Gay Men's Network

PARLIAMENTARY BRIEFING

Amendment NC30 (Conversion Practices Prohibition) to the Criminal Justice Bill moved by Alicia Kearns MP

Table of Contents

Introduction

1. Conversion legislation globally criminalises practices aimed at modifying a person's sexual orientation or "gender identity". While this legislation is well intended, it leads to far reaching and unintended consequences. These consequences principally flow from enacting the concept of "gender identity" into criminal law, and thereby chilling clinical practice in the field of paediatric gender medicine. This is of serious concern to GMN because evidence shows homosexuals are overrepresented at youth gender clinics[1] and conversion practices bans have the effect of limiting clinical inquiry.

2. These concerns were recently reflected in evidence placed before the Women and Equalities Select Committee from staff at the Tavistock clinic in the following terms: "Dr Natasha Prescott, a former GIDS clinician reported in her exit interview from the Tavistock that 'there is increasing concern that gender affirmative therapy, if applied unthinkingly, is reparative therapy against gay individuals, i.e. by making them straight' and Dr Matt Bristow, a former GIDS clinician, reported to Hannah Barnes that he came to feel that GIDS was performing 'conversion therapy for gay kids[2]'

Summary of legal problems with the amendment

3. Amendment NC30 moved by Alicia Kearns MP appears to be a modified version of a Private Member's Bill moved by Lloyd Russell Moyle MP on 01.03.2024. This modified bill contains many of the same problems we identified at that time[3] and adds to them with defects of a fundamental nature in a criminal statute, namely:

   a. the amendment fails to define a key term, "gender identity".

   b. no DPP or Attorney General's permission requirements are contained in the amendment meaning a post office scandal private prosecution situation is possible.

   c. the statutory defences are in some cases circular or otherwise ineffective because they misunderstand legal concepts like parental responsibility.

[1] The most recent reported data from GIDS in England demonstrates that older patients expressing a sexual orientation were overwhelmingly not heterosexual. 67.7% of adolescent female patients were recorded as being attracted to other females only, 21.1% were bisexual, and only 8.5% were listed as heterosexual. Among adolescent male patients, 42.3% were attracted only to other males, 38% were bisexual, and only 19.2% said they were attracted only to females. Holt V, Skagerberg E, Dunsford M. Young people with features of gender dysphoria: Demographics and associated difficulties. Clinical Child Psychology and Psychiatry. 2016;21(1):108-118. doi:10.1177/1359104514558431

[2] https://committees.parliament.uk/publications/43255/documents/215243/default/

[3] https://www.gaymensnetwork.com/letters-and-responses

We take the view that these defects considered collectively mean the amendment is not compliant with the Human Rights Act 1998 and is therefore vulnerable to a declaration of incompatibility application.

The Wide net of criminal liability and failure to define core terms

4. This amendment provides via Clause 1 and 2 that

   i. a single act or series of acts,

   ii. the "premeditated intent" of which,

   iii. is to change, replace or negate,

   iv. an actual or perceived sexual orientation or "gender identity" (or lack thereof),

   v. be a criminal offence if not excused by a defence in clause (6)

5. We draw attention to the terms "gender identity" (and to "transgender identity") at clause 6 (a) (ii) which we take to be a drafting error and the intent be that it means the same. We also draw attention to the potentially wide meaning of the word "change".

6. It is unprecedented to attempt to enact the concept of "gender identity" into law and not define it. All enacted comparative legislation globally contains a definition, the Scottish proposed legislation in this area attempts a definition, and the Private Member's Bill (PMB) in this area sought to rely on the 2020 Sentencing Act for this purpose. Criminal Courts require clear definitions of terms to direct juries accurately and in accordance with the intent of parliament. It is highly unusual to create a criminal offence with no definition at all of a key term.

7. Any defendant prosecuted for this offence for the "gender identity" variant would be bound by criminal law to accept that "gender identity" exists. That requirement cannot be reconciled with the existing civil law position set out in Forstater v GCD[4] that a person's view that "gender identity" does not exist is a protected characteristic belief. This amendment thus creates a serious inconsistency in law. In the civil sphere "gender identity ideology" is correctly treated as a contested mind/body dualist theory, but this amendment would compel a defendant in a criminal context to accept it as the basis for their prosecution.

8. With "gender identity" left undefined, the use of the potentially wide term "change" raises areas of serious concern. By way of example, a concerned parent who refuses to privately

[4] https://inews.co.uk/news/long-reads/trans-conversion-therapy-patient-speaks-out-psychiatrist-reported-1641330
[4] https://www.legislation.gov.uk/ukpga/1985/23/section/17

source puberty blockers for a teenager could be accused of the "premeditated intent" of "changing" a "gender identity" if "gender identity" is taken to include manifestations of that concept.

Ability of Private Prosecutors to misuse this amendment and potential costs issues

9. This amendment provides for an offence which may be privately prosecuted as per s.6 of the Prosecution of Offences Act 1985. This is highly undesirable in a political space where fiercely contested public litigation is a norm. Activists in this area have previously targeted clinicians[5] regarded as political opponents and there is every reason to expect crowdfunded private prosecutions designed to politicise the field of gender paediatrics. This would be a misuse of the criminal law in a fraught area where recent developments around puberty blockers suggest gender activist are motivated by ideology, rather than emerging NHS England clinical best practice.

10. The amendment at clause 5 creates a fine only, magistrates only "summary" offence and would limit the ability of private prosecutors to claim state funding because summary only offences are exempt from the relevant costs regime[6]. This is not an end to the matter though because s.17 (1) (b) provides costs may be claimed from central funds in proceedings before the High Court and Supreme Court. Such cases are extremely likely because core terms are left undefined in this legislation, and these would be mostly likely be high-cost cases turning on complex questions of human rights and Parliament's unclear intent caused by the lack of definition identified above.

Circular and ineffective statutory defences

11. Clause 6 [7]of the amendment substantially reproduces defences from the previous PMB on this subject. It reproduces the same defects in that bill and the defences are ineffective, circular or misunderstand legal concepts like parental responsibility. The defences raise the following issues:

    (i) The religion defence is not a statutory defence at all because it cannot apply where a conversion practice has taken place. This means it is not an excusatory defence in criminal law[8].

[6] Prosecution of offences Act 1985, s.17 (1) (a)
[7] Clause 6 (a) (i)
[8] Clause 6 (a) (i)

(ii) The "approval/disapproval" defence is vague, and "disapproval" is not defined. It also introduces a new concept of "transgender identity", and it is not clear whether this means the same as "gender identity" which features elsewhere[9].

(iii) The "parental responsibility" defence[10] applies only where a person is "exercising" that responsibility, this will be extremely difficult for any parent to prove as against a Gillick competent child. The exercise of parental responsibility was analysed by Lord Denning MR in Gillick who said "the legal right of a parent to the custody of a child…is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control, and it ends with little more than advice[11]".

(iv) The "health practitioner" defence[12] fails to define what a health practitioner is in law and then goes onto set out a complex three-part defence which places three "reverse burden" on a Defendant. To rely on this defence, a defendant must show on the civil standard, (i) they were complying with "regulatory and professional standards" (which are not defined), (ii) that they were exercising "reasonable professional judgment" and (iii) that they did not commence the treatment with an intention to change, replace or negate a sexual orientation or "gender identity". Placing reverse burdens on Defendants (particularly clinicians or similar) is generally considered to be undesirable and onerous because Defendants are not expected to prove their innocence. Legitimate clinical practice will sometimes have a predetermined outcomes where a confident and clear diagnosis is made.

(v) The "assisting" defence[13] is unclear and undefined and introduces the concept of "therapy" into the amendment which is does not feature in the "health practitioner" defence.

(vi) The "exploring or questioning" defence[14] suffers from the same flaw as the religion defence, it applies only where a conversion practice is not proved and so is not a statutory defence at all.

Human Rights Concerns

12. We take the view that the amendment as drafted is not compliant with the Human Rights Act 1998 and would likely be declared incompatible with the convention for the following reasons:

[9] Clause 6 (a) (ii)
[10] Clause 6 (b)
[11] https://www.bailii.org/uk/cases/UKHL/1985/7.html
[12] Clause 6(c) (i) and (ii)
[13] Clause 6 (d)
[14] Clause 6 (e) (i) and (ii)

Right to a Fair Trial (Article 6)

13. This amendment provides for no definition of "gender identity" at all which is remarkable in this type of legislation and contrary to the Article 6 right that a Defendant understand the case against them in ordinary and clear language. The reverse burdens in clause 6 impose significant and onerous burdens on Defendants and in some cases do not amount to statutory defences at all. A defendant charged with an alleged attempt to change to a "gender identity" must accept the existence of that term as the basis for their prosecution. This deprives a defendant of an article 6 right to an independent tribunal free from bias as to the existence of a contested political concept because the tribunal must operate on the assumption this unevidenced and contested concept exists.

Right to respect for private and family life (Article 8)

14. The amendment makes significant incursions into family life by potentially criminalising parental guidance or regulation that touches on sexual orientation or "gender identity". Difficult conversations that parents have as a matter of course would potentially be criminalised. Further, a parent can only rely on the relevant defence where they are "exercising" parental responsibility (PR). Courts are unlikely to conclude PR is being exercised over Gillick competent teenagers (where prosecutions seem most likely).

Right to freedom of conscience (Article 9) and expression (Article 10)

15. This amendment would significantly curtail both religious and political expression. A similar law passed in Victoria, Australia, led to the domestic human rights body regulating public prayer.

Conclusion

16. GMN continues to share the concern of the Secretary of State for Women and Equalities and members across both houses that there is “evidence that children likely to grow up to be gay (same sex attracted) might be subjected to conversion practices on the basis of gender identity rather than their sexual orientation. Both prospective and retrospective studies have found a link between “gender non-conformity” in childhood and someone later coming out as gay. A young person and their family may notice that they are gender nonconforming earlier than they are aware of their developing sexual orientation”.

17. The fact that this amendment seeks to introduce “gender identity” in criminal law but not to define that term is extraordinary. Gender Identity is a contested concept and potentially imposing criminal liability on parents, teachers and clinicians without a clear definition of what will meet the criteria for prosecution is not the hallmark of responsible legislating. This amendment is poorly drafted and likely to create long and expensive cases in the High Court where all parties will be state funded, and the court is likely to regard the statute as a less than serious attempt to grapple with the many clearly identified problems in this area.

THE DIRECTORS

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