Highlighting added by The Christian Institute

THE CHRISTIAN INSTITUTE

re

the Scottish Government consultation on its proposals for the Scottish Parliament to legislate with a view to bringing to an end in Scotland "Conversion Practices" 'related to individuals' "sexual orientation" and separately to their "gender identity"

ADVICE

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1. INTRODUCTION

1.1 I refer to the E-mails from my instructing solicitor, Sam Webster of The Christian Institute, of 9, 10, 12 and 16 January 2024.

1.2 My advice is sought by The Christian Institute in relation to the Scottish Government's latest consultation on its proposals for the Scottish Parliament to legislate with a view to bringing to an end in Scotland "Conversion Practices" related to individuals' (lack of) sexual orientation and separately to their "gender identity".

1.3 In particular, I am asked to consider whether or not any Scottish primary legislation from the Scottish Parliament and/or Scottish secondary legislation from the Scottish Government which substantially reflects the Scottish Government's current consultation proposals may be vulnerable to court challenge, on the basis of its falling outside the legislative competence of the Scottish Parliament and/or the devolved competence of the Scottish Ministers.

1.4 In order to determine issues around whether this proposed legislation falls within the legislative competence of the Scottish Parliament (and to allow its Convention proportionality to be assessed) it is necessary to be clear on the extent to which this proposed new law *changes* the current legal situation as it applies to what the Scottish Government has termed and deemed in its consultation papers to be "harmful conversion practices".

2. THE LAW AS IT CURRENTLY STANDS IN RELATION TO HARMFUL "CONVERSION PRACTICES"

2.1 As I set out in my earlier advice to The Christian Institute of 7 December 2022, following on from the publication of a report from the various individuals selected and appointed by the Scottish Government to form, what the Scottish Government designated as, an "Expert Advisory Group on Ending Conversion Practices", there is a significant body of law which already applies in this area.

Existing obligations of the State under the ECHR

2.2 In *Macatė v. Lithuania* (2023) 55 BHRC 277 the Grand Chamber of the European Court of Human Rights unanimously and unequivocally re-stated that contracting states are obliged under the ECHR to afford equality of respect as between same sex relationships and opposite sex relationships, noting (at § 214)

> "214. … [T]he Court makes clear that *equal and mutual respect for persons of different sexual orientations is inherent in the whole fabric of the Convention*. It follows that *insulting, degrading or belittling persons on account of their sexual orientation, or promoting one type of family at the expense of another is never acceptable under the Convention*.… [T]o depict, as the applicant did in her writings, committed *relationships between persons of the same sex as being essentially equivalent to those between persons of different sex rather advocates respect for and acceptance of all members of a given society in this fundamental aspect of their lives*…..
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> 215. Moreover, the Court is firmly of the view that measures which restrict children's access to information about same-sex relationships solely on the basis of sexual orientation have wider social implications. Such measures, whether they are directly enshrined in the law or adopted in case-by-case decisions, demonstrate that the authorities have a preference for some types of relationships and families over others – that they see different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, are incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.
>
> 216. In the light of the foregoing, the Court finds that where restrictions on children's access to information about same-sex relationships are based solely on considerations of sexual orientation – that is to say, where there is no basis in any other respect to consider such information to be inappropriate or harmful to children's growth and development – they do not pursue any aims that can be accepted as legitimate for the purposes of art 10(2) of the Convention and are therefore incompatible with art 10.."

2.3 And the European Court of Human Rights has reiterated that

> "Article 1 ECHR [which provides that The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention], taken in conjunction with Article 3 ECHR [which specifies that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"], imposes positive obligations on the States to ensure that individuals within their

jurisdiction are protected against all forms of ill-treatment prohibited by Article 3 ECHR, including where such treatment is inflicted by private individuals." [1]

2.4 Thus subjecting a child to "physical or mental violence, injury, or abuse", [2] or subjecting another to "torture or to inhuman or degrading treatment or punishment", already constitute criminal conduct in Scotland. [3]

2.5 A positive obligation has been said to be inherent in Article 3 ECHR (and in the right to respect for private and family life protected under Article 8 ECHR) requiring ECHR States to enact criminal-law provisions providing for effective punishment in respect of serious sexual offences inflicted on children, and to apply these provision *in practice* through effective police investigation and prosecution before the courts. (That said, however, there is no absolute Convention right to <u>*obtain*</u> the prosecution or conviction of any particular person.) [4] The measures required as a result of the positive obligations imposed under Article 3 ECHR "should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge." [5]

2.6 And the case law of the European Court of Human Rights is clear that Article 3 ECHR cannot be limited to acts of physical ill-treatment; it may also covers the infliction of psychological suffering. [6] Hence, treatment can be qualified as "degrading" (and thus fall within the scope of the prohibition set out in Article 3 ECHR):

- if it causes in its victim feelings of fear, anguish and inferiority;
- if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes (whether or not that was the aim);
- if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience; or

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[1] *Romanov v. Russia* [2023] ECtHR 58358/14 (Third Section, 12 September 2023) at § 70

[2] Cf *GRPW v. HM Advocate* [2021] HCJAC 47, 2022 JC 73

[3] qv *O'Hara (Patrick) v. HM Advocate* [2016] HCJAC 107, 2017 SLT 71 which concerned offending described as a "prolonged sadistic attack with elements of humiliation, torture and degradation"

[4] *Szula v. United Kingdom* (2007) 44 EHRR SE19 237 at pp 239-240

[5] *Women's Initiatives Supporting Group and Others v. Georgia* [2021] ECtHR 73204/13 & 74959/13 (Fifth Section, 16 December 2021) at § 68

[6] See e.g. *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022)
"90. The Court has already found in several other cases concerning allegations of ill-treatment motivated by homophobia where the applicants had <u>*not*</u> suffered actual physical injuries that the threshold of Article 3 of the Convention had been attained

- if it shows a lack of respect for, or diminishes, human dignity. [7]

2.7 More particularly the Strasbourg Court has held that:

> "discriminatory treatment can in principle amount to degrading treatment within the meaning of Article 3 ECHR where it attains a level of severity such as to constitute an affront to human dignity. More specifically, *treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3 ECHR*." [8]

2.8 The European Court of Human Rights has also acknowledged that:

> "[G]ender and sexual minorities required special protection from hateful and discriminatory speech because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected.
> ...
> [E]xpression that promotes or justifies violence, hatred, or intolerance in its gravest forms falls under Article 17 ECHR [which under the heading "Prohibition of abuse of rights" provides that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention] and is excluded entirely from the protection of Article 10 ECHR [which provides that "Everyone has the right to freedom of expression. ...."].
>
> As regards less grave forms of "hate speech", although they do not fall entirely outside the protection of Article 10 ECHR, it is permissible for the Contracting States to restrict them. The Court has accepted that it <u>*may*</u> be justified to impose even criminal-law sanctions in cases of hate speech or incitement to violence." [9]

2.9 Further, the Strasbourg Court has confirmed that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. This applies equally to hate speech directed against others' sexual orientation and what the European Court of Human Rights refers to as others' "sexual life". [10] Comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on their face, may in principle require the States to take certain positive measures. [11]

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[7] Cf *Aghdgomelashvili and Japaridze v. Georgia* [2020] ECtHR 7224/11 (Fifth Section, 8 October 2020) at § 42

[8] *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022) at § 81

[9] *Nepomnyashchiy and Others v. Russia* [2023] ECtHR *39954/09 and 3465/17* (Third Section, 30 May 2023) at §§ 59, 74

[10] *Association Accept v. Romania* (2022) 75 EHRR 15 at §§ 119, 123

[11] *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022) at § 119

2.10 The Human Rights Act 1998 and the Scotland Act 1998 when read together require the Scottish Parliament, the Scottish Government, the Crown Office and Procurator Fiscal Service ("COPFS"), Police Scotland and separately the courts in Scotland to act in a Convention compatible manner (which includes taking such action as may be required as a matter of an ECHR positive obligation).

2.11 Accordingly, under the law as it currently stands in Scotland, where individuals make credible assertions to the relevant authorities in Scotland that they have suffered treatment infringing the standards set out in Article 3 ECHR any unjustified failure or refusal by the police to carry out, or the Lord Advocate to order, an effective investigation [12] (including examining the role, if any, played by homophobic and/or transphobic motives in the alleged abuse [13]) - and separately any decision by the COPFS (the public authority responsible for criminal prosecutions in Scotland) to refuse to prosecute [14] - should, in

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[12] See, for example, *Kennedy and Black v. Lord Advocate* [2008] CSOH 21, 2008 SLT 195

[13] *Sabalić v. Croatia* [2021] ECtHR 50231/13 (First Section, 12 January 2021) at §§ 94-95

[14] See Article 11 of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the "Victims of Crime Directive") which provides as follows

> *Article 11*
>
> **Rights in the event of a decision not to prosecute**
>
> 1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.
>
> 4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.
>
> 5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out- of-court settlement, in so far as national law makes such provision.

This provision is avowedly implemented in Scotland by Section 4 of Victims and Witnesses (Scotland) Act 2014 which provides as follows:

> **4 Rules: review of decision not to prosecute**
> (1) The Lord Advocate must make and publish rules about the process for reviewing, on the request
> of a person who is or appears to be a victim in relation to an offence or alleged offence, a decision of the prosecutor not to prosecute a person for the offence or alleged offence.
>
> (2) Rules under subsection (1) may in particular make provision for or in connection with—
> (a) the circumstances in which reviews may be carried out,
> (b) the manner in which a request for review must be made,

principle, be able to be challenged before the courts in Scotland, [15] (just as challenges to decisions of their respective public prosecution services (not) to prosecute can be brought before the courts of England and Wales [16] and before the courts of Northern Ireland, [17] whether by way of judicial review, or in the course of a criminal appeal. [18])

2.12 The basis for any such challenges might be of a failure by the relevant State authorities in Scotland to comply with their positive obligations under Article 3 ECHR. [19] Indeed, such

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(c) the information that must be included in a request for review,
(d) the matters to be taken into account by the Lord Advocate when carrying out reviews,
(e) the process to be followed by the Lord Advocate when carrying out reviews.
(3) In this section, "prosecutor" means Lord Advocate, Crown Counsel or procurator fiscal.

[15] cf *Niven v. Lord Advocate* [2009] CSOH 110, 2009 SLT 876 and *Ross v. Lord Advocate* [2016] CSIH 12, 2016 SC 502.

[16] See e.g.: *R. (on the application of Slade) v HM Attorney General of England and Wales* [2018] EWHC 3573 (Admin); *R (on the application of FNM) v. DPP* [2020] EWHC 870 (Admin) [2020] 2 Cr. App. R. 17

[17] See e.g.: *Re JR76's Application for Judicial Review* [2019] NIQB 93; *Re B's Application for Leave to Apply for Judicial Review* [2020] NIQB 76; *Re Duddy's Application for Judicial Review* [2022] NIQB 23; and *Re Bassalat's Application for Leave to Apply for Judicial Review* [2023] NIKB 8

[18] See e.g.: *R v. Thacker* [2021] Crim 97 [2021] QB 644 and *R v. BKR* [2023] EWCA Crim 903 [2023] 2 Cr. App. R. 20

[19] In *Szula v. United Kingdom* (2007) 44 EHRR SE19 237 at pp 239-240 the Strasbourg Court noted as follows:

> "[T]he obligation of the High Contracting Parties under Article 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3 ECHR, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *A v United Kingdom* (1999) 27 EHRR 611 at [22]; *Z and Others v United Kingdom* [GC] (2002) 34 EHRR 3 at [73]–[75] and *E and Others v United Kingdom* (2003) 36 EHRR 31).
>
> Positive obligations on the State are also inherent in the right to effective respect for private life under Article 8 ECHR; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 ECHR in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.
>
> Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v Netherlands* (1986) 8 EHRR 235 at [23]–[24] and [27] and *August v United Kingdom* (2003) 36 EHRR CD115 (dec.) N o.36505/02, January 21, 2003).
>
> In a number of cases, Article 3 ECHR has also been held to give rise to a positive obligation to conduct an official investigation (see *Assenov and Others v Bulgaria* (1999) 28 EHRR 653 at [102]). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by state agents (see, *mutatis mutandis*, *Calvelli and Ciglio v Italy*).
> ...
> [T]he Court found in *MC v Bulgaria* No.39272/98, (2005) 40 EHRR 20 at [153] that states had a positive obligation inherent in Article 3 ECHR and Article 8 ECHR to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective

failure or refusal to act may itself form the basis for a damages action against the police [20] or prosecution authorities [21] - at least if and insofar as their refusal or failure to act could be shown to be motivated by discriminatory reasons, such that a finding of "malice" might reasonably be inferred.

Existing civil law obligations of individuals under the common law

2.13 Separately as a matter of civil law, the courts in Scotland are able to make an award of monetary damages to reflect the loss, injury and damage sustained by an individual consequent upon harm intentionally and wrongfully inflicted on that person by another.

2.14 Among the wrongful acts or omission which the law recognises as giving rise to a claim for personal injury damages in respect of the loss, injury and damage attributable thereto and to which the injuries were attributable are: the infliction on another of inhuman and degrading treatment in contravention of the standards set out in Article 3 ECHR; [22] and separately sexual abuse, physical abuse, emotional abuse and (at least in the case of a child or vulnerable dependent adult) abuse which takes the form of neglect.[23]

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investigation and prosecution. These considerations apply equally to serious sexual offences inflicted on children. That said, however, there is no absolute right to obtain the prosecution or conviction of any particular person."

[20] See e.g. *Grier v. Police Scotland* [2022] CSOH 2, 2022 SLT 199

[21] See *Whitehouse v Lord Advocate* [2019] CSIH 52, 2020 SC 133

[22] See for example *Napier v. Scottish Ministers*, 2005 SC 229, OH (upheld on appeal *Napier v. Scottish Ministers* [2005] CSIH 16, 2005 1 SC 307) per the Lord Ordinary, Lord Bonomy at §§ 78, 95:

"78. Having regard to the factual evidence, the experts medical, psychological, scientific and technical evidence, the informed opinion evidence of those with special experience of prison conditions, I am entirely satisfied that the petitioner was exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation. He was, in my opinion, subjected to degrading treatment which infringed Art 3 of the Convention.

...

95. I shall, therefore, in my interlocutor find and declare that the respondents acted unlawfully in terms of sec 6 of the Human Rights Act 1998 and *ultra vires* in terms of sec 57 of the Scotland Act 1998 by acting in a manner incompatible with Art 3 of the Convention and detaining the petitioner in conditions in which he was subjected to degrading treatment; I shall find that the petitioner suffered loss, injury and damage by reason of the fault of the respondents; I shall find the respondents liable to pay damages to the petitioner of £2,450 with interest at eight per cent from the date of decree until paid ..."

[23] See e.g. Section 17A of the Prescription and Limitation (Scotland) Act 1973 insert—

"17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

(a) the damages claimed consist of damages in respect of personal injuries,

(b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,

2.15 In such a personal injury action the defender is liable to make reparation for all losses suffered by the pursuer which directly arise from the wrongdoing - whether or not these losses are reasonably foreseeable. [24] For example damages in respect of post-traumatic stress disorder sustained in consequence of the unlawful abuse is often a head of claim in personal injuries actions. [25]

Obligations imposed under Protection from Harassment Act 1997

2.16 Section 8(1) of the Protection from Harassment Act 1997 specifies that in Scotland "every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and— (a) is intended to amount to harassment of that person; or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.". For these purposes, "harassment" of a person *includes* causing the person alarm or distress, but the causation of alarm and distress is not essential to constitute this statutory delict (civil wrong).

2.17 This provision (together with Section 8A which deals with harassment amounting to domestic abuse) gives the person who is or may be the victim of the conduct in question which constitutes harassment and/or domestic abuse the right to take a civil action before the courts for, among other remedies, damages, interdict and a non-harassment order "requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified".

2.18 Section 9(1) of the 1997 Act specifies that "any person who is in breach of a non-harassment order made under section 8 or section 8A is guilty of an offence and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both such imprisonment and such fine; and

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(c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
(d) the action is brought by the person who sustained the injuries.

(2) In this section—
abuse' includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,
'child' means an individual under the age of 18."

[24] See Professor Thomson, *Delictual Liability*, 5th Edition, at § 16.4

[25] See *Connelly v. New Hampshire Insurance Co.*, 1997 SLT 1341, OH holding that the phrase "accidental bodily injury" used in an insurance policy encompassed a diagnosis of post-traumatic stress disorder.

(b) on summary conviction, to imprisonment for a period not exceeding six months or to a fine not exceeding the statutory maximum, or to both such imprisonment and such fine."

Obligations imposed under the Equality Act 2010

2.19 Further the Equality Act 2010 ("EA 2010") outlaws harassment by a service provider of another where the harassing behaviour constitutes less favourable treatment than others do or would receive because of, among other protected characteristic, 'sexual orientation': cf *Porcelli v Strathclyde Regional Council*, 1986 SC 137.

2.20 Separately the EA 2010 expressly outlaws (in the context of the provision of services or the exercise of a public function, other than in the context of the provisions of school education), "*unwanted conduct"* - whether by, or for, or on behalf, or on the instructions of or induced or caused or aided by other, individuals or associations – where the conduct is related to the protected characteristic of "gender reassignment" and has the purpose or effect either of violating another's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person: subsection 26(1) EA 2010.

2.21 In deciding whether the unwanted conduct has these adverse effects, the courts *must* take into account all of the following:— the perception of the person subject to the conduct, the other circumstances of the case; and whether it is reasonable for the conduct to have that effect: subsection 26(4) EA 2010. Separately the law also outlaws the less favourable treatment of another because of their *rejection of or submission to* the conduct related to the protected characteristic of gender reassignment: subsection 26(3) EA 2010.

Obligations imposed on medical professionals at common law

2.22 The courts have also held that treating physicians are required to acknowledge and respect individual's right of involvement and self-determination in relation to their own medical treatment. This "human rights informed" approach has been said to "point away from a model of the relationship between the doctor and the patient based upon medical paternalism" and instead to "point towards … an approach to the law which… treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices" meaning that "[a]n adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering

with her bodily integrity is undertaken": *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, 2015 SC (UKSC) 63 at §§ 81 and 87.

2.23 Section 2(4) Age of Legal Capacity (Scotland) Act 1991 allows that

> "(4) A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment."

2.24 In the case of the possible prescription to children of puberty blocking drugs and/or cross-sex hormones on grounds of their reported experience of gender dysphoria the Court of Appeal of England and Wales has observed in *R(Bell) v The Tavistock and Portman NHS Foundation Trust* EWCA Civ 1363 [2022] PTSR 544 (at §§ 92-93) that

> "92. Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of evolving research and understanding of the implications and long-term consequences of such treatment. *Great care is needed to ensure that the necessary consents are properly obtained*. …
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> 93. … [C]linicians *must* satisfy themselves that the child and parents appreciate the short- and long-term implications of the treatment upon which the child is embarking …. it is for the clinicians to exercise their judgement knowing how important it is that consent is properly obtained according to the particular individual circumstances … and by reference to developing understanding in this difficult and controversial area."

2.25 Picking up on the concluding quoted reference from the Court of Appeal decision in *Bell* (at § 93) to "*developing understanding* in this difficult and controversial area" it should be noted that the NHS England's Interim Clinical Policy on *Puberty suppressing hormones (PSH) for the purpose of puberty suppression for children and adolescents who have gender incongruence/dysphoria* (November 2023) notes as follows:

> "We have concluded that there is not enough evidence to support the safety or clinical effectiveness of PSH to make the treatment routinely available at this time. NHS England recommends that access to PSH for children and young people with gender incongruence/dysphoria should only be available as part of research.
>
> On an exceptional, case by case basis any clinical recommendation to prescribe PSH for the purpose of puberty suppression outside of research and in contradiction to the routine commissioning position set out in this policy must be considered and approved by a national multidisciplinary team."

Conclusion as to the existing law relevant to conversion practices

2.26 In sum, it is *already* the case in Scotland that conduct towards another which constitutes degrading treatment and which results in the infliction of psychological suffering on that other, is already illegal and in breach of the criminal law. Such conduct

could include insulting, degrading or belittling persons on account of their sexual orientation.

2.27 And the police and prosecution authorities in Scotland are already obliged to provide effective protection (in particular of children and other vulnerable persons) against such conduct and should take reasonable steps to *prevent* such ill-treatment of which the authorities had or ought to have had knowledge.

2.28 More particularly the police are obliged in their investigations to examine the role, if any, played by homophobic and/or transphobic motives in the alleged ill-treatment. If such homophobic and/or transphobic motives are substantiated then the prosecution authorities are obliged to take these into account in making its prosecution decision in relation to the complained of degrading ill-treatment.

2.29 It is also a civil wrong - actionable before the civil courts - for private individuals to inflict on another inhuman and degrading treatment (which may include physical abuse and emotional abuse) in contravention of the standards set out in Article 3 ECHR. And individuals who have been subject to conduct which amounts to harassment and/or domestic abuse also have the right to take a civil action before the courts to obtain among other remedies a non-harassment order, breach of which constitutes a criminal offence.

2.30 In addition, the Equality Act 2010 outlaws harassing behaviour which constitutes less favourable treatment because of "sexual orientation". Separate provision is made in the EA 2010 to make unlawful *unwanted conduct* which is related to the protected characteristic of "gender reassignment" and which has the purpose or effect either of violating another's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person. And less favourable treatment of another because of their *rejection of or* <u>*submission to*</u> the unwanted conduct related to the protected characteristic of gender reassignment is also made a statutory wrong under the EA 2010.

2.31 Finally, in relation to any proposed medical interventions, the law recognises adult persons of sound mind are entitled to decide which, if any, of the available forms of treatment to undergo and that law has to respect the informed consent of adults and separately the informed consent of those children who, clinicians adjudge, are capable of understanding the nature and possible short and long term consequences of the procedure or treatment. In relation specifically to the prescription to children of puberty blocking

drugs and/or cross-sex hormones on grounds of their reported experience of gender dysphoria, it is for the clinicians to exercise their judgment on the medical advisability of such treatment by reference to developing medical understanding. And the medical consensus set out by NHS England on this matter is that there is not enough evidence to support the safety or clinical effectiveness of puberty suppressing hormones to make the treatment routinely available at this time.

2.32 That is the background against which the proportionality of the legislative changes proposed by the Scottish Government in this consultation document has to be assessed because what has to be established by them is that there is a pressing social need for the further legislative changes which they advocate to be made in this area.

3. THE SCOTTISH GOVERNMENT PROPOSALS FOR NEW LEGISLATION CONCERNING HARMFUL CONVERSION PRACTICES

3.1 In its January 2024 publication *Ending Conversion Practices in Scotland: A Scottish Government Consultation*, the Scottish Government repeatedly draws parallels between its proposals for the criminalisation of "conversion practices" and earlier Scottish Parliament legislation concerning domestic abuse (the Domestic Abuse (Scotland) Act 2011, the Domestic Abuse (Scotland) Act 2018, and the Domestic Abuse (Protection) (Scotland) Act 2021), forced marriage (Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011), and female genital mutilation (Prohibition of Female Genital Mutilation (Scotland) Act 2005 as amended by the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020).

3.2 The Scottish Government clearly considers what it terms "conversion practices" to be social evils akin to domestic abuse, forced marriage and female genital mutilation. On the basis that the current law does not sufficiently counter the social evil of conversion practices the Scottish Government has indicated that it is currently minded to introduce and promote before the Scottish Parliament a Government Bill which it is envisaged will contain provisions along the following lines:

"1. Offence of engaging in conversion practice
(1) A person ("person A") commits an offence in relation to another person ("person B") if—
(a) person A engages in—
(i) behaviour (whether a course of behaviour or behaviour on a single occasion) which constitutes (or is part of) provision of a service in relation to person B, or
(ii) a course of behaviour which is coercive of person B,

(b) person A engages in the behaviour with the intention mentioned in subsection (2), and
(c) the behaviour *causes* person B to suffer physical or psychological harm.

(2) The intention is that any sexual orientation or gender identity which (at any time the behaviour is engaged in)—
(a) person B considers is (or *may be*) person B's sexual orientation or gender identity, or
(b) person A *presumes* to be person B's sexual orientation or gender identity,
will be changed or suppressed.

2. Further provision in relation to offence of engaging in conversion practice

(1) Subsections (2) to (5) contain examples and other material to assist in the interpretation of section 1.

(2) Examples of behaviour which may constitute (or be part of) provision of a service in relation to person B include—
(a) person A counselling or providing any other form of talking therapy to person B,
(b) person A coaching or instructing person B,
(c) person A carrying out a purported treatment in relation to person B.

(3) Examples of behaviour which, if it forms part of a course of behaviour, may indicate that the course of behaviour is coercive of person B include—
(a) person A directing behaviour that is violent, threatening or intimidating towards person B,
(b) person A controlling person B's day-to-day activities,
(c) person A manipulating or pressuring person B to act in a particular way,
(d) person A frightening, humiliating, degrading or punishing person B.

(4) In subsection (3)(a), the reference to violent behaviour includes reference to sexual violence as well as physical violence.

(5) It does not matter for the purposes of section 1—
(a) whether any behaviour engaged in *changes*, or *is capable of changing*, person B's sexual orientation or gender identity,
(b) whether behaviour is engaged in free of charge or in exchange for payment (of any kind),
(c) whether, on any occasion on which behaviour is engaged in, it is engaged in only in relation to person B or in relation to person B and other persons at the same time.

(Please note that section 2 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

3. Interpretation

In this Part—
(a) references to behaviour—
(i) do not include reference to a person failing to do things in relation to another person,
but

(ii) otherwise include reference to behaviour of any kind (including, for example, saying or otherwise communicating something as well as doing something),

(b) a course of behaviour—

(i) involves behaviour on at least two occasions,

(ii) may involve—

(A) the same behaviour being engaged in on a number of occasions, or

(B) different behaviour being engaged in on different occasions,

(c) psychological harm includes fear, alarm and distress,

(d) reference (however expressed) to a person's sexual orientation includes reference to the person having no sexual orientation towards other persons.

(Please note that section 3 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

4. Further provision in relation to offence of engaging in conversion practice: intention

(1) For the avoidance of doubt, examples of behaviour being engaged in *without* the intention mentioned in section 1(2) *include*—

(a) the provision, by a healthcare professional *in the course of employment as such*, of healthcare, including—

(i) medical treatment intended to align person B's physical characteristics with person B's gender identity,

(ii) any medical treatment that causes or addresses a *lack* of sexual desire on person B's part,

(b) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of behaviour which—

(i) *affirms* a sexual orientation or gender identity which person B considers is (or *may be*) person B's sexual orientation or gender identity, or

(ii) is *not* intended to *direct* person B towards any particular sexual orientation or gender identity (including, in particular, any such behaviour which consists entirely of conversation, whether or not extending to the provision of advice and guidance, of a therapeutic, spiritual or any other nature),

(c) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of person A expressing opinions or beliefs, *without intending to direct person B towards any particular sexual orientation or gender identity*.

(Please note that section 4 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

5. Defence of reasonableness

(1) In proceedings for an offence under section 1, it is a defence for person A to show that person A's behaviour was, in the particular circumstances, reasonable.

(2) For the purposes of subsection (1), it is shown that person A's behaviour was, in the particular circumstances, reasonable if—

(a) evidence adduced is enough to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

6. Offence of taking person outside Scotland for conversion practice

(1) A person ("person A") commits an offence in relation to another person ("person B") if—

(a) person B is habitually resident in Scotland,

(b) person A causes person B to leave Scotland, and

(c) person A intends—

(i) that, while person B is outside Scotland, behaviour of a type mentioned in subsection (2) will be engaged in (whether by person A or another person) in relation to person B,

and

(ii) that, by the behaviour being engaged in, the outcome mentioned in subsection (3) will be secured.

(2) The behaviour is—

(a) behaviour (whether a course of behaviour or behaviour on a single occasion) which constitutes (or is part of) provision of a service in relation to person B, or

(b) behaviour which is coercive of person B.

(3) The outcome is that a sexual orientation or gender identity which (at the time person B leaves Scotland)—

(a) person B considers is (or *may be*) person B's sexual orientation or gender identity, or

(b) person A presumes to be person B's sexual orientation or gender identity,

will be changed or suppressed.

7. Further provision in relation to offence of taking person outside Scotland for conversion practice

(1) Subsections (2) and (3) contain examples and other material to assist in the interpretation of section 6.

(2) Examples of behaviour which *may indicate* that person A caused person B to leave Scotland include—

(a) person A accompanying person B on a journey outside Scotland,

(b) person A—

(i) paying all, or a substantial portion of, the costs incurred by person B in leaving and being outside Scotland (for example, person B's travel or accommodation costs), or

(ii) making arrangements in relation to person B's leaving and being outside Scotland (for example, person A booking travel tickets or accommodation for person B).

(3) It does *not* matter for the purposes of section 6 whether the behaviour which person A intends will be engaged in in relation to person B while person B is outside Scotland is in fact engaged in.

8. Defence of reasonableness

(1) In proceedings for an offence under section 6, it is a defence for person A to show that person A's behaviour was, in the particular circumstances, reasonable.

(2) For the purposes of subsection (1), it is shown that person A's behaviour was, in the particular circumstances, reasonable if—

(a) evidence adduced is enough to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

9. Aggravation of offence involving conversion practice

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence committed by a person ("person A") in relation to another person ("person B") is aggravated by being committed with the intention mentioned in subsection (2), and

(b) proved that the offence is so aggravated.

(2) The intention is that a sexual orientation or gender identity which (at the time the offence is committed)—

(a) person B considers is (or may be) person B's sexual orientation or gender identity, or

(b) person A presumes to be person B's sexual orientation or gender identity,

will be changed or suppressed.

(3) It does not matter for the purposes of subsection (1)(a) whether person A's commission of the offence changed, or was capable of changing, person B's sexual orientation or gender identity.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated as mentioned in subsection (1)(a).

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated as mentioned in subsection (1)(a),

(b) record the conviction in a way that shows the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(6) The reference in subsection (1)(a) to an offence does not include reference to an offence under section 1 or 6.

10. Conversion practices protection orders

(1) A "conversion practices protection order" is an order—

(a) which, for a purpose mentioned in subsection (2), requires persons specified in the order to do, or prohibits persons so specified from doing, things described in the order,

and

(b) which is made on an application to a court under section 11.

(2) A court may make a conversion practices protection order only if satisfied that the order is necessary for one of the following purposes—

(a) to prevent, *or reduce the likelihood of*, a person who is habitually resident in Scotland and who is identified in the order being harmed by behaviour mentioned in subsection (3) being engaged in in relation to the person,

(b) to otherwise prevent or reduce the likelihood of persons, who are habitually resident in Scotland, *generally being harmed by behaviour mentioned in subsection (3) being engaged in*.

(3) The behaviour is behaviour (whether a course of behaviour or behaviour on a single occasion)—

(a) which—

(i) constitutes (or is part of) provision of a service to another person, or

(ii) is coercive of another person, and

(b) which is engaged in with the intention mentioned in subsection (4).

(4) The intention is that any sexual orientation or gender identity which (at the time the behaviour is engaged in)—

(a) the person in relation to whom the behaviour is engaged considers is (or may be) the person's sexual orientation or gender identity,

or

(b) the person engaging in the behaviour presumes to be the sexual orientation or gender identity of the person in relation to whom the behaviour is engaged,

will be changed or suppressed.

(5) A conversion practices protection order may impose a requirement or prohibition on a person only if—

(a) the court considers the particular requirement or prohibition to be necessary for the purpose for which the order is made,

(b) where the requirement or prohibition is imposed on an individual, the individual is aged 18 or over,

(c) where the order is made for the purpose mentioned in subsection (2)(b), the court is satisfied that the person has, on at least one previous occasion—

(i) engaged in behaviour mentioned in subsection (3), or

(ii) with the intention mentioned in section 6(1)(c), caused a person who is habitually resident in Scotland to leave Scotland.

(6) The requirements and prohibitions which *may* be imposed on a person by a conversion practices protection order *include*—

(a) a prohibition on approaching or contacting, or attempting to approach or contact, any protected person,

(b) a prohibition on engaging in behaviour mentioned in subsection (3),

(c) a prohibition on attending such place as is specified in the order,

(d) a prohibition on taking any protected person from, or to, such place as is specified in the order,

(e) a requirement to facilitate or otherwise enable any protected person to return or go to such place as is specified in the order within such period as is so specified,

(f) a prohibition on causing any protected person to leave Scotland,

(g) a requirement to submit to the court such documents as are specified in the order (which may include passports, birth certificates or other documents identifying a person and travel documents),

(h) a prohibition on advertising or promoting a service mentioned in subsection (3).

(7) A conversion practices protection order may include requirements and prohibitions relating to behaviour outside (as well as, or instead of, behaviour within) Scotland.

(8) In this Part, "protected person" means a person identified in a conversion practices protection order as mentioned in subsection (2)(a).

11. Application for conversion practices protection order

(1) The following persons may apply to the court for the making of a conversion practices protection order—

(a) where the application is for an order to be made for the purpose mentioned in section 10(2)(a)—

(i) any person who would, were the order made, be a protected person,
(ii) a relevant local authority,
(iii) the chief constable,
(iv) with the leave of the court, any other person,

(b) where the application is for an order to be made for a purpose mentioned in section 10(2)(b)—

(i) a relevant local authority,
(ii) the chief constable.

(2) In deciding whether to grant a person ("the applicant") leave to make an application for a conversion practices protection order as mentioned in subsection (1)(a)(iv), the court is to have regard to all the circumstances, including—

(a) the applicant's connection with any person who would, were the order made, be a protected person,
(b) the applicant's knowledge of that person and the person's circumstances,
(c) *the wishes and feelings of such a person so far as they are reasonably ascertainable*,
(d) any reason why the application is being made is being made by the applicant and not such a person.

(3) The *court is only required to have regard to a person's wishes and feelings as mentioned in subsection (2)(c) so far as it considers it appropriate to do so, having regard to the person's age and understanding*.

(4) The court may permit—

(a) any person who would, were the order made, be a protected person to be a party to proceedings relating to an application made under subsection (1).

(b) any other person mentioned—

(i) in subsection (1)(a) to be a party to proceedings relating to an application made, for the purpose mentioned in section 10(2)(a), by another person mentioned in that subsection,
(ii) in subsection (1)(b) to be a party to proceedings relating to an application made, for the purpose mentioned in section 10(2)(b), by another person mentioned in that subsection.

(5) In this Part, a "relevant local authority" is—

(a) the local authority in the area of which a person who would, were the order made, be a protected person is present, or

(b) any local authority in the area of which there is a risk of behaviour of the type mentioned in section 10(3) being engaged in.

12. Determination of application

(1) A court to which an application under section 11 is made must hold a hearing prior to determining the application.

(2) The hearing must include an opportunity for any of the following persons who wish to make representations to the court about the application to do so—

(a) the person who made the application,

(b) any person who would, should the application be granted, be a protected person,

(c) any person on who any requirement or prohibition would be imposed, should the application be granted,

(d) any other person who is a party to the proceedings.

(3) In determining the application (including what requirements and prohibitions to impose, should the application be granted), the court must have regard to all the circumstances, including in particular the need to secure the health, safety and well-being of any person who would, should the application be granted, be a protected person.

(4) In ascertaining the well-being of any such person the court must——

(a) to such extent as the court considers appropriate having regard to the person's age and understanding, have regard to the person's wishes and feelings (so far as reasonably ascertainable), including whether the person wishes the application to be granted, and

(b) where the person does not wish the application to be made, any reasons for that view of which the court is aware."

3.3 The following may be noted from the outset in relation to the legislation in its current form:

(1) The draft legislation contains in its current Section 3(d) a novel definition of "sexual orientation" which does *not* map on to that contained in the Equality Act 2010 in that it "includes reference to the person having *no* sexual orientation towards other persons", whom the Scottish Government refers to in their consultation document as "asexuals".

(2) There is *no* definition given of "gender identity". However the scheme of the proposed legislation in its current form is predicated on "gender identity" being a specific characteristic of (at least some) individuals which is distinct from that person's "physical characteristics". The legislation also proceeds on the basis that others may make (right or wrong) presumptions about what another's gender identity is, or may be. Yet the legislation is also drafted on the basis that any individual may be unsure or uncertain as to what their own current "gender

identity" might, or might not, be. But the failure in the draft legislation to define "gender identity" and/or to give any indications as to how "gender identity might be identified (whether by the courts or by the police or relevant local authorities or by individuals) immediately raises particular concerns since the legislation criminalises behaviour which is said to be intended to "change" what is or may be or is presumed by another to be a person "gender identity".

(3) The proposed legislation would criminalise, within the context of the provision of a "(free) service" to another, all and any instances of any person non-coercively saying to, or otherwise communicating with, another (even just once) with the intention (however vainly) of changing *or* suppressing that other's (lack of) sexual orientation and/or gender identity, provided that it can be established that this talk or communication made the addressee afraid, alarmed and/or distressed. The Scottish Government Consultation states (at § 98) that its

> "*intention* is that, in order to fall within this part of the offence, the provision of advice, guidance or support will need to reach a level of formality, professionalism or expertise for it to be considered a service. …"

But there is nothing on the face of the legislation which clarifies what is meant by the provision of a service in the manner set out in this guidance.

(4) In any event the criminalisation of conduct is *not* confined to those offering a service. The Scottish Government consultation says this (at § 98, 103):

> "For example, where a parent *without any relevant background or purported expertise* researches and carries out something they consider to be "therapy", they are *not* providing a service.
>
> Nor is a religious leader who has an *informal conversation* with someone about doctrinal views in relation to their sexual orientation or gender identity.
>
> These situations *may fall within the legislation if they form part of a coercive course of behaviour*.
> …
> [T]he provision of advice and guidance by a religious leader *or restrictions and pressure from parents over a period of time*, could only be captured by the definition of the course of conduct where *coercion* is also applied. There would also need to be specific *intent* to change or suppress the person's sexual orientation or gender identity and the actions *must have caused harm*.
>
> For example, advice and guidance from a religious leader which includes statements of traditional faith beliefs and sexual ethics would also have to be demonstrably coercive through evidence of *emphatic directives* accompanied by *forceful or threatening* statements intended to pressure the individual person into changing or suppressing their orientation or identity."

(5) The Scottish Government propose the following sentencing range for convictions under this principal offence:
- on summary conviction: imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum (£10,000), or to both
- on conviction on indictment (solemn procedure): imprisonment for a term not exceeding 7 years, or to an unlimited fine, or both

(6) The draft legislation would also criminalise anyone accompanying an otherwise habitual Scottish resident on a journey outside Scotland - or simply booking and/or paying for tickets for another's travel and/or for accommodation outside Scotland - where the intention (whether or not it in fact happens) that the trip outside Scotland will provide an occasion or opportunity for some form of behaviour to occur which is intended (however vainly) to change or suppress that other's (lack of) sexual orientation and/or gender identity. The Scottish Government propose a maximum term of imprisonment on summary conviction of 12 months (and/or a fine) and a maximum 3 years term of incarceration for conviction of this offence on indictment (and/or a fine).

3.4 The Ministerial foreword to the Scottish Government's January 2024 publication *Ending Conversion Practices in Scotland: A Scottish Government Consultation* states that there exists "a significant *gap* in our law – which can allow *forms of conversion practices to fall through the cracks*".

3.5 But given the reach of the existing law as outlined in Section 2 above, such "gaps" in the law can only be in relation to behaviour that does *not* reach the Article 3 ECHR threshold such as to constitute "degrading treatment", does *not* constitute the infliction of physical abuse or mental or emotional abuse such as to be already civilly actionable at common law, and does *not* constitute harassment because of sexual orientation or gender reassignment which is already covered by the EA 2010.

3.6 The other supposed "gap" in the current law which the Scottish Government would appear to wish to change is the principle that an adult person of sound mind (and a child of sufficient understanding) is entitled to decide on and consent to any treatment.

3.7 The Scottish Government sets out its own ideological stall as follows by way of justification/explanation for this proposed new legislation (at §§ 13, 83, 160 of its consultation document):

"13. Conversion practices *are* harmful to individuals subjected to them. *They are promoted within an ideology that views LGBTQI+ identities as wrong and believes that they can be changed. Their existence contributes to this way of thinking even further.*

This legislation specifically aims to protect people from the *harm* of conversion practices and, in doing so, contributes to the broader protection of human rights and respect for the dignity of LGBTQI+ people.

...

83. ... Conversion practices are often driven by a desire to help or protect the person being subjected to them even though harm is *ultimately* caused. Because of this, the proposed offence does *not* require it to be proven that the perpetrator to *intend* to cause harm to the victim or to be reckless as to whether harm would occur.

However, for the offence of engaging in a conversion practice to be committed, *harm will need to have resulted nonetheless*.

[...]

160. .... The main aim of this legislation is to protect people from the *harm* of conversion practices and protect the human rights and dignity of LGBTQI+ people."

3.8 From the Scottish Government's own account (see § 28) the entities most likely to be affected by its proposals to criminalise "conversion practices" are "faith groups", followed by "health professionals" and "parent, guardian, other family members" noting (at § 29) that the evidence indicates that "conversion practices often happen in religious, community and family settings" and (at § 34) that "an individual's culture and race may play a part in their experience of conversion practices".

3.9 The Scottish Government gives as example of what it considers to be "gaps" in the existing law the following examples (at §§ 74-5):

"74. ... For example, talking therapy, or coaching someone to change or suppress their sexual orientation or gender identity *are unlikely to be prosecutable under the existing criminal law.* While these are generally reasonable and non-harmful everyday actions in the majority of circumstances, *when used with the intent to change or suppress the sexual orientation or gender identity of another, they can become harmful*.

75. Even where the act that was being carried out might relate to an existing criminal offence, a conversion practice might not meet all of the requirements of that offence. For example, to be convicted of *stalking* a person must cause their victim to suffer fear and alarm. They must also *intend to cause the victim fear or alarm or know, or ought to know in all the circumstances, that their actions would likely have this effect.* This would *not* apply to many cases of conversion practices as the perpetrators often believe that they are helping the victim. In such a case, it may be difficult to prove an intention or recklessness to cause fear and alarm.

In addition, the harmful effect of conversion practices *is less likely to be fear and alarm but more often resemble post-traumatic stress which may manifest in different ways and over a longer period*."

3.10 This is, to say the least, a rather confused passage. The Scottish Government is here indicating that it is intending to promote a Bill which will criminalise what it describes as "generally reasonable *and non-harmful* everyday actions" (such as talking therapy or counselling). Such behaviour will be criminalised in situations where there is *no* subjective intention to cause another fear or alarm, and indeed where no fear or alarm results. And the fact that there is simply no evidence of any harm, fear or alarm resulting from any such supposed attempt to change or suppress another's sexual orientation or gender identity is deemed to be irrelevant. This is because it appears to be presumed (or deemed) that individual harm will (inevitably?) result, if not immediately then in the longer term in the form of post-traumatic stress disorder.

3.11 And on whether there is any need to prove "harm" resulting in order to criminalise conversion practices, the Scottish Government appear also to assert that harm *necessarily* and *always* comes from conversion practices, even if those subject to them are not (immediately) aware of it, noting (at §§ 35-36, 38-40) that

> **"What harm do conversion practices cause?**
> 35. Conversion practices are *inherently harmful*. They deny people's right to be themselves and *send a message to the LGBTQI+ community as a whole that their identity is wrong and can and should be fixed or suppressed*.
>
> 36. The impact of conversion practices on people can be lifelong. *Often*, *the harm is not immediately apparent*. People who have experienced conversion practices have reported severe mental health consequences, including suicidal ideation, depression, and anxiety. As pointed out in the EAG report, undergoing these practices can result in feelings of shame, self-loathing and a crisis of identity. Survivors have also reported a negative impact on their relationships, work and career. The EAG report stressed that this negative impact can affect every aspect of life, stating that 'survivors have difficulty building a life after conversion practices'.
> ...
> 38. A report from the United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity (IESOGI), titled *Report on Conversion Therapy*, highlights that
>
> > '*all* practices attempting conversion are *inherently humiliating, demeaning and discriminatory*. The combined effects of feeling powerless and extreme humiliation generate profound feelings of shame, guilt, self-disgust, and worthlessness, which *can* result in a damaged self-concept and enduring personality changes.'
>
> 39. Testimonies provided to the EHRCJ committee [of the Scottish Parliament] by individuals with lived experience of conversion practices describe PTSD, nightmares, bulimia, self-harm, shame, and panic attacks as some of the long-term effects caused by being subjected to conversion practices.
>
> 40. The trauma associated with conversion practices can present itself at different times for each person. Often, trauma can appear in adulthood despite the practices happening in childhood. In taking a trauma-informed approach we are mindful of where an individual may be affected by trauma, and the need to respond in ways which

minimise distress and support recovery through a safe and compassionate response. *We are also mindful of the importance of not retraumatising those who have suffered harm from conversion practices or expecting them to denounce their families, communities or loved ones.*

3.12 But if conversion practices are indeed (as the Scottish Government stipulates after this review of essentially anecdotal claims) "inherently harmful", then the proposed new offence of engaging in a conversion practice may be committed without the need to prove that any "harm" has indeed resulted, since the Scottish Ministers are operating on the basis of what appears to be an irrebuttable presumption that harm inheres in such conversion practices, even if not immediately manifest in or to the individual subject to such conversion practices.

3.13 It appears to be on the basis of an application of irrebuttable presumption that harm inheres in such conversion practices, even if not immediately manifest in or to the individual subject to such conversion practices, that the Scottish Government has proposed that there be no defence of consent available in relation to a conversion practices charge. This is because the Scottish Government considers (at § 136) that

"*harmful conduct* cannot be consented to".

3.14 The Scottish Government instead *deems* that no individual (regardless of age or capacity) is capable of consenting to undergoing conversion practices: everyone is to be rendered statutorily *incapax* on this matter.

3.15 One explanation for this approach appears to be the Scottish Government's further stipulation that very existence of conversion practices causes harm to the broader Lesbian, Gay, Bisexual, Trans, Queer/Questioning, Intersex/Inquiring, Asexual plus allies ("LGBTQIA+") *community*, regardless of whether or not any individual person who has been subject to such practices is aware of any harm having been caused thereby to them as individuals.

3.16 The draft legislation seeks to *exclude* from its to-be-criminalised "conversion practices" the provision by medics, with a view to gender re-assignment, of therapy, puberty blocker, hormones and surgery, and the provision by medics of medicines and therapy to those complaining of loss of libido. Specifically, it excludes "the provision, by a healthcare professional in the course of employment as such, of healthcare including"

(i) "medical treatment" which is intended to "align" a person "physical characteristics" with that person's asserted "gender identity",

and

(ii) any medical treatment provided that "causes or addresses" a person's *lack* of sexual *desire*".

3.17 Currently any person who aids, abets, counsels, procures or incites an act of "female genital mutilation" will be guilty of an offence under Section 3(1) of the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

3.18 Yet if the current legislative proposals concerning the criminalisation of "conversion practices" come into law, any person who obstructs, counsels against, discourages or otherwise seeks to prevent an act of (male or female) genital mutilation where that act is avowedly intended to "align" a person's "physical characteristics" with that person's asserted "gender identity" will, in principle, be guilty of an offence.

3.19 The Scottish Government then states (at §40) that it *believes* "that *any* effort to *change* a person's sexual orientation or gender identity is harmful, *regardless of how an individual identifies*." Indeed "a conversion practice may be directed against a person who states that they are unsure of, or exploring, their gender identity, to *change* them to have a *fixed identity*" (§ 48 of the consultation). The Scottish Government states that it therefore intends to promote the enactment of legislation which will criminalise anything other than what it describes (at § 45) as

> "*non-directive and ethical* guidance and support to a person who might be questioning their sexual orientation or gender identity or experiencing conflict or distress, whether that is provided by a healthcare practitioner, a family member, or a religious leader."

3.20 The draft legislation accordingly seeks to exclude from its to-be-criminalised "conversion practices" any behaviour which is said *entirely* to *affirm* the sexual orientation or gender identity which another currently considers to be, or *may* be, their sexual orientation or gender identity. However statements such as

> "that being gay is sinful or that transgender identity does not exist, that bisexual people are in denial, or [other] statements of belief"

which *are* made in relation to any particular individual *will* be criminalised under this legislation: see § 85 of the consultation. And at §§ 59-60 of the consultation the Scottish Government says that:

> "59. .. We also intend to include conversion practices undertaken against asexual people.
>
> 60. For example, a bisexual or asexual person may experience a type of conversion practice based on cultural perceptions, *often* referred to as bisexual or asexual erasure,

that these orientations do not really exist and that the individual is 'confused' or ashamed of being gay."

3.21 The "Expert Group" whose recommendations have been largely adopted by the Scottish Government in this consultation document proposing new legislation says this (at Section 8 of its report):

> **"8. Intent**
> Our proposed definition requires that conversion practices be carried out with the *intent* of changing, suppressing and/or eliminating a person's sexual orientation, gender identity and/or gender expression.
>
> The definition of conversion practices should *not* limit the practice to those who genuinely believe that the relevant change of sexual orientation, gender identity and/or gender expression is possible and desirable, nor should it require an intent to cause harm.
>
> The United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity defines conversion practices as:
>
> > 'an umbrella term to describe interventions and acts of a wide-ranging nature, all of which have in common the *belief* that a person's sexual orientation or gender identity can and should be changed. Such practices aim (or claim to aim) at changing people from gay, lesbian, or bisexual to heterosexual and from trans or gender diverse to cisgender'
>
> In practice, however, those carrying out conversion practices may do so for a number of different reasons and with a range of motivations, for example, commercial providers who seek financial gain. *Conversion practices can therefore be carried out not only by those who genuinely believe that the relevant change is possible and desirable, but also by those who are motivated by different reasons*.

3.22 Yet the law cannot *require* the impossible. And no-one can be said to have the necessary criminal intent (*mens rea*) to do that why they know to be impossible. Accordingly any attempt on the part of any legislature to criminalise an intention to do what the perpetrator does not believe to be possible is, to say the least, highly problematic.[26] As the philosopher of action Stuart Hampshire has observed:

> "To intend something to happen (as the result of my activity) is at least to believe that it may or could happen. It would be self-contradictory to say "I intend that to happen but I am sure that it will not" or "I believe it to be impossible". [27]

[26] *R v. Bentham* [2005] UKHL 18 [2005] 1 WLR 1057 in which the House of Lords considered the question of whether a person who has his hand in a zipped-up jacket to give the impression that he has a gun, can be held to have in his possession an imitation firearm within the meaning of s17(2) of the Firearms Act 1968. The House of Lords held that a person cannot possess something which is not separate and distinct from himself.

[27] Stuart Hampshire *Thought and Action* (1959) at page 134

Accordingly one cannot be said to have acted with the *intention* of *changing* another's sexual orientation or gender identity when one is acting *in the knowledge, or with the belief, that any such change is simply not possible*.

3.23 Apparently aware of these conceptual difficulties, the Scottish Government proposes that its draft legislation should *broaden* the ambit of behaviour to be criminalised under it. So what is to be criminalised is not just (however vainly) acting with the intention of *changing* another's sexual orientation or identity, but all and any actions done with the intention of "suppressing" another's sexual orientation or gender identity. The Scottish Ministers give the following explanation for this:

> 53. .... [L]egislation which does *not* account for suppression *may fail to address conversion practices that are more prevalent in racialised minorities*."
> 54. Including suppression means that there would be a wider net of protection for LGBTQI+ people. Legislation would address harmful conduct that was motivated by both an intention to change, or to suppress an individual's sexual orientation or gender identity. For example, talking therapy designed to suppress an individual's sexual orientation *which acknowledges that changing sexual orientation is not possible* would be included, where other legal tests were met.
>
> 55. In either a civil or criminal process, [those carrying out conversion practice] *could argue that they know that it is not possible to change a person's sexual orientation or gender identity, and this change was therefore not their intention. This would create a potential loophole in our legislation.*
>
> 56. Including suppression would widen the scope of legislation, by including restrictions or limitations imposed on someone specifically *to repress or prevent the development of their sexual orientation or gender identity*.

3.24 Suppression is clearly a key term in this legislation. Yet the draft legislation contains *no* guidance or definition as to what is meant by behaviour which is intended to "suppress" an individual's gender identity. And the draft legislation contains *no* guidance or definition as to what is meant by behaviour which is intended to "suppress" an individual's (lack of) sexual orientation. It presumably means any behaviour which might be said to thwart or inhibit or discourage an individual from *expressing* their sexual orientation or gender identity in all and any such manner as they might otherwise choose or wish to.

3.25 Thus subsection 1(2) of the Bill, subject only to a vague and unspecified reasonableness defence in Section 5, in principle criminalises *all* of the following (on the assumption that physical or psychological harm results):

(i) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own sexual orientation

(ii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own *lack of* sexual orientation

(iii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own sexual orientation

(iv) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own *lack of* sexual orientation

(v) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what they *presume* to be another person's sexual orientation

(vi) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what they *presume* to be another person's *lack of* sexual orientation

(vii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own gender identity

(viii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own gender identity

(ix) All and any behaviour by a person or persons which is intended to effect a change in, or of, what they *presume* to be another person's gender identity

(x) All and any behaviour by a person or persons intended to *suppress* what another person considers to be their own sexual orientation

(xi) All and any behaviour by a person or persons intended to *suppress* what another person considers to be their own *lack of* sexual orientation

(xii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own sexual orientation

(xiii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own *lack of* sexual orientation

(xiv) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's sexual orientation

(xv) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's *lack of* sexual orientation

(xvi) All and any behaviour by a person or persons intended to *suppress* what another person considers *to be* their own gender identity

(xvii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own gender identity

(xviii) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's gender identity

3.26 This means that "any discussions, questioning, guidance or general parental direction, guidance, controls and restrictions" in relation to a person's sexuality and/or their claimed or presumed gender identity which the Scottish Government deems to be "directive" or "coercive" *will* be criminalised. Thus a*ll and any* attempt by parents to *direct* their children towards any sexual orientation or gender identity which a child's parents consider to be "preferable" will be outlawed in Scotland under this legislation. This is on the basis that under the proposed legislation such parental intervention will be regarded as evidencing an intention to change or suppress their child's identification or development of their own sexual orientation or gender identity (of which they may still be questioning or unsure).

3.27 It is clear that it will be no defence for a parent to say that they acted out of love and with a view to help their child and that they had no intention by their intervention to cause their child to suffer fear or alarm or distress or any kind of harm. The Scottish Government states (at § 104) that its definition of a coercive course of behaviour in the context of conversion practices will include acts that are "controlling of the victim's day-to-day activities" and continues (at § 105) as follows:

> "By controlling, we refer to actions that regulate, restrict, or monitor a person's behaviour or otherwise deprives them of their own freedom of action. *For example, preventing someone from dressing in a way that reflects their sexual orientation or gender identity, associating with certain people or undertaking certain activities considered to be linked to their sexual orientation or gender identity*.
>
> In the context of conversion practices, controlling actions are used deliberately to restrict, prevent, or limit people from living or acting in accordance with their sexual

orientation or gender identity. Controlling actions, by their nature, apply a degree of force and give a person no choice other than to regulate their behaviour accordingly."

3.28 This definition of coercion would clearly therefore include parents seeking to control how their child "presents" in terms of, say clothes, make-up, and hairstyle or imposing restrictions on where their child might go and whom they might see. Thus parents who actively and consistently and directly oppose "their child's decision to, for example, present as a different gender from that given at birth" (see § 108) would be committing a criminal offence.

3.29 Were the Scottish Government's proposals adopted by the Scottish Parliament and legislation introduced and passed to give them effect, this would have the undoubted effect of criminalising much mainstream pastoral work of churches, mosques and synagogues and temples. Prayers and pastoral discussions could be criminalised if their content did not conform to the new State requirements *only* to affirm, validate and support the identity and lived experience as expressed and stated by an individual from time to time (but never to question or give direction or raise concerns about an individual's expression of their sexuality, or their "gender expression" or assertion of their "gender identity".

3.30 The proposals, if they come into law, could also criminalise medical practitioners who express a professional opinion seeking to dissuade an individual against undergoing or undertaking medical procedures (such as puberty blockers, hormone treatment and/or surgeries) which are associated with, and intended to further, gender reassignment.

3.31 Indeed these proposals could also criminalise parents who, lovingly and in good faith and in accordance with their own best judgment and conscience, seek to caution and direct their children against acting on any stated intention to embark on "gender affirmatory"/"gender transition" treatment in respect of their currently experienced discomfort or dysphoria in relation to their sex and/or sexuality.

3.32 But perhaps the most fundamental problem with this proposed legislation is that it leaves it entirely open and undefined just what it might mean to seek to *suppress* another's sexual orientation or gender identity, when you are *not* seeking to change it. The Scottish Government consultation document states (at § 44):

"although the proposals are *mainly* intended to address harmful practices that affect LGBTQI+ people, they will apply to everyone equally. This includes *change* efforts directed at those who are heterosexual or cisgender."

3.33 The legislation will also *necessarily*, from its terms, include *suppression* efforts directed at those who are heterosexual or cisgender. Thus since the Scottish Government's proposals are intended, in the name of equality also to cover any efforts to change *or suppress* the "sexual orientation" or "gender identity" which may be "directed at those who are heterosexual or cisgender" (per § 44 of the consultation document) then the legislation if passed will directly impact not just parents faced with their children identifying as trans and/or gay and/or queer/questioning, but also those parents of those children identifying as straight and as happy and comfortable in their actual biological sex.

3.34 Accordingly *any* child who wishes to explore and express their sexual/gender identity as they (and not their parents) wish in their behaviour and clothing and comportment and associations may be able to pray in aid this legislation against their parents.

3.35 Thus, for example, a parent's inflexible and absolute ban forbidding, say, their 14 year old daughter, going out publicly dressed in what might be regarded, by her parents as an overly sexualised and sexually provocative and explicit way could, in principle, be criminalised under this proposed legislation on the basis that the parental action is stopping the child from living or acting in accordance with how their child wishes to express their (hetero)sexual orientation and/or (cis)gender identity.

3.36 Similarly, the actions of parents engaging in a course of conduct such as forbidding their heterosexual adolescent son from displaying on his bedroom wall pornographic images of women (which images his parents consider to be demeaning of and for women), and/or seeking systematically to police and block his online access to hardcore heterosexual pornography and/or directing him from or against downloading and listening to podcasts by, say, Andrew Tate could also all, in principle, be criminalised under this legislation.

3.37 The parents would have difficulty in essaying or praying in aid the possible carve outs set out in subsection 4(1)(b) and 4(1)(c) of the draft legislation. This gives as *examples* of behaviour which can be engaged in *without* the criminal intention set out in section 1(2) the following:

> "(b) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of behaviour which—
>
> (i) *affirms* a sexual orientation or gender identity which person B considers is (or *may be*) person B's sexual orientation or gender identity,
>
> or

(ii) is *not* intended to *direct* person B towards any particular sexual orientation or gender identity (including, in particular, any such behaviour which consists entirely of conversation, whether or not extending to the provision of advice and guidance, of a therapeutic, spiritual or any other nature),

(c) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of person A expressing opinions or beliefs, *without intending to direct person B towards any particular sexual orientation or gender identity*.

3.38 The Scottish Government consultation explains these proposed provisions in their consultation document thus (at §§ 116-117):

"116. .. [C]ertain other behaviour will not be carried out with the requisite intention for the offence. These are situations where the service or course of behaviour *affirms* the sexual orientation or gender identity that another person considers themselves to be.

117. We will also be clear that the intent requirement is not met where there is no intention to direct person B towards any particular sexual orientation or gender identity – particularly where this involves conversations or where the behaviour *only* involves the expression or opinions or beliefs. The intention requirement ensures that it will not fall under the legislation where a person such as a family member or someone expressing their views in the street states negative views about a particular sexual orientation or gender identity *without a specific intention to change or suppress those characteristics of another person*."

3.39 Thus subsection 4(1)(b) of the proposed legislation appears to be intended to exclude *affirmatory and/or non-directive* counselling about sexuality or gender identity from the ambit of the to-be-criminalised conversion practices. Subsection 4(1)(c) appears to be directed at excluding *mere* expression of opinions or beliefs on matters of sexuality or gender from being criminalised as "conversion practices", providing always that the expression of these opinions or belief is *not* done with the intention of *directing* anyone towards any particular sexual orientation or gender identity. The Scottish Government advises that "shouting abuse at someone about their sexual orientation or gender identity, where there was *no intention* to change or suppress that specific person's sexual orientation or gender identity" would *not* be criminalised under this proposed new law (§ 81). However, the consultation fails to mention, any such "shouted abuse" about another's sexual orientation or gender identity may instead *already* be criminalised under Section 4(2) of the Hate Crime and Public Order (Scotland) Act 2021.

3.40 In any event the parental actions outlined above *are precisely about* parents *directing* their children. They are *not* simply giving their opinions or offering counselling. They are *telling* their children what to do in matters which undoubtedly relate to their children's experience and expression of their sexuality and/or gender identity.

3.41 Such parental action may well also be said to be intended to *direct* their children *towards* their children's proclaimed (hetero)sexual orientation and/or (cis)gender identity, while seeking to *suppress* their children's chosen explorations and expressions of this sexuality and "gender identity" to a manner which their parent consider acceptable.

3.42 Yet the parents' actions cannot be said, for the purposes of Section 4(1)(b), to consist *entirely* of behaviour which *affirms* their child's sexual orientation or gender identity. Instead they are seeking to *suppress* their children's choices as to how they might wish to express and experience their proclaimed (hetero)sexual orientation and/or (cis)gender identity in how they dress or comport themselves or who they associate with or what they watch online. The parents may not be seeking to *change* their child's currently avowed sexual orientation or gender identity but they are seeking to *control* their child's sexuality and/or gender identity by preventing or impeding that child from expressing the sexual orientation and/or gender identity with which the child currently identifies in a way which feels most authentic to that child.

3.43 And if the parents' actions constitute a course of conduct seeking to question impede or change their children's choices on how they wish to express, explore and develop their proclaimed (hetero)sexual orientation and/or (cis)gender identity then the parental action *could* be judged under this legislation to constitute coercive control against their daughter or son.

3.44 Thus decisions made by parents which relate to and seek to direct their children on matters of sexuality and gender identity can be brought before the courts under this proposed legislation such as to require the parents, in order to avoid criminal liability for their decision, to satisfy the court that their behaviour was, in the particular circumstances, what the court would regard as being "reasonable".

3.45 In addition to placing basic parenting decision under the shadow of potential prosecution before the criminal courts, under these proposals the courts are to be granted sweeping powers to pronounce coercive requirements and prohibitory civil conversion practices protection orders against others (legal persons or individuals). Such requirements or prohibitions may be ordered when the court is satisfied that they are necessary to prevent - or at least reduce the likelihood of - either an identified individual or people in general in Scotland from being "harmed" by behaviour intended to change or *suppress* others' (lack of) sexual orientation and/or gender identity.

3.46 Although the Scottish Government recognises (at § 140) that legislation mandating advertising bans or restrictions are matters reserved to the UK apparently it considers that a person who advertised or promoted those conversion practices may, depending on the particular circumstances, be found to have aided and abetted in the commission of the offence (at § 142) and further envisage (at § 141) orders from the courts under this provision to prohibit informal promotion and advertising of conversion practices simply by word of mouth which may take place in particular familial and community environments.

3.47 It is also envisaged that the courts will be able to make orders with an extra territorial effect or scope, specifically: to include conditions preventing a person from being taken out of Scotland for the purpose of conversion practices; and to include requirements or prohibitions in relation to conduct that takes place outside of Scotland.

3.48 The order-making powers would require evidence to be proved on the balance of probabilities (the civil court standard of proof) which is a much lower threshold than that applied in the criminal courts (beyond reasonable doubt). And yet breach of the terms of such conversion practices protection orders as may be pronounced by the court will be made a criminal offence. The Scottish Government are proposing the following sentencing range for breaching a conversion practices civil order: on summary conviction: imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum, or both; on conviction on indictment (solemn procedure): a sentence of imprisonment not exceeding 2 years, a fine, or both.

3.49 Applications to the court for conversion practices protection orders which are specifically to protect an identified individual from "harm" may be sought, with the leave of the court, by *any* person (not just by the police or local authorities).

3.50 The legislation imposes no requirements and specifies no test in the legislation by which the standing of any person to seek such an order in relation to another is to be determined. And the court is empowered to grant such order even against the wishes (and feelings) of the to be "protected person". The Scottish Government gives this explanation/justification (at § 193)

> "[I]t is essential that family, friends, or a support organisation are able to apply for an order in relation to a person at risk. *This is particularly important as individuals may not be aware that they are victims of conversion practices*. For example, if the conduct is being carried out by a family member or trusted member of their community."

3.51 The mere *existence* of "conversion practices" is regarded as necessarily *always* harmful to the (LGBTQIA+) community at large (even if the individual subject of these practices does not realise or appreciate or experience it). It is this approach and claim that informs the creation of the possibility of the court pronouncing *general* conversion practices protection orders. These are intended "to otherwise prevent or reduce the likelihood of persons, who are habitually resident in Scotland, *generally being harmed by behaviour" deemed under the legislation to be a "conversion practice"*: Section 10(2)(b) of the proposed legislation. So, as we have seen, even where an adult who is not lacking in capacity and is not otherwise vulnerable, gives informed consent to the conversion practices, these will still constitute criminal offences under this proposed legislation.

3.52 Further, although providing for a "reasonableness defence" the legislation provides no definition or test or example of what may be considered to be "reasonable" such as to constitute a defence against a prosecution for behaviour otherwise apparently criminalised under this proposed Act of the Scottish Parliament. The consultation says this:

> **"Defence of reasonableness**
> 119. We propose that the offence will include a defence that the accused's conduct was reasonable in the particular circumstances. This test is whether the accused's behaviour was reasonably objective, meaning that it is not determinative that the accused person considers their behaviour was reasonable based on their own values.
> ...
> 121. We are clear that practices that seek to change or suppress the sexual orientation or gender identity of someone else are abhorrent and have no place in our society.
> ...
> 123. While it may be difficult to envisage circumstances in which behaviour meeting each of the four tests set out above (relating to an individual, provision of a service/coercive course of behaviour, intention to change or suppress, cause of harm) would ever be "reasonable", this provision ensures that where someone behaves in an objectively reasonable way, but their behaviour nonetheless technically amounts to the commission of the offence of engaging in conversion practices, they are not criminalised by the offence.
>
> 124. We anticipate this defence may potentially arise where the immediate safety of the victim was at risk, and acts were carried out to protect them from imminent harm. For example, where someone is at immediate risk of suicide as a result of distress related to their sexual orientation or gender identity, requests and is supported to find a short-term coping mechanism.
>
> It could also *potentially* apply in situations where the specific day-to-day controls implemented by a parent were to *prevent a child from engaging in illegal or dangerous behaviour*."

3.53 But this last example makes no sense in terms of how the proposed legislation is currently drafted. The doctrine of double effect posits that if the primary intention of a parent in implementing any specific day-to-day controls were to prevent their child from

engaging in illegal or dangerous behaviour, then it might be said to be a foreseeable (though not necessarily intended) ***effect*** that the child might subjectively experience these restriction as what the legislation would term "coercive suppression" of the child's sexual orientation or gender identity. But that, on the legislation's own terms, would ***not*** be sufficient to establish the requisite *mens rea* for the parent to be found guilty of the offence of engaging in "conversion practices". In such circumstances the reasonableness defence would simply not apply.

3.54 The Scottish Government then says this about this reasonableness defence (at §§ 161, 165):

> "161. … In developing the proposals set out in this consultation we have carefully considered their impact on rights protected by the ECHR, in particular the right to family and private life; freedom of thought, conscience and religion; and freedom of expression.
>
> In line with the requirements of the ECHR, interference with these rights must be necessary and proportionate to the aim to be achieved, in this case, protection of the rights of LGBTQI+ people.
> …
> 165. The offence also includes a defence of reasonableness. This acts as an additional protection by allowing, for example, an accused person to put forward a justification as to why their behaviour was reasonable, *which could include the exercise of their Convention rights*."

3.55 It is clear, then, that the Scottish Government is aware that the provisions of this proposed Act of the Scottish Parliament impact on among other Convention rights: the rights of parents under Article 8 ECHR to respect for their private and family life; the rights of individuals and of Churches to respect for the free exercise of religion under Article 9 ECHR; and the rights of free expression as protected under Article 10 ECHR.

3.56 In order to be Convention compatible (and so within the statutorily limited devolved competence of the Scottish Parliament and the similarly statutorily limited devolved competence of the Scottish Ministers) it is *not enough* that passing reference is made, in consultation documents, to the ECHR. The legislation itself has to be "in accordance with law" in order to be shown to be justified interferences in the identified Convention rights under Articles 8, 9 and 10 ECHR which the Scottish Government agree are engaged by this proposed legislation. As the UK Supreme Court noted in *Christian Institute v. Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at §§ 79

> (iii) *In accordance with the law*
> "79. In order to be 'in accordance with the law' under Art 8(2) of the ECHR, the measure must not only have some basis in domestic law — which it has in the provisions of the Act of the Scottish Parliament — but also be accessible to the person concerned and foreseeable as to its effects.

These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual — if need be with appropriate advice — to regulate his or her conduct *(Sunday Times v UK* (A/30) (1979–80) 2 EHRR 245, § 49; *Gillan v UK* (2010) 50 EHRR 1105, § 76).

Secondly, it must be sufficiently precise to give legal protection <u>*against arbitrariness*</u>:

> '[I]t must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation— which cannot in any case provide for every eventuality — depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.' (*Gillan v UK* (2010) 50 EHRR 1105, § 77; *Peruzzo v Germany* (2013) 57 EHRR SE17 § 35.)

80. Recently, in *R (on the application of T) v Chief Constable, Greater Manchester Police* [2014] UKSC 35 [2015] AC 49 this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation."

3.57 Finally (at §§ 205-206) the Scottish Government concludes its consultation document with the following statement of intent as regards future educational work to be done

> "205. We will explore how best to educate children and young people as well as the general public on what conversion practices are, and the detrimental impact they have on victim's lives, as part of our wider work on LGBTQI+ visibility.
>
> Tailored and targeted community outreach programmes will also be considered to ensure that no area of society is left out."

3.58 Education is itself the subject of distinct provision in the ECHR. Among the Convention rights listed in Schedule 1 of the Human Rights Act 1998 is Article 2 of Protocol No. 1 to the European Convention ("A2P1 ECHR") which is in the following terms:

> **"Right to education**
> [i] No person shall be denied the right to education
>
> [ii] In the exercise of any functions which it assumes in relation to education and to teaching, the State *shall respect the right of parents to ensure such education and teaching in conformity with their own religious* <u>*and philosophical convictions*</u>."

3.59 As regards the second sentence of A2P1 ECHR concerning the duty of the State to "respect the right of parents to ensure such education and teaching *in conformity with*

their own religious and philosophical convictions" the United Kingdom has accepted this right under express reservation which has been incorporated into UK law by Section 15(1)(a) and Part II of Schedule 3 to the Human Rights Act and is to the following effect:

> "the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom *only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure".*

3.60 The Strasbourg court takes a broad view of what constitutes education, the right to which is protected under and in terms of A2P1 ECHR, noting in one early case as follows:

> 33. .... [T]he education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development .... [and] the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.
> ...
> 40. ... Article 2 (P1-2) constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education. [28] ....[T]here is also a substantial difference between the legal basis of the two claims, for one concerns a right of a parent and the other a right of a child. The issue arising under the first sentence is therefore not absorbed by the finding of a violation of the second.
>
> 41. The right to education guaranteed by the first sentence of Article 2 (P1-2) by its very nature calls for regulation by the State, *but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols* [29]" [30]

3.61 Accordingly, the declaration by the Scottish government of its intention to "educate children and young people" about and against the necessarily detrimental impact of what it considers to be "conversion practices" will be lawful (and within the powers of the Scottish Government) only insofar as compatible with the A2P1 ECHR Convention right of parents to ensure their children's education and teaching is in conformity with the parents' own religious and philosophical convictions.

4. DOES THIS PROPOSED CONVERSION PRACTICES LEGISLATION FALL WITHIN THE LEGISLATIVE COMPETENCE OF THE SCOTTISH PARLIAMENT ?

[28] See the above-mentioned *Kjeldsen, Busk Madsen and Pedersen* judgment, pp. 25-26, § 5

[29] See the judgment of 23 July 1968 on the merits of the *"Belgian Linguistic"* case, Series A no. 6, p. 32, § 5

[30] *Campbell and Cousens v. United Kingdom* (1982) 4 EHRR 293 at §§ 33, 40-1

4.1 The proposals which the Scottish Government has consulted on would, if passed into law, effect radical changes in the current law. They will also involve a marked intrusion and expansion in the powers of the State into the private realm of families, and over the expression of orthodox religious teaching by faith groups.

4.2 The importance of protecting parents' rights and duties from an over-expansive State is expressly set out in preamble and Articles 5 and 18(1) of the UN Convention on the Rights of the Child ("UNCRC") as follows:

> "Convinced that the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community
> ....
> Article 5: State parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacity of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention
>
> Article 18: Parents ... have the primary responsibility for the upbringing and development of their child: the best interests of the child will be their basic concern."

4.3 And the domestic UK and Strasbourg caselaw is replete with judicial statements about not merely the centrality of parents in decisions about their children, but also as to why a legislature obliged to conform to the requirements of the ECHR *must* in the vast majority of situations respect and uphold the parents' views and decision making about their children and their upbringing.

4.4 Thus parents' rights in relation to their children are undoubtedly too part of family life to which protection is given by Article 8(1) ECHR which provides that "everyone has the right to respect for his private and family life, his home and his correspondence". And in *Lautsi v. Italy* the Strasbourg Grand Chamber in a case which concerned the issue of whether the hanging of crucifixes on the walls of the classrooms of State run schools violated the A2P1 ECHR right of parents to educate their children in conformity with their own religious and philosophical convictions, and the right of their children to believe or not to believe - observed that:

> "The state is *forbidden* to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the states must not exceed." [31]

[31] *Lautsi v. Italy* (2012) 54 EHRR 3 (18 March 2011)

4.5 These legislative proposals also implicate Article 9 ECHR, which guarantees freedom of religion and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance. In *TC v. Italy* [2022] ECtHR 54032/18 (First Section, 19 May 2022) the following was observed (at § 30):

> "The Court considers that for a parent to bring his or her child up in line with one's own religious or philosophical convictions may be regarded as a way to 'manifest his religion or belief, in teaching, practice and observance'. It is clear that when the child lives with his or her parent, the latter may exercise Article 9 ECHR rights in everyday life through the manner of enjoyment of his or her Article 8 ECHR rights"

4.6 Also relevant is Article 10 ECHR, which guarantees freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference. A further immediately relevant Convention right is Article 11 ECHR which guarantees to everyone the right to freedom of peaceful assembly and to freedom of association with others. In *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12 the Strasbourg Court observed at § 93:

> "religious associations are not merely instruments for pursuing individual religious ends. In profound ways, *they provide a context for the development of individual self-determination and serve pluralism in society*. The protection granted to freedom of association for believers enables individuals *to follow collective decisions to carry out common projects dictated by shared beliefs*."

4.7 In order to be able to challenge the validity of legislation passed by the Scottish Parliament as beyond legislative competence because Convention incompatible it is necessary for the court to be satisfied that the legislation at issue was simply not capable of being applied (at least in most cases) in a Convention compliant manner. [32] As the decision in *Christian Institute v. Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 concerning the Scottish "named person" legislation shows, this is a high, but not insurmountable hurdle to overcome. [33]

4.8 It is clearly impossible to *finalise* possible arguments against the validity of this legislation unless and until there is legislation which has been passed by the Scottish Parliament. But given the undoubted impact that this legislation would have on a host

[32] *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505

[33] See too *AB v Her Majesty's Advocate*[2017] UKSC 25, 2017 SC (UKSC) 101 in which the UKSC upheld a Convention incompatibility challenge to the terms of section 39 of the Sexual Offences (Scotland) Act 2009 (which deprived a person, A, who is accused of sexual activity with an under-aged person, B, of the defence that he or she reasonably believed that B was over the age of 16, if the police had previously charged A with a relevant sexual offence).

of Convention rights, if a court challenge is brought as to the validity of this legislation, the onus will then be placed on the State authorities to satisfy the court that the legislation is, in all the circumstances, Convention proportionate and separately "in accordance with law" to the standards required by the European Court of Human Rights. This will require the State authorities to produce cogent and reliable evidence before the court sufficient to satisfy the court on these points.

4.9 In this regard the authorities have to show – against the background of the existing law covering this area - that there is indeed a pressing social need for this further legislation. Separately the new legislation has to be shown to set out rules of sufficient precision to enable any individual to regulate his or her conduct, and to afford individuals protection against the possibility of ***arbitrary*** interferences by public authorities with their Convention rights.

4.10 On this point of potential arbitrariness, the proposals in this legislation for conversion practices protection orders (which may be applied for by private parties) echo, in some ways, the approach which has been taken in a number of States in the United States, exercising their restored legislative competence on matters of abortion since the decision in *Roe* v. *Wade*, 410 US 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 US 833 (1992) was overturned and reversed by the US Supreme Court in *Dobbs v. Jackson Women's Health Organization* 597 US 215 (2022). Since the Dobbs decision a number of State legislatures, notably that of Texas, has passed abortion law which are enforced not directly by the State but by "private citizen enforcers". Thus under the Texas Heartbeat Act of 2021/Texas Senate Bill 8 private citizens are given legal standing to sue any individual or organization who assists a woman to obtain an abortion otherwise outlawed under the Act. The incentive for such private enforcement civil action is that if the claimant establishes on the civil standard of proof that the individual or organization has indeed assisted a woman to obtain an abortion which is otherwise outlawed under the Act then the claimant is given a right to an award of damages of not less than $10,000. [34]

4.11 Under the Scottish Government's proposals, although no right of damages is given and standing is also given to the authorities to enforce, the fact remains that any private body (whether an individual activist or, for example, an LGBTQIA+ advocacy

[34] See Meredith Johnson "The Texas Heartbeat Act: how private citizens are given the power to violate a woman's right to privacy through an unusual enforcement mechanism" (2021) 23 The *Georgetown Journal of Gender and the Law* 1-10

organisation), will be able to *threaten* civil court action against other individuals (for example parents of children) or organisation (such as churches) whom they accuse of engaging in illegal "conversion practices" in relation to their child or a member of their church. And the fact that the person who is the subject of these conversion practice does *not* wish, or actively objects to, such court action being brought to protect them against their parents, their church or themselves is no barrier to such court action being threatened, and if permission given by the court to the private citizen enforcer, initiated.

4.12 This all necessarily brings a certain (and arguably Convention incompatible) arbitrariness in enforcement since the class of potential "private activists" who might threaten supposed enforcement actions against individual parents or doctors or churches is not defined, and hence their number not limited. Further such private activists are not bound by public law principles of consistency or any requirement to promulgate and follow policies of enforcement, so an individual or association or church or professional body cannot predict when or why or by whom court action might be threatened against them.

4.13 Distinct from the Convention rights based challenges to the legislative competency of these proposed measures were they to be passed unchanged into law, successful challenges to the validity of such legislation can also be envisioned based on the following:

(1) Certain provisions of this proposed legislation, notably as regards the offences and prohibition against travel outside of Scotland purport to have extra-territorial effect contrary to the provisions of Section 29(2)(a) of the Scotland Act 1998 ("SA 1998") which state "a provision [of an Act of the Scottish Parliament] is outside that [legislative] competence so far as … it would … confer or remove functions exercisable otherwise than in or as regards Scotland".

(2) Contrary to the provisions of Section 29(2)(b) SA 1998 (which state "a provision [of an Act of the Scottish Parliament] is outside that [legislative] competence so far as …. it relates to reserved matters") the provisions of this legislation relate to the reserved matters of equal opportunities which is defined (in § L2 of Schedule 5 SA 1998) as

> "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal

attributes, including beliefs or opinions, such as religious beliefs or political opinions." [35]

(3) In its disregard of the constitutional principle of subsidiarity by requiring parents of children and religious organisations either to keep silent their own views on sexual orientation and/or gender identity or actively to adopt and promote and give voice to only the views of the Scottish Government on these matters, the legislation at issue has the intent and effect of *abrogating fundamental rights recognised at common law and/or violating the rule of law* in breach of the common law limitations on the powers of the Scottish Parliament spoken to in *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

5. CONCLUSION

5.1 As we have seen, if passed this legislation would criminalise parents who sought to exercise any form of parental authority or guidance in relation to their children as regards issues around sexuality and gender which conflicted with the official position now adopted by the State.

5.2 Separately if these proposals were passed into law, then the law would have a chilling effect on the ability and willingness of religious bodies - and separately, among others, gender critical feminist activist individuals or groups - to teach and preach and lobby and proselytise, on any matters relating to sexuality and/or gender, which conflicted with any of the official positions now adopted by the State.

5.3 This is perhaps best described as "*jellyfish legislation*". The concepts it uses are impossible to grasp; its limits are wholly undefined; it contains a sting in the tail in the form of criminal sanction of up to 7 years and unlimited fines; and thus it will have an undoubted and intended effect of dissuading persons from ever even entering the now murky waters of what may or may not constitute unlawful "conversion practices".

5.4 And these criminal sanctions can be imposed, among others:

- on parents who in bringing up their children, do not conform to the State's new dogmas on sex, sexuality and gender identity;

[35] Cf *For Women Scotland Ltd. v. Lord Advocate* [2022] CSIH 4, 2022 SC 150

- on religious bodies whose teaching and preaching and religious practices in the area of sex, sexuality and gender identity run contrary to the State's approved doctrine on these matters;
- on political bodies, feminist groups and associations and NGOs and individuals who publicly disagree with, and seek to challenge and change the State's current orthodoxies on sexual orientation and/or gender identity;
- on medical professionals who in their medical practice would dispute and dissent from what the State now stipulates as, to use an Orwellian term, "goodthink" in relation to sex, sexuality and gender identity. [36]

5.5 If the proposals become law this would involve the Scottish authorities using the full weight of the State's coercive powers of expropriation, incarceration and humiliation against individuals and associations in Scotland deemed guilty - even at an individual's request, or with their consent – of performing, offering, promoting, authorising, prescribing or arranging for *any* treatment, practice or effort that is deemed to be *aimed* at changing, suppressing and/or eliminating that person's (expression of) their avowed sexual orientation (whether heterosexual, homosexual, bisexual or asexual) and/or "gender identity" (whether congruent or incongruent with their actual sex) .

5.6 The proposals have serious consequences for individuals subject to the law, but they emanate from a government which appears to have forgotten its duty to take seriously its obligations to maintain the conditions of and for a *liberal* democracy, preferring instead to *impose*, by virtue of its possession of a monopoly on legitimate violence, its own vision of the good life.

5.7 But a *liberal* democracy is one in which the State gives space to, and affords respect for, other forms of life, and visions for society. Such alternative views may be, embraced by individuals, embodied in families, and given voice in and by voluntary associations of people choosing to come together with a common purpose. These might be, say, feminist groups; or recreational clubs; or political entities; or religious bodies. A liberal democracy is a society in which a multiplicity of diverse voices can be heard, and where freedom of expression is honoured. It is space in which dissent

[36] See too the Gender Recognition Reform (Scotland) Bill, which was passed by a majority in the Scottish Parliament on 22 December 2022. In *Scottish Ministers v. Advocate General for Scotland - re gender recognition reform* [2023] CSOH 89 the Lord Ordinary, Lady Haldane, upheld the lawfulness of the decision of the UK Secretary of State for Scotland to make an order under section 35 of the Scotland Act 1998 to block Royal Assent to this Bill and so prevent it from becoming law. The Scottish Government has stated that it will not appeal against this decision.

thrives and where a free and open and ultimately tolerant and pluralist society flourishes because of, not in spite of, contradiction and opposition.

5.8 The criticisms voiced in the judgment of Baroness Hale, Lord Reed and Lord Hodge in *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 (when the UK Supreme Court unanimously struck down Scottish legislation which required the universal appointment of State guardians to children in Scotland - which legislation had been passed without any dissenting votes by the democratically elected and accountable Scottish Parliament) can be applied equally to the present case. The Court there noted (at § 73) that:

> "The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."

5.9 As we have noted above, it is not clear from these proposals just what the concept of harm play in them. Are "conversion practices" to be regarded as being "inherently harmful" such that harm inevitably results from them, even if not to the individual subject to them but to the wider community?

5.10 The proposals in this legislation simply fail to define what are to become criminal "conversion practices". It will thus become impossible for individual parents and faith groups and medical practices and political associations to be able to know how to regulate their behaviour to avoid falling foul of the criminal law. The legislation fails too to define crucial terms as to just what constitutes an individual's "gender identity", and just what behaviour is to be regarded as (attempted) "suppression" of either sexual orientation or gender identity.

5.11 In sum, these proposals from the Scottish Government for legislation are ill-thought out, confused and confusing, and fundamentally illiberal in intent and effect. I conclude therefore that there are very strong arguments indeed that these legislative proposals of the Scottish Government are beyond the legislative competence of the Scottish Parliament, primarily because of their over-breadth, their disproportionate intrusion into private and family life and freedom of religion and freedom of expression, but also because of their internal incoherence.

5.12 I have nothing more to add at this stage. I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor and client. Those instructing me

should not hesitate to revert to me if there is anything arising from the above on which I might usefully further advise, whether in writing or at a consultation.

2 February 2024

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