Gay Men's Network

PARLIAMENTARY BRIEFING

CONVERSION PRACTICES (PROHIBITION) PRIVATE MEMBERS BILL FOR SECOND READING

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1 Background

1. Conversion legislation globally criminalises practices aimed at supressing or changing 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]'

2 Consultation process behind the bill

3. The member for Brighton Kemptown has made serious and genuine efforts to reflect concerns such as this in the Conversion Practices (Prohibition Bill)[3] and we thank him for his openness to discussion. That said, we consider that the bill as drafted (i) draws the net of criminal liability far too widely and would risk the prosecution of therapists, counsellors, family members and those providing pastoral guidance (ii) fails to define key terms such as "transgender identity" and "sexual orientation" and (iii) impermissibly interferes with fundamental human rights.

3 The wide net of criminal liability in the bill

4. The bill provides via clause 1, 4 and the Sentencing Act 2020 that:

    a. a single act
    b. the purpose and intent of which
    c. is to change or supress

[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.russell-moyle.co.uk/conversion/

d. sexual orientation or transgender identity
e. be a criminal offence if not excused by a defence in clause 1(2)

We draw attention to the terms “supress”, “sexual orientation” and “transgender identity”.

5. “Supress” in comparative Scottish proposed legislation is defined widely[4], it includes, for example, a concerned parent forbidding an autistic daughter from wearing a breast binder because regulation of clothing is specifically cited as an act of suppression.

6. This bill proposes that the terms “Sexual Orientation” and “transgender identity” mean the same as in the Sentencing Act 2020, this is problematic because that act defined neither term[5]. It is important to note that the meaning of “sex” (and therefore sexual orientation) is not settled in law and a Supreme Court Case on the subject is pending[6]. “Transgender Identity” is similarly problematic because the concept of “identity” is wider than the equivalent protected characteristic[7].

4 Ineffectiveness of statutory defences

7. While Clause 1(2) of the bill makes serious efforts to deal with concerns around prosecutions each defence raises serious issues in the following terms:

   a. The religion defence[8] 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.

   b. The “approval/disapproval” defence[9] is vague and “disapproval” is not defined

   c. The “health practitioner” defence is a complex[10] three-part defence which places three “reverse burden” on a Defendant. The definition of a “health practitioner” at Clause 4 covers most but not all clinical roles, (unregulated therapists, counsellor, helpline operators or online forum moderators would not qualify). To rely on this defence, a health practitioner must also prove to the civil standard (i) they were complying with regulations (this term is not defined) (ii) that the action they took was reasonable and (iii) that there was no “predetermined outcome”. Placing reverse burdens on Defendants (particularly clinicians or similar) is generally considered to be undesirable because Defendants are not expected to

[4] https://www.gov.scot/publications/ending-conversion-practices-scotland-scottish-government-consultation/pages/6/
[5] See Section 66(6) SA 2020 https://www.legislation.gov.uk/ukpga/2020/17/section/66/enacted
[6] https://forwomen.scot/16/02/2024/appeal-to-the-uk-supreme-court/
[7] https://www.legislation.gov.uk/ukpga/2010/15/section/7
[8] Clause 1(2)(a)
[9] Clause 1(2)(b)
[10] Clause 1(2)(c)

prove their innocence. Legitimate clinical practice will sometimes have a predetermined outcomes where a confident and clear diagnosis is made.

d. The "assisting" defence[11] is unclear and undefined.

e. The "exploring or questioning[12]" defence 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.

f. The "parental responsibility[13]" defence applies only where a person having parental responsibility (i) is exercising it and (ii) where they prove on reverse burden that the welfare of the child was their paramount consideration. As children get older parental responsibility in law is "exercised" less and less[14]. Requiring a parent to prove that welfare was not simply a consideration, but a "paramount" consideration is onerous and likely impossible for a Defendant parent to prove.

5 Human Rights concerns.

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

- Right to a Fair Trial (Article 6)

  A prosecution alleging a parent supressed an identity by regulating clothing would require a parent to accept that such an identity exist. That is contrary to Article 6 which requires criminal tribunals be independent. It would also compel belief in the criminal sphere in such a concept while disbelief in such a concept is a protected characteristic in the civil sphere. That would create a serious inconsistency in law. The bill leaves key terms undefined which is contrary to the Article 6 right that a Defendant understand the case against them in ordinary and clear language. The reverse burdens in clause 1(2) impose significant and onerous burdens on Defendants and in some cases do not amount to statutory defences at all.

[11] Clause 1(2)(d)
[12] Clause 1(2)(e)
[13] Clause 1(2)(f)
[14] See speech of Lord Denning in Gillick v West Norfolk and Wisbech AHA [1986] AC 112

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

  The bill makes significant incursions into family life by potentially criminalising parental guidance or regulation that touches on sexual orientation or "transgender 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 as outlined above. This is highly likely to be viewed as significant state overreach by domestic and supra national courts.

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

  This bill would significantly curtail both religious and political expression. A similar bill passed in Victoria, Australia, led to the domestic human rights body regulating public prayer[15]. The fact that criminal liability can trigger from a single incident and the wide meaning of the term "supress" casts the net of criminal liability so widely the offence is likely to be declared incompatible with the convention.

6 Conclusion

9. GMN shares the concern of the Secretary of State for Women and Equalities and members across the house 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"*. While the member for Brighton Kemptown has made significant efforts to deal with such concerns our position is that a bill based on the self-reported phenomenon of "identity" and the wide term "supress" might, despite best efforts, perversely fuel the very problem that it intends to solve.

THE DIRECTORS

GAY MEN'S NETWORK

[15] See speech of Baroness Foster https://hansard.parliament.uk/lords/2024-02-09/debates/DB690A34-D945-4EDA-9178-DD6357498F45/ConversionTherapyProhibition(SexualOrientationAndGenderIdentity)Bill(HL)