25 August 2023

NSW Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124

BY E-MAIL: policy@justice.nsw.gov.au

Dear Sir/Madam,

CONVERSION PRACTICES LAW REFORM – CONSULTATION PAPER

We refer to the Departments of Communities and Justice, and Health, invitation for submissions in response to the Consultation Paper concerning the banning of conversion practices NSW.

The combined group of undersigned faith leaders are deeply concerned about the proposals put forward in the Consultation Paper and we welcome the opportunity to provide submissions to the departments on this very important area of law reform that will profoundly affect faith communities and religious institutions in NSW.

We enclose our submission with this letter.

Yours sincerely,

Right Rev'd Dr Michael Stead
Anglican Bishop of South Sydney

On behalf of:

Imam Shadi Alsuleiman
President
Australian National Imams Council

Surinder Jain
National Vice-President & Director
Hindu Council of Australia

Ben Grieg
Moderator
Presbyterian Church NSW

Most Rev'd Kanishka Raffel
Archbishop
Anglican Diocese of Sydney

Antoine-Charbel Tarabay
Maronite Bishop of Australia,
New Zealand and Oceania

Mohamad Chams
Manager
Darulfatwa Islamic High Council of Australia

Rev David Tse
Chairman
Sydney Chinese Christian Churches Association

雪梨華人基督教聯會

Rev Jong O Yu
President
Council of the Ministers of Korean Churches in Sydney Australia

Rev Wayne Swift
National leader
Acts Global Churches

ACTS GLOBAL CHURCHES

Rev Steve Bartlett
Director of Ministries
Baptist Churches of NSW & ACT

Baptist Churches of NSW & ACT

Ken Fischer
State Secretary
Australian Christian Churches NSW/ACT

ACC NEW SOUTH WALES & ACT

Michael Worker
General Secretary
Seventh-day Adventist Church in Australia

Seventh-day Adventist Church Australia

George Aghajanian
Global General Manager
Hillsong Church

Hillsong

Mike Southon
Executive Director
Freedom for Faith

FREEDOM FOR FAITH

Murray Norman
Chief Executive Office
Better Balanced Futures

Better Balanced Futures

The following faith leaders also sign in broad support of these submissions and will be making their own submissions from their respective organisations:

Monica Doumit
Director of Public Affairs and Engagement
Catholic Archdiocese of Sydney

CATHOLIC ARCHDIOCESE OF SYDNEY

Chris Brohier
Director, Policy & Research
Australian Christian Lobby

ACL Truth made public AUSTRALIAN CHRISTIAN LOBBY

The Australian Christian Lobby (ACL) is broadly supportive of the arguments and proposals in this submission. The ACL's own position is set out in our separate response to the Consultation Paper.

Hussein Faraj
President
United Shia Islamic Foundation

United Shia Islamic Foundation

Mark Sneddon
Executive Director
Institute for Civil Society

INSTITUTE FOR CIVIL SOCIETY

FAITH LEADERS' RESPONSE TO CONVERSION PRACTICES CONSULTATION PAPER

1. The purpose of this document is to provide a collective response from the faith leaders listed below to the *Banning of Conversion Practice Consultation Paper* released by the Departments of Communities and Justice and Health (**Departments**) of the New South Wales Government dated 31 July 2023 (**Consultation Paper**).

2. We consider the timeframe allotted for this consultation to be extremely brief. It is not commensurate with the dramatic and unprecedented limitations that the reforms represent for religious and associational freedom in New South Wales. If the pressured timeframe is indicative of the intended pace of the reform, the reforms will fail to adequately address the very serious concerns we express in this collective response.

3. It is indisputable that the proposals in the Consultation Paper produced by the Departments severely depart from the commitments the Premier and other ALP candidates provided prior to the election, including at a community forum at which many of the signatories to this submission were present. This submission further details how we consider the proposals in the Consultation Paper fail to reflect, and even breach, the government's commitments.

4. The Consultation Paper proposes 25 questions. They touch upon immensely complex and unchartered areas of the law. In the interest of clarity and in avoiding unnecessary repetition, we first overview our concerns through an analysis of the Consultation Paper. We then answer the questions posed by referring back to that analysis. It is fortunate that New South Wales may take the benefit of the experience of other jurisdictions. In particular, the proposals in the Consultation Paper disclose a close alignment with the Victorian *Change or Suppression (Conversion) Practices Prohibition Act 2021,* notwithstanding the Premier's election commitment to not 'transpose the Victorian legislation and implement it into New South Wales'.[1] Indeed, the Consultation Paper itself acknowledges this when it states, '[p]rovisions in Victoria … are most similar to this proposal.'[2] Given that candid admission, regard to the evidence provided by the Victorian Government during the Parliamentary debate and the subsequent clarifications of that law provided by the Victorian Equal Opportunity and Human Rights Commission enables us to illustrate the dramatic incursions upon religious and associational freedoms regarding parental rights and clinical practice that is proposed in the Consultation Paper. We submit that the current proposal, if accepted will cause actual harm to vulnerable people.

[1] '2023 State Election Faith Groups Town Hall', 27 February 2023, https://www.youtube.com/live/-NlyY6LIfgc?feature=share&t=2165

[2] *Banning LGBTQ+ Conversion Practices Consultation Paper* released by the New South Wales Government Departments of Communities and Justice and Health dated 31 July 2023 (Consultation Paper) 12.

5. The following account provides illustrations from the Victorian regime. Each of the examples are taken from materials provided by the Victorian Government:

5.1. During Parliamentary debate the Victorian Attorney-General confirmed that a breach of the law would occur where a heterosexual father who discerns that he is experiencing same sex attraction wishes to commit to his marriage to complete the raising of his children, regardless of whether or not there has been any third-party involvement encouraging that commitment.[3]

5.2. The Victorian legislation prohibits 'pastoral conversations'[4] and '*informal* practices, such as conversations with a community leader'[5] and teaching that states that certain sexual conduct and transgender practices are inconsistent with the religious beliefs of a tradition. We are particularly concerned about the effect that such legislation has on the relationship between parent and child. We strongly oppose interference in the relationship between parents and children. For example, the VEOHRC states that the following are illegal:

(a) A parent who expresses their religious belief to their child 'that if they didn't live the cishet [*i.e., cisgender heterosexual*] lifestyle they'd be separated for eternity' is said to be engaging in a CSP 'if this was said to try to change or suppress [the person's] sexual orientation or gender identity'.[6]

(b) The statement 'that through long-term and consistent devotion in their faith community and the avoidance and suppression of LGBTQ influences'[7] is illegal. Similarly, 'recurrent messaging that with faith and effort a person'[8] may live consistently with religious teaching are illegal.

5.3. Alarmingly, the Victorian legislation also prohibits a religious leader from telling a member of their congregation that they are no longer eligible for membership where they do not hold the beliefs of the institution or do not act in accordance with the beliefs of the institution in respect of sexual conduct and transgenderism.[9] In such cases a person may complain to VEOHRC so that the VEOHRC may 'educate' the institution and ensure '*the harm caused can be acknowledged by their community, without the survivor being separated from their community as a result*.'[10]

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[3] See Victorian Parliament *Hansard,* Legislative Council Debate, 04 February 2021, https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2021/Legislative_Council_2021-02-04.pdf 278-279.

[4] *Change or Suppression (Conversion) Practices Prohibition Act 2021* Statement of Compatibility 17.

[5] *Change or Suppression (Conversion) Practices Prohibition Act 2021* Explanatory Memorandum 5 (emphasis added).

[6] https://www.humanrights.vic.gov.au/change-or-suppression-practices/change-or-suppression-stories/sams-story/

[7] https://www.humanrights.vic.gov.au/change-or-suppression-practices/have-you-experienced-a-change-or-suppression-practice/

[8] *Change or Suppression (Conversion) Practices Prohibition Act 2021,* Second Reading Speech 21.

[9] VEOHRC, https://www.humanrights.vic.gov.au/change-or-suppression-practices/have-you-experienced-a-change-or-suppression-practice/; VEOHRC, https://www.humanrights.vic.gov.au/change-or-suppression-practices/change-or-suppression-stories/ollys-story/

[10] *Change or Suppression (Conversion) Practices Prohibition Act 2021* Statement of Compatibility 13-14 (emphasis added).

6. The two latter examples from Victoria would run afoul of the proposed prohibition, expressed in the Consultation Paper in the following terms: 'practices that … constitute the expression of a belief or the delivery of religious practices, such as sermons, [which] have a primary purpose of changing or suppressing an individual's sexual orientation or gender identity.'[11]

7. We also emphasise that the Consultation Paper provides no direct evidence of conversion practices in New South Wales. As the Queensland Law Society stated to the Queensland Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee Inquiry (the Queensland Inquiry):

> *As a general policy, it is the society's view that law reform and particularly the creation of criminal offences should be based upon evidence informing policy and there appears to be a scant amount of evidence as to the extent to which health service providers in Queensland are practising conversion therapy and why the existing laws, whether the existing criminal law or professional disciplinary offences, do not currently address the conduct that the bill contemplates. Usually, where outdated and harmful therapeutic practices are used in medicine, these are almost always dealt with by way of health practitioner regulation and not by criminal offences.*[12]

8. This reflects a broader problem with the consultation paper. Conversion therapy in the past has referred to unethical and ineffectual therapeutic practices by mental health professionals such as aversion therapy designed to change a person's same sex orientation. Given that such practices have long since died out, the main purpose of the legislation in Queensland, Victoria and the ACT seems to be to deter mental health professionals from providing therapy to children, adolescents and young adults who experience gender incongruence in order to help them become more comfortable with their bodies. The chilling effect of this legislation will be to push many mentally unwell children and adults into making lasting changes to their bodies that they will later deeply regret, and which the evidence shows will often not make them happier or less prone to suicidal ideation.

9. The VEOHRC interpretations of the Victorian legislation, and the proposals in the consultation paper, extend the meaning of 'conversion practices' dramatically, to try to outlaw any beliefs that contradict the moral positions or values of the authors of these documents.

The Government's Pre-election Commitments

10. This joint response has been prepared in light of the following pre-election commitments given by Mr Minns and a significant number of ALP candidates. We are very surprised, and greatly disappointed, that the consultation paper does not reflect the very public and oft-repeated commitments made.

[11] *Banning LGBTQ+ Conversion Practices Consultation Paper* (n 2) 16.

[12] Report No. 32, 56th Queensland Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, February 2020, page 32, available at https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T328.pdf.

10.1. The Premier promised to ban 'dangerous and damaging' conversion practices. The Consultation Paper goes much further than this. The Consultation Paper asserts that all conversion practices are 'known to be ineffective and extremely harmful' (2.3) or 'deeply harmful' (4.19.2). For a civil complaint, there is no requirement that any harm has in fact occurred. A person has committed an offence solely on the basis that they have provided a conversion practice, even if the complainant testifies that the practice was beneficial to them. In effect, the Consultation Paper bans all conversion practices (as defined), because harm is assumed.

10.2. ALP candidates made the following commitment at election candidates forums:

> *'Any legislation to ban conversion therapy or suppression practices must not outlaw individuals voluntarily seeking out medical health, allied health or other advice and assistance regarding their personal circumstances.'*

Similarly, the Premier promised:

> *'The ban or the conversion ban has to be directed at an individual's sexuality with the correct purpose of suppression. Taking offence at the teachings of a religious leader will not be banned. Expressing a religious belief through sermon will not be banned. And an individual of their own consent seeking guidance through prayer will not be banned either.'*

Contrary to these promises, the Consultation Paper proposals would ban sermons or prayer or an individual voluntarily seeking out assistance if these practices have the purpose of changing or suppressing a person's sexual orientation or gender identity.

10.3. The Premier stated that:

> *'New South Wales is served best when its Faith communities and its governments work together' and committed to establishing the 'New South Wales Faith Affairs Council as a formal channel of communication between faith organisations and my government'.*

It is disappointing that this consultation process is being pursued with such haste that it is not considered relevant or necessary to wait for the formation of the NSW Faith Affairs Council, so that this body could be consulted in relation to matters which have the potential to have a significant impact on faith communities in NSW.

10.4. ALP Candidates and the Premier committed that the NSW Legislation would not be based on the Victorian legislation. There are currently three jurisdictions in Australia that prohibit conversion practices. The table below compares the key features of each regime. At every point of comparison except the last, the Consultation Paper proposal mirrors the Victorian legislation. As we will argue below, the criminal offence proposed in the Consultation Paper is more draconian than the Victorian version.

Queensland	ACT	Victoria
Term - 'Conversion Therapy' examples demonstrate the scope	Term - 'sexuality or gender identity conversion practice' (i.e., 'change' only)	Term- 'change or suppression practice'
Only for health service providers	Only applies to vulnerable persons	All people in all circumstances; with or without person's consent
Balanced exemption	Balanced Exemption	Exemption biased toward gender-affirming treatments
Extra-territorial - NO	Extra-territorial - NO	Extra-territorial - YES
Criminal regime only. Greater penalty re. 'vulnerable person'	Criminal offence – only where a vulnerable person Civil – action must be 'likely to cause harm'	Criminal offence – causes [serious] injury + negligent No civil complaints mechanism Civil response scheme

Legislative Definition of 'Conversion Practices'

Base definition of conversion practices

Consultation Paper Proposal: that conversion practices be defined as any practices (or a collection of practices) directed to a person:

- on the basis of their sexual orientation or gender identity (**SOGI**); and
- with the purpose of changing or suppressing that person's SOGI.

Response:

11. The proposed definition of 'conversion practices' is very broad and practically equivalent to the Victorian legislation (the Victorian Governmental interpretations of which have been outlined above), notwithstanding the government's election promise.

12. The definition, insofar as it applies to health professionals, takes a similar form to that in Queensland,[13] in respect of which the Queensland Law Society took the view that:

> *From the point of view of a lawyer advising a health practitioner as to whether or not what they propose to do might breach this provision, that will be very difficult, at least until the courts have provided some interpretation around the bill. The prudent advice to avoid any risk of being prosecuted would be to cease providing any services which might arguably result in a breach of paragraph (1). It is more a matter of construction and drafting that raises our concerns. As a piece of criminal legislation, if it is going to be enforced and followed, it is unworkable—almost hopelessly unworkable in our view.*[14]

[13] *Public Health Act 2005* (Qld), section 213F.

[14] *Report of the Queensland Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee Inquiry (Queensland Inquiry Report),* 17.

13. Laws banning conversion therapy are often promoted as being required because of very cruel or barbaric prior practices, examples which would be cruel, inhumane, or degrading treatment under international law (see, e.g., paragraph 8.2.3 of the Consultation Paper). However, precise consideration of the capacious but obscure definition of conversion practices proposed in the Consultation Paper shows that the prohibitions extend far beyond such alleged practices. The proposal moves far beyond unethical therapies by mental health professionals a few decades ago, to ban so-called 'practices' which do not have at all the same evidence-base in terms of causing harm. The effect of the proposed definition is that a Priest/Rabbi/Imam who encourages celibacy as an expression of one's religious convictions is treated as being in the same category as someone who administers aversion therapy, exorcisms or 'corrective rapes'.

14. A key issue is the imprecision of the term 'suppression'. The Consultation Paper relies on definitions in the 2020 report provided by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity to the UN Human Rights Council titled, *Practices of so-called 'Conversion Therapy'.*[15] The Report says that:

> *"Conversion therapy" is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed or* ***suppressed****. (Emphasis added)*

The report goes on to clarify what is meant by 'change' or 'suppression' in this definition,

> *Such practices are therefore* ***consistently aimed at effecting a change*** *from non-heterosexual to heterosexual and from trans or gender diverse to cisgender.*

15. The next paragraph of the UN report gives examples of the kinds of 'change' or 'suppression' that the report is directed against – 'persons subjected to exorcisms by churches or traditional healers and to so-called 'corrective' rapes arranged by the families of lesbian women, the community, authorities in faith-based organizations or traditional healers.'[16] We here pause to reject in the strongest possible terms that 'corrective' rape has or does occur in Australia.

16. It is evident from this that the 2020 UN Report uses the word 'suppress' in the limited sense of 'active repression' – i.e., conduct 'consistently aimed at effecting a change'. The quotation cited above is the only instance of the words suppressed/suppress/suppression in the entire report. The Consultation Paper, however, does not use 'suppression' in a manner consistent with the 2020 UN Report. Instead, the Consultation Paper uses the term in the widely expansive way that is understood in the Victorian legislation.

17. The definition of conversion practice should be consistent with the Report cited above. This will be assisted by only using the term 'change' in the definition, and by omitting the term

[15] It is important to note that this document is only a report to the Council, and therefore not the view of the Council. It therefore cannot be relied upon as a statement of international law.
[16] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/108/68/PDF/G2010868.pdf?OpenElement

'suppress'. 'Suppress' is redundant because the phrase 'purpose of changing' encompasses both 'actual change' and 'suppression aimed at effecting a change'.

18. The government has committed to ban harmful ('dangerous and damaging') practices and also committed to permit individuals to voluntarily seek out medical health, allied health or other advice and assistance regarding their personal circumstances. Consistent with the Premier's commitment, the definition should make it clear that an adult with agency is not prevented from making their own informed choices in this regard. In light of this, we propose that a conversion practice be defined as a practice which is coercive, deceptive or misleading (as to the likelihood that the practice will produce change in sexual orientation), in order to address both of these commitments simultaneously - coercive, deceptive or misleading practices are harmful, and an individual is not acting voluntarily when coerced, deceived or misled. The drafting proposed would give effect to the right to freedom of religion or belief of those persons who wish to align their practices with their freely accepted religious convictions, while protecting people from practices which are harmful because they are coercive, misleading or deceptive.

19. While some people say the practices the Consultation Paper proposes to ban have caused them significant psychological injury[17] others say the practices it would ban have caused them great benefit including preventing their suicides.[18] Some academic studies show that some people who are same-sex attracted have greatly benefited from talking therapies that they say have helped them to authentically align their conduct with their religious beliefs.[19] Some of these people also report an effective change in their sexual orientation. Others do not and allege harm on the basis of coercion or unqualified promises of change which were not achieved. Academic studies differ as to the prevalence of harm or benefit and of course

[17] 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. The report includes their stories - https://www.hrlc.org.au/reports/preventing-harm

[18] See for example the 2021 Report on the Survey of 78 ex-LGBT People (the majority of whom are Australian) who say they benefited greatly from some of the practices that would be made illegal under the Consultation Paper proposals in their transition out of same sex sexual practice of at www.freetochange.org. The report includes some of their stories and the website includes videos of some of the people telling their stories.

[19] See e.g. 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. More recently see Sullins DP, Rosik CH, Santero P: *Efficacy and risk of sexual orientation change efforts: a retrospective Analysis of 125 exposed men* . F1000Res. (2021) 10: 222, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8080940/> The results of this analysis show the complexity of the topic: Exposure to SOCE was associated with significant declines in same-sex attraction (from 5.7 to 4.1 on the Kinsey scale), identification (4.8 to 3.6), and sexual activity (2.4 to 1.5 on a 4-point scale of frequency). From 45% to 69% of SOCE participants achieved at least partial remission of unwanted same-sex sexuality; full remission was achieved by 14% for sexual attraction and identification, and 26% for sexual behaviour. Rates were higher among married men, but 4-10% of participants experienced increased same-sex orientation after SOCE. From 0.8% to 4.8% of participants reported marked or severe negative psychosocial change following SOCE, but 12.1% to 61.3% reported marked or severe positive psychosocial change. Net change was significantly positive for all problem domains. For analyses disputing that gender identity change efforts always cause harm see Roberto D'Angelo, Ema Syrulnik, Sasha Ayad, Lisa Marchiano, Dianna Theadora Kenny, Patrick Clarke *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria* Archives of Sexual Behavior https://doi.org/10.1007/s10508-020-01844-2. For Detranistioner's testimonies about the harms of some affirmation approaches to transition see : Entwistle K. 'Debate: Reality check – Detransitioner's Testimonies require us to Rethink Gender Dysphoria'. Child & Adolescent Mental Health, 2020. doi:10.1111/camh.12380..

criticize and defend methodologies. The American Psychological Association accepts the evidence of sexual fluidity [in attraction/orientation] across people's lifespan[20] but argues that the fact that sexual orientation can evolve and change for some does not mean that it can be altered through intervention or that it is advisable to try.[21] This is an argument about causation. Some studies show a correlation between people's participation in conversion practices and changes in their sexual attraction but can neither prove that the practice caused the change (as proponents of change practices would argue) or that the practice did not cause the change (as opponents of change practices including the APA would argue). This largely leaves us with studies based on participants' self-appraisal of whether they experienced the practices as effective or ineffective or harmful or beneficial.

20. The bottom line is that, based on their own testimonies, some people have experienced conversion practices as harmful and ineffective, and some people have experienced them as beneficial and effective.

21. Given that evidence, the correct public policy response cannot be to ban a broad range of practices in the proposed definition and civil response regardless of whether injury is caused, by assuming that injury always occurs. Instead, any ban must focus on whether actual injury was caused by a particular practice. We support the prohibition of coercive, misleading or deceptive conversion practices that are shown to cause harm, where harm is defined as causing serious bodily or serious psychological injury.

22. **International Benchmarking:** The vast majority of conversion therapy bans around the world (24 out of 33 including Queensland) are directed to health practitioners only. [22] 27 out of 33 bans (including the ACT, Germany and Malta) only apply to practices in relation to minors or those without decision making capacity or who are coerced to participate. [23] Of the 6 jurisdictions not limited to practices directed to minors, France and Quebec require proof of injury and Queensland is limited to health service providers. Only 3 jurisdictions – Victoria, New Zealand and Canada – of the 33 ban jurisdictions in the world have bans applying to any practice in relation to all persons without regard to their consent to participate and without requiring proof of harm. The UK government's ban proposal which has not yet produced a Bill promises to be limited to practices in relation to minors. The Victorian model (which the Consultation Paper relies heavily upon) is thus in a very small minority of bans around the world and in Australia which do not have one or more significant limitations on the scope of the ban. As the Premier acknowledged, adults should not have their agency to seek and receive the help they want and consent removed by law.

[20] See, e.g., Diamond, L. M. (2008). Sexual fluidity: Understanding women's love and desire. Harvard University Press.
[21] APA Resolution on Sexual Orientation Change Efforts February 2021 p.3
[22] Queensland, all 20 US States with bans, 3 out of 4 Canadian Provinces with bans.
[23] Queensland covers practices by health service providers in relation to adults but exempts any practice which in the reasonable professional judgment of the health service provider is necessary to provide a health service. Ontario permits practices by health service providers in relation to minors with decision making capacity.

23. For clarity, the definition should include examples to demonstrate the scope of conversion practices.

24. In light of the forgoing, we proposed the following (noting that the definitions of harmful and serious psychological injury are relevant for the criminal and civil offences below.

> The purpose of the legislation is 'prohibiting **harmful** conversion practices'.
>
> **Harmful** means causing **serious bodily injury or serious psychological injury**.
>
> **Serious psychological injury** means 'injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind'[24] and where the injury is protracted.
>
> ***Conversion practices*** means coercive or misleading or deceptive practices (being a course of conduct) directed to a person on the basis of the person's sexual orientation for the primary purpose of changing the person's sexual orientation.
>
> The follow are examples of conduct within the definition of Conversion practices:
>
> - a practice aimed at effecting a change in a person's sexual orientation by-
>   - inducing nausea, vomiting or paralysis while showing the person same-sex images;
>   - using coercion to give the person an aversion to same-sex attractions;
>   - ritualised beatings, 'corrective rapes' or other forms of physical abuse to change sexual orientation;
>   - using techniques to encourage the person to believe their sexual orientation is a medical or psychological disorder; and
>   - exorcism or similar spiritual deliverance practices with the aim of changing the person's sexual orientation.
>
> The following are examples of conduct not within the definition of Conversion practices:
>
> - Religious teaching, acts or practices that require sexual abstinence or celibacy;
> - Religious teaching that same-sex sexual activity is not in accordance with God's will, and that sexual activity outside of heterosexual marriage could result in a person going to hell;
> - Practices engaged in by parents and, when applicable, legal guardians, and their affiliates to raise their children in conformity with their own religious and moral convictions; and
> - Religious communities, institutions and educational institutions requiring leaders, employees, volunteers, members and/or persons affiliated with those communities or institutions to live in conformity to religious beliefs.

[24] Li v R [2005] NSWCCA 442 at [45], https://www.caselaw.nsw.gov.au/decision/549fbc483004262463ba0508

- Clinical care by clinicians or service providers which are within professional guidelines or in accordance with the accepted practices of reputable service providers in the relevant area.

The issue of gender identity or incongruence

25. The definition of conversion practices should not include 'gender identity'. In the last 2 years there has been increasing international concern expressed by governmental health authorities and expert bodies on evidence-based medicine, about the lack of evidence supporting aspects of the 'gender affirmation' approach.[25] This includes lack of follow up and uncertainties about the long term effects and safety of puberty blockers and cross-sex hormones. Keira Bell sued the UK NHS Tavistock Gender Clinic for giving her puberty blockers and hormones at 16 when she could not give informed consent. That evidence has been thoroughly reviewed by the eminent paediatrician Dr Hillary Cass.[26] Following the UK Cass Review in June 2023 the NHS has decided that puberty blockers will not be prescribed to under 18s for gender dysphoria, except in exceptional circumstances, because of a lack of evidence to support their safety or clinical effectiveness.[27] Similar reviews and changes have occurred in Finland, Sweden, Norway and Denmark. These countries now offer psychotherapeutic treatment as the first line of response to gender dysphoric children and young people, the very kind of treatment that activists disparage as 'conversion therapy'.

26. The Consultation Paper proposed an approach (again modelled on the Victorian legislation) that proposes to ban practices which seek to change or suppress a person's gender identity but exempts services supporting gender transition or gender expression and gender affirming care. The proposed law would thus preference the view that the correct treatment for a young person experiencing gender incongruence is to commence puberty blockers and hormones and body transition. But it creates a risk of illegality for any other medical approach (and support for it by parents or family) as being illegal suppression (e.g., holistic assessment of all causes of distress and psychotherapeutic support through puberty without using puberty blockers and cross-sex hormones). This legal threat over one medical approach but not others places a legislative thumb on the scales of medical and psychiatric decision making. This is irresponsible and inappropriate public policy.

27. A large body of evidence shows that children and adolescents presenting to gender clinics often have experienced family breakdown or other loss, disordered attachments or other adverse childhood experiences,[28] and have a range of mental health problems that predate

[25] National Institute for Health and Care Excellence ('NICE'), Evidence Review: Gonadotrophin Releasing Hormone Analogues for Children and Adolescents with Gender Dysphoria (2020); NICE, Evidence Review: Gender-Affirming Hormones for Children and Adolescents with Gender Dysphoria (2020) (published March 2021).
[26] https://cass.independent-review.uk/publications/interim-report/
[27] As reported in the BMJ https://www.bmj.com/content/381/bmj.p1344.full
[28] Kasia Kozlowska et al, 'Australian Children and Adolescents with Gender Dysphoria: Clinical Presentations and Challenges Experienced by a Multidisciplinary Team and Gender Service' (2021) 1(1) *Human Systems: Therapy, Culture and Attachments*, 70; Kasia Kozlowska et al, 'Attachment Patterns in Children and Adolescents with Gender Dysphoria', (2021) 11 *Frontiers in Psychology* 582688. See also Guido Giovanardi et al, 'Attachment Patterns and Complex Trauma in a Sample of Adults Diagnosed with Gender Dysphoria', (2018) 9 *Frontiers in Psychology* 60.

their gender incongruence.[29] The idea, which underlies the Consultation Paper, that people are either 'cis' or 'trans' and that this gender identity is innate and unchangeable has very little scientific evidence to support it. Indeed, it is contradicted by a large body of evidence. Legislation providing for criminal sanctions should not be based upon a belief system which is not only unsupported by evidence, but contradicted by it.

28. There is no reason to believe that the introduction of civil or criminal sanctions against parents or medical professionals who are not convinced that a gender transition is in the best interests of a child will make what is already a highly complex and difficult matter any better. In fact, it can only make it worse. For this reason, we strongly recommend that the scope of the legislation be limited to that which the Premier committed – that is, change to sexual orientation.

29. If the definition proposed above is adopted, no exceptions are needed for parents or religious institutions.

Exceptions or exclusions

Consultation Paper Proposal: that the law specify that the following do not fall within the definition of 'conversion practices':

- Gender affirmative care and support, including practices supporting gender exploration, transition and expression […] and
- expression of a belief or delivery of religious practices, such as sermons, unless they have the direct purpose of changing or suppressing and individual's SOGI.

Response:

30. On the basis of the definitions of Conversion Practices proposed in the Consultation Paper, the proposed exemption for religious activities is insufficient to protect religious associational freedom and the free exercise of religious beliefs and activities in NSW. It is also insufficient to fulfil the government's pre-election commitments.

31. In following the Victorian model, it even extends to limiting the ability of religious institutions to determine their leadership, employees and volunteers and who they admit into

[29] See e.g. Gemma Witcomb et al, 'Body Image Dissatisfaction and Eating-Related Psychopathology in Trans Individuals: A Matched Control Study', (2015) 23(4) *European Eating Disorders Review* 287; Riittakerttu Kaltiala-Heino et al, 'Two Years of Gender Identity Service for Minors: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development' (2015) 9 *Child and Adolescent Psychiatry and Mental Health* 9; Tracy Becerra-Culqui et al, 'Mental Health of Transgender and Gender Nonconforming Youth Compared With Their Peers' (2018) 141(5) *Pediatrics* e20173845. For earlier evidence, see Madeleine Wallien, Hanna Swaab and Peggy Cohen-Kettenis, 'Psychiatric Comorbidity Among Children with Gender Identity Disorder' (2007) 46(10) *Journal of the American Academy of Child and Adolescent Psychiatry* 1307; Norman Spack et al, 'Children and Adolescents with Gender Identity Disorder Referred to a Pediatric Medical Center' (2012) 129(3) *Pediatrics* 418.

membership.[30] Take, for example, a religious institution or school that says to a leader, employee or member that decides they are transgender that they may remain provided they continue, with pastoral support, to act in accordance with their biological sex. That stipulation would amount to an attempt to 'suppress' (and even possibly 'change') their gender identity. If a religious institution cannot require that its leaders, employees or members believe and live in accordance with its religious beliefs it foregoes its institutional character. That proposal amounts to one of the most dramatic interventions on religious and associational freedom that Australia has seen.

32. Even sermons, relationship counselling and prayer, if they are deemed to have the primary purpose of changing or suppressing an individual's sexual orientation or gender identity, would not be exempt.

33. Any religious school (inclusive of their board members, employees, chaplains and volunteers) that seeks to counsel a traditional understanding of gender identity (for example by requiring that all students use facilities that align with their biological sex) will be in danger of criminal conviction. Such would amount to an attempt to 'suppress' a person's gender identity.

34. The model proposed in the Discussion Paper is inconsistent with the Premier's pre-election commitment that 'expressing a religious belief through sermon will not be banned'. If the direct purpose of a religious teaching is to suppress a person's expression of their sexual orientation (i.e., telling single people that God wants them to refrain from sex), then this will be banned. Indeed, such would be consistent with the interpretation the Queensland Law Society submitted, that it would be 'at least arguable' for the equivalent Queensland provisions.[31] Indeed, the Consultation Paper specifically cites the encouragement of celibacy as a conversion practice.[32]

35. These concerns are further outlined at Appendix B.

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[30] See VEOHRC, www.humanrights.vic.gov.au/change-or-suppression-practices/change-or-suppression-stories/; www.humanrights.vic.gov.au/change-or-suppression-practices/change-or-suppression-stories/ollys-story/ and www.humanrights.vic.gov.au/change-or-suppression-practices/have-you-experienced-a-change-or-suppression-practice/. 'The scheme is designed to educate the public about the ban on change or suppression practices and the harm these practices cause and respond to reports about such practices by anyone. This allows someone subjected to change or suppression practices to make a report to VEOHRC *so the harm caused can be acknowledged by their community, without the survivor being separated from their community as a result*.' *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), Statement of Compatibility 13-14.

[31] See *Queensland Inquiry Report* (n 14) 24. The Queensland Law Society stated:

> When you come to the definition of conversion therapy being a change to that, it is at least arguable that any intervention or attempts to change a person's sexual behaviour or who they are attracted to is captured by this bill rather than simply therapy which is designed to change the gender to which they are attracted or to suppress an attraction. It could even be arguable that that definition is so broad as to capture the work that is done in prisons with sex offenders and with sex offenders who have attraction to people who are under the legal age of consent. That is not the intention of the bill, but the wording is not sufficient to make it clear. In the Australian Medical Association's submission they suggest adopting the definition of 'sexual orientation' from the Sex Discrimination Act. That seems to be a better and clearer definition which fits the intention of what this legislation is trying to achieve.

[32] *Banning LGBTQ+ Conversion Practices Consultation Paper* (n 2) 37.

36. As noted above,in respect of the proposed exemption for 'gender affirmative care and support, including practices supporting gender exploration, transition and expression', the Consultation Paper introduces a bias towards these practices (which are given an automatic exemption), and a bias against a psychotherapeutic approach (where the onus is on the practitioner to demonstrate that this form of treatment is 'necessary'). The chilling effect of this is likely to lead many gender incongruent young people to embark upon the pathway of radical alteration of their bodies because this very controversial form of treatment is state-endorsed, while the psychotherapeutic approaches that are now seen as optimal in many European countries are strongly discouraged and possibly criminalised.

37. Precisely what constitutes evidenced based care in the context of minors is hotly disputed. As Dr Philip Morris President of the National Association of Practising Psychiatrists told the Queensland Inquiry:

> *'As the National Association of Practising Psychiatrists, we have called for a national organisation or committee to look at this area with the national health and medical research council, the medical boards, the AMA and the professional organisations that treat children in this area to come up with a set of guidelines that can guide the country, because it is a very controversial area -the difference between the affirmation model of treatment and the more conservative model of treatment. It has not been resolved. It is way too premature to put legislation before there is any resolution in the field about what is the best way forward.'*[33]

38. That was so when the Queensland Bill was being debated. It is now even more so as many countries have moved away from the affirmation model to holistic care and the irreversible harm that has been done to many young people is now evident.[34] Since he gave that evidence, the Royal Australian and New Zealand College of Psychiatrists has withdrawn its previous position statement 103 on treatment for gender dysphoria and is currently engaged in a major review, acknowledging the range of views in the profession.[35]

39. Section 5O of the *Civil Liability Act* (NSW) states that a professional 'does not incur a liability in negligence…if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.' It recognises that '[t]he fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.' It acknowledges that '[p]eer professional opinion does not have to be universally accepted to be considered widely accepted.' However, in proposing an exception for only affirmative treatment the Consultation Paper effectively mandates only that form of treatment. This not only is inconsistent with, but also negates, the protection from liability under the *Civil Liability Act*.

[33] Cited in Dissenting Report to the *Queensland Inquiry Report* (n 14) 55.
[34] https://www.persuasion.community/p/keira-bell-my-story; https://www.amazon.com/Irreversible-Damage-Transgender-Seducing-Daughters/dp/1684510317
[35] https://www.ranzcp.org/news-analysis/review-of-ranzcp-position-statement-on-gender-dysphoria (July 2023).

40. All of these concerns are addressed by not including Gender Identity within the definition of Conversion Practices, as previously argued.

41. If, however, gender identity is included in the scope of Conversion Practices, then it will be necessary also to include appropriate and balanced exceptions, unlike the proposal in the Consultation Paper. The exemption must not privilege transition assistance and gender affirming care over holistic care and psychotherapeutic treatment, for otherwise children and young people could be driven to life-altering medical treatments that they do not need and later profoundly regret. Any health service provider exemption should be neutral and open to providers using either approach. Further extensive consultation is needed with health practitioners to ensure that the legislation attains these ends. A possible model is the following exemption for health services providers, adapted from Chapter 5B of Public Health Act 2005 (Queensland), instead of narrower, and unbalanced, Victorian version.

> *A conversion practice does not include any practice by, or on the advice of, a registered health practitioner that, in the practitioner'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.*

42. We are particularly concerned about, and oppose, interference in the relationship between parent and child.[36] As the European Court of Human Rights has said: 'It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions.'[37] The religious or moral convictions of many parents (and indeed many mainstream religions within Australia) include teachings about sexual orientation and gender identity. As has been recently noted by the Australian Human Rights Commission, the [United Nations] Human Rights Committee has recognised that 'the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.'[38] As Langlaude has clarified, under the ICCPR 'States are forbidden from pursuing an aim of indoctrination that does not respect the religious convictions of the parents.'[39]

[36] Darae Eom 'Government Regulation of Sexual Orientation Change Efforts: Infringement upon our Rights to Exercise Parental Authority and Preserve Family Unity' *Journal of Global Justice and Public Policy* (2016) 2(2), 458.
[37] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, [52].
[38] Australian Human Rights Commission, *Submission to the Expert Panel on Religious Freedom*, February 2018, available at https://www.humanrights.gov.au/submissions/religious-freedom-review-2018, 10, citing Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993) [8].
[39] Sylvie Langlaude *The Right of the Child to Religious Freedom in International Law,* (Martinus Nijhoff, 2020) 87.

43. This is particularly an issue if the definition of Conversion Practices includes gender Identity. *Prima facie*, where a child identifies as 'transgender' or 'non-binary' but the parents encourage their child to act in conformity with their natal sex, this could arguably constitute 'coercion' for the purposes of the definition of a conversion practice. For the avoidance of doubt, there would need to be an explicit provision to protect parental and familial rights as follows:

> A conversion practice does not include a practice engaged in by parents and, when applicable, legal guardians, and their affiliates to ensure the religious and moral education of their children in conformity with their own convictions

44. A further provision would also be necessary to recognise the right of religious institutions to determine their leadership, employees and volunteers and who they admit into membership based on whether an individual is willing to live in conformity to religious teaching. To avoid competing statutory obligations, as set out at Appendix A, this should be consistent with the regime of exceptions in the *Anti-Discrimination Act 1977* (NSW).

Criminal Law Responses

Actus reus: conduct covered by an offence

Consultation Paper Proposal: that the conduct covered by the criminal offence should be providing or delivering conversion practices, where a reasonable person would consider the practices to be likely to cause harm to the person they are directed towards.

Where there are a series of linked or connected practices that occur both in NSW and outside of NSW, the offence will cover all the linked practices.

Response:

45. Proposed criminal legislation sets a lower threshold for the physical element of the offence compared to the Victorian legislation. The focus on whether a reasonable person would consider the practices likely to cause harm is vague and undefined, which may lead to uncertainty and difficulties in proving intent.

46. The Consultation Paper does not adequately define the term 'harm'. As Appendix B shows, it relies on a contested notion of 'harm' that negates the Consultation Paper's purported protections of religious teaching and practice.

47. The Consultation Paper proposals do not require any harm to have actually occurred. The Consultation Paper assumes that all practices that do not unquestioningly affirm a person's sexual orientation, sexual activity and gender identity are always harmful, but does not make out this claim. The Departments of Justice and Health have not considered or consulted those who have benefited from some of the practices proposed to be banned. There are abundant examples of persons who willingly sought support from fellow believers to authentically align

their conduct with their religious beliefs who now consider that support to be beneficial, not harmful.[40]

48. The claim that all so-called conversion practices are harmful is particularly contentious when it comes to supposed harm from psychotherapeutic practices to help a person become more comfortable in their natal sex. Evidence for harm from such therapy is practically non-existent. As noted above, psychotherapeutic treatment is now the preferred approach to gender dysphoria in children and young people in several European countries and the use of puberty blockers or cross-sex hormones is restricted to a small number of cases where the treatment is offered within a medical research context. The latest approach to psychotherapeutic treatment involves an active exploration of possible reasons for the gender incongruence, taking account of all the child or young person's mental health problems and history of adverse childhood experiences. It is an open-ended exploratory model, neutral as to the outcome.

49. If talking therapy practices about changing or suppressing SOGI can sometimes produce injury and sometimes produce great benefit, a blanket ban on such practices cannot be justified. Instead, any ban must be related to proof of actual injury.

50. The *Crimes Act 1900* (NSW) does not contain any express reference to psychological harm.[41] As McGorrery shows, no conviction for psychological injury has been reported in New South Wales.[42] In *obiter* the NSW Court of Appeal has suggested that psychological harm can amount to actual bodily harm under the *Crimes Act 1900*.[43] A series of judgements of the NSW Civil and Administrative Tribunal have recently determined that victims of crime would be awarded compensation for actual bodily harm where expert evidence supports a diagnosis of a 'very serious' psychological or psychiatric 'condition'.[44] This definition of harm could provide an acceptable model for reform. To ensure that the criminal prohibition only captures genuinely illegitimate actions the additional requirement (modelled on Victorian law) that such be 'protracted' should be imposed.[45]

51. We propose the following:

It should be a criminal offence for a person to engage in a conversion practice where:

[40] 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

[41] See *Crimes Act 1900* (NSW), s 59.

[42] Paul McGorrery 'Causing Psychological Harm: A Criminal Offence?' (2022) 46 *Criminal Law Journal* 125.

[43] *McIntyre v The Queen* (2009) 198 A Crim R 549, [44]; [2009] NSWCCA 305; *Shu Li v The Queen* [2005] NSWCCA 442, [45]; *R v Lardner* (Unreported, Court of Criminal Appeal for New South Wales, Dunford J, 10 September 1998).

[44] See, for eg, *Shu Qiang Li v R* [2005] NSWCCA 442 'injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind' (at [45]), relied upon in *BXB v Commissioner of Victims Rights* [2015] NSWCATAD 173; *EMT v Commissioner of Victims Rights* [2021] NSWCATAD 39; *CZU v Commissioner of Victims Rights* [2017] NSWCATAD 240 and *FNA v Commissioner of Victims Rights* [2022] NSWCATAD 388.

[45] *Crimes Act 1958* (Vic) s 15.

(a) the conversion practice causes **serious bodily or serious psychological injury** to the person to whom practice is directed; and

(b) the person engaging in the practice intends to **cause serious bodily or psychological injury** to the person to whom practice is directed, knows that it will cause **serious bodily or psychological injury**, or is reckless as to whether **serious bodily or psychological injury** will be caused.

As already noted;

Serious psychological injury means 'injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind' (following Li v R [2005] at [45])[46] and where the injury is protracted.

52. The Victorian legislation distinguishes between two levels of criminal offence, depending on the magnitude of injury. The proposed definition of serious psychological injury above equates to actual bodily harm for the purposes of the Crimes Act 1901.[47] As noted above, to ensure that the criminal prohibition only captures genuinely illegitimate actions the additional requirement (modelled on Victorian law) that such be 'protracted' should be imposed.[48]

Mens rea: mental element of an offence

Consultation Paper Proposal: that the offence requires an intention to change or suppress the SOGI of the person the practices are directed against.

Response:

53. The Consultation Paper recasts the focus of the *mens rea* from an intentionality regarding causing injury or serious injury (Victoria) to whether there is 'an intention to change or suppress the sexual orientation or gender identity of the person'. Given the breadth of the definition of 'change or suppress the sexual orientation or gender identity', this is a significantly lower threshold than the Victorian proposal.

54. As noted above, we recommend that the requisite *mens rea* is the person intents to cause serious psychological injury to the person to whom practice is directed, knows that it will cause serious bodily or psychological injury, or is reckless as to whether the serious bodily or psychological injury will be caused.

55. The background medical conditions of a person should be relevant in assessing whether the treatment caused the harm.

[46] https://www.caselaw.nsw.gov.au/decision/549fbc483004262463ba0508

[47] *Shu Qiang Li v R* at [45] " if the victim had been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would be likely to have amounted to "actual bodily harm".

[48] *Crimes Act 1958* (VIC), s15.

Offence for removal from jurisdiction

Consultation Paper Proposal: that an offence be developed to cover taking or arranging to take a person from NSW for the purposes of having conversion practices directed to them or engaging a person outside of NSW to provide or deliver conversion practices on another person in NSW be a criminal offence.

Response:

56. Contrary to the Government's election commitment to not use the Victorian model as the starting point, the Consultation Paper proposed an extra-territorial application like that of Victoria, with one minor variation (see paragraph 4.32), after noting that 'Victoria is the only jurisdiction to have an offence with extraterritorial application' (paragraph 4.30). Absent any evidence that people are being removed from NSW for the purpose of conversion practices, there is no need for this provision.

Civil Law Responses

Consultation Paper Proposal: It should be unlawful for a person to provide or deliver conversion practices. Conversion practices should be defined consistently with the definition used for the criminal offence.

The existing complaints mechanism used by Anti-Discrimination NSW should be expanded to include complaints about conversion practices.

Response:

57. We agree that Conversion Practices should be defined consistently with the definition used for the criminal offence. In similar measure, a civil complaint should only arise where the conversion practice has caused serious bodily or serious psychological harm.

58. We agree in principle (subject to comments about timing below) that the existing complaints mechanism used by Anti-Discrimination NSW be expanded to include complaints about conversion practices. No new powers of investigation or enforcement should be conferred on Anti-Discrimination NSW in relation to complaints of conversion practices. The proposed complaints mechanism should not incorporate a representative complaints mechanism or an investigatory power that is initiated by an anonymous complaint.

59. The complaints regime should be modified to implement recommendations 2, 3, 4 and 6 of Report 55 of the Portfolio Committee No.5 of the Legislative Council addressing unmeritorious or vexatious complaints made under the complaint procedures of the *Anti-Discrimination Act*

(noting that these recommendations were also endorsed by the Labor members of the Committee).[49]

60. The implementation of a civil complaints mechanism should be deferred until the completion of the current review of the Anti-Discrimination Act. The proposal to use the complaints mechanism of the Anti-Discrimination Act is problematic, because of unresolved issues about unmeritorious or vexatious complaints (see above). Furthermore, the definition of 'transgender' in the ADA clashes with the proposed definition of 'gender identity' (though noting that our proposal to omit Gender Identity from the definition of Conversion Practices deals with this issue). The terms of reference for the current review into the Anti-Discrimination Act should be expanded to include a civil complaints procedure in relation to conversion practices.

61. Parents and their affiliates (including other family members) must be excluded from any civil law scheme. It is intolerable that the state provides a means for children to sue their parents or their parents' affiliates or family members.

Regulation of Health Practitioners and Health Service Providers

Consultation Paper Proposal: existing regulation through the Health Practitioner National Law (NSW), the Public Health Act 2010 and Health Care Complaints Act 1993 is considered sufficiently broad to cover conversion practices.

Response:

62. Agreed. The current complaints regime under the *Health Care Complaints Act 1993* (NSW) is sufficient. It already enables the Health Care Complaints Commission to investigate complaints of health practitioners involved in conversion therapy. This was the understanding underpinning the analysis of the law undertaken by the Parliamentary Committee on the Health Care Complaints Commission in its 2014 Report titled 'The Promotion of False and Misleading Health-Related Information and Practices'. The NSW Gay and Lesbian Rights Lobby concurred with this view in their submission to the 2014 inquiry (see Appendix C).

Supporting Non-Legislative Actions

Consultation Paper Proposal: that the commencement of any legislation be delayed for 12 months to enable supporting implementation activities to occur, such as practice guidelines, training and education and community awareness campaigns.

Response:

63. Agreed in part. Delay is supported so that any legislation banning 'conversion practices' can be appropriately integrated with any changes that result from the NSW Government's review of

[49] The report is available at: www.parliament.nsw.gov.au/lcdocs/inquiries/2583/Report%20No%2055%20-%20PC%205%20-%20Anti-Discrimination%20Amendment%20(Complaint%20Handling)%20Bill%202020.pdf

the Anti-Discrimination regime,[50] and much needed associated protections for religious institutions to operate according to their doctrines, tenets and beliefs. Delay is not supported for the purpose of producing community awareness campaigns about changes to the law that have not yet been implemented, or indeed, taken clear shape.

[50] NSW Law Reform Commission, "Anti-Discrimination Act review", last accessed 7 August 2023, <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/ADA/ADA_Project.aspx>.

Response to Questions

In light of the foregoing, we provide the following responses to the questions posed in the Consultation Paper. In Appendix A we set out what we consider to be an acceptable framework for the regulation of conversion practices.

	Question	**Response**
1	Do you agree with the proposed definition of conversion practices?	No.
2	If no, what amendments or adjustments to the definition would you make?	See Appendix A.
3	Do you agree with the proposed exceptions to the definition of conversion practices? If no, please explain why.	No. See submission body.
4	Are there practices not covered by these exceptions that should be? If so, please provide some examples.	Yes.
5	Are there any practices captured by these exceptions that should not be? If so, please provide some examples.	Yes. See submission body.
6	Are there any practices where you are unsure whether they would fall under this exception?	Yes. See submission body, particularly in respect of the discussion on the notion of 'suppress' and also the employment, teaching and other practices of religious institutions and schools.
7	Are there any practices where you are unsure whether they would have a primary purpose of changing or suppressing an individual's sexual orientation or gender identity?	Yes. See submission body, particularly in respect of the discussion on the notion of 'suppress' and also the employment, teaching and other practices of religious institutions and schools.
8	Do you agree with the proposed conduct element for the offence which requires that a reasonable person would consider the conduct is likely to cause harm?	No.
9	If no, what amendments should be made to the conduct element instead or in addition to what is proposed?	The offence should be limited to practices that the

		accused intended to cause actual harm.
10	Do you support the extraterritorial application of the offence?	No.
11	Do you support the proposed mental element?	No.
12	What would you consider to be 'intention' to change or suppress the sexual orientation, gender identity or gender expression of a person?	Intention to cause actual harm.
13	Are there any practices where you are unsure whether there would be an intention to change or suppress the sexual orientation, gender identity or gender expression of a person?	Yes. See submission body, particularly in respect of the discussion on the notion of 'suppress' and also the employment, teaching and other practices of religious institutions and schools.
14	Should taking or arranging to take a person from NSW for the purposes of conversion practices be a criminal offence?	No.
15	Should engaging a person outside of NSW to provide or deliver conversion practices on a person in NSW be a criminal offence?	No.
16	Should the civil prohibition apply to providing or delivering conversion practices, wherever they occur?	No.
17	Should conversion practices be defined consistently across criminal and civil law?	Yes. That does not mean that the consequences of breach should be identical.
18	What, if any, changes should there be to the ADNSW complaints process to deal with conversion practices complaints? For example, are changes needed to a) who should be able to bring a complaint b) powers available to deal with complaints, including the discretion to decline a complaint where the conduct occurred more than 12 months ago c) the role of the NSW Civil and Administrative Tribunal, including how a complaint is substantiated and the orders it may make?	See Appendix A.
19	Should complaints be able to be referred to other bodies?	No.

20	Should a civil complaint process be available where a matter is being investigated by police, or criminal proceedings are ongoing?	No.
21	Should the Anti-Discrimination Board's general functions be adapted to enable it to address systemic concerns about conversion practices?	No.
22	What other issues should be considered in the development of a civil response scheme?	Appropriate exemptions for religious institutions and schools, parents and affiliates, members, as contemplated in the body of this submission and Appendix A.
23	Does the existing professional regulation framework provide sufficient coverage for conversion practices performed by health professionals? If no, what amendments are required?	No. The regime should not prevent non-registered counsellors from providing counselling (including in relationship or marriage counselling) to those who request it in accordance with their religious beliefs.
24	Do you support a delayed commencement period?	Agreed in part. See submission body.
25	What implementation actions should be prioritised during this period to support the commencement of legislation?	Education to clarify the scope of both the prohibition and the exceptions provided to religious institutions, schools and parents and affiliates. Education must also include clinicians.

Appendix A – An Acceptable Framework of Conversion Practices Legislation

Definitions

1. The purpose of the legislation should be defined as 'prohibiting **harmful** conversion practices'. This reflects the Premier's commitment to ban 'dangerous and damaging' conversion practices.

2. ***Harmful*** should be defined as causing ***serious bodily injury or serious psychological injury***.

3. ***Serious psychological injury*** should be defined (following Li v R [2005] NSWCCA 442 at [45])[51] as 'injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind' where the injury is protracted.

4. ***Conversion practices*** should be defined as coercive or misleading or deceptive practices (being a course of conduct) directed to a person on the basis of the person's sexual orientation for the primary purpose of changing the person's sexual orientation which cause the person injury.

   The definition of ***Conversion practices*** should not include the term 'suppression', because the phrase 'purpose of changing' encompasses both 'actual change' and 'suppression aimed at effecting a change'. A Report to the United Nations Human Rights Council in 2020 provided by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity titled, *Practices of so-called 'Conversion Therapy'*[52] defines both change and suppression practices as 'consistently aimed at effecting a change from non-heterosexual to heterosexual'.[53] If it is necessary to include the word 'suppress', then it should be defined consistently with the Report definition, in the sense of 'active repression'.

   Conversion practices should be defined as coercive or misleading or deceptive practices (being a course of conduct) directed to a person on the basis of the person's sexual orientation for the primary purpose of ***change or suppression*** of the person's sexual orientation.

   Change or suppression of sexual orientation means practices 'consistently aimed at effecting a change' in sexual orientation.

5. The term 'coercion' is used within the recently legislated *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW)).

6. The definition should include examples that demonstrate the definition of Conversion Practices (in a manner similar to subsections 213F(2)&(3) of the Queensland *Public Health*

[51] https://www.caselaw.nsw.gov.au/decision/549fbc483004262463ba0508
[52] It is important to note that this document is only a report to the Council, and therefore not the view of the Council.
[53] https://digitallibrary.un.org/record/3870697/files/A_HRC_44_53-EN.pdf?ln=en, para 17.

Act 2005 which sets out what does not constitute a conversion practice).

7. The follow are examples of conduct within the definition of ***Conversion practices*** a practice aimed at effecting a change in a person's sexual orientation by—

    7.1. inducing nausea, vomiting or paralysis while showing the person same-sex images;

    7.2. using coercion to give the person an aversion to same-sex attractions;

    7.3. ritualised beatings, 'corrective rapes' or other forms of physical abuse to change sexual orientation;

    7.4. using techniques to encourage the person to believe their sexual orientation is a medical or psychological disorder; and

    7.5. exorcism or similar spiritual deliverance practices with the aim of changing the person's sexual orientation.

    Note: most of the examples above are drawn from A Report to the United Nations Human Rights Council in2020 provided by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity titled, *Practices of so-called 'Conversion Therapy'.*

8. The following are examples of conduct not within the definition of **Conversion practices:**

    8.1. Religious teaching, acts or practices that require sexual abstinence or celibacy;

    8.2. Religious teaching that same-sex sexual activity is not in accordance with God's will, and that sexual activity outside of heterosexual marriage could result in a person going to hell;

    8.3. Practices engaged in by parents, and when applicable, legal guardians, and their affiliates, to ensure the religious and moral education of their children in conformity with their own convictions; and

    8.4. Religious communities, institutions and educational institutions requiring leaders, employees, volunteers, members and/or persons affiliated with those communities and institutions to live in conformity to religious beliefs.

    8.5. Clinical care by clinicians or service providers which are within professional guidelines or in accordance with the accepted practices of reputable service providers in the relevant area.

Criminal and Civil schemes

9. It should be a criminal offence for a person to engage in a conversion practice where:

    9.1. The conversion practice causes serious injury to the person to whom the practice is directed; and

    9.2. The person engaging in the practice intends to cause serious injury to the person to whom the practice is directed, knows that it will cause serious bodily or psychological

injury, or is reckless as to whether the serious bodily or psychological injury will be caused.

10. ***Serious injury*** means serious bodily injury or being injured psychologically in a very serious and protracted way, going beyond merely transient emotions, feelings and states of mind.

11. The background medical conditions of a person will be relevant in assessing whether the treatment caused the injury.

12. Conversion practices are subject to the civil response mechanism under the Act if they cause serious psychological injury to the person to whom the practice is directed. A complaint to Anti-Discrimination NSW may be made by a person that they were subjected to a conversion practice that caused a *serious injury*.

13. AD NSW should have powers to conciliate the complaint in the same way as a discrimination complaint and the complaint may be handled by NCAT in the same way as a discrimination complaint if it cannot be conciliated.

14. The complaints regime should also implement recommendations 2, 3, 4 and 6 of Report 55 of the Portfolio Committee No.5 of the Legislative Council addressing unmeritorious or vexatious complaints made under the complaint procedures of the *Anti-Discrimination Act* (recommendations endorsed by the Labor members of the Committee).[54]

No new powers of investigation or enforcement should be conferred on AD NSW in relation to complaints of conversion practices.

15. The complaints regime should not incorporate an investigatory power that relies upon anonymous complainants who are not identified to the institution investigated (as is the case in Victoria). The regime should not include a representative body complaint mechanism, which will encourage litigation against religious institutions and schools.

16. In Victoria the threat of civil response compulsory powers and compliance notices from the Victorian Human Rights Commission has caused great angst for parents and religious organizations and schools. We refer to examples of illegal practices as published by the VHREOC.[55]

[54] The report is available at: www.parliament.nsw.gov.au/lcdocs/inquiries/2583/Report%20No%2055%20-%20PC%205%20-%20Anti-Discrimination%20Amendment%20(Complaint%20Handling)%20Bill%202020.pdf

[55] See https://www.humanrights.vic.gov.au/change-or-suppression-practices/for-families-and-friends/

- a parent denying their child access to any health care services that would affirm their child's gender identity because they do not want their child to have access to information or advice that would affirm their child's gender identity;
- a parent rejecting the recommendations of qualified health professionals and refusing to support their child's request for medical treatment that will prevent physical changes from puberty that do not align with the child's gender identity;
- a religious leader telling a member of their congregation – with the intent to induce that person to change or suppress their sexuality – that they will be excommunicated if they continue their same-sex relationship and

17. Conversion practices should not create any civil or criminal liability under the Act except to the extent expressly provided by the Act (i.e., there is no separate statutory duty of care arising from the Act, but a conversion practice can also attract ordinary criminal or civil legal consequences under other laws e.g., as an assault).

18. Provided conversion practices and the criminal and civil provisions are defined as they are in Appendix A, there should not be any need to include exemptions for religious practices or health treatments, as these will be lawful if they do not cause serious injury. However, if conversion practices are not defined as above there should be exemptions for religious practices and health practitioners as well as family members and their affiliates as discussed above.

Remove Gender Identity Altogether

19. The government should not address gender identity in the ban. The government should not place a legal thumb on the scales of medical and psychiatric decision making in this controversial area.

20. There has been a dramatic increase in the last 10 years in Western countries in the number of adolescents saying they experience gender incongruence and seeking treatment and being put on puberty blockers and cross-sex hormones (and sometimes sex change surgery). There is a sharp division of opinion in the medical and psychiatric professions about the best approach to gender dysphoria in children or adolescents, the great majority of whom, in previous research studies, have resolved their gender incongruence before or while going through puberty.[56] Until a few years ago the most widely practiced approach was a biopsychosocial assessment of all causes of distress including the gender dysphoria, and mental health support to children and adolescents to see whether they resolve their gender dysphoria before or while going through puberty. The more recent approach, advanced despite a weak evidential foundation, is to affirm the child's sense of being in the wrong body and moving them on to puberty blockers and cross-sex hormones.

21. In the last 2 years there has been increasing international health opinion caution about the lack of evidence supporting aspects of the 'gender affirmation' approach including lack of follow up and uncertainties about the long term effects and safety of puberty blockers and cross-sex hormones. A number of young people who took these to transition their bodies have sued. Keira Bell (and another person) sued the UK NHS Tavistock Gender Clinic for giving her puberty blockers and hormones at 16 when she could not give informed consent

prohibited from returning as long as that relationship continues;

- using a youth group session to provide 'support' through group prayer to a young person to help them fight a desire to act on their feelings of same-sex attraction;
- running a peer-to-peer support group designed to coach a person who is exploring or questioning their gender identity to accept the sex they were assigned at birth.

[56] See Jiska Ristori and Thomas Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1*) International Review of Psychiatry* 13; See Jiska Ristori and Thomas Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1) *International Review of Psychiatry* 13.

and won at first instance. The litigation led the NHS to commission a review by senior pediatrician Dr Hillary Cass.[57] Following the UK Cass Review in June 2023 the NHS has decided that puberty blockers will not be prescribed to under 18s for gender dysphoria, except in exceptional circumstances, because of a lack of evidence to support their safety or clinical effectiveness.[58] Similar reviews and changes have occurred in Sweden, Norway and Denmark.

22. It is remarkable that the Consultation Paper does not discuss this debate or these developments. It proposes to ban practices which seek to change or suppress a person's gender identity but exempts services supporting gender transition or gender expression and gender affirming care. The proposed law would thus preference the view that the correct treatment for a young person experiencing gender incongruence is to commence puberty blockers and hormones and body transition. But it creates a risk of illegality for any other medical approach (and support for it by parents or family) as being illegal suppression (e.g., holistic assessment of all causes of distress and psychotherapeutic support without using puberty blockers and cross-sex hormones). This legal threat over one medical approach but not the others places a legislative thumb on the scales of medical and psychiatric decision making. But the government cannot know what is the best medical course for any individual person and should not be weighting medical decisions with the threat of criminal and civil consequences. The Consultation Paper also ignores de-transitioners[59] like Keira Bell and Chloe Cole and ignores the risks of litigation by them asserting that they were put on blockers and hormones without informed consent. Jay Langadinos has a claim in NSW Supreme Court against a psychiatrist and there is a slew of cases in the USA by detransitioners. Senior physicians at the Westmead Clinic have raised concerns over gender affirmation bias. As reported widely only last month, one very large Australian medical insurer has withdrawn cover for medical practitioners providing gender affirming services for minors.

Given the above disputes as to appropriate medical practice and legal liability risks, there are good reasons to omit gender identity from the proposed legislation. *But if it is included,* there must be no specific exemptions privileging transition assistance and gender affirming care over holistic care and psychotherapeutic support. Any health service provider exemption should be neutral and providers using either approach will have to bring themselves within that.

Health Service Providers

23. Further extensive consultation is needed with health practitioners to ensure that the legislation gives clarity that a biopsychosocial approach to the diagnosis and assessment of gender incongruence in minors, and the provision of psychotherapeutic support, is in no way

[57] https://cass.independent-review.uk/publications/interim-report/
[58] As reported in the BMJ https://www.bmj.com/content/381/bmj.p1344.full
[59] See e.g. https://segm.org/first_large_study_of_detransitioners

discouraged by the legislation.[60] Adults should also be able to consent to medical care that takes a 'holistic' approach and should not be prohibited from accessing medical care and therapies that are anything other than completely affirmational treatment. A possible model is the following exemption for health services providers, adapted from Chapter 5B of Public Health Act 2005 (Queensland), instead of narrower, and unbalanced, Victorian version:

> *A conversion practice does not include any practice by, or on the advice of, a registered health service provider that, in the 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.*

Objects of the Act

24. Include within the objects of the Act a recognition of the importance of parental rights and of associational and religious freedom in order to assist interpreters of the legislation in giving appropriate weight to these liberties. Such should also be included in any provision listing relevant factors that a decision-maker must have regard to.[61]

Incidental Effect of the Law

25. The proposal should ensure that religious institutions, schools and faith-based charities do not lose their accreditations or charity status if they breach the laws.[62]

26. The proposal should not extend extra-territorially.

If Gender Identity is included within the scope of the prohibition on conversion practices, the following exemptions will be necessary.

Parents, Families and Children

27. Prima facie, where a child identifies as 'transgender' or 'non-binary' but the parents encourage their child to act in conformity with their natal sex, this could arguably constitute

[60] Support for this view may be found in several submissions to the Queensland Parliament Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee Inquiry into the *Health Legislation Amendment Bill 2019* including Professor Patrick Parkinson, National Association of Practising Psychiatrists, AMA Queensland, Wilberforce Foundation and Christian Medical Dental Fellowship/Professor John Whitehall. The Report is available at: https://www.parliament.qld.gov.au/work-of-committees/committees/HCDSDFVPC/inquiries/past-inquiries/HealthLAB2019

[61] See, for e.g, section 53ZE(3) *Human Rights Commission Act 2005* (ACT).

[62] See, for e.g., section 35-10(1) of the *Australian Charities and Not for profits Commission Act 2012* (Cth) and the *Education and Training Reform Act 2006* (Vic) and accompanying *Education and Training Reform Regulations 2017* (Vic).

'coercion' for the purposes of the definition of a conversion practice. For the avoidance of doubt, there should be an explicit exception to protect parental and family rights as follows:

> *A conversion practice does not include a practice engaged in by parents and, when applicable, legal guardians, and their affiliates, to ensure the religious and moral education of their children in conformity with their own convictions.*

Religious Institutions and Schools

28. For consistency, an exception should be provided to religious institutions and schools that is based upon the existing exceptions in the *Anti-Discrimination Act 1977* (NSW). In respect of educational institutions, to offer an allowance for the exercise of parental rights, but not cover the faith-based schools to which parents send their child for education in exercise of that right would be inconsistent. This would have the effect of excluding the ban on conversion practices from applying to religious instruction and teaching and prayer and counselling which is based on religious beliefs in relation to sexual morality and gender including beliefs. It would also ensure that schools that are concerned to maintain teaching and practices based upon a traditional sexual ethic may continue to do so.

Appendix B – The Consultation Paper's Flawed Understanding of 'Harm'

1. Alarmingly, the Consultation Paper proposes a model virtually identical to the Victorian model. The Consultation Paper's key formulation of the religious exception is: 'practices that … constitute the expression of a belief or the delivery of religious practices, such as sermons, unless they have a primary purpose of changing or suppressing an individual's sexual orientation or gender identity.'[63] The qualification that a religious practice such as a sermon or prayer must have the 'primary purpose' of changing or suppressing someone's SOGI will provide no meaningful difference to the Victorian law in protection for legitimate religious activity. Religious teaching of many Muslim and Christian and other religious communities is that God requires believers to limit sexual relations to man-woman marriage and to heterosexual activity and encourages self-control in relation to the expression of desire. Religious groups teaching what they believe God asks of people in these matters should not fall into the category of 'harm' and should not become illegal.

2. The Consultation Paper states: 'people are free to believe and express their beliefs as long as this does not intend to directly cause harm.'[64] The statement illustrates the objection of religious institutions to the proposal proceeds from its foundational element: the legislation pivots on a contested notion of *harm*. The Consultation Paper proposes that harm be determined by a 'reasonable person'.[65] Living in accordance with religious doctrines contributes to the good of the individual and the good of society. It is the ultimate beneficial expression of their humanity. However, the legislation conceives of those beliefs as harmful. Under the proposal that is an attempt to change a person's SOGI. Although the Consultation Paper states, 'people are free to believe and express their beliefs as long as this does not intend to directly cause harm',[66] the proposal makes clear that it is its understanding of harm that prevails. This core conceptual conflict means that the proposed exception for religious institutions is effectively inoperable.

3. Further the Consultation Paper proposes that the prohibition will apply to activities that have 'a primary purpose of changing or suppressing an individual's' SOGI.[67] This gives rise to unnavigable questions of fact and degree and results in arbitrary distinctions and outcomes. Purpose will be determined in light of activity. What is the relevant bundle of activities that will be weighed in considering whether purpose is 'predominant'? If a 30 second prayer in respect of a person's SOGI is provided (on their request) accompanied by a two minute prayer for the person's family, although we are given no direction, one might think that the SOGI focussed prayer is 'not predominant'. However, if the next engagement with the person occurs two months later when they attend a forty-minute sermon in which the traditional view of marriage and sexuality is affirmed does this in conjunction with the former prayer now comprise a 'predominant' purpose? The proposal will bring all religious activities, such as the delivering of sermons, under scrutiny from complainants and the State. The example illustrates

[63] *Banning LGBTQ+ Conversion Practices Consultation Paper* (n 2) 16.
[64] Ibid.
[65] Ibid 21.
[66] Ibid 16.
[67] Ibid.

the absurdity of the proposition and the calculations that will need to be made by officers of the State in policing the proposal. This level of imprecision will dramatically curtail religious practices in this State, with cautious religious leaders understandably erring on the side of caution.

Appendix C – Existing New South Wales Law

1. The current complaint regime regulating New South Wales health practitioners under the *Health Care Complaints Act 1993* (NSW) already provides an ability for the Health Care Complaints Commission to investigate a complaint that a health practitioner has engaged in conversion therapy. This was the understanding underpinning the analysis of the law undertaken by the Parliamentary Committee on the Health Care Complaints Commission in its 2014 Report 5/55 titled 'The Promotion of False and Misleading Health-Related Information and Practices'.[68]

2. In 2014 the NSW Gay and Lesbian Rights Lobby wrote to the NSW Parliament Committee on the Health Care Complaints Commission endorsing this view in the following evidence provided to the Committee:

> *Conversion therapy involves attempts to re-orient a person's SOGI, supposedly underpinned by a religious ethos … [we] welcome the recent amendments through the Health Care Complaints Act 1993 (NSW) that enable the Commission to investigate the delivery of health services by a provider that directly affects the care or clinical management of a client and that may not arise from a singular complaint. We note that, encouragingly, this may lead to attempts to address systemic issues, rather than merely individual complaints, notwithstanding their own merits.*[69]

3. In addition, health practitioners in New South Wales are required to comply with the *Health Practitioner Regulation National Law 2009* (NSW).[70] If conversion therapy by health practitioners is already banned in NSW, the question rises as to why such legislation is required? The case for an expanded regime is has not been made out.

[68] Parliamentary Committee on the Health Care Complaints Commission *The Promotion of False and Misleading Health-Related Information and Practices* Report 5/55, 20 November 2014, https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1954

[69] Justin Koonin, Convenor, NSW Gay & Lesbian Rights Lobby, Committee on the Health Care Complaints Commission, Submission 35, 07 February 2014.

[70] The Regulations are made pursuant to section 100 of the *Public Health Act 2010* (NSW).