



# Is a conversion therapy ban compatible with human rights?

**Legal Opinion**

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The opinion is written by Roger Kiska, who has considerable expertise in human rights law. Kiska has extensive experience in European Court of Human Rights litigation, setting precedents on several occasions in Article 8 and 9 cases involving private life and religious freedom. He has also litigated before the Grand Chamber of the Court of Justice of the European Union. He served a 2-year term as an elected member of the Advisory Panel of the European Union's Fundamental Rights Agency. Kiska has acted as legal adviser for several Members of European Parliament and provided legal support for two EU political groups. Finally, he has provided keynote addresses or given expert evidence to national parliaments around the world, including the United Kingdom and the United States Congress, as well as to the European Parliament and the Council of Europe. Kiska is legal counsel to the Christian Legal Centre.



# Introduction

Is a ban on conversion therapy lawful and practical?

Following pressure from campaigners, the UK government has pledged to make ‘conversion therapy’ illegal. However, there are considerable practical and legal difficulties in following through with this promise. A ban that restricts the right to respect for private and family life and curtails freedom of thought, conscience and religion would be wide open to human rights challenges.

## What is ‘conversion therapy’?

One of the major difficulties of meeting activists’ demands is defining what is (or is not) included under the umbrella term ‘conversion therapy’.

The government’s own consultation admits the problem with the terminology, using the phrase “so-called ‘conversion therapy’”<sup>1</sup>. Who is calling it ‘conversion therapy’? The government itself is uncomfortable with the phrase and no one in the UK has used the term to describe or promote their own work. Even campaigners who originally popularised the term now prefer ‘conversion practices’ in an attempt to cover a broader range of activities.

This is not a question of semantics but covers most of the concerns reasonable people have about the proposals. Everyone agrees that physical assault in any context is wrong. However, there has been no clear answer to the simple question: *what will a ban on ‘conversion therapy’ ban that is not already illegal?*

## ‘Talking conversion therapy’

The government proposes to create a new offence covering ‘talking conversion therapy’ if “delivered to either a person under 18 or a person who is 18 or over and who has not given informed consent”. Concerns about this proposal include:

- Certain types of private consensual conversations would risk criminal sanctions.
- People who want help with unwanted sexual attractions or identities will be unable to obtain the type of support they want.
- Counsellors will be at risk of allegations of ‘conversion therapy’ by disgruntled former clients.
- Ordinary pastoral care (e.g. from church leaders) which may include encouragement to resist sexual feelings could constitute ‘conversion therapy’.
- Prayer ministry could be criminalised. The existing proposals claim that ‘private prayer’ would not fall under the definition, but leading proponents of a ban insist that it should,<sup>2</sup> and it is unclear how a definition could be written to exclude this.
- How can an absolute ban for under-18s be justified, given the recent vast increase in children referred to gender identity clinics for gender dysphoria? These children, who suffer disproportionately from mental health conditions, self-harming and suicidality, and whose outcomes after medical transition are extremely poor are nevertheless considered able to consent to life-changing treatment<sup>3</sup>. A ban would stifle proper inquiry into the causes of a child’s feelings due to accusations of ‘conversion therapy’.

## Gender identity

Although the government is currently saying it will only legislate to ban attempts to change sexual feelings, pressure remains for the government to ban ‘conversion therapy’ relating to gender identity. Within UK law, this amounts

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<sup>1</sup> <https://www.gov.uk/government/consultations/banning-conversion-therapy>

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<sup>2</sup> For example: <https://www.premierchristianity.com/interviews/jayne-ozanne-the-christian-campaigner-explains-why-she-wants-to-ban-hate-prayer/5807.article>

<sup>3</sup> The expert reports supporting the case of Nigel and Sally Rowe outline some of the evidence: <https://christianconcern.com/cccases/nigel-and-sally-rowe/>

to a substantial problem, given the lack of clarity about what precisely a gender identity is. The existing Gender Recognition Act allows a person to formally adopt an acquired gender, limited to male and female. However, the term ‘gender identity’ as used in the proposals cannot make sense if referring to this legal status. Nor is gender identity the same as gender reassignment, the latter being defined as a protected characteristic under the Equality Act 2010 and requiring some overt step towards physical reassignment of sex traits.

To be coherent, the proposals would have to cement widely-questioned, controversial ideas about gender in law.

### *A ban would not be shown to be necessary or proportionate*

At time of writing, the government has recently closed the consultation on its proposals. Although many groups and individuals have expressed concerns and asked the government to narrow or abandon its plans, some wish for an even harsher and broader legislative approach.

Therefore, this legal opinion covers a range of approaches that the government could take to ban ‘talking conversion therapy’. It focuses on the human rights and equality laws that the United Kingdom is already committed to and how they restrict possible approaches the government may take.

Whatever approach the government takes needs to be supported by credible evidence that the specific activities being restricted cause harm. The government’s existing research does not meet this threshold<sup>4</sup>.

In summary, the opinion finds that there is no real and verifiable evidence to show that a ban

is necessary and proportionate. Therefore, a ban would be in breach of articles 8 and 9 of the European Convention on Human Rights.

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<sup>4</sup> For example, the most recent peer-reviewed study shows that sexual orientation change efforts do not cause harm even when unsuccessful (<https://www.frontiersin.org/articles/10.3389/fpsyg.2022.823647/full>). This finding is consistent across studies when properly analysed.

# Executive Summary

In 2018, the government, for the first time, expressed its intention to legislate a ban on 'conversion therapy'. On 29 October 2021, the government published its consultation document announcing how it intended to do so.

The plans included a new law to ban 'talking conversion therapy' for anyone who has not properly consented or who has been coerced. Those under the age of 18 would be unable to consent to such therapy.

However, the consultation failed to define exactly what 'conversion therapy' might entail or what would amount to coercion. Although assurances were made – for example that “casual conversations” and “private prayer” would not be considered as conversion therapy – it is unclear how these distinctions would be made.

The proposals also endorse the term 'gender identity', which has yet to be defined clearly or given effect in British law.

This legal opinion demonstrates that the new law addressing 'talking conversion therapy' would have significant legal and social consequences, particularly for those who have legal capacity and desire counselling, for their own reasons, to move away from same-sex attraction or behaviour, or to reconcile their gender identity with their biological sex.

This may include:

- people who are married and have children and wish to keep that intact
- clergy who wish to remain faithful to their religious vows
- people of faith who wish to live in accordance with their beliefs.

A ban could also affect practitioners caught up in an overly broad or ill-defined ban on 'conversion therapy', despite practising within a peer regulated and ethical framework. This could give rise to claims under Protocol 1, Article 1 of the European Convention on Human Rights

[Convention] for interfering with otherwise lawful business activities.

One argument in favour of a ban is that 'conversion therapy' could violate Article 3 of the European Convention on Human Rights – and that the government may therefore be required to take action against conversion therapy, even at the expense of other human rights. However, practices that reach the level of inhumane and degrading treatment, thus violating Article 3, are already prohibited by existing criminal law. The opinion contends that Article 3 does not provide a justification for a ban on ordinary talking therapies.

The opinion further concludes that any proposed legislation is likely to be unlawful under the Human Rights Act 1998 and/or the Equality Act 2010.

By placing further restrictions on either those seeking counselling, who enjoy an Article 8 right to privacy and sexual self-determination, and/or by restricting the Article 9 rights of practitioners or clients to choose and manifest their own religious beliefs, any ban would likely be adjudicated under a strict scrutiny standard of review.

This means that the law's limitations on Article 8 and 9 rights would have to be clearly defined, provide foreseeability to client and practitioner alike, and place precise limitations on the discretion of the public authority. Moreover, it would have to be shown that the new restrictions are necessary and are narrowly tailored to serve one of the legitimate aims identified in Articles 8 and 9 of the Convention.

Regulation rather than an outright ban is a more proportionate means of passing Convention scrutiny, so any proposed law will face high hurdles if it is to be deemed compatible with the Convention.

Any ban on 'conversion therapy' related to gender identity will likely face even greater obstacles, given the difficulty in defining gender identity.

This is most obvious in the government's proposed ban on talking therapies for under-18s. If the government deems children, or their parents on their behalf, to have the capacity to consent to puberty suppression or the first stages of transitioning itself, it is difficult to see why they would not also have the capacity to obtain counselling to move away from these choices.

Lastly, a case for discrimination can be made under the Equality Act 2010 if a ban, once implemented, led to the disparate treatment of certain categories of people. 'Ex-gay' is recognised as a protected characteristic under the wider umbrella of sexual orientation and a broad ban on conversion therapy would likely impact such people more than those in other groups. A claim would need to show that the restrictions on receiving counselling are disproportionate to serving a legitimate aim or that the aim of the ban is in fact illegitimate.

For all these reasons, the proposed ban on 'talking conversion therapy' may prove unjustifiable on the grounds of human rights and equalities, rendering the legislation unworkable in practice.



# Legal opinion

## Introduction

1. In 2018, the government first pledged to ban 'conversion therapy'. On 11 May 2021, on the occasion of the Queen's Speech, the government made overt its intentions to do so. On 29 October 2021, the government published its consultation document on 'conversion therapy'. Yet, at this stage, the public still only had a vague idea of what the ban might entail or even how the key terms within the proposed law will be defined. What is known is that any counselling which falls under the government's definition of 'conversion therapy' would be banned for all persons under the age of 18. The consultation document sends mixed messages about talking therapy and to what extent it will be allowed, or how the consent requirements will be defined. Lastly, while the government holds out in the consultation its respect for religious freedom and freedom of expression, it is yet to be seen to what extent these two fundamental rights will be interfered with under the new legislation.
2. 'Conversion therapy' is a pejorative term which has intentionally never been well-defined, so as to give it the widest possible scope. The Memorandum of Understanding (MOU), which is signed by NHS England, a number of other professional bodies, as well as several LGBT organisations, defines 'conversion therapy' in the broadest terms:

*For the purposes of this document 'conversion therapy' is an umbrella term for a therapeutic approach, or any model or individual viewpoint that demonstrates an assumption that any sexual orientation or gender identity is inherently preferable to any other, and which attempts to bring about a change of sexual orientation or gender identity, or seeks to suppress an individual's expression of sexual orientation or gender identity on that basis.*

*These efforts are sometimes referred to by terms including, but not limited to, 'reparative therapy', 'gay cure therapy', or 'sexual orientation and gender identity change efforts', and sometimes may be covertly practised under the guise of mainstream practice without being named.<sup>1</sup>*

3. For the purposes of this Opinion, the term 'conversion therapy' will be retained, even if the term is pejorative and lacking in legal clarity in that it is intentionally suggestive that any counselling aimed at helping people move away from unwanted same-sex attraction or behaviour or gender dysphoria (whether done ethically or not) is a form of 'conversion therapy'. The term will be used in this Opinion for the sole reason that it is the term used in the MOU and, in all likelihood, any prospective legislation. It is worth noting that the government's consultation offers no definition of the term, and that hermeneutically we therefore must rely on the MOU's terminology. It is vital for the reader of this Opinion to understand, however, that the majority of the counselling done under this wide umbrella is professionally regulated and done within a strict ethical framework, and that the ban of such work raises serious questions of legality.
4. 'Conversion therapy' stirs up images of abuse, manipulation and preying upon the vulnerable. The proposed ban on 'conversion therapy' implies that almost all forms of counselling for unwanted same-sex attraction or gender incongruency are equally harmful and unethical. Not only is the impression given by those advocating a ban irresponsible and untruthful, these advocates seek to deny existing and future individuals the exact same right to self-

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<sup>1</sup> Memorandum of Understanding (Version 2), October 2017, para. 2. Found at: <https://www.bacp.co.uk/media/6526/memorandum-of-understanding-v2-reva-jul19.pdf>.



realisation that everyone else enjoys in a free and democratic society.<sup>2</sup> Individuals seeking counselling for unwanted same-sex attraction can be husbands wishing to remain faithful to their wives, clergy wishing to say true to their religious vows, or people of religious faith seeking to be true to the life that they believe God calls them to live.

5. Much has been made of historic abuse which is now encompassed within the meaning of 'conversion therapy'. Ironically, methods often referred to were those used by the medical profession itself. In all spheres of medicine and counselling, abuse sadly has occurred. However, it is false generalisation to group all practitioners together, particularly those working transparently and within a strict ethical framework. Abuses have occurred in every area of counselling, yet we do not define other areas solely by those who have acted badly. A simple proportionality test makes clear that regulation, rather than prohibition, is the most legally robust way forward. However, given the strong political element and populist sentiment behind the proposed law, anything short of a ban is likely to upset campaigners and LGBT groups, regardless of the question of lawfulness.
6. This Opinion will outline the legal issues involved if such a ban were to take place, focusing on Articles 3, 8 and 9 of ECHR as involved into law by the Human Rights Act 1998 and Section 19 of the Equality Act 2010. What is crucially important when analysing this question is that any liberally worded ban on counselling for unwanted same-sex attraction or gender dysphoria would not only impact practitioners, but its effects would indeed be felt by a large number of those desiring counselling. It will also look at the European Convention rights of the prospective clients involved, as well as those of the practitioner.

7. The findings of this Opinion are straightforward. Statutes require good definitions; and those laws which are not well defined are likely to fall when scrutinised by the courts. Laws must be easily understandable so that the public has foreknowledge of what is banned and what remains lawful. Evidential standards of proof are also important so that harm can be identified in reality, and not just in theory. Harm must also reach to a level of severity which could justify criminal or administrative sanction. As it stands, the government has yet to provide compelling evidence that the 'conversion therapy' being undertaken, that which is not already subject to criminal law, actually causes any level of harm that would justify a new and more extensive ban. Lastly, the government has also failed to provide any details on how it intends to protect the legal rights of those legitimately seeking treatment and those who perform the therapy. A poorly worded ban can, in fact, have extensive and damaging unintended consequences to parents, teachers, therapists, pastors, minors with legitimate interests in receiving the therapy, and any number of other people who might get caught up in an overly broad ban.

## Human Rights Act 1998

8. The Human Rights Act 1998 transposes the European Convention on Human Rights into UK domestic law, giving it direct legal effect in UK courts. Section 6 of the Act prohibits public authorities from acting in a way which is incompatible to a Convention right. Section 7 of the Act allows for claims under the Human Rights Act 1998 to be brought before a court or tribunal.
9. The European Court of Human Rights has ruled that the Convention applies to private employers, including counselling services<sup>3</sup>, in that the government has a

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<sup>2</sup> See e.g., ECHR, *Case of Gladysheva v. Russia*, application no. 7097/10, judgment of 06 December 2011, para. 93.

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<sup>3</sup> *Relate*, one of the signatories to the Memorandum of Understanding, is specifically referenced in the case in relation to this issue.

positive obligation to secure the rights guaranteed to individuals by the Convention even in employment settings.<sup>4</sup> For private employers, that would require that a balance be struck between the competing interests of the employer and the employee.<sup>5</sup> For the context of this Opinion, it would also include the Article 8 and 9 rights of the individual seeking counselling services, and the Article 9, 14 and Protocol 1, Article 1 rights of the person providing the counselling services.

## Article 8: Right to Privacy

10. Article 8 of the Convention is broad in scope and protects private and family life, home and correspondence. The primary purpose of Article 8 is to protect individuals from arbitrary interference from public authorities in relation to their personal autonomy.<sup>6</sup> While the negative obligations stemming from Article 8 are obvious, the Convention imposes a positive obligation on States to ensure that Article 8 rights are respected, even between private parties.<sup>7</sup>
11. Article 8 protects the right to self-development.<sup>8</sup> It provides a sphere where people are free to pursue the development and fulfilment of their personality.<sup>9</sup> In the Court's words, "*Article 8 concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.*"<sup>10</sup>

12. The concept of "private life" is a broad term not susceptible to exhaustive definition, which also covers the physical and psychological integrity of a person.<sup>11</sup> The concepts of sexual life, gender identity and sexual orientation all fall within the personal sphere protected by Article 8.<sup>12</sup> In order for Article 8 to attach, an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one's private life.<sup>13</sup> The right to both self-determination<sup>14</sup> and sexual self-determination<sup>15</sup> have been defined as aspects of one's private life within the meaning of Article 8. Precisely stated, the issues discussed in this Opinion regarding potential bans on counselling which affect an individual's right to self-determination would be caught under Article 8.
13. Unfettered access to the counselling of one's choice is not an absolute right. The Court has found that in rare circumstances, psychological treatment for mental health that does not rise to the level of cruel and degrading treatment as defined by Article 3 of the Convention, may nonetheless violate Article 8 of the Convention.<sup>16</sup> However, that threshold is a particularly high one and the treatment would have to create sufficiently adverse effects on physical and moral integrity to engage Article 8.<sup>17</sup> As the Court has stated, such circumstances must be fairly extraordinary if the Convention is to be engaged.

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4 ECHR, *Eweida and Others v. the United Kingdom*, 48420/10, 36516/10, 51671/10, 59842/10, HEJUD [2013] ECHR 37 (15 January 2013, para. 109).

5 Id.

6 ECHR, *Libert v. France*, application no. 588/13, judgment of 22 February 2018, §§40-42.

7 ECHR, *Case of Bărbulescu v. Romania* [GC], application no. 61496/08, judgment of 05 September 2017, §§108-111.

8 ECHR, *Niemietz v. Germany*, application no. 13710/88, judgment of 16 December 1992, §29.

9 ECHR, *Case of A.-M.V. v. Finland*, application no. 53251/13, judgment of 23 March 2017, §76.

10 Id.

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11 ECHR, *Nicolae Virgiliu Tănase v. Romania* [GC], application no. 41720/13, judgment of 25 June 2019, § 126.

12 See e.g.: ECHR, *S. and Marper v. the United Kingdom* [GC], application nos. 30562/04 and 30566/04, judgment of 04 December 2008, § 66.

13 ECHR, *Denisov v. Ukraine* [GC], application no. 76639/11, judgment of 25 September 2018, §§ 110-14.

14 ECHR, *Case of Van Cuck v. Germany*, application no. 35968/97, judgment of 12 June 2003, §77.

15 Id., § 78.

16 ECHR, *Bensaid v. the United Kingdom*, application 44599/98, judgment of 06 February 2001, §46.

17 ECHR, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no 247-C, pp. 60-61, § 36.

14. It would be evident therefore that where Article 8 is provided as a grounds justifying limitations on the availability of 'conversion therapy', application of Article 8 would apply only on a case-by-case basis where the counselling in question had demonstrably serious adverse physical or moral effects on the individuals seeking counselling. Neither the government<sup>18</sup> nor any other stakeholder has provided any evidence that the incidences of abuse are so common as to justify a complete ban. In other words, there is no justification for such sweeping measures as they are grossly disproportionate to the aims of such a proposal.

### Article 3: Inhuman and Degrading Treatment

15. The threshold for justifying a ban under Article 3 is even more daunting and reference to it in the government's consultation fails in that criminal law would already punish any form of cruel or degrading treatment that reached this level. Determination of whether treatment reaches the required level of severity depends on all of the circumstances of an individual case, such as the nature and context of the treatment, and the manner and method of its execution.<sup>19</sup> The concept of a 'minimal level of severity' can be relative, and can include factors such as the physical and mental effects of the treatment, as well as the sex, age, and state of health of the alleged victim.<sup>20</sup>
16. The Commission, in the Greek case, noted that: "*the notion of inhuman or degrading treatment covers at least such treatment*

*as deliberately causes severe suffering, mental and physical, which in the particular situation is unjustifiable.*"<sup>21</sup>

While Article 3 may involve the treatment of someone because of their sexual orientation or perceived gender identity, these situations would be incredibly rare given the very high threshold needed to establish an Article 3 violation.

17. For example, in a case which involved the dismissal of several individuals from the British armed forces because of bias involving their sexual orientation, the Court held that while sometimes discriminatory treatment can be of such a level that it engages Article 3, the threshold is a high one. The feeling of distress and humiliation because of ill treatment based on someone's sexual orientation is always regrettable, however it does not rise to the minimum level of severity required under the Convention to justify a violation of Article 3.<sup>22</sup>
18. A blanket and liberally-worded ban on counselling for unwanted same-sex attraction or gender dysphoria would undoubtedly have serious consequences for those wishing to live a heterosexually oriented lifestyle or those who wish to have gender congruency with their biological sex. The majority of options open to the counsellor that would be specifically tailored to their needs would be taken away from the patient. Such a ban would encourage underground counselling, for which there would be no oversight or regulation. The remaining counselling options would either be LGBT-affirming, or the practitioners might feel pushed to lean towards that direction for fear of criminal or professional sanction. Moreover, any treatment which

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18 The consultation document relies on questionnaire data that in reality cannot be verified as being either true or false. It therefore relies heavily on speculation and the methodology would certainly be susceptible to tampering with by 'conversion therapy' ban activists.

19 ECHR, *Soering v. the United Kingdom*, judgment of 07 July 1989, Series A, no 161, § 100.

20 ECHR, *Ireland v. the United Kingdom* (1979-1980) 2 EHRR 25, §65.

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21 12 (1969) YECHR, application no. 3321/66 (*Denmark v. Greece*), application no. 3322/67 (*Norway v. Greece*), application no. 3323/67 (*Sweden v. Greece*), application no. 3344/67 (*Netherlands v. Greece*), decision of 05 November 1969.

22 ECHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 42, §§90-91.



would rise to the level of an Article 3 violation is already caught by the criminal law, making a further ban redundant and unsafe if the intent is to also effect otherwise lawful counselling.

19. Applied equally, a person has just as much right to move away from unwanted same-sex attraction or gender dysphoria as they do to embracing homosexual feelings or transgenderism. Superficially, the gesture of protecting vulnerable people suffering unwanted feelings relating to their sexual attraction or gender dysphoria may seem valid; the reality is that such efforts can take an insipid form of paternalism which injures self-determination, stifles pluralism, offends human dignity and breaches Convention Rights. Moreover, paternalism is not a legitimate ground to base legislative limitations on personal freedoms. Paternalism, in and of itself, still needs to pass constitutional muster. The belief that people need to be protected from seeking help for unwanted feelings can be more damaging and dogmatic than the treatment the Memorandum of Understanding or any proposed ban is trying to prevent.
20. The Convention protects only rights which are actual, and not illusory. No matter how much fear mongering proponents of the ban create or how terrible a picture they paint, if the reality is that the counselling that is presently offered bears no resemblance to how it is being portrayed, then a ban which is sought to be justified under either Articles 3 or 8 would face an incredibly high, if not insurmountable, level of judicial scrutiny.

## Article 9: Freedom of Thought, Conscience and Religion

21. Article 9 of the European Convention for Human Rights requires that any restriction to religious expression be narrowly tailored and proportionate to serving a legitimate

government aim.<sup>23</sup> Article 9 stands alone in that it is the only fundamental right which recognises the relationship between the individual and the transcendent. It therefore protects the most profound and deeply held conscience and faith-based beliefs.<sup>24</sup>

22. Although a qualified right, the Court nonetheless considers that freedom of religion is one of the foundations of a democratic society.<sup>25</sup> The European Court, in the *Manoussakis and Others v. Greece* judgment, has also ruled that any interference with freedom to manifest one's religion must be reviewed with very strict scrutiny.<sup>26</sup> This fact is noteworthy in the context of comparative jurisprudence, where United States' courts utilise a strict scrutiny standard when reviewing matters pertaining to a constitutional right.<sup>27</sup> Undoubtedly this fact was not lost on the European Court when it allocated this standard of review to Article 9.
23. The Grand Chamber of the Court of Justice has noted that Article 10(1) of the Charter of Fundamental Rights and Freedoms

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23 (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

24 See e.g., *Eweida and Others v. the United Kingdom*, 48420/10, 36516/10, 51671/10, 59842/10, HEJUD [2013] ECHR 37 (15 January 2013), dissenting opinion of Judges Vučinić and De Gaetano, §2ff. They argue that freedom of conscience is mentioned in Article 9.1, but is not subject to any of the limitations in Article 9.2, meaning that once a genuine and serious case of conscientious objection is established, an employer is obliged to respect it both positively and negatively.

25 ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.

26 ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, § 44.

27 The standard was introduced by the United States Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), fn. 4.

corresponds to Article 9 of the Convention.<sup>28</sup> It has also held that it is not for state authorities to distinguish between private or public manifestations of faith, because to do so would diminish the protections afforded to freedom of thought, conscience, and religion.<sup>29</sup> The Advocate General's opinion<sup>30</sup> in the case provides further illumination stating that people of faith cannot be expected to forgo manifesting their religion as faith is a core component of who we are.<sup>31</sup>

24. Article 9 thus protects the *forum externum*, on the basis that “*bearing witness in words and deeds is bound up with the existence of religious convictions.*”<sup>32</sup> This is important given that religious faith often plays a role in existing treatment. It may be that the person seeking counselling already is a person of faith and wishes to live a life in accord with his religious beliefs. It may also be that the individual is a religiously curious person, seeking counselling for unwanted feelings and wishing to do so within the context of Christian counselling. The practitioners themselves, some of whom have personally dealt with the same issues their patients have struggled with, provide their services within the context of a Christian ethos. Yet others, from the perspective of a Christian ministry, deal with the issues involved from a theological perspective, offering pastoral or prayer support. All of the scenarios outlined above are protected to some extent under Article 9 of the Convention.
25. Therefore, any ban which seeks to affect the internal workings of churches and ministries would face high legal hurdles.

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28 C-71/11 and C-99/11, Judgment of 5 September 2012.

29 *Id.*, §62-63.

30 Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d56f4da844638e4762911b82fb0bb55b65.e34KaxiLc3eQc40LaxqMbN4Oa3aNe0?text=&docid=121723&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1062121>.

31 *Id.*, § 107.

32 *Id.*

One of the most unwavering and established principles found in the jurisprudence of the European Court of Human Rights is the doctrine of church autonomy. In the seminal case of *Metropolitan Church of Bessarabia v Moldova*, the Court held that: “*the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention.*”<sup>33</sup>

26. The Court has concluded that a public authority may not interfere with the internal workings of a church or religious organisation and may not impose rigid conditions on the practice or functioning of religious beliefs.<sup>34</sup> So strong is this principle that it has been upheld three times by the Grand Chamber of the European Court of Human Rights.<sup>35</sup> Most recently the Court again upheld the same principle regarding respect for the internal workings of religious organisations in a judgment against Hungary.<sup>36</sup>
27. Apart from the formal settings of a church ministry, Article 9 rights are still protected to the extent that any interference with religious expression must be necessary in a democratic society and serve a legitimate aim. The parameters of the test used for Article 9, as well as Article 8, will be set out below.
28. It is first worth noting, however, that where the desire to seek counselling is a

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33 ECHR, *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118.

34 See: ECHR, *Serif v. Greece*, No. 38178/97, Reports 1999-IX, 14 December 1999, §§ 51-53; ECHR, *Manoussakis v. Greece*, No. 18748/91, Reports 1996-IV, 26 September 2000, § 82.

35 ECHR, *Hasan and Chaush v. Bulgaria* [GC], No. 30985/96, Reports 2000-XI, 26 October 2000, § 82; ECHR, *Case of Fernandez Martinez v. Spain* [GC], No. 56030/07, Judgment of 12 June 2014; ECHR, *Case of Sindicatul “Pastorul Cel Bun” v. Romania* [GC], No. 2330/09, Judgment of 9 July 2013.

36 ECHR, *Case of Karoly Nagy v. Hungary*, No. 56665/09, Judgment of 1 December 2015.

matter of conscience rather than religious belief, an argument can be made that interference of any kind might fail under an Article 9 analysis. The position that rights of conscience are absolute under the Convention has enjoyed some support by judges of the Strasbourg court. For example, the dissenting opinions of Judges Vučinić and De Gaetano in *Eweida* argued that instances of conscientious objection are not so much a case of freedom of religion as they are of freedom of conscience. Freedom of conscience is mentioned in Article 9.1, but is not subject to any of the limitations in Article 9.2, meaning that once a genuine and serious case of conscientious objection is established, an authority is obliged to respect it both positively and negatively.<sup>37</sup>

### Three-pronged Analysis: Article 8-11

29. The Court applies a three-pronged test when analysing alleged interferences with rights under Articles 8 to 11 of the Convention. For the purposes of this Opinion, interference with either the right to privacy or freedom of religion or belief in the context of utilising or providing counselling services for unwanted same-sex attraction or behaviour or incongruency between biological sex and one's sense of gender identity, can only be justified when three criteria are met concurrently: (a) that the interference was prescribed by law; (b) that it pursues a legitimate aim and (c) that the action taken was necessary in a democratic society.

#### PRESCRIBED BY LAW

30. With regard to the first prescription prong of the test, by no means is the margin of appreciation enjoyed by the United Kingdom in enacting a ban on 'conversion therapy' unlimited; the ECHR utilises a high level of scrutiny when analysing interference with fundamental rights such as the protection

of privacy.<sup>38</sup> As set out above, the Court also analyses interferences with freedom of religion or belief using a strict scrutiny standard. In order to be prescribed by law, the law in question must be accessible and foreseeable in its effects.<sup>39</sup> It thus cannot suffer from vagueness. The "quality" of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.<sup>40</sup>

31. In *Metropolitan Church of Bessarabia v. Moldova*, the Court held that in order to meet the clarity requirement, domestic law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention:

*In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, 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 such discretion and the manner of its exercise.*<sup>41</sup>

32. Precisely stated, for the general public, regulations restricting personal freedoms, such as the ones involved in the type of counselling covered in this Opinion, must be accessible and foreseeable in their effects. One of the roles of judges, therefore, is to assess the "quality" of a law, ensuring that the law has the requisite precision in defining the conditions and forms of any limitations on basic safeguards.<sup>42</sup>

<sup>37</sup> *Eweida and Others v. the United Kingdom*, op. cit., para 2ff (dissent).

<sup>38</sup> Cf. *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 19 (1988).

<sup>39</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

<sup>40</sup> *Olsson v. Sweden*, 130 Eur. Ct. H.R. (ser. A) at 30 (1988); see also *S.W. v. United Kingdom*, 335 Eur. Ct. H.R. 28, 42 (1995) (discussing how the development of criminal law by the courts should be reasonably foreseeable).

<sup>41</sup> *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 111.

<sup>42</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.



If the MOU is to give us any indication of what a future ban might look like, none of the key terms are precisely defined nor is what is permitted and what is banned foreseeable for the average practitioner or client. As will be discussed at length below, the definition of sexual orientation in law has always been less than clear. Moreover, the MOU's use of the term gender identity is even more troublesome, as no corresponding legal right currently exists in British law.

33. The question of legislating a 'conversion therapy' ban is further complicated by the fact that our legal understanding of the operative terms used in the MOU, and their scope, can change depending on the state of the common law. In *Sunday Times v. United Kingdom*, for example, the ECHR stated that "the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law."<sup>43</sup> Unwritten law is common law.<sup>44</sup> In common law countries, such as the United Kingdom, the ECHR has stated that:

[i]t would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would . . . strike at the very roots of that State's legal system.<sup>45</sup>

34. The legal meanings of sexual orientation and gender identity, being fluid and sometimes subjective terms, are particularly at risk of changing with the tides of judicial opinion. The area of gender identity will be covered extensively in the last section of this Opinion. This analysis will first turn to the definitional issues surrounding sexual orientation.

## LACK OF LEGAL CERTAINTY

35. One of the chief problems that exists in how and why sexual orientation appears to have been privileged over other characteristics is a hermeneutical one. Put succinctly, the problem began because of the lack of legal clarity in how sexual orientation is defined.<sup>46</sup> When the Equality Framework Directive 2000<sup>47</sup> was being drafted (which would later create a legal obligation upon all EU Member States to adopt their own in-kind anti-discrimination legislation) it originally stated that: "With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not."<sup>48</sup> The provision never became part of the final binding Directive, and the confusion of whether sexual practice was included in sexual orientation was *de facto* entrusted to the Member States.
36. The United Kingdom appears to have conflated the two issues, creating significant legal confusion for those trying to make sense of their obligations under existing anti-discrimination law. The issues surrounding sexual behaviour, which have an inherently moral character to them, are subject to an incredibly wide divergence of public and theological opinion. Had the original distinction between sexual behaviour and sexual orientation been captured in the law, arguably many of the legal conflicts between freedom of religion and sexual orientation would never have taken place. However, the UK courts have taken a different approach.
37. In 2004, the High Court held that: "The protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in

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<sup>43</sup> 30 Eur. Ct. H.R. (ser. A) at 30 (1979).

<sup>44</sup> *Chappell v. United Kingdom*, 152 Eur. Ct. H.R. 3, 22 (1989) (stating that "law" includes unwritten or common law").

<sup>45</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 30.

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<sup>46</sup> For a more detailed treatment of this issue, see: Paul Coleman and Roger Kiska, *The Proposed EU "Equal Treatment" Directive: How the UK Gives Other EU Member States a Glimpse of the Future*, IJRF Vol 5:1 2012 (113-128).

<sup>47</sup> 2000/78/EC.

<sup>48</sup> See: Commission of the European Communities, Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p.8.

the form of sexual behaviour as it does to sexuality as such. Sexual orientation and its manifestation in sexual behaviour are both inextricably connected with a person's private life and identity."<sup>49</sup> Lord Roger, writing his opinion for the majority in an asylum case, posited that sexual orientation includes the right to live freely and openly as a gay man, suggesting that: "Male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates."<sup>50</sup>

38. The problem is exacerbated by the confusion that often exists between sexual orientation and what are perceived as LGBT rights. The two often do not go hand in hand, particularly where the latter sometimes refer to aspirational or campaigning goals. The courts initially found the two issues to be indissociable until the Supreme Court delivered its landmark ruling in the Ashers Bakery case. In that case, a clear line was drawn between sexual orientation and LGBT campaigning; a distinction which recognised that a service provider can object to providing services which would cause them to violate their conscience or the ethos of the business.<sup>51</sup> Presumably this principle might extend to any forced participation in events which affirm LGBT relationships or homosexual behaviour, making the current legal state of affairs all the more muddled.
39. Clearly the problem with having a ban of counselling relating to sexual orientation is that the term itself is a moving target, with different people understanding it in different ways. Even within the LGBT campaigning community, there is a wide divergence of thought as to whether one is

born gay<sup>52</sup> or whether sexual attraction is fluid and changing.<sup>53</sup>

40. Perhaps most troubling is the open-ended definition of what might amount to 'conversion therapy'. If the proposed legislation will have any resemblance to the MOU, then such a ban would strike at the heart of why the law requires statutes affecting Convention rights to be clear, precisely defined and affording reasonable foreseeability to the public.

## LEGITIMATE AIM

41. The second prong of the test must determine whether the interference in question pursues a legitimate aim. Restrictions on rights guaranteed by the European Convention on Human Rights must be narrowly tailored and must be adopted in the interests of public and social life, as well as the rights of other people within society.<sup>54</sup> The Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient."<sup>55</sup>
42. The Court has articulated that the offending authority must succinctly articulate the legitimate aim it is pursuing when limitations are placed on Article 8 and 9 rights.<sup>56</sup> The onus is on the authority to evidence that the interference pursued a legitimate aim.<sup>57</sup>

<sup>49</sup> R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry [2004] IRLR 430 at § 432.

<sup>50</sup> HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department, [2010] UKSC 31, per Lord Roger, at §78.

<sup>51</sup> Lee v. Ashers Baking Company Ltd. and Others [2018] UKSC 49, §§34-35.

<sup>52</sup> See e.g.: Nick Duffy, *Are you Born Gay or is it a Choice? Scientists may have Found the Answer*, Pink News, 22 November 2014, at: [Are you born gay or is it a choice? Scientists might have found the answer](http://www.pinknews.co.uk/2014/11/22/are-you-born-gay-or-is-it-a-choice-scientists-might-have-found-the-answer/) (pinknews.co.uk).

<sup>53</sup> See e.g.: Diversity of sexual orientation (kinseyinstitute.org).

<sup>54</sup> See e.g.: Thoma v. Luxemborg, 2001-III Eur. Ct. H.R. 67, 84.

<sup>55</sup> Id, §85. (citing Fressoz & Roire v. France, 1999-I Eur. Ct. H.R. 1, 19-20).

<sup>56</sup> ECHR, S.A.S. v. France [GC], application no. 43835/11, judgment of 01 July 2014, §114.

<sup>57</sup> ECHR, Mozer v. the Republic of Moldova and Russia [GC], application no. 11.138/10, judgment 23 February 2016, §194.

43. The suggestion of a legitimate aim must be made in good faith. It therefore must be justified. Where the court has found that there was no reasonable connection between the interference and the stated legitimate aim justifying the interference, that a violation of the Convention will be found.<sup>58</sup> Where no legitimate aim is provided by the authority causing the interference, a violation of the Convention will also be found.<sup>59</sup>
44. It is likely that any proposed ban on 'conversion therapy' will seek to be justified on the basis that it serves the legitimate aim of protecting the health and morals of others or for the protection of the rights and freedoms of others. Both aims are enumerated in the second paragraphs of Articles 8 and 9.
45. While the margin of appreciation afforded Member States in determining what legitimate aims are at play when legislating interferences with Convention rights is wide, that margin is not absolute. There must be some basis that the aim being proffered by the legislating authority is actual and necessary.
46. As this Opinion has noted, much of the campaigning surrounding 'conversion therapy' looks at the very worst actors and does not remotely reflect the counselling practices of the vast majority of practitioners. Core Issues Trust (CIT) for example, arguably the largest provider of counselling services for unwanted same-sex attraction in the United Kingdom, directs potential clients on its website to a 49-page safeguarding policy. This makes reference to other CIT policies including a code of conduct, commitment to continuing education, whistleblowing, a complaint's procedure and a document outlining the values and guidelines CIT holds towards its clients.<sup>60</sup>
47. The document explains that while CIT does not believe people are born gay, it acknowledges that neither does it believe that same-sex attraction is chosen. Citing several studies on same-sex attraction<sup>61</sup>, CIT argues that for some people, sexual identity, attraction and behaviour are not in harmony and that these individuals in particular may experience change in their sexuality.<sup>62</sup>
48. Organisationally, CIT advocates for clients having a safe space for self-exploration and self-determination with a counsellor who will honour their freely chosen values. They disavow any form of treatment which treats a client against their will, or which encourages clients to seek treatment which uses manipulation, coercion or authoritarianism. They believe that clients have a right to discuss their concerns and identity stress without being reduced to diagnostic categories or labels. They also have a right to evaluate the risks and benefits, with the help of a therapist, of various options and conduct in order to promote personal responsibility and more effective choice making. Moreover, as has been a central theme in this memorandum, CIT advocates for the right of individuals to seek therapy from a licensed mental health professional for any personal motivation, free from governmental obstruction or intrusion.<sup>63</sup>

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<sup>58</sup> See e.g.: *id.*, §§194-196.

<sup>59</sup> ECHR, *Toma v. Romania*, application no. 42716/02, judgment of 24 February 2009, § 92.

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<sup>60</sup> Out of Harm's Way: Safeguarding at Core Issues Trust, found at: [https://www.core-issues.org/UserFiles/File///Safeguarding/Out\\_of\\_Harm\\_s\\_Way\\_Final\\_11.05.20.pdf](https://www.core-issues.org/UserFiles/File///Safeguarding/Out_of_Harm_s_Way_Final_11.05.20.pdf).

<sup>61</sup> Diamond LM and Rosky CJ, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, J. Sex Res. 2016 May-Jun;53 (4-5):363-91; and Geary RS, Tanton C, Erens B, Clifton S, Prah P, Wellings K, et al. (2018) *Sexual identity, attraction and behaviour in Britain: The implications of using different dimensions of sexual orientation to estimate the size of sexual minority populations and inform public health interventions*. PLoS ONE 13(1): e0189607. <https://doi.org/10.1371/journal.pone.0189607>

<sup>62</sup> Out of Harm's Way: Safeguarding at Core Issues Trust, at pp. 8-9.

<sup>63</sup> *Id.*, at pp. 7-8.



49. While the voices of those who oppose 'conversion therapy' are certainly louder and better published than those who oppose banning counselling options for those with unwanted same-sex attraction or gender identity confusion, professional bodies do exist which advocate against bans. Their reasons are valid, chief being among them the right to find therapy and support to help struggling individuals achieve their desired goals and outcomes and the legitimate fear that bans may lead to incidences of suicide among children and adults who are forbidden treatment for underlying issues.<sup>64</sup>
50. Ultimately, the question of whether a ban pursues a legitimate aim or not rests on the integrity of the principle that all forms of counselling being banned are harmful. As stated above, that aim must be actual and not mere conjecture. Portraying any and all such counselling as harmful does not suffice to establish overall harm and would not withstand Convention scrutiny.

#### NECESSARY IN A DEMOCRATIC SOCIETY

51. Where a legitimate aim is established and the legislation in question properly prescribed, the last hurdle the legislation would face would be to prove that it is 'necessary in a democratic society'.
52. The ECHR has stated that the typical features of a democratic society are pluralism, tolerance, and broadmindedness.<sup>65</sup> For such an interference

to be necessary in a democratic society, it must meet a "pressing social need" while at the same time remaining "proportionate to the legitimate aim pursued."<sup>66</sup> The ECHR defines proportionality as being the achievement of a fair balance between various conflicting interests. The notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'.<sup>67</sup>

53. The margin of appreciation given to governments by the Court is reduced where a particularly vulnerable group is subjected to differential treatment on grounds that are not specifically linked to relevant individual circumstances.<sup>68</sup> Arguably that is precisely the case involved when banning 'conversion therapy'. The last section of this analysis will provide a detailed study of mental health issues among those who identify as transgender. It is worth noting that the LGB community have for many years been advocating for themselves on the prevalence of mental health issues. A May 2018 white paper issued by 5 different LGBT campaigning groups stated that those who identify as homosexual are around twice as likely to report symptoms of poor mental health than heterosexual adults, including anxiety and depression. The study also suggests that this population group has around a 1.5 times higher prevalence of depression and anxiety disorders than heterosexual adults, with that number rising significantly with age.<sup>69</sup> In 2019 the Employment Appeal Tribunal, in a case heard by the EAT's President, the Honourable Mr Justice Choudhury, took judicial notice of the fact that LGBT members of the community

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64 See: American College of Pediatricians, *Unlawful, Dangerous and Unnecessary—Oppose AB 1779 & AB 2943*, found at: [https://d3uxejw946d7m5.cloudfront.net/wp-content/uploads/2020/07/Andre-Oppose-Anti-SOCE-Bill-March-2018\\_R2.pdf?x52173](https://d3uxejw946d7m5.cloudfront.net/wp-content/uploads/2020/07/Andre-Oppose-Anti-SOCE-Bill-March-2018_R2.pdf?x52173).

65 *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); accord *Dichand*, App. No. 29271/95 § 37; *Marônek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 81; *Arslan v. Turkey*, App. No. 23462/94 § 44(i) (Eur. Ct. H.R. July 8, 1999); *De Haes v. Belgium*, 1997-I Eur. Ct. H.R. 198, 236; *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 500; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

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66 *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38.

67 *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 § 116 (Eur. Ct. H.R. June 14, 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067>.

68 ECHR, *Case of A.-M.V. v. Finland*, application no. 53251/13, judgment of 23 March 2017, §83.

69 *Stonewall Scotland et al., LGBTI Populations and Mental Health Inequality*, May 2018, found at: <https://www.lgbthealth.org.uk/wp-content/uploads/2018/08/LGBTI-Populations-and-Mental-Health-Inequality-May-2018.pdf>.

suffer disproportionately from mental health problems and that there have been significant difficulties in getting those members to engage with mental health services.<sup>70</sup>

54. The NHS, in an attempt to engage those whom identify as LGBT with therapy services, has acknowledged that while depression and self-harm can affect anyone, such issues are common among the LGBT community.<sup>71</sup> Moreover, the NHS, acknowledging that there are those having difficulty accepting their sexual orientation, will signpost potential clients to exclusively LGBT or LGBT-affirming practitioners.<sup>72</sup> The underlying assumption would appear to be that the NHS would wish any confusion relating to sexual orientation to be reconciled in favour of accepting an LGBT identity and/or to embrace any homosexual or gender confused feelings, rather than consider the possibility that such a patient may wish to consider a heterosexual /non-gender confused identity.
55. In 2014, the Royal College of Psychiatrists published its position on sexual orientation, saying: “sexual orientation is determined by a combination of biological and postnatal environmental factors . . . [it] is not the case that sexual orientation is immutable or might not vary to some extent in a person’s life . . . ”<sup>73</sup> It further acknowledges that lifestyle choices among those who identify as LGBT may play an important factor with some mental health issues such as higher rates of substance misuse.<sup>74</sup> While

the statement disavows any counselling aimed at changing sexual behaviour as harmful, it provides no direct evidence that this is the case. It also claims that such counselling stigmatises being LGBT but fails to acknowledge the role of the highly partisan ‘anti-conversion therapy’ advocates in perpetuating that stigma by creating the caricature it has of this form of counselling. What is perhaps most disingenuous about the statement is that after acknowledging that sexual orientation can be fluid during someone’s lifetime, and then advocating that LGBT individuals should have equal access to health care and share equal rights and responsibilities with everyone else in society, it demands that LGBT people should be ‘protected’ from all forms of ‘conversion therapy’, regardless of method, safeguarding measures or efficacy.

56. To this latter issue of efficacy, it is worth noting that before being taken down by its webhost, Voices of Change published over 100 testimonials of people who moved away from unwanted same-sex attraction or gender identity confusion.<sup>75</sup> There are also peer reviewed papers suggesting both efficacy and health benefits for counselling which the government would likely place under the umbrella of ‘conversion therapy’.<sup>76</sup> In a pluralistic society, where one group suggests that certain counselling causes harm, those who have been helped by that very counselling have an equal right to defend their own right of self-determination and metanarrative.

## Discrimination: Article 14

57. Article 14 of the Convention reads:

*The enjoyment of the rights and freedoms set forth in this Convention shall be*

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70 Richard Page v. NHS Trust Development Authority [2019] UKEAT 0183\_18\_1906, at para. 4.

71 NHS, Mental Health Support if You’re Lesbian, Gay, Bisexual or Trans (LGBTQ+), page last reviewed 02 July 2020, found at: <https://www.nhs.uk/mental-health/advice-for-life-situations-and-events/mental-health-support-if-you-are-gay-lesbian-bisexual-lgbtq/>.

72 Id.

73 Royal College of Psychiatrists Statement on Sexual Orientation, Position Statement PS02/2014 (April 2014), found at: [https://www.rcpsych.ac.uk/pdf/PS02\\_2014.pdf](https://www.rcpsych.ac.uk/pdf/PS02_2014.pdf).

74 Id.

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75 American College of Pediatricians, Unlawful, Dangerous and Unnecessary—Oppose AB 1779 & AB 2943, supra fn. 63.

76 Sullins DP, Rosik CH and Santero P. *Efficacy and risk of sexual orientation change efforts: a retrospective analysis of 125 exposed men* [version 1; peer review: 2 approved] F1000Research 2021, 10:222 <https://f1000research.com/articles/10-222/v2>.

*secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

58. The European Court of Human Rights has stressed that Article 14 is an “autonomous” provision and can be violated even where the substantive article relied upon to invoke Article 14 has not been violated.<sup>77</sup>

59. Under Article 14, different treatment is subject to an objective justification test. This applies to both alleged direct and indirect discrimination. As with Articles 8-11, interference with Article 14 rights can be justified where it pursues a legitimate aim and where the means pursued are both appropriate and necessary in a democratic society:

*...a difference in the treatment of persons in relevantly similar situations... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*<sup>78</sup>

60. It is perhaps worth noting that nothing in the United Kingdom’s leaving the European Union impacts its Convention obligations under the Human Rights Act 1998, the Convention being an instrument of the Council of Europe rather than the European Union. For the context of this Opinion, this is important in that Article 14 is wider in scope than the EU’s non-discrimination directives both in terms of substantive rights and the manner in which the Strasbourg Court has interpreted these rights for the purposes of the Convention.

61. In 2000, the protections afforded under Article 14 were greatly bolstered by the adoption of Protocol 12, which reads in pertinent part: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>79</sup> While the distinction between Article 14 and Protocol 12 may seem subtle at first, Protocol 12 in fact significantly expands the area of non-discrimination protection from just those rights enjoyed under the Convention, to any rights which are protected under the national laws of the Member States.

62. The Court of Appeal in England and Wales has perhaps framed the issue of changing sexual orientation best when it concluded that: “discrimination against a person because of his or her past actual or perceived sexual orientation, or because his or her sexual orientation has changed, is discrimination ‘because of.....sexual orientation.’”<sup>80</sup>

63. Any ban, by seeking to prohibit recourse to counselling for unwanted same-sex attraction, regardless of how valid or personal that reason may be to the individuals involved, is a form of discrimination and should not be tolerated in a democratic society.

## Protocol 1, Article 1: Right to Property

64. A ban of ‘conversion therapy’ would have an impact on the income of counsellors engaged in providing services to those with unwanted same-sex attraction or those wishing to reconcile their gender identity with their biological sex, and depending on how liberally the ban is defined, also

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<sup>77</sup> *Belgian Linguistic case* (1968) 1 EHRR 252, 283.

<sup>78</sup> ECHR, *Burden v. the United Kingdom* [GC], application no. 13378/05, judgment of 29 April 2008, § 60.

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<sup>79</sup> European Convention on Human Rights, Protocol 12, Article 1(1).

<sup>80</sup> *The Queen on the Application of Core Issues Trust and Transport for London & Anor.*, [2014] EWCA Civ 34, para. 98.

on religious organisations and ministries. As such, a ban could arguably violate the Protocol 1, Article 1 rights of practitioners.

65. The first issue that needs to be addressed is the question of whether there is a property right, or possession, within the scope of Article 1. The case-law acknowledges that rights akin to property rights exist in professional practices where, by the efforts of the practice, they have built up a clientele which, in most respects, constitute an asset and therefore a possession within the meaning of Protocol 1, Article 1.<sup>81</sup> The revocation or refusal of a licence to practice by a regulatory body also engages Protocol 1, Article 1 in the same way.<sup>82</sup> Precisely stated, counsellors or counselling services which have built up a client base of those seeking counselling for unwanted same-sex attraction or who wish to reconcile their mental state with their biological sex would have a possession within the meaning of the Convention. Similarly, a counsellor who has been refused a licence or had their licence revoked for supposedly practicing 'conversion therapy' would have an arguable property right under Protocol 1, Article 1.
66. Having established a property right, the next question that needs to be addressed is whether there had been an interference with that possession and under which of the three rules of Article 1 the interference falls. The European Court of Human Rights, in *Sporrong and Lönnroth v Sweden*, set out its three-pronged analysis of Article 1, Protocol 1 as consisting of three distinct rules:

*That Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph.*

81 See: ECHR, *Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, Series A no. 101, p. 13, para. 41; and ECHR, *Döring v. Germany* (dec.), no. 37595/97, ECHR 1999-VIII; see also: ECHR, *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II.

82 ECHR, *Case of Megadat.com SRL v. Moldova*, application no. 21151/04, judgment of 08 April 2008, paras. 62-63.

*The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.*<sup>83</sup>

67. The third prong of the property analysis thus examines whether the interference serves a legitimate objective in the public or general interest.<sup>84</sup> Additionally, the interference in question must be proportionate to the legitimate objective served:

*...the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of Protocol 1].*<sup>85</sup>

68. Restrictions on any and all of the qualified rights guaranteed by the European Convention on Human Rights; Protocol 1, Article 1 included; must be narrowly tailored and must be adopted in the interests of public and social life, as well as the rights of other people within society.<sup>86</sup>
69. Similar to the Articles 8-11 analyses, the ECHR must determine whether the interference with the property interest is proportionate. Again, as with Articles 8-11, the Court has determined that for an interference to be necessary in a democratic society, it must meet a "pressing social

83 ECHR, *Sporrong and Lönnroth v. Sweden*, 7152/75, [1983] 5 EHRR 35, [1982] ECHR 5, 7151/75, para. 61.

84 *James v. the United Kingdom*, 8793/79, (1986) 8 EHRR 123, [1986] ECHR 2, Series A no 98, [1986] RVR 139, 8 EHRR 123, para. 46.

85 *Sporrong and Lönnroth v. Sweden*, op. cit., para. 69.

86 See e.g.: *Thoma v. Luxemborg*, 2001-III Eur. Ct. H.R. 67, 84.



need” while at the same time remaining “proportionate to the legitimate aim pursued.”<sup>87</sup> The Court, as detailed above, defines proportionality as being the achievement of a fair balance between various conflicting interests. Therefore, the notion ‘necessary’ does not have the flexibility of such expressions as ‘useful’ or ‘desirable.’<sup>88</sup>

70. The same obstacles face Parliament in relation to Protocol 1, Article 1 as they do with Articles 8 and 9; namely scope, legal precision and necessity. If an individual is receiving counselling on their own volition and they have mental capacity to do so, and where that counselling is done in a regulated, ethical and professional manner, however objectionable the nature of the treatment might be to certain campaigning groups, it still cannot be banned under the Convention. Nor, under a Protocol 1, Article 1 analysis can a legislating authority cause pecuniary damage to a practitioner by refusing them a licence or making it illegal to treat an existing client base where necessity and proportionality are lacking. The existing state of affairs raises serious questions about exactly what is being banned and why it is being banned. Seemingly the scope of any proposed ban, if the MOU is to provide any indication, sweeps up the good practitioners, who pursue practice in good faith. Such a deliberate failure in defining the scope and terms of any ban would certainly not be tolerated under the Human Rights Act 1998 or its supervisory organs domestically or in Strasbourg.
71. Finally, the Court must determine whether the interference complies with the principle of legal certainty, or legality. What constitutes legal certainty has already been discussed at length above. In essence, an average practitioner should be provided with enough clarity as to the scope of any

restrictions, that they should be sufficiently able to foresee the conditions upon which their property interest, in their client base or licence, would be interfered with. It is hard to see how any proposed legislation could be drafted sufficiently precisely to limit overreach or the unfettered discretion of authorities from interfering with the rights of practitioners. Bans on advertising, for example, would be a form of overreach which the government would have a difficult time defending under a Protocol 1, Article 1 analysis.<sup>89</sup>

72. Suffice it to say, the government will have an uphill battle given the lack of clarity on defining exactly what is being banned. While the professional bodies associated with the MOU argue that there is no evidence supporting the efficacy of existing counselling for unwanted same-sex attraction or gender incongruity, that is not a legal standard justifying interference with Convention rights. While LGBT groups argue that the counselling is degrading and harmful, that has never been sufficiently evidenced so as to justify a liberally applied ban. Moreover, the practitioners in this type of counselling, as well as those who have benefited from such counselling, would certainly robustly argue the opposite position.

## The Equality Act 2010

73. Any proposed ban on counselling for unwanted same-sex attraction will also engage the Equality Act 2010. As detailed above,<sup>90</sup> the protection afforded to sexual orientation by equality law extends to the right to change your sexual orientation and the right to be “ex-gay”. Given the Court of Appeal ruling in the Core Issues Trust case, it is clear that adopting a policy which prevents one class of people from obtaining the counselling services they choose

<sup>87</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38.

<sup>88</sup> *Supra* fn. 67.

<sup>89</sup> See e.g.: See 6.1 <https://www.gov.uk/government/consultations/banning-conversion-therapy/banning-conversion-therapy>.

<sup>90</sup> *Supra* fn. 80.

for unwanted same-sex attraction while allowing counselling for those who wish to 'come out' as gay raises serious questions about discrimination.

74. Section 19 of the Equality Act 2010 defines indirect discrimination in relation to sexual orientation and gender reassignment as:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—  
gender reassignment;  
sexual orientation.

75. One of the key considerations involved in looking at an overly broad ban of counselling under the general umbrella of 'conversion therapy' is proportionality. Just as with the question of necessity when looking at this issue under Articles 9 and 10 of the Convention, Section 19(2)(d) requires the alleged discriminator to show that the ban is a proportionate means of achieving a legitimate aim. If there are other ways of modifying the law, such as more precision in defining 'conversion therapy' or regulation

rather than an outright ban, a case for indirect discrimination may be made out.<sup>91</sup>

76. Similar to the doctrine of margin of appreciation utilised by the Strasbourg Court, domestic courts also allow public bodies a "*discretionary area of judgment*."<sup>92</sup> In the words of the Supreme Court, the role of the judge in assessing proportionality is to "*make his own assessment of proportionality, but giving weight to the views of the primary decision-maker, as the person with relevant statutory or other authority, and institutional competence*."<sup>93</sup>

77. The corresponding discretion given to public bodies depends on the context of the matter being legislated. If it involves suspect classes, and certainly sexual orientation and gender reassignment fit that bill, then a standard of strict scrutiny is applied. Even where the courts have granted a particularly wide margin of appreciation over sensitive social policy questions<sup>94</sup>, a lack of proportionality will be found where the measure was "*manifestly without reasonable foundation*."<sup>95</sup>

78. Proportionality is intimately linked with the question of the burden of proof. Section 136(1) of the Equality Act 2020 applies a burden of proof which applies to all proceedings under the Act, which would include matters involving both direct and indirect discrimination. The burden is defined in Section 136(2)–(3) thus:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened

91 *Naeem v. The Secretary of State for Justice*, UKEAT /0215/13/RN.

92 *R(AR) v. Chief Constable of Greater Manchester Police* [2018] UKSC 47.

93 *Id.*, § 53.

94 See e.g.: *R (Countryside Alliance and others) v. Attorney General & Another* [2007] UKHL 52.

95 *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47.

the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

79. Nonetheless, the courts have still found that the initial burden of proof remains on the claimant.<sup>96</sup> This burden however is relatively low, with a claimant merely needing to evidence a provision criterion or practice (PCP), group disadvantage and personal disadvantage for the burden to shift onto the respondent.<sup>97</sup>
80. The reason why the PCP puts those struggling with unwanted same-sex attraction or gender dysphoria at a disadvantage must be read in context; i.e. the PCP itself must be related to the disadvantage caused. As the Court of Appeal has stated: “The concept of ‘putting’ persons at a disadvantage is causal, and, as in any legal analysis of causation, it is necessary to distinguish the legally relevant cause or causes from other factors in the situation.”<sup>98</sup>
81. The pool chosen (the disadvantaged) should be of such a nature as to suitably test the particular discrimination being complained of.<sup>99</sup> In the instant matter, that pool would likely be liberally defined, particularly given how open ended the existing definition of ‘conversion therapy’ is. It would include anyone with unwanted same-sex attraction choosing to explore counselling to move away from it. Whether their reasons for doing so were compelling or legitimate would be largely irrelevant, in the sense that the person would only have to evidence that in a similar situation (using

the hypothetical comparator), treatment would have been given. The same would be true with those wishing to either move away from transgender feelings or who wish to reconcile with their biological sex.

82. The PCP must be in relation to a relevant protected characteristic. If there is group and individual disadvantage which the PCP is a ‘but for’ cause of, there will be *prima facie* indirect discrimination requiring justification.<sup>100</sup> Indirect discrimination does not require the establishment of a causal link between the PCP and the protected characteristic. Instead, it requires a causal link between the PCP and the disadvantage, suffered by both the group and the individual. In any case, the causal link under either test is self-evident when discussing the issue of banning ‘conversion therapy’. But, for the yet to be clearly defined ban on ‘conversion therapy’, those struggling with unwanted same-sex attraction or gender dysphoria are forbidden from seeking the treatment they desire. The PCP, which would be the legislative ban, or in the case of the MOU the practice and/or policy, is clearly and unequivocally linked to the disadvantage suffered; which is the inability to receive treatment that others similarly situated, but not having the desire to move away from same-sex attraction or transgenderism, continue to be able to receive.
83. The justification given for such measures under the MOU is non-existent. The government’s consultation document, which utilises only anecdotal evidence without any specific control variables or methodological safeguards, is not much better. There is in fact no way of knowing whether the data collected by the government was factual, given by activists, embellished or remotely representative of the actual state of play for ‘conversion therapy’. Given that the worst instances of ‘conversion therapy’, those which include acts of physical or mental

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96 *Hewage v. Grampian Health Board* [2012] IRLR 870 [the Supreme Court affirms but refines the guidance provided by the EAT in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332].

97 *Bethnal Green and Shoreditch Education Trust v. Dippenaar*, UKEAT/0064/15.

98 *Haq v. Audit Commission*, [2012] EWCA 1621, at para. 22.

99 *Grundy v. British Airways Plc*, [2007] EWCA Civ 1020, at para. 27.

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100 Cf. *Naeem v. The Secretary of State for Justice*, UKEAT/0215/13/RN.

violence, are already prohibited by the law, the justification for further government criminal or civil measures certainly appears to meet the standard of being manifestly without reasonable justification.

84. The very fact that ex-gay is protected under the umbrella of sexual orientation makes the group disadvantage all the more concrete. Given the aforementioned Article 8 right to sexual self-actualisation, the reasons thus far provided by the government to create a ban reflect no sense of proportionality or necessity in relation to the rights they are interfering with. It is therefore the position of this Opinion that any proposed ban, whether under the MOU, or through criminal and civil law as set out in the government's consultation document, would fail to pass muster under a Section 19 analysis.

## How the Active Demonisation of 'Conversion Therapy' has Affected Counsellors

85. As has already been discussed in great detail in this Opinion, counselling services for those who want to move away from unwanted same-sex attraction have been demonised and practitioners punished simply for assisting clients who sincerely want their assistance and expertise. We have already noted that there are any number of valid reasons an individual would seek help in refraining from unwanted same-sex attraction, both on religious grounds and otherwise.
86. The Christian Legal Centre has supported both Dr Michael Davidson of Core Issues Trust<sup>101</sup> and Lesley Pilkington<sup>102</sup>, who have been leaders in this field of counselling. Mrs Pilkington was secretly recorded by an undercover journalist during a counselling

session, who deceived her into believing that he wanted counselling for unwanted same-sex attraction. She agreed to treat the man, within a Christian counselling context, and he agreed. The journalist later complained to her professional body and to the press. The result was that Mrs Pilkington lost her licence to practice.

87. Dr Michael Davidson was similarly prohibited from practice because he discussed counselling for unwanted same-sex attraction during a television interview. Dr Davidson, who represents and is the CEO of Core Issues Trust, was further denied the right to place advertising on the sides of buses promoting a post-gay message.<sup>103</sup> This despite LGBT campaigners Stonewall being allowed to hold a very similar ad campaign but in promotion of homosexuality.
88. Core Issues Trust also produced a full-length documentary on the struggle of those seeking to move away from unwanted same-sex attraction entitled 'Voices of the Silenced.' It had come to a contractual agreement with Vue Cinemas to hire a screen for the premiere of the movie. One day prior to the event, after a negative story from an LGBT based media source, Vue cancelled the event, leaving Core Issues Trust almost no time to seek alternative provision. Other cinemas similarly refused to air the documentary. In the end, Core Issues Trust settled for damages against Vue Cinema.<sup>104</sup>
89. The further result of the MOU and campaigning against 'conversion therapy' has been the public hatred stirred against practitioners. For example, Dr Davidson, who himself has moved away from homosexuality, appeared on *Good Morning Britain*, where he was eviscerated by Piers Morgan for being "a horrible little bigot," was told to shut up and that he was a "malevolent

<sup>101</sup> <http://www.christianconcern.com/cases/core-issues-trust>.

<sup>102</sup> <http://www.christianconcern.com/cases/lesley-pilkington>.

<sup>103</sup> Core Issues Trust, *R (on the application of) v. Transport For London & Anor* [2014] EWCA Civ 34 (27 January 2014).

<sup>104</sup> See: <https://premierchristian.news/en/news/article/vue-cinemas-settles-claim-brought-by-christian-makers-of-ex-gay-film>.



*and dangerous part of society.*"<sup>105</sup> Whatever one's opinion about counselling for unwanted same-sex attraction is, the fact is that Dr Davidson made the decision to live out his life with a wife, and as the father of two children.

90. In July 2020, a concentrated online effort targeting Dr Davidson and Core Issues Trust (CIT) has seemingly sought to destroy him and CIT.
91. CIT has received well over 300 nuisance phone calls and numerous hateful messages. Its email address was, without consent, signed up to porn sites such as Pornhub, UK Lads, Lesbian Videos and a range of fetish sites. Bogus claims using the CIT email address for information about surgical procedures continues. A large volume of emails from mailing lists purporting to have received requests from CIT were also received – with the intention of discrediting and blacklisting the address as spam.
92. On social media there has been a campaign of aggressive trolling and dehumanising of Dr Davidson, Matthew Grech (trustee of CIT) and other staff workers – extending also to personal accounts. One text message hoped that staff family members would be raped and killed. A text message with a satanic image was sent to the CIT mobile phone. Multiple complaints to social media sites were made about CIT. Videos and live broadcasts, previously reviewed and agreed as valid adverts with the platform were taken down by Facebook, as was the CIT banner on more than one occasion. CIT Instagram content was also removed, despite being acceptable for more than two years. CIT staff were blocked from posting on Facebook and were unable to block trolls.
93. In early July, Mailchimp unilaterally terminated services to CIT without notice

or explanation which made it difficult for CIT to contact its supporters. PayPal also unilaterally terminated its CIT accounts without warning and with no explanation, restricting the ability of supporters to make donations. Also, following a Twitter campaign targeting CIT's bank accounts, on 20 July 2020 Barclays Bank informed CIT that its account, and that of a project supported by CIT, were to be closed.

94. The situation is so bad that counsellors seeking to meet on this issue are often forced to hold their conferences outside of the United Kingdom, and even then, in an anonymous location, in order to avoid disruption.

## Gender Identity

### THE ISSUE OF DEFINITIONS

95. The scope of the MOU in seeking to ban certain forms of treatment relating to gender identity, as opposed to more precise terms such as gender dysphoria or transgenderism, is deeply problematic. Rather than dealing with the psychological aspects of the issue, which after all is the entire purpose of therapy, gender identity belief instead introduces ill-defined philosophical concepts.
96. The belief that gender identity is fluid and malleable, and not necessarily binary, threatens to make the meaning of gender wholly meaningless. Facebook, for example, offers 58 different choices of gender identity.<sup>106</sup> Where gender identity becomes completely detached from biological sex, it could come to refer to any distinctions in behaviour, biological attributes, or psychological traits, and each person could have a gender defined by the

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<sup>105</sup> Mark Duell, 'You're a malevolent and dangerous part of society. What's the matter with you?': Piers Morgan Blasts 'Formerly Gay' Doctor Who Claims He Can 'Cure' Homosexual People, Daily Mail (Online), 05 September 2017, <https://www.dailymail.co.uk/news/article-4853152/Piers-Morgan-blasts-gay-doctor.html>.

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<sup>106</sup> See e.g. Will Oremus, *Here Are All of the Different Genders You Can Be On Facebook*, Slate, 13 February 2014. Found at: <https://slate.com/technology/2014/02/facebook-custom-gender-options-here-are-all-56-custom-options.html>.

unique combination of characteristics the person possesses.<sup>107</sup>

97. The problem with gender identity belief or the deconstruction of gender is that biological realities matter. Science tells us that sex is immutable. The genetic information directing development of male or female gonads and other primary sexual traits, which normally are encoded on chromosome pairs “XY” and “XX” are present at conception. As early as eight weeks’ gestation, endogenously produced sex hormones cause prenatal brain imprinting that ultimately influences postnatal behaviours.<sup>108</sup>
98. No matter how disturbing the condition of gender dysphoria may be, nothing can change the biological reality of a human person. It is widely accepted that the science behind sex is simple and straightforward. Biological sex is a fixed principle, determined at conception.<sup>109</sup> More than 20% of the genes in the human genome are specific to one sex or the other.<sup>110</sup> In most tissue, there are over 6500 protein-coding genes with specific sex-differential expression.<sup>111</sup> The most sex-differentiated tissue in the human body relates to the reproductive organs, with the breast mammary glands being the most differentiated to allow for lactation in females.<sup>112</sup> Men and women differ in their predisposition to certain diseases precisely because of this genetic architecture in our
- tissue.<sup>113</sup> This architecture also explains body physiology. For example, gene expression for muscle building is higher in men; and in women gene expression is higher in fat tissue because it relates to her biological capacity for having children and needing as a result to store fat.<sup>114</sup>
99. The central underlying basis for sex is the distinction between the reproductive roles of males and females.<sup>115</sup> This basis is not unique to humans and is used in the categorisations of all biological creatures.
100. While it is unclear how any proposed legislation will define ‘gender identity’, the most current version of the MOU defines it as: “For the purposes of this document, gender identity is interpreted broadly to include all varieties of binary (male or female), nonbinary and gender fluid identities.”<sup>116</sup>
101. Definition is important, particularly when imposing legislation which bans certain activities based on those definitions. What is clear from the above definition of gender identity is that it is far broader than existing legal definitions of gender reassignment.
102. The two statutes which most clearly apply and define gender reassignment are the Gender Recognition Act 2004 and the Equality Act 2010.
103. The Gender Recognition Act 2004 allows an individual, for legal purposes, to change how their sex is registered in official documentation and has the legal effect of recognising that individual as being of a different sex than their birth sex. A very strict legal process is required to obtain a Gender Recognition Certificate pursuant

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107 Lawrence S. Mayer, Paul R. McHugh, *Sexuality and Gender*, The New Atlantis, Issue 50, Fall 2016, A Journal of Technology and Society, p. 88.

108 See: Francisco I. Reyes et al., *Studies on Human Sexual Development*, 37 J. of Clin. Endocrinology & Metabolism 74-78 (1973).

109 Fauci, Anthony S.; Harrison, T. R., eds. (2008). *Harrison's principles of internal medicine* (17th ed.). New York: McGraw-Hill Medical. pp. 2339-2346.

110 Prof. Pietrokovski, Shmuel; Dr. Gershoni, Moran. The Landscape of Sex-Differential Transcriptome and Its Consequent Selection in Human Adults, *BMC Biology* (2017) 15:7.

111 Id.

112 Id.

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113 Rawlik K, Canela-Xandri O, Tenesa A. Evidence for Sex-specific genetic architectures across a spectrum of human complex traits. *Genome Biol.* 2016; 17: 166.

114 Prof. Pietrokovski, Shmuel; Dr. Gershoni, Moran, *The Landscape of Sex-Differential Transcriptome* (see fn. 20).

115 Lawrence S. Mayer, Paul R. McHugh, *Sexuality and Gender*, The New Atlantis, Issue 50, Fall 2016, A Journal of Technology and Society, p. 89-90.

116 Memorandum of Understanding on Conversion Therapy in the UK (Version 2), October 2017, para. 2(ii).

to the Gender Recognition Act 2004. The applicant seeking legal recognition of their gender reassignment must be 18 years of age<sup>117</sup> and must have lived in the acquired gender for a period of at least 2 years ending with the date the application is made.<sup>118</sup> Evidence of gender dysphoria is also required, provided either by a medical practitioner practising in the field of gender dysphoria or a chartered psychologist in the field.<sup>119</sup> A Gender Recognition Panel must then determine if the evidence provided is sufficient to grant the Certificate.<sup>120</sup>

104. Gender reassignment is defined by Section 7(1) of the Equality Act 2010 as:

*A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*

105. Whilst the Gender Recognition Act is not wholly determinative as to how gender reassignment is defined in the Equality Act 2010, it nonetheless provides a robust canon of interpretation making it evident that Parliament never intended legal protection to attach at such a *de minimus* threshold as that provided in the MOU. Moreover, the adoption of anti-discrimination legislation in the United Kingdom was originally undertaken as part of its EU obligations to transpose the various EU anti-discrimination directives.
106. It is worth noting that the terms gender reassignment, gender expression and gender identity are not recognised by EU primary law.
107. In secondary EU legislation, while gender reassignment is recognised in Recital 3 of

the recast Directive (2006/54/EC), it relates only to discrimination within employment. The Court of Justice held in *P v. S and Cornwall County Council*,<sup>121</sup> a reference to the CJEU under Article 177 of the EC Treaty by a domestic tribunal in the United Kingdom for a preliminary ruling on the meaning of sex within the Directive, that for gender reassignment to attach to an individual in employment law, some overt step towards the physiological reassignment of gender can be required. A similar position has also been upheld up by the European Court of Human Rights in the case of *A.P., Garçon and Nicot v. France*<sup>122</sup>, which found that Member States act within their margin of appreciation when requiring medical assessment prior to being granted the civil status of being gender reassigned.

108. One of the key concerns, therefore, underlying any potential ban on therapy for gender dysphoria aimed at reconciling the client with their birth sex, is that gender identity is not synonymous with gender reassignment. The way one views their gender identity is wholly different from the process, or part of the process, that must be undertaken or proposed to be undertaken, to change physiological or other attributes of sex for Section 7 to attach. Rather than seeking to ban therapy that relates to existing protected characteristics, the MOU goes well beyond the law and enters the realm of gender identity belief.
109. Moreover, while the MOU seeks to ban any form of counselling which views one gender identity as preferable to another, there are nonetheless valid reasons why a practitioner would hold those views or why a client would wish to have their gender identity be congruent to their biological sex. Chief among those reasons is the prevalence of depression, self-harm, risky sexual behaviour and suicide among those who identify as transgender.

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<sup>117</sup> Gender Recognition Act 2004 (c.7), § 1(1).

<sup>118</sup> *Id.*, § 2(1)(b).

<sup>119</sup> *Id.*, § 3(1)(a-b).

<sup>120</sup> *Id.*, § 1(3).

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<sup>121</sup> Case C-13/94, judgment of 30 April 1996.

<sup>122</sup> Application nos. 79885/12, 53471/13 and 52596/13, judgment of 06 April 2017, paras. 149-154.

110. Tragically, the suicide rate among those who use cross-sex hormones and undergo sex-reassignment surgery is twenty times higher than among the general population. Prevalence of suicide at this rate is universal, including in countries, such as Sweden, which are among the most LGBT-affirming nations in the world.<sup>123</sup> This statistically debunks the notion that lack of acceptance is the cause of suicide among transgender individuals.<sup>124</sup>
111. The National Centre for Transgender Equality published the results of an exhaustive survey of American transgender people in 2015 which analysed their self-reported experiences.<sup>125</sup> The survey revealed that 40 percent of the 27,715 people surveyed admitted to attempting suicide, with 7 percent having attempted suicide within 12 months of the survey.<sup>126</sup> 39 percent reported serious psychological stress just in the month prior to completing the survey.<sup>127</sup> The rates of HIV among those surveyed was 5 times the national average in the United States (1.4 percent versus 0.3 percent).<sup>128</sup> 12 percent of those surveyed admitted to having engaged in sexual activity for money, with 5% of respondents having done so within 12 months of completing the survey.<sup>129</sup> The report also evidenced astronomically higher rates of domestic violence

victimisation,<sup>130</sup> poverty,<sup>131</sup> unemployment<sup>132</sup> and homelessness.<sup>133</sup>

## The Conflation of Gender Identity Belief and Gender Reassignment

112. One of the key problems with the MOU's use of the term gender identity, rather than using the legally protected categories of gender reassignment or transgenderism, is that the MOU ties itself into a philosophical belief rather than something concrete and scientific. The anaemic nature of the MOU's definition of gender identity speaks to this reality by not being able to number exactly how many different gender identities there may be. When self-identification becomes the sole arbiter of someone's gender, absent any inspection into underlying causes for those internal feelings, counselling becomes largely impotent. The proverbial client is permitted to self-diagnose, and enquiries into root causes and co-morbidities can be deemed to be abuses under the ill-defined terms of the MOU.
113. Moreover, not only is gender identity not a protected legal category in UK law, the promulgation of gender identity belief itself may create discrimination issues with the protected characteristics of religion or belief. The belief that sex is assigned at birth and that a man cannot be a real woman is a protected belief under the Equality Act 2010 and the Human Rights Act 1998. So too is the right not to believe in gender identity a belief.<sup>134</sup>
114. Importantly, case-law is clear that the legal protections afforded to gender reassignment under the Equality Act 2010 would only apply to a portion of the people who identify

123 Dhejne, C, et.al. *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLoS ONE, 2011; 6(2). Affiliation: Department of Clinical Neuroscience, Division of Psychiatry, Karolinska Institutet, Stockholm, Sweden.

124 Those who have undergone gender reassignment surgery.

125 James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality. Found at: USTS-Full-Report-Dec17.pdf (transequality.org).

126 *Id.*, p. 5.

127 *Id.*, p. 5.

128 *Id.*, p. 10.

129 *Id.*, p. 164.

130 *Id.*, p. 10.

131 *Id.*, p. 9.

132 *Id.*

133 *Id.*, p. 17.

134 *Forstater v. CGD Europe & Ors*, [2021] UKEAT 0105 20 1006, at §§ 108-110.



as transgender.<sup>135</sup> The people not covered would presumably include those relying exclusively on gender identity belief rather than meeting any of the conditions set out in Equality Act or Gender Recognition Act to be legally identified as transgender.

## Proliferation of Referrals of Children to GIDS

115. What is perhaps most troubling about the MOU's position on 'conversion therapy' is the effect that transgender affirming policies and gender identity belief being taught in schools has had on a significant number of children. Perhaps the most disturbing element of the government's consultation document is the blanket ban on under-18s seeking counselling aimed at reconciling a child's gender identity with their birth sex.
116. Case in point, since introducing the topic of gender identity belief into British schools, there has been an increase in the number of children referred to Gender Identity Clinics from 97 referrals in 2009<sup>136</sup> to 2519 referrals in 2017/18<sup>137</sup>. Under any matrix, such an astonishing increase is a matter of serious concern.
117. This is particularly troubling given the findings of Stonewall, Britain's leading LGBT campaigning organisation. The group has suggested that despite a 1/3 decrease in HBT bullying (homophobic, biphobic, transphobic), 84 percent of young people who identify as transgender self-harm, while an additional 45 percent have attempted to take their own lives.<sup>138</sup> Children suffering from gender dysphoria also have higher rates of psychological problems and psychiatric disorders, such as negative self-image, low self-esteem, adjustment

disorders, depression, suicidality, and personality disorders compared to other segments of the population.<sup>139</sup>

118. Melissa Midgen, formerly a gender clinician at the Tavistock, in a book review on gender identity issues in children, stated the problem thus: *"it is both my experience, and the argument posited throughout this book, that the current socio-cultural situation is one which has permitted an inflation of the idea, and that we are indeed co-creating the very notion of the 'trans kid'."*<sup>140</sup>
119. There have also been a number of widely circulated national media stories from whistle-blowers at the Tavistock who are concerned about the current state of affairs. One article for example, published in the Spectator on 8 July 2020, questioned whether the NHS has been silencing its whistle-blowers to prevent a greater scandal from erupting.<sup>141</sup> As a direct result of the exposure of the activities of The Tavistock, Dr Hilary Cass was appointed by the NHS in Autumn 2020 to lead an independent review of gender identity services for children and young people.<sup>142</sup> It would seem premature for the UK government to consider legislation in this area in relations to under 18s before this review, which was expected to take about a year, has reported its findings.
120. The GIDS Tavistock and Portman NHS Trust cite an internationally agreed figure for those no longer conforming to the diagnosis of gender dysphoria after naturally passing through puberty as 73% to 88%, or on

<sup>135</sup> Forstater, op. cit., at §118.

<sup>136</sup> See: <https://tavistockandportman.nhs.uk/documents/408/gids-service-statistics.pdf>.

<sup>137</sup> See: <https://tavistockandportman.nhs.uk/about-us/news/stories/gids-referrals-increase-201718>.

<sup>138</sup> Stonewall, School Report (2017), p. 7. Available at: <http://www.stonewall.org.uk/school-report-2017>.

<sup>139</sup> D. Duisin, B. Batinic, J. Barisic, et. al., Personality Disorders in Persons with Gender Identity Disorder, *The Scientific World Journal*, (2014); 2014: 809058, doi: 10.1155/2014/809058.

<sup>140</sup> Melissa Midgen, Transgender Children and Young People: Born in Your Own Body, *Journal of Child Psychotherapy*, (2018) DOI: 10.1080/0075417X.2018.1435707.

<sup>141</sup> James Kirkup, *Are Whistleblowers Being Silenced at the NHS Gender Clinic*, found at: <https://www.spectator.co.uk/article/are-whistleblowers-being-silenced-at-the-nhs-gender-clinic>.

<sup>142</sup> Details about the independent review can be found at: <https://cass.independent-review.uk/>.

average 4-in-5.<sup>143</sup> Leading experts in the area of psychiatry and paediatrics argue that abundant scientific evidence exists showing that transgender-affirming policies do none of the children they are meant to serve any real or lasting good; that it harms the vast majority of them; and that it leads to catastrophic outcomes for many such afflicted children.<sup>144</sup>

121. Earlier this year, the High Court issued a landmark ruling finding that under-16s are unlikely to be able to give informed consent to begin the medical elements of transitioning, that being puberty suppression.<sup>145</sup> As a result of the ruling, the Tavistock had suspended all new referrals for puberty blockers for all under-16s. While the Court of Appeal annulled the declaration this past September<sup>146</sup> on the grounds that the Divisional Court did not have the authority to issue such a declaration, it noted that the regulation of treatment was not for the courts but for the NHS, regulatory bodies and parliament. The basis of the Court of Appeal's decision was far more procedural than substantive. For the government to consider that an under-18 is capable of consenting to life-altering treatment that affects fertility, sexual functioning, and may have any number of other serious and irreversible health consequences but not to counselling aimed at reconciling his or her sense of gender with biological reality, flies in the face of reason.

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143 Cf.: Richards C, Maxwell J, McCune N, Use of puberty blockers for gender dysphoria: a momentous step in the dark. *Archives of Disease in Childhood*, Published Online First: 17 January 2019.

144 See e.g.: United States Supreme Court: Brief of Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., PH.D. and Dr. Lawrence S. Mayer, PH.D. as Amici Curiae, Gloucester County School Board v. G.G., by his next friend and mother, Deidre Grimm, (January 10, 2017)(No. 16-273). See also: American Psychological Association, "Answers to Your Questions About Transgender People, Gender Identity and Gender Expression" (pamphlet), <http://www.apa.org/topics/lgbt/transgender.pdf>.

145 *Bell & Anor v. The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin).

146 *Bell & Anor v. The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.

## Comorbidities and Concerns about Transitioning

122. The proposed ban on 'conversion therapy' for gender identity issues also ignores the very high number of comorbidities associated with gender dysphoria, including autism, PTSD disorders, body dysmorphic disorders, schizophrenia, social anxiety disorders and eating disorders.<sup>147</sup> Practitioners, because of the threat of criminal penalty, are likely to be hesitant to explore these areas and accept the self-diagnosis of the patient to avoid potential liability. All of this is done to the detriment of the individual presenting with gender dysphoria.

## Conclusion

123. Legislating against a vaguely perceived threat is inevitably a troublesome exercise. If the MOU gives any indication of the scope or nature of the government's proposed ban of 'conversion therapy', then the likelihood of ensuing litigation is guaranteed. At the moment, there is no satisfactory definition of 'conversion therapy' or of who might fall into the class of people subject to a ban. The law requires that individuals should have a certain level of foreseeability and legal clarity that their actions may run afoul of the law.
124. As stated above, there are any number of legitimate reasons for seeking to live a heterosexual life or have gender congruency with one's biological sex. While it is an uncomfortable truth which is shunned in 'politically correct' circles, there will be cases where underlying childhood or adult

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147 See e.g.: M.S.C. Wallien, H. Swaab, P.T. Cohen-Kettenis, Psychiatric Comorbidity Among Children with Gender Identity Disorder, *Journal of the American Academy of Child & Adolescent Psychiatry*, (2007) 46(10): 1307-1314; C.M. Cole, M. O'Boyle, L.E. Emory, W.J. Meyer, III, Comorbidity of Gender Dysphoria and Other Major Psychiatric Diagnoses, *Archives of Sexual Behavior*, (1997); 26(1):13-26; and M. Hoshiai, Y. Matsumoto, T. Sato, et al., Psychiatric Comorbidity Among Patients with Gender Identity Disorder, *Psychiatry and Clinical Neurosciences*, (2010); 64(5):514-519.

trauma or other co-morbidities will play a significant role in why the individual is feeling the way that they do. The current demonisation of any treatment which seeks to, at the client's request, deal with those issues with the goal of reducing those feelings, serves none of these clients' legitimate interests in getting treatment. Instead, it creates a strawman of the client, suggesting that they are all vulnerable, incapacious or too naive to know what is in their best interests.

125. It is a basic but fundamental principle of human rights law that individuals should be given a private sphere to develop their personality and to pursue their self-actualisation. Ultimately, any ban on counselling which disproportionately and/or intentionally affects those seeking to move away from same-sex attraction or align their perceived feelings about gender identity with their biological sex would likely be held by the courts to be discriminatory under either the Human Rights Act 1998 or the Equality Act 2010.
126. As a nation, the United Kingdom prides itself as being a bastion of pluralism, tolerance and freedom. Pluralism, however, is not a defined set of minorities which culture deems to be the "right kind" of minorities, nor is tolerance militantly paternalistic and antagonistic towards those who wish to move away from certain behaviours or feelings which the cultural *zeitgeist* celebrates.
127. In a free society, someone seeking to reduce their unwanted feelings for their own personal reasons should have the exact same access to the type of counselling they want to receive as someone wishing to embrace those feelings. The introduction of new criminal sanctions would have an immediate chilling effect; even the most neutral of practitioners will have to think twice about honouring a client's wish if they fear that doing so might draw unwanted stigma, professional misconduct proceedings, and/or criminal charges. One of the most significant effects of the proposed law will

undoubtedly be the chilling effect it causes on the counselling profession.

128. The reality is that the government consultation has provided no real and verifiable evidence to support the proposition that a ban is either necessary or proportionate. Its evidence is wholly anecdotal, and no attempts have been made to verify its veracity. The proposals and key definitions, such as harm, 'conversion therapy' and coercion, are never clearly defined. Neither is gender identity defined in British law; and given the scope of its definition in gender identity belief, can mean just about anything. It is inconceivable that a law could be created which could cause such widespread criminal and civil regulation, touching the most intimate aspects of private life, without any serious legal or evidential basis underpinning it. If a ban is legislated, the reality is that the real victims will be everyday people; parents, pastors, counsellors, and adults and minors with undiagnosed co-morbidities or past trauma. The well-being and value of these individuals should not be so easily discarded by the government. Genuine consideration should be given to the potential unintended consequences of a new law and real and verifiable evidence of harm must be scrutinised when this matter comes before parliament for legislative deliberation if such sweeping measures stand any chance of being justified.

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14 March 2022









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