in the UN Convention on the Rights of the Child?

Yes, we do. We consider that there are articles in the CRC of particular relevance with the first four listed being regarded as the general principles that underpin the CRC as a whole.¹

Art.3(1): Primacy of child's best interest

One of the general principles of the CRC, art.3(1), requires that primacy should be accorded to the child's best interests in all matters concerning the child. The eternal challenge here lies in determining *what* is in the child's best interests. On the one hand, it seems clear that it is not in

¹ UN Committee on the Rights of the Child, General Comment No. 5 on the general measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 2003, para.12, repeated in UN Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard, CRC/GC/2009/12, 2009, para.2; and UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para. 1), CRC/C/GC/14, 2013, para.1.

a child's best interests to be subjected to coercive treatment that causes harm. On the other hand, preventing a child or young person from taking a dramatic or irreversible step that may be regretted later may be in his or her best interests.

Art.2: Non-discrimination

The second of the general principles of the CRC, art.2, seeks to protect the child from discrimination. The enumerated grounds of prohibited discrimination – race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status – do not make express reference to sexual orientation or gender identity. However, the reference to “other status” means that the CRC has been “future-proofed” and is capable of addressing issues that were not anticipated – or not discussed – when it was being drafted and the UN Committee on the Rights of the Child has made clear that each comes within the ambit of “other status”.² Since conversion practices single out sexual orientation and gender identity for disapproval or condemnation, arguably, they fall foul of art.2.

Art 6: right to life, survival and development

Art.6 is the third of the CRC's general principles. While art.6(1) focuses on the child's “inherent right to life”, art.6(2) requires States parties to “ensure to the maximum extent possible the survival and development of the child.” Art.6(2) has been described by the Office of the High Commissioner for Human Rights as “adding a new dimension to life” and it amplifies the obligation on States parties to provide preventive health-care measures, nutrition, environmental sanitation and so forth.³ However, it continues by making clear that respecting the right to survival and development is “in no way limited to a physical perspective” but, rather, extends to ensuring “a full and harmonious development of the child, including at the spiritual, moral and social levels, where education will play a key role.”⁴

Arguably, preventing a child from exploring all aspects of his or her sexual orientation and gender identity would be counter to facilitating development. Thus restricting conversion practices is consistent with the overarching goal of art.6(2).

Art. 12: Taking account of the child's views.

The fourth of the general principles, art.12, requires giving the child the opportunity to express his or her views on all matters affecting the child with due account being taken of the child's views in the light of the child's age and maturity.

² UN Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/C/GC/2003/4, 2003, para.6 and UN Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 2016, para.20.

³ Office of the High Commissioner for Human Rights, Manual on Human Rights Reporting under Six Major International Human Rights Instruments, HR/PUB/91/1 (Rev.1) (1997), p.425.

⁴ Id.

- The consultation paper proposes that there should be no defence of consent to conversion practices whether in respect of adults or children. Does this pose a problem under art.12 since it allows no scope for taking account of the child's views? Much of the criminal law does not take account of the victim's consent, so the proposal is consistent with that law but that does not really answer the art.12 question.
- The proposed civil conversion practices protection order (CPPO) is modelled on other protective orders already on the statute book. Thus, it could be sought by a range of people other than the victim (police, local authority or a third party with leave of the court) and could be granted if the criteria set out in s.10 (p.64, para.183) are satisfied. However, unlike the forced marriage protection order⁵ and the female genital mutilation protection order,⁶ there is no mention, in the context of CPPOs, of ascertaining the wishes of the person to be protected. Since CPPOs are defined in terms of harm and coercion, this may not be crucial but would it at least be worth taking account of the victim's views.

Art. 8(1): the right of children to preserve his or her identity and

Art.13: freedom of expression

While art.8(1) refers to the child's "right to preserve his or her identity, including nationality, name and family relations", the UN Committee on the Rights of the Child recognises identity as being a great deal wider in scope and as including sexual orientation and gender identity, something it also sees as implicating the art.13 right to freedom of expression. As it put it:

*"The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. It condemns the imposition of so-called "treatments" to try to change sexual orientation and forced surgeries or treatments on intersex adolescents. It urges States to eliminate such practices, repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures."*⁷

Question 34 - Do you have any views on the potential impacts of the proposals in this consultation on socio-economic inequality?

We don't have any views on this.

⁵ Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011, s.1(3).

⁶ Female Genital Mutilation (Scotland) Act 2005, s.5A(5).

⁷ UN Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 2016, para.34.

Question 35 - Do you have any views on potential impacts of the proposals in this consultation on communities on the Scottish islands?

We don't have any views on this.

Question 36 - Do you have any views on the potential impacts of the proposals in this consultation on privacy and data protection?

We don't have any views on this.

Question 37 - Do you have any views on the potential impacts of the proposals in this consultation on businesses and the third sector?

Yes, we do. We consider that the proposals in the consultation could have an impact on faith-based organisations (FBOs). We are aware of the very serious concerns expressed about these proposals by a wide range of religious bodies. Whilst we appreciate that there are some misunderstandings about the proposals, we think there are legitimate concerns that perfectly normal activities by religious organisations could fall foul of the suggested legislation. For example, that praying with anyone about their sexual ethics or sexual behaviour, or offering counselling on such issues, could fall foul of the definitions in the proposed bill.

We appreciate that the proposed legislation does not have the intention to criminalise such activities. However, we are of the view that much of the concerns come from the definitions provided in the consultation paper that seem to be vague on this.

Question 38 - Do you have any views on the potential impacts of the proposals in this consultation on the environment?

We don't have any views on this.

For further information, please contact:

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