



BEYOND A BAN, TOWARDS JUSTICE:

SUBMISSION TO THE VICTORIAN CONSULTATION INTO
LEGISLATIVE OPTIONS TO IMPLEMENT A BAN ON
CONVERSION PRACTICES

CONTENTS

Summary of our position.....	2
1. What is banned?.....	5
(a) Health, education and welfare service settings.....	5
(b) Other settings.....	8
(c) SOGI conversion practices outside of jurisdiction.....	9
2. Who is protected?.....	9
3. Who is regulated?.....	10
4. If only professionals are regulated, must the conversion practices be within the scope of their professional practice?.....	11
5. Should conversion practices be regulated by the criminal law or the civil law or both?	11
(a) Redress scheme for survivors.....	12
(b) Consequences for relevant persons in health, education and welfare services settings.....	13
(c) Protective orders and information sharing.....	13
(d) Penalties for commercialisation of SOGI conversion practices.....	14
(e) Voluntary engagement from religious leaders and organisations.....	14
(f) Training.....	15
6. How do we address concern about freedom of religion?.....	15

ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ legal advocacy and campaigning organisation dedicated to achieving equality for LGBTIQ+ people. We work to amplify the voices of our community and achieve positive legal, policy and social change for LGBTIQ+ people and their families in Australia. Equality Australia has been built from the Equality Campaign, which ran the successful campaign for marriage equality, and was established with support from the Human Rights Law Centre.

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

SUMMARY OF OUR POSITION

Equality Australia welcomes the opportunity to provide a submission in response to the Victorian Government's discussion paper regarding *Legislative options to implement a ban of conversion practices*.

We acknowledge that the Victorian Government has already taken significant steps to address sexual orientation and gender identity (SOGI) conversion practices, including:

- establishing the Health Complaints Commissioner with a mandate in respect of 'health services',¹ broadly defined to allow complaints to be made and investigations to be conducted in respect of therapeutic counselling and psychotherapeutic services involving SOGI conversion practices;²
- referring to the Health Complaints Commissioner an inquiry into conversion therapy;³
- participating as a member of the reference group to the *Preventing Harm, Promoting Justice* report;⁴ and
- funding further research and education initiatives and providing support to survivors.

We welcome the opportunity to contribute to the consideration of further action by the Department of Justice and Community Services.

SOGI conversion practices, generally understood, are those practices which seek to change or suppress the affirmation of an individual's sexual orientation or gender identity. SOGI conversion practices are varied,⁵ have historically evolved,⁶ and can include counselling, pastoral care, targeted programs, informal groups and publications directed to the purpose of changing or suppressing the affirmation of an individual's sexual orientation or gender identity.⁷ These practices are founded in belief systems that 'people who are not heterosexual and cisgendered are in some ways especially broken, disordered and sinful – more so than other humans', and that lesbian, gay, bisexual and trans people 'should seek healing for their sexual brokenness and, until such time as they are 'healed', live chaste and celibate lives'.⁸ Practices attempting to change sexual orientation or gender identity are harmful, cause untold and enduring damage and pain to individuals,⁹ and find no support in the medical or psychological professional community.¹⁰

Equality Australia stands with survivors of SOGI conversion practices, affirming their right to tell their stories on their own terms. We seek to understand their experiences, acknowledge their tribulations, and work with them to move towards a best practice and world leading response which achieves redress and justice. We have consulted with survivors in settling this submission, but do not purport to speak for them, and this submission should obviously not be taken as speaking on their behalf. We merely lend our legal and policy expertise to support the

¹ *Health Complaints Act 2016* (Vic) (HCA), s 3(1) (definition of *health service*).

² HCA, ss 6-7, 45-47 and 103.

³ Health Complaints Commission (HCC) (2018) '[Inquiry into conversion therapy](#)', 17 May.

⁴ Timothy Jones, Anna Brown, Lee Carnie, Gillian Fletcher and William Leonard (2018) *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*, Melbourne: GLHV@ARCSHS and the Human Rights Law Centre (*Preventing Harm, Promoting Justice Report*).

⁵ *Preventing Harm, Promoting Justice Report*, pp 31-36, 58-63.

⁶ *Preventing Harm, Promoting Justice Report*, pp 11-19.

⁷ *Preventing Harm, Promoting Justice Report*, pp 27, 31-36.

⁸ *Preventing Harm, Promoting Justice Report*, p 19.

⁹ *Preventing Harm, Promoting Justice Report*, p 21, 38-41.

¹⁰ Australian Medical Association (2002) *AMA Position Statement: Sexual Diversity and Gender Identity*, [6.10]; Australian Psychological Society (2015) *APS Position Statement on Psychological Practices that attempt to change Sexual Orientation*; Psychology and Counselling Federation of Australia (2018) *Scope of Practice for Registered Counsellors*, p 20; Royal Australian & New Zealand College of Psychiatrists (2019) *Sexual orientation change efforts: Position Statement 60*.

Beyond a Ban, Towards Justice: Submission to the Victorian consultation into legislative options to implement a ban on conversion practices, December 2019

development of a whole-of-government, whole-of-community response, informed by the calls for reform made in the [Sexual Orientation and Gender Identity Change Efforts \(SOGICE\) Survivor Statement](#), [Conversion Therapy in Australia](#) report by Anthony Venn-Brown, the [Preventing Harm, Promoting Justice](#) report and the Victorian Health Complaints Commissioner's [Report on the Inquiry into Conversion Therapy](#).

Carefully crafted legislative 'bans' on particularly harmful practices should be part of the response but will not, in and of themselves, address the lasting and profound damage that has already been inflicted on survivors, or actively engage with the religious and cultural communities who are necessary participants in a journey to ensuring these practices are not encouraged or promoted. That is a major failing of international responses to SOGI conversion practices to date. While we can draw on international precedents, we think that Victoria can do much better.

Given SOGI conversion practices manifest in a range of ways and are based in a range of religious and culturally-based ideologies, a multifaceted response to a complex issue is necessary. It is not possible or appropriate to criminalise or penalise thoughts or beliefs,¹¹ nor would a blanket penalisation of conversion practices always be in the best interest of survivors. Owing to a profound and deeply held desire to reconcile their own sexual or gender identity with their faith, a survivor today may have yesterday promoted, or encouraged others to engage in, SOGI conversion practices.¹² Like responses to other complex social and cultural issues, a blunt punitive approach would not necessarily discourage such practices, but instead drive them underground, and discourage people from engaging in the conversations necessary to emerge, without fear of penalty, from these places of darkness. We know this because merely imposing hard-edged bans on culturally or religiously-based practices, such as female genital mutilation and forced marriages, have not been in and of themselves enough to stop these practices,¹³ notwithstanding the important normative role that law can play in setting clear standards.

That is why Equality Australia calls for a roundtable with survivors and key agencies already working in the child protection, family violence, human rights, healthcare regulation, consumer affairs and law enforcement space. The purpose of the roundtable should be to explore existing powers and functions available to address SOGI conversion practices, agree on principles for taking the issue forward with additional legislative measures if and where necessary, and identify where this program of work should sit so there is clear ownership of, and an enduring effort to address, the issue. Importantly, our current understanding of the nature of SOGI conversion practices and the harms they cause is still evolving. The analysis and conclusions below reflect our current thinking, and this may change after further consideration, particularly following the further research and consultation we recommend.

Equality Australia supports the development, in consultation with survivors, of a comprehensive response to addressing the issue of SOGI conversion practices that includes:

1. **Redress.** A redress scheme which provides survivors with funding for appropriate counselling addressing past trauma from SOGI conversion practices.¹⁴ Such a scheme would require a modest financial investment from the Victorian Government. The redress scheme could also fund education campaigns on the harm caused by SOGI conversion practices and further research into its effects. The scheme should

¹¹ International Covenant on Civil and Political Rights (ICCPR), art 18(1); United Nations Human Rights Committee, [General Comment No. 22: The right to freedom of thought, conscience and religion \(Art 18\): 30/07/93](#), CCPR/C/21/Rev.1/Add.4 (General Comment No. 22), [3].

¹² Preventing Harm, Promoting Justice Report, p 27.

¹³ See, for example, *The Queen v A2 and ors* [2019] HCA 35 (case of female genital mutilation offence in NSW); Marcus Costello and Elise Potaka (2018) ['It happens here: Underage forced marriage in suburban Australia'](#), *The Feed*, 23 February.

¹⁴ While the funding should at least be prospective, recognising that addressing past harm has inflicted a financial burden on survivors to date, the Government should consider extending the scheme to allow some reimbursement for past psychological services which have already been procured for the purposes of recovery.

be developed in consultation with survivors and informed in its work by an expert panel that includes survivors. The aim of the redress scheme should be healing and prevention, not punishment. It could also consider the application of principles of restorative justice, such as by establishing a process for a mediated dialogue between survivors and persons who have engaged in SOGI conversion practices to promote healing and understanding.

2. **Prohibition.** We support carefully crafted legislative prohibitions on SOGI conversion practices in health, education and welfare¹⁵ service settings (including for teachers, counsellors, social workers, youth workers, paid carers, pastoral care workers, health professionals and providers of any service funded by the Commonwealth or the State of Victoria in these settings). These should ensure no taxpayer dollars are used to fund, support or encourage SOGI conversion practices and persons working in these settings who hold positions of trust are not engaging in or promoting SOGI conversion practices. Criminal offences should prohibit attempts to remove a person from Victoria for the purposes of engaging in SOGI conversion practices which are otherwise prohibited in Victoria.
3. **Protection.** Outside of health, education and welfare service settings, we support:
 - a. prohibitions on a commercial market in, or profiteering from, SOGI conversion practices;
 - b. protections from SOGI conversion practices for children, vulnerable people who are unable to consent and for all persons who do not consent; and
 - c. giving consideration to whether there is a need for further protections for adults in cases where serious harm has occurred or is likely to occur from SOGI conversion practices.
4. **Change.** We support encouraging religious institutions to voluntarily make statements denouncing SOGI conversion practices and demonstrating their commitment by voluntarily contributing to the redress scheme. We also support training for health, education and welfare professionals, including school chaplains, to educate them on the harms caused by SOGI conversion practices in the context of their professional obligations.

We have responded to each of the topics in the discussion paper using the same headings as in the paper.

¹⁵ When this submission using the term 'welfare' service settings, it means broadly government provided or funded services, such as human services, disability care services, aged care services, and child welfare and protection services including adoption and fostering services.

1. WHAT IS BANNED?

DISCUSSION QUESTIONS:

Do you agree with the HCC's definition?

Would you suggest any changes?

Should the definition of conversion practices be broad enough to capture the practices that do not involve health services or counselling?

What treatments and practices should be expressly excluded from the definition?

When considering prohibitions or regulations regarding SOGI conversion practices, it is not our preference to consider a definition of SOGI conversion practices in isolation of its context. This is because prohibiting SOGI conversion practices in an indiscriminate way may have unintended and/or damaging consequences, including:

- driving SOGI conversion practices underground and thereby making it harder to drive change through education and to reach survivors who wish to access help;
- potentially penalising survivors who were themselves involved in referring people into SOGI conversion practices in the past;
- limiting the freedom of thought, conscience and religion in an impermissible way, recognising that the freedom to manifest religion is not absolute and may be subject to such limitations as are prescribed by law and are necessary to protect public safety, health or the fundamental rights and freedoms of others.¹⁶

Accordingly, these comments provide some observations about how a definition of SOGI conversion practices could be approached in particular regulatory contexts, but the definition will ultimately need to be considered in the context of any proposed legislation.

(a) Health, education and welfare service settings

There is a strong case for prohibiting SOGI conversion practices in health, education and welfare settings because of the position of trust that these professionals hold and/or because public funds should not be used to fund discredited and harmful SOGI conversion practices.

The definition of SOGI conversion practices should include all professionals working in health, education and welfare settings who hold positions of trust (including by holding themselves out to be in such positions), or who provide health, education and welfare services which are publicly funded or regulated. A list of such professionals is set out in 3. *Who is regulated?* below and includes teachers, counsellors, social workers, paid carers, pastoral care workers in schools, and other health professionals. The prohibition should include engaging in or promoting SOGI conversion practices in these settings.

A DEFINITION OF SOGI CONVERSION PRACTICES

There is a need for a different approach to defining conversion practices when considering, on the one hand, public policy responses to the phenomenon, and on the other hand, a suitable definition for the purpose of a legislative response. This is because a legislative definition requires specificity in order to identify and capture the relevant

¹⁶ ICCPR, art 18(3); General Comment No. 22, [8].

conduct and any mental element. Further, the definitions of each practice to be captured by legislation must be considered and drafted appropriately to the overall context rather than in isolation. Beyond a legislative definition for specific practices, we would encourage the Victorian Government to fund its further research and education work in this area to tackle the broader social phenomenon, including the ideology, that lies at the heart of conversion practices.

In respect of a legislative definition of SOGI conversion practices, the Health Complaints Commissioner definition serves as a useful starting point but is too broad in some respects and too narrow in others.

The definition is too broad by its reference to 'sexual orientation' and 'gender identity' generally. A better definition would squarely connect SOGI conversion practices with the problematisation of non-heterosexual sexual identities, sexual attractions to people of the same gender or more than one gender, and the affirmation of a gender identity different to that assumed at birth. Otherwise, the general reference to 'sexual orientation' and 'gender identity' results in the need for specific exclusions for sexual orientation-neutral or gender affirming practices.

In terms of gender identity and expression, it would be preferable if SOGI conversion practices were not defined in a way which treated the *affirmation* of a self-defined gender identity as, *prima facie*, a conversion practice needing an exception. Nor should the definition simply refer to efforts to 'change gender expressions'. Many innocent practices could be caught up in that definition (for example, a teacher or counsellor encouraging a man or boy to talk about their feelings). These are each aspects of the Health Complaints Commissioner's current definition of conversion practices which could be refined in any future legislation.

In terms of sexual orientation, there is distinction between sexual identity (the way a person identifies their sexuality), sexual behaviour (how and when a person engages in sexual activity), and sexual attraction (to whom, and especially to which gender(s), a person feels romantically and/or sexually drawn towards). These are related and often overlapping concepts, but not always. For example, a heterosexually-identified person can engage in sexual behaviour with a person of the same gender. SOGI conversion practices should be defined to address practices ultimately aimed at changing, suppressing or eliminating non-heterosexual *identities* and *attractions*, but not necessarily sexual behaviour. Otherwise, merely encouraging abstinence or celibacy could become a form of SOGI conversion practice.¹⁷ Again, there are many innocent practices which could include suggesting to someone to refrain from engaging in sexual behaviour, such as during a window period before PrEP treatment becomes effective. The definition also must not exclude the possibility of therapies connected to suppressing or eliminating unlawful or harmful sexual behaviour, such as non-consensual sex.

We have considered four key planks which might form the basis of a potential future legal definition of SOGI conversion practices in health, education and welfare settings. These planks may need further refinement and consultation, including from expert drafters and professionals, to ensure they do not capture practices which are unobjectionable and form part of legitimate medical or psychological practice.

The four planks are:

- **Defining SOGI practices generally.** For example, *SOGI conversion practice* means any practice undertaken, subject to a reasonable defence (see below), by a relevant person¹⁸ in the course of

¹⁷ Some survivors have specifically commented to us that behavioural change, such as abstinence or celibacy, has been held up in ex-gay/ex-trans programs in the past as evidence of success. This shows the importance of a definition of SOGI conversion practices which looks to the purpose for the practice, namely to seek to change, suppress or eliminate the identity or attraction.

¹⁸ 'Relevant person' will need a separate definition broadly as suggested in 3. *Who is regulated?* below and should include health professionals, counsellors, teachers and pastoral workers working in education settings.

providing a health, education or welfare service¹⁹ with the purpose of changing, suppressing or eliminating:

- a person's sexual attraction towards persons of the same gender or more than one gender (**sexual attraction**);
 - the affirmation of a sexual identity which is not heterosexual (**sexual identity**);
 - a person's sense of being a different gender to the one assumed at birth (**gender identity**);
 - the affirmation of a gender identity different to the one assumed at birth (**gender affirmation**).
- **Defining practices to include engaging in and promoting SOGI conversion practices.** For example, defining a *practice* as:
 - counselling, the prescription or administration of medication, or the application of any physical force to the body;
 - publishing, disseminating or causing to publish or disseminate any statement, advertisement or notice²⁰ which promotes or offers to provide (whether for fee or reward or not) any of the practices in the subparagraph above; and
 - knowingly assisting in any of the practices in two subparagraphs above.
 - **Ensuring the definition extends to attempts.** For example, specifying that practices do not have to be effective in changing, suppressing or eliminating sexual attraction, sexual identity, gender identity or gender affirmation to constitute a SOGI conversion practice. This follows from the observation that the harm inflicted on survivors comes from *attempts* to change, suppress and eliminate sexual attraction, sexual identity, gender identity or gender affirmation.
 - **Providing a defence for legitimate practices.** For example, in crafting any defence considering whether a relevant person has a reasonable excuse for engaging in any practice, ensuring a court can have regard to all the relevant circumstances of the case such as:
 - the purpose for which the practice is being engaged in and whether it is a purpose which is consistent with the objects of the legislation;
 - whether the person subject to the practice is capable of consenting to and consents to the practice;
 - whether the practice has the purpose or effect of discriminating against persons on the grounds of their sexual attraction, sexual identity, gender identity or gender affirmation;
 - whether the person engaging in or promoting the practice knew or ought to have known of the likely impact of the practice.

¹⁹ 'Health, education and welfare service' should be defined to include health services, teaching, counselling or care provided in an education setting, or any welfare service provided using public funding or which is publicly regulated (such as foster care or adoption services).

²⁰ Drawing on the language in s 45 of the *Assisted Reproductive Treatment Act 2008* (Vic).

(b) Other settings

Outside of health, education and welfare service settings, prohibitions on SOGI conversion practices should specifically define the conduct which causes harm and deal with those practices. An overly broad definition in these contexts has the risk of resulting in the unintended and harmful consequences we have described above, such as penalising survivors and impermissibly limiting the freedom of thought, conscience and religion.

However, it is here, in these broader community (including religious) settings, that it is important to separate the right to hold a religious belief from the manifestation of that belief in a way which causes harm to others. The unfounded notion that some people are ‘broken’ because they are or exhibit non-heterosexual attractions or identities, or are trans, should not be allowed to manifest in a way which causes harm to others, regardless of whether it is a belief based in religion or not. Whether it should be the law, the community, or a mixture of the two, which responds to this unfounded and harmful idea is the issue. Another issue is *how* the law, the community, or the mixture of the two should respond.

Conversion bans overseas, and proposed reforms domestically, have struggled to engage critically with these issues, either banning conversion practices indiscriminately or failing to address practices outside health service settings. Proposals that proceed on that basis do not adequately address the site of current SOGI conversion practices.

In these settings, Equality Australia would support:

- Prohibitions on publishing, disseminating or causing to publish or disseminate statements, advertisements, notices or documents for fee or reward (for example, books, paid advertisements, etc.):
 - to the effect that it is possible to change or eliminate a person’s sexual attraction or gender identity (as defined above); or
 - which are misleading or deceptive, or are likely to mislead or deceive,²¹ as to the origins or causes of a person’s sexual attraction or gender identity (as defined above).
- Prohibitions on engaging in or promoting SOGI conversion practices in any setting (including private settings such as domestic or family environments) that are performed on a child or on a person who is unable to or does not consent. Such prohibitions should be dealt with by way of a protection regime, rather than a penalisation regime unless and until a protection order is breached. We have also given consideration to whether this regime should apply to adults, given consent to SOGI conversion practices could be procured through deceptive or false claims about the possibility of change, or the origins or causes, of a person’s sexual orientation or gender identity. We address this issue further in section 2 *Who is protected?* below.

In our view, the two additional prohibitions above should continue to operate alongside existing laws that regulate professional conduct and persons making health claims, such as the *Health Complaints Act 2016 (Cth)*, and which outlaw criminal conduct, such as assault laws.²²

In this regard, certain extreme forms of SOGI conversion practices (such as aversion therapy) would remain criminalised under existing laws. A specific offence (or amendments to existing offences) that clarified the application of existing criminal assault laws to the SOGI conversion context could be considered.

²¹ Modelled on section 18 of the Australian Consumer Law, and similar provisions.

²² See Preventing Harm, Promoting Justice Report, p 53-57.

(c) SOGI conversion practices outside of jurisdiction

Equality Australia also supports the creation of a new criminal offence of:

- taking a person outside its jurisdiction;
- to engage in conduct which would otherwise be prohibited within Victoria (e.g. SOGI conversion practices, but also conduct that would breach criminal laws such as assault, forced marriage etc. offences); and
- for the purpose of changing, suppressing or eliminating sexual attraction, sexual identity, gender identity or gender affirmation (as defined above).

This offence would also ensure the protective regime we have recommended could not be evaded by simply taking someone outside the jurisdiction to engage in harmful conduct which could otherwise have been prevented if it had occurred in Victoria.

2. WHO IS PROTECTED?

DISCUSSION QUESTIONS:

Who do you think should be protected?

Should protection be limited to children and people experiencing vulnerability? If so, what vulnerable groups should be included?

Should protection be available to all members of the community?

In what ways do you think the issue of consent is relevant to determining who should be protected?

In health, education and welfare service settings, all persons should be protected from SOGI conversion practices. Persons in positions of trust, or who provide publicly funded or regulated health, education and welfare services (including those who put themselves out as willing to provide such services), should not use these positions to engage in or promote SOGI conversion practices.

In other settings, we have suggested prohibitions on the commercialisation of SOGI conversion practices to protect everyone against misleading and deceptive commercial materials. We have also suggested prohibitions on SOGI conversion practices being undertaken in respect of children and persons who are unable to or do not consent. These prohibitions should be enacted by way of a predominantly protective system, as described below. A flexible protective regime ensures that the law can accommodate the particular circumstances and complexities of each case.

Further consideration could also be given to the extension of the protective regime to adults who ‘consent’ to their own SOGI conversion practices where there are compelling public health or other justifications (e.g. because the practice would result in serious harm to the person, for example death or permanent physical injury). However, where adults ‘consent’ to participating in their own SOGI conversion practices, we have found it difficult at this stage to articulate an appropriate legal threshold beyond which a protective regime could be activated. This is because:

- consistent with the freedom of thought, conscience and religion, adults should arguably be given some latitude to engage in SOGI conversion practices if they freely choose to do so (provided they cause no harm to others); and

- recognising that SOGI conversion practices are in and of themselves harmful, it is difficult to draw a line as to what risk or degree of 'harm' will be deemed acceptable before the law should intervene. Specifically, should the protective regime only activate where there is a risk of serious harm, and if so, should the definition of serious harm include significant mental harm?

Because of these difficulties, we have stopped short of recommending an extension of the protective regime to 'consenting' adults at this stage. We acknowledge the notion of consent is problematic in circumstances where deceptive or false claims have encouraged a person to engage in SOGI conversion practices. We would suggest that this issue is subject to further consultation by the Victorian Government, including with survivors. One potential way forward is to define 'consent' under any protective regime as being limited to situations where there has been full, free and informed consent, in that consent has not been procured through deceptive or false claims about the possibility of change, or the origins or causes, of a person's sexual orientation or gender identity. Further, if a statutory period of review could be included in any legislative reform, the issue could be revisited once the proposed protective regime has been tested.

3. WHO IS REGULATED?

DISCUSSION QUESTIONS:

Who do you think should be banned from providing conversion practices?

Specific professionals or persons? Or everyone who offers conversion practices?

In health, education and welfare service settings, we have suggested that all professionals in positions of trust, or performing duties or providing services which are publicly funded or regulated, be prohibited from engaging in or promoting SOGI conversion practices. This should include:

- teachers
- counsellors
- social workers
- youth workers
- paid carers
- pastoral care workers
- public service employees
- registered health professionals
- providers of 'health services' within the meaning of *Health Complaints Act 2016 (Vic)*, and
- providers of any service funded by the Commonwealth or State of Victoria.

This reflects the twin objectives of ensuring persons who are in a position of trust or who enjoy public funding to perform their duties or provide their services do not engage in or promote harmful and scientifically debunked SOGI conversion practices.

Outside these settings, it becomes more difficult to impose a 'one-size-fits-all' approach, given the variety of circumstances in which SOGI conversion practices may occur and the unintended and harmful consequences from heavy-handed regulation (described above) which we are concerned to avoid. This is not to say that SOGI conversion practices occurring outside health, education and welfare service settings are not harmful or should not be regulated. Rather, the complexity and diversity of these settings requires any intervention to be carefully directed to preventing harm and promoting healing and justice.

4. IF ONLY PROFESSIONALS ARE REGULATED, MUST THE CONVERSION PRACTICES BE WITHIN THE SCOPE OF THEIR PROFESSIONAL PRACTICE?

DISCUSSION QUESTIONS:

Do you think conversion practices should be regulated wherever they occur or only in certain contexts or places?

The regime prohibiting SOGI conversion practices in health, education and welfare service settings should apply to those professionals in the course of their professional practice or service provision, or if acting in a personal capacity, when they hold themselves out as a person of trust because of their professional qualification or experience (for example, such as in the case of Dr Craddock, to whom a young man from his church was referred for a ‘cure’ for homosexuality, in part because of Dr Craddock’s qualifications as a doctor).²³

Outside of these contexts, the general protective regime we discuss below should apply. The professional background of the person may be relevant to the response required under that regime, but the protective regime should apply to all persons, not only professionals in health, education and welfare service settings.

5. SHOULD CONVERSION PRACTICES BE REGULATED BY THE CRIMINAL LAW OR THE CIVIL LAW OR BOTH?

DISCUSSION QUESTIONS:

Do you think conversion practices should be regulated through criminal law, civil regulatory schemes or civil laws, or a combination of these?

What aspects of each approach would be effective in regulating conversion practices?

What aspects of each approach would be less effective in regulating conversion practices?

It is not useful to talk in general terms about civil versus criminal regulatory systems. Part of the problem with looking at the issue from this perspective is to focus too heavily on penalties rather than preventing harm and promoting justice. A creative, flexible and carefully targeted regulatory response will deliver the protection required while creating an environment which enables positive engagement to occur, while supporting the needs of survivors.

It is also impossible to properly formulate a regulatory response without identifying the regulator which ought to be responsible for the response, including who will be responsible for taking any enforcement action. That is why we see the need for a roundtable with survivors and key agencies already working in the child protection, family violence, human rights, healthcare regulation, consumer affairs and law enforcement space.

²³ [Craddock, Dr Mark Christopher](#) [2012] NSWMPSC 8 (23 August 2012).

Beyond a Ban, Towards Justice: Submission to the Victorian consultation into legislative options to implement a ban on conversion practices, December 2019

The roundtable should:

- consider existing powers and functions and clearly map how existing regulatory schemes (such as consumer protection schemes, health complaints, child protection and reporting regimes, whistleblower regimes, and public employment requirements) can work together to address the issue of SOGI conversion practices and provide support to survivors;
- consider what steps could trigger the exercise of a power or function (e.g. a complaint, evidence of the practice occurring through third party or mandatory reports, or an own motion investigation);
- agree on principles for taking the issue forward with additional legislative measures if and where necessary; and
- identify where this program of work should sit so there is clear ownership of, and an enduring effort to address, the issue of SOGI conversion practices.

Given SOGI conversion practices are based in a range of religious and culturally-based ideologies, we should draw guidance from what has worked well (and has not been effective) in regimes that have addressed other complex cultural practices, such as female genital mutilation and forced marriage. The response to family violence and institutional child sex abuse, can also provide us with some guidance.

In answering question 5, Equality Australia would support the following regulatory responses.

(a) Redress scheme for survivors

A central part of any regulatory response should be to ensure services are there to support survivors of SOGI conversion practices. We would support establishing a redress scheme which would:

- contribute to the cost of appropriate counselling and psychological services to support survivors who are working towards healing;
- help put survivors in touch with services that support their healing or help them access justice or support. As an example, a service that assists survivors to access existing financial support where the impacts of SOGI conversion practices have been so debilitating on their mental health and wellbeing;
- commission research and educative materials on the impacts of SOGI conversion practices to further inform initiatives in this area.

A scheme should be established, and administrated, in consultation with survivors and other experts through an established advisory framework, such as an expert panel.

Such a scheme would require a modest financial investment from the Victorian Government and could encourage voluntary contributions from religious leaders and organisations who wish to commit to eradicating SOGI conversion practices as part of a broader community push towards healing and prevention. Ideally, the redress scheme should also allow reimbursement for past psychological services which have been procured for the purposes of recovery by survivors. While these amounts may be relatively small for the Victorian Government, they impose a significant financial burden on individual survivors.

The redress scheme could also consider principles of restorative justice, such as the possibility of a process establishing mediated dialogue between survivors and those who have engaged in SOGI conversion practices.

The aim of the redress scheme should be healing and prevention, not punishment.

(b) Consequences for relevant persons in health, education and welfare services settings

For those professionals who breach prohibitions on SOGI conversion practices in health, education and welfare service settings, Equality Australia would support a range of rehabilitative and disciplinary consequences, as appropriate for each case. The regulatory response should be flexible to accommodate the different circumstances of each case and the person who has engaged in the conduct. The proposed roundtable should investigate the range of regimes which currently exist (such as the Health Complaints Commissioner) and whether existing responses need to be supplemented or extended to enable the full range of rehabilitative and disciplinary consequences.

The outcomes of these processes might include, as and where appropriate in the particular circumstances:

- requiring the attendance of training on the harm caused by SOGI conversion practices
- warnings on repeating conduct
- payment of compensation to victims
- payment of a fine as a general or specific deterrent
- conditions or limitations on licences to practice, or if conditions on practice cannot be imposed directly, referrals to relevant professional bodies with recommendations, and/or
- where SOGI conversion practices have been undertaken by an individual or entity in receipt of public funds, loss of contract and/or requirement to repay taxpayer funds towards the survivor redress scheme.

Who would be best involved in administering this regime, and the interface it has with courts and tribunals, should be the subject of discussion at the roundtable.

(c) Protective orders and information sharing

Where there is evidence that a person is engaging in or is likely to engage in SOGI conversion practices against children or people who are unable to or do not consent, we suggest the possibility of a protective order regime allowing a protective order to be sought by a regulator from a court in respect of a particular person. A protective order could be sought against any person not only those in health, education and welfare service settings. That is, it would apply to anyone, including a person (such as a pastoral care worker) acting in a private, familial or spiritual capacity.

The protective order regime could be supported by establishing information sharing frameworks which:

- clarify the obligation to report (or at least the availability of reporting avenues) when SOGI conversion practices are identified, so that information is passed on through existing reporting frameworks in child protection, consumer protection, public whistleblower regimes and health complaints regimes;
- allow that information to be provided to the relevant regulator responsible for the SOGI conversion practices protection regime; and
- allow information about protection actions to be then provided back to child protection, consumer and other relevant government agencies, to complete the feedback loop.

Protection orders sought through a court could include requirements, as and where appropriate in a particular case, that the person:

- attend training on the harm caused by SOGI conversion practices;

- cease engaging (or not engage) in the specific SOGI conversion practices set out in the order in respect of a particular person or all persons.

In this way, protective orders avoid the effect of prohibiting SOGI conversion practices in a blunt or untargeted way which penalises survivors and squarely focuses on preventing harm. It avoids impermissible limitations on the freedom of thought, conscience and religion because it directly connects the response with preventing harm. The freedom of thought, conscience and religion does not permit causing harm to others.

Breach of an order could then give rise to a criminal offence, resulting in the possibility of penalties and other consequences, including:

- warnings on repeating conduct
- payment of compensation to victims, and/or
- payment of a fine as a general or specific deterrent.

This protective regime should be established in addition to existing criminal and civil mechanisms.

(d) Penalties for commercialisation of SOGI conversion practices

While we recognise that many existing SOGI conversion practices are undertaken without fee or payment, in our view, specific prohibitions on the commercialisation of SOGI conversion practices are necessary to deter the type of fee-paying programs and services prevalent in some other countries.

As set out above, we support prohibitions on publishing, disseminating or causing to publish or discriminate statements, advertisements, notices or documents for fee or reward (for example, books, paid advertisements, etc.):

- to the effect that it is possible to change or eliminate a person's sexual attraction or gender identity (as defined above); or
- which are misleading or deceptive, or are likely to mislead or deceive, as to the origins or causes of a person's sexual attraction or gender identity (as defined above).

Consistent with consumer protection regimes and other advertising restrictions,²⁴ it is appropriate to treat prohibitions on making these statements as either criminal and/or civil penalty provisions. This would penalise and/or criminalise the commercialisation of SOGI conversion practices in the same way that misleading and deceptive conduct in trade or commerce,²⁵ or particular types of advertisements,²⁶ are prohibited.

(e) Voluntary engagement from religious leaders and organisations

To support the work of the redress scheme, religious leaders and institutions could be encouraged to make statements denouncing SOGI conversion practices voluntarily and demonstrating their commitment by voluntarily contributing to the redress scheme.

²⁴ Such as s 45 of the *Assisted Reproductive Treatment Act 2008* (Vic); Part 5-2 of the Australian Consumer Law.

²⁵ Australian Consumer Law, s 18.

²⁶ *Assisted Reproductive Treatment Act 2008* (Vic), s 45;

Beyond a Ban, Towards Justice: Submission to the Victorian consultation into legislative options to implement a ban on conversion practices, December 2019

(f) Training

To support the proposed response, and encourage broader cultural change, we support training for professionals in health, education and welfare services settings (including pastoral care workers in schools and school chaplains) on the harms caused by SOGI conversion practices and relevant professional obligations in this regard.

6. HOW DO WE ADDRESS CONCERN ABOUT FREEDOM OF RELIGION?

DISCUSSION QUESTIONS:

What rights do you think are relevant to consider when determining how best to implement a ban of conversion practices?

Can the impact on these rights be justified in light of the harm conversion practices cause?

The freedom to manifest religion is not absolute and may be subject to such limitations as are prescribed by law and are necessary to protect public safety, health or the fundamental rights and freedoms of others.²⁷

The proposal we have outlined in this submission preserves the freedom of thought, conscience and religion because it is focussed on redressing and preventing harm.

Our proposal is entirely consistent with the freedom of thought, conscience and religion in the following ways:

- It prohibits SOGI conversion practices which, because they are undertaken by persons in positions of trust in health, education and welfare service settings, it is appropriate to ensure those persons do not breach the trust placed in them. These are not inherently religious settings, and to extent that they limit the freedom of thought, conscience and religion at all, they do so to protect public safety, health and the fundamental rights and freedoms of others. Further, no person has a right to expect the state will fund harmful and discredited SOGI conversion practices.
- It prohibits the commercialisation of SOGI conversion practices. The freedom to manifest one's religion does not include the right to profit from it, and to the extent that the commercialisation of SOGI practices touches on religious practice, these limits are necessary to protect public safety, health and the fundamental rights and freedoms of others.
- It protects children and persons unable to or who do not consent to SOGI conversion practices. This may circumscribe certain practices, which are religiously based, but which are harmful to public safety, health and the fundamental rights and freedoms of others. Our protective regime ensures limitations on a person's freedoms are only as necessary as required to protect the safety, health and fundamental rights and freedoms of others.
- It protects the freedoms of religious leaders and organisations who wish to denounce SOGI conversion practices. However, no one is compelled to do so.

²⁷ ICCPR, art 18(3).