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Re: Proposed Legislation Against Conversion Practices

LEGAL OPINION

Introduction

1. In its 2022-2023 Programme for Government, the Scottish government reaffirmed its commitment to adopt legislation ending what they call "conversion practices". Part 5 of the Government's consultation document[1] purports to define conversion practices for the envisioned legislation, but fails to do so with any sense of clarity or precision, suggesting instead that its "*proposals are informed by the definitions used by different bodies, and in other countries.*"[2]

2. The closest the consultation document comes to establishing a definition for conversion practices is: "*that core to the definition of conversion practice is a purpose or intention to change or suppress another individual's sexual orientation or gender identity. In order for any act or course of behaviour to fall within the scope of this legislation, it will have to meet this intent requirement.*"[3]

3. The consultation was informed by two reports. The Expert Advisory Group on Ending Conversion Practices, which published its findings in October 2022. The objectivity of the advisory group, or lack thereof, can be readily gleaned from the group's name. The second report was published by the Equalities, Human Rights, and Civil Justice Committee in January 2022. The consultation also relies on survey data from a 2017 study utilizing a self-reporting format and used as the evidential basis for England's

[1] *Available at:* https://www.gov.scot/publications/ending-conversion-practices-scotland-scottish-government-consultation/documents/ (accessed 26 March 2024).
[2] *See*: Part 5, para. 43.
[3] *Id.*

conversion therapy consultation. The quality of the evidence gathered from these 3 sources and relied upon for the consultation will be analysed below.

4. The proposed legislative framework would create new criminal and civil measures to tackle what the Scottish government perceives to be conversion practices. Criminally, the government seeks to adopt measures punishing any engagement in conversion practices, which it defines as either the provision of conversion practices services or engaging in a *coercive* pattern of behaviour. The consultation document defines coercive behaviour as: "*an act or a pattern of acts of assault, threats, humiliation and intimidation, or other abuse that is used to harm, punish, or frighten a victim. The intention to change or suppress a person's sexual orientation or gender identity.*"[4] This could include talk therapy, counselling or faith-based practices. The new legislation would also criminalise taking someone outside of Scotland for the purposes of providing conversion practices. The new proposals also include the creation of an aggravating offense to existing offences for conversion practices.

5. Civilly, the government has proposed the creation of civil protection orders to either protect a specific individual at risk from would-be conversion practitioners or to protect the wider community from an individual or organisation known to engage in conversion practices. A breach of the order would lead to criminal sanction.

6. The consultation further recommends taking steps to ban advertising of conversion practices. While the Scottish government recognises that the regulation of advertising is a devolved power of the UK government[5], it nevertheless proposes to take civil and criminal action in relation to advertising or promoting conversion practices. Civilly, it proposes to do so by way of civil protections orders; criminally, where someone has allegedly undergone conversion practices, the individual advertising the services, even if they are not the practitioner, could be prosecuted for aiding and abetting.

7. The following Legal Opinion will first take a broad approach to analysing conversion practices prohibitions as informed by the Scottish Government's consultation document. It will do so by scrutinising the Government's proposals from the lens of the

[4] *Id.,* para. 42.
[5] Part 9, para. 140.

Human Rights Act 1998, which is binding on Scotland. It will also briefly look at whether a ban, as envisioned by the consultation document, would breach the Equality Act 2010. Finally, the Legal Opinion will look at specific provisions being proposed by the Government and gauge whether they are Convention compliant.

(I) A Hermeneutical Note

8. The first issue facing any proposed ban is a hermeneutical one. Any ban would necessarily entail government interference with a plethora of Convention rights, including freedom of religion and the right to respect for private and family life. The threshold question for any such Convention analysis is whether the law clearly and precisely defines the conditions and forms of any limitations on basic Convention rights and whether it prevents the possibility of arbitrary application.

9. Conversion therapy is a pejorative term which stirs up images of abuse, manipulation and preying upon the vulnerable. The Scottish government has gone even further widening the scope of their proposed ban to include conversion practices. The proposed ban 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-realisation that everyone else enjoys in a free and democratic society.[6] 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.

10. Much has been made of historic abuse which is now encompassed within the meaning of conversion practices. 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

[6] *See e.g.*, ECHR, *Case of Gladysheva v. Russia*, application no. 7097/10, judgment of 06 December 2011, para. 93.

those who have acted badly. A simple proportionality test makes clear that regulation, rather than prohibition, is the most legally robust way forward.

(II) Human Rights Act 1998

11. The Human Rights Act 1998 transposes the European Convention on Human Rights into UK domestic law, giving it direct legal effect in all 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.

12. The European Court of Human Rights has ruled that the Convention applies to private employers, including counselling services[7], in that the government has a positive obligation to secure the rights guaranteed to individuals by the Convention even in employment settings.[8] For private employers, that would require that a balance be struck between the competing interests of the employer and the employee.[9] 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. It would also include Article 10 and the right to freedom of expression, which includes both the right to impart and to receive information.

Article 8: Right to Privacy

13. 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.[10] While the negative obligations stemming from Article 8 are obvious, the Convention

[7] Relate, one of the signatories to the Memorandum of Understanding, is specifically referenced in the case in relation to this issue.
[8] 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.
[9] *Id.*
[10] ECHR, *Libert v Frace*, application no. 588/13, judgment of 22 February 2018, §§40-42.

imposes a positive obligation on States to ensure that Article 8 rights are respected, even between private parties.[11]

14. Article 8 protects the right to self-development.[12] It provides a sphere where people are free to pursue the development and fulfilment of their personality.[13] 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."*[14]

15. 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.[15] The concepts of sexual life, gender identity and sexual orientation all fall within the personal sphere protected by Article 8.[16] 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.[17] The right to both self-determination[18] and sexual self-determination[19] 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.

16. 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.[20] However, that threshold is a particularly high one and the treatment would have to create sufficiently

[11] ECHR, *Case of Bărbulescu v. Romania* [GC], application no. 61496/08, judgment of 05 September 2017, §§108-111.
[12] ECHR, *Niemietz v Germany*, application no. 13710/88, judgment of 16 December 1992, §29.
[13] ECHR, *Case of A.-M.V. v. Finland*, application no. 53251/13, judgment of 23 March 2017, §76.
[14] *Id.*
[15] ECHR, *Nicolae Virgiliu Tănase v. Romania* [GC], application no. 41720/13, judgement of 25 June 2019, § 126.
[16] *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.
[17] ECHR, *Denisov v. Ukraine* [GC], application no. 76639/11, judgment of 25 September 2018, §§ 110-14.
[18] ECHR, *Case of Van Cuck v Germany*, application no. 35968/97, judgment of 12 June 2003, §77.
[19] *Id.*, § 78.
[20] ECHR, *Bensaid v the United Kingdom*, application 44599/98, judgment of 06 February 2001, §46.

adverse effects on physical and moral integrity to engage Article 8.[21] As the Court has stated, such circumstances must be fairly extraordinary if the Convention is to be engaged.

17. It would be evident therefore that where Article 8 is provided as a grounds justifying limitations on the availability of conversion practices, 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 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.

18. In its consultation document, the Scottish government signposts to three documents justifying new legislation. The first is the 2017 LGBT survey undertaken by the UK government and relied upon during England's consultation on conversion practices. The survey utilises only anecdotal evidence without any specific control variables or methodological safeguards. There is really 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 practices. The second document is the EHRCJ's report on *Petition PE1817: End Conversion Therapy*. Paragraphs 109-115 of the document purports to provide evidence of the need for new legislation. Yet, it also does not go beyond the anecdotal, admitting that a number of their submissions also queried the prevalence of conversion practices or called for more evidence to be deduced. The Committee concluded that enough evidence was available, without referencing what evidence that might be, and suggested that no more time need be 'wasted' in gathering new evidence. The third document is the *Expert Advisory Group in Ending Conversion Practices Report and Recommendations*. That document provides no supporting evidence for new legislation apart from signposting to the aforementioned two documents.

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

Article 3: Inhuman and Degrading Treatment

19. 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.[22] 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.[23]

20. 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."*[24] 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.

21. 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.[25]

22. A blanket and liberally-worded ban on counselling or 'practices' for unwanted same-sex attraction or gender confusion would undoubtedly have serious consequences for those wishing to live a heterosexually oriented lifestyle or those who wish to have

[22] ECHR, *Soering v the United Kingdom*, judgment of 07 July 1989, Series A, no 161, § 100.
[23] ECHR, *Ireland v the United Kingdom* (1979-1980) 2 EHRR 25, §65.
[24] 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.
[25] ECHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 42, §§90-91.

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 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.

23. 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 practices the Scottish government is trying to prevent.

24. 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

25. It is notable that the Scottish government specifically includes faith-based practices as a target of its proposed ban. It is clear from the Consultation document that not only would a criminal ban and civil protection orders apply to faith-based counsellors, but they would impact churches, prayer ministries and other religiously based organisations

where pastoral care, or even simple conversations, about unwanted same-sex attraction or gender incongruency might take place.

26. 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.[26] 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.[27]

27. Although a qualified right, the Court nonetheless considers that freedom of religion is one of the foundations of a democratic society.[28] 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.[29] 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.[30] Undoubtedly this fact was not lost on the European Court when it allocated this standard of review to Article 9.

28. The Grand Chamber of the Court of Justice has noted that Article 10(1) of the Charter of Fundamental Rights and Freedoms corresponds to Article 9 of the Convention.[31] 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

[26] (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.
[27] *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, §2*ff*. 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.
[28] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.
[29] ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, § 44.
[30] The standard was introduced by the United States Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), *fn.* 4.
[31] C-71/11 and C-99/11, Judgment of 5 September 2012.

freedom of thought, conscience, and religion.[32] The Advocate General's opinion[33] 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.[34]

29. 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."*[35] This is important given that religious faith often plays a role in existing treatment for unwanted same-sex attraction or gender confusion. 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.

30. Therefore, any ban which seeks to affect the internal workings of churches and ministries would face high legal hurdles. 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.*"[36]

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[32] *Id.*, §62-63.
[33] Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d56f4da844638e4762911b82fb0bb55b65.e34KaxiLc3eQc40LaxqMbN4Oa3aNe0?text=&docid=121723&pageIndex=0&doclang=en&mode=req&d%20ir=&occ=first&part=1&cid=1062121.
[34] *Id.*, § 107.
[35] *Id.*
[36] ECHR, *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118.

31. 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.[37] So strong is this principle that it has been upheld three times by the Grand Chamber of the European Court of Human Rights.[38] Most recently the Court again upheld the same principle regarding respect for the internal workings of religious organisations in a judgment against Hungary.[39]

32. 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.

33. It is first worth noting, however, that where the desire to seek counselling is a 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.[40]

3 Prong Analysis: Article 8-11

34. The courts apply 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

[37] *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.
[38] 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.
[39] ECHR, *Case of Karoly Nagy v. Hungary*, No. 56665/09, Judgment of 1 December 2015.
[40] *Eweida and Others v the United* Kingdom, *op. cit.*, para 2*ff* (dissent).

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

35. With regard to the first prescription prong of the test, by no means is the margin of appreciation enjoyed by Scotland in enacting a ban on conversion practices unlimited; the ECHR utilises a high level of scrutiny when analysing interference with fundamental rights such as the protection of privacy.[41] 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.[42] 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.[43]

36. 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.*

[41] *Cf. Müller v. Switzerland,* 133 Eur. Ct. H.R. (ser. A) at 19 (1988).
[42] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.
[43] *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).

Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[44]

37. Precisely stated, for the general public, regulations restricting personal freedoms, such as the ones involved in the type of counselling or practices 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.[45] The Scottish Government's proposals are particularly flawed in this area. In fact, 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 devolved government's use of the term gender identity is even more troublesome, as no corresponding legal right currently exists in British law.[46]

38. The question of legislating a conversion practices ban is further complicated by the fact that our legal understanding of the operative terms used in the consultation document, and their scope, can change depending on the state of the common law.[47] 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*

[44] *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 111.
[45] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.
[46] It is noteworthy that the Scottish government sought to legislate on the issue of gender recognition with the Gender Recognition Reform (Scotland) Bill, which was ultimately blocked by the government from receiving royal assent under s 35 of the Scotland Act 1998. The Court of Session rejected the Scottish government's judicial review of the Order, holding that Parliament was within its legal right to use s 35 to ensure legal consistency within its laws. *See*: *Judicial Review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 made and laid before the UK Parliament by the Secretary of State (under section 35 of the Scotland Act 1998) on 17 January 2023* [2023] CSOH 89.
[47] Common law remains fundamental where legislative clarity is lacking but itself can confuse matters where different courts and tribunals apply the same common law principle in different ways. For example, the EAT recently held that *Corbett v Corbett* [1970] 2 All ER 33 remains the leading case defining sex as binary. *Forstater v CGD Europe & Ors* [2021] UKEAT 0105_20_1006. The Court of Sesson, however, recently took a much different approach on *Corbertt v Corbertt*, holding that sex is not necessarily defined by biology, but can change where the individual has obtained a gender recognition certificate. *For Women Scotland Limited against the Scottish Ministers* [2023] CSIH 37. That case is now pending review by the Supreme Court.

law."[48] Unwritten law is common law.[49] 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.*[50]

39. 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

40. 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.[51] When the Equality Framework Directive 2000[52] 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."*[53] 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.

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[48] 30 Eur. Ct. H.R. (ser. A) at 30 (1979).
[49] *Chappell v. United Kingdom*, 152 Eur. Ct. H.R. 3, 22 (1989) (stating that "'law' includes unwritten or common law").
[50] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 30.
[51] 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).
[52] 2000/78/EC.
[53] *See*: Commission of the European Communities, Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p.8.

41. 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.

42. 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 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."*[54] 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.*"[55]

43. 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.[56] 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.

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[54] R (on the application of Amicus - MSF section and others) v. Secretary of State for Trade and Industry [2004] IRLR 430 at § 432.
[55] HJ (Iran) (FC) (Appellant) v. Secretary of State for the Home Department, [2010] UKSC 31, per Lord Roger, at §78.
[56] *Lee v. Ashers Baking Company Ltd. and Others* [2018] UKSC 49, §§34-35.

44. Clearly the problem with having a ban of counselling or practices 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[57] or whether sexual attraction is fluid and changing.[58]

45. Perhaps most troubling is the open-ended definition of what might amount to conversion practices. If the proposed legislation will have any resemblance to what is suggested in the consultation document, 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

46. 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.[59] 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."[60]

47. 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.[61] The onus is on the authority to evidence that the interference pursued a legitimate aim.[62]

48. 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

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[57] *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 (pinknews.co.uk).
[58] *See e.g.*: Diversity of sexual orientation (kinseyinstitute.org).
[59] *See e.g.: Thoma v. Luxemborg*, 2001-III Eur. Ct. H.R. 67, 84.
[60] *Id,* §85. (*citing Fressoz & Roire v. France*, 1999-I Eur. Ct. H.R. 1, 19–20).
[61] ECHR, *S.A.S. v Frnace* [GC], application no. 43835/11, judgment of 01 July 2014, §114.
[62] ECHR, *Mozer v the Republic of Moldova and Russia* [GC], application no. 11138/10, judgment 23 February 2016, §194.

the interference and the stated legitimate aim justifying the interference, that a violation of the Convention will be found.[63] Where no legitimate aim is provided by the authority causing the interference, a violation of the Convention will also be found.[64]

49. It is likely that any proposed ban on conversion practices 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.

50. 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.

51. The inconvenient truth for legislators is that much of the campaigning surrounding conversion practices 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.[65]

52. 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[66], CIT argues that for some people, sexual

[63] *See e.g.*: *id.*, §§194-196.
[64] ECHR, *Toma v Romania*, application no. 42716/02, judgment of 24 February 2009, § 92.
[65] *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.
[66] 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.

identity, attraction and behaviour are not in harmony and that these individuals in particular may experience change in their sexuality.[67]

53. 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, 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.[68]

54. While the voices of those who oppose conversion practices 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.[69]

55. 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 or practices being banned are harmful. As stated above, that aim must be actual and not mere conjecture. Portraying any and all such counselling, or other so-called conversion practices, as harmful does not suffice to establish overall harm and would not withstand Convention scrutiny.

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[67] *Out of Harm's Way: Safeguarding at Core Issues Trust*, at pp. 8-9.
[68] *Id.*, at pp. 7-8.
[69] *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.

Necessary in a Democratic Society

56. 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'.

57. The ECHR has stated that the typical features of a democratic society are pluralism, tolerance, and broadmindedness.[70] 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."[71] 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.'[72]

58. 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.[73] Arguably that is precisely the case involved when banning conversion practices. 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

[70] *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).

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

[72] *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.

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

significantly with age.[74] 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 suffer disproportionately from mental health problems and that there have been significant difficulties in getting those members to engage with mental health services.[75]

59. 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.[76] 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.[77] 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.

60. 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. . . "*[78] 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.[79] 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 practices' advocates in perpetuating that stigma by creating the caricature

[74] 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.
[75] *Richard Page v NHS Trust Development Authority* [2019] UKEAT 0183_18_1906,at para. 4.
[76] 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/.
[77] *Id.*
[78] *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.
[79] *Id.*

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 practices, regardless of method, safeguarding measures or efficacy.

61. 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.[80] 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 practices.[81] 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

62. Article 14 of the Convention reads:

> *The enjoyment of the rights and freedoms set forth in this Convention 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.*

63. 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.[82]

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[80] American College of Pediatricians, *Unlawful, Dangerous and Unnecessary—Oppose AB 1779 & AB 2943*, *supra fn.* 63.
[81] 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.
[82] *Belgian Linguistic case* (1968) 1 EHRR 252, 283.

64. 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.*[83]

65. 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.

66. 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."*[84] 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.

67. 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*

[83] ECHR, *Burden v. the United Kingdom* [GC], application no. 13378/05, judgment of 29 April 2008, § 60.
[84] European Convention on Human Rights, Protocol 12, Article 1(1).

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.'" [85] Precisely stated, the ruling includes ex-gay as a sub-category of sexual orientation.

68. 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

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

70. 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.[86] The revocation or refusal of a licence to practice by a regulatory body also engages Protocol 1, Article 1 in the same way.[87] 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 engaging in conversion practices would have an arguable property right under Protocol 1, Article 1.

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[85] *The Queen on the Application of Core Issues Trust and Transport for London & Anor.*, [2014] EWCA Civ 34, para. 98.
[86] 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.
[87] ECHR, *Case of Megadat.com SRL v* Moldova, application no. 21151/04, judgment of 08 April 2008, paras. 62-63.

71. Having established a property right, the next question that needs to be addressed is whether there 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. 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.* [88]

72. The third prong of the property analysis thus examines whether the interference serves a legitimate objective in the public or general interest.[89] 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].*[90]

73. 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.[91]

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[88] ECHR, *Sporrong and Lönnroth v Sweden*, 7152/75, [1983] 5 EHRR 35, [1982] ECHR 5, 7151/75, para. 61.
[89] *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.
[90] *Sporrong and Lönnroth v Sweden*, *op. cit.*, para. 69.
[91] *See e.g.: Thoma v. Luxemborg*, 2001-III Eur. Ct. H.R. 67, 84.

74. 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 need"* while at the same time remaining *"proportionate to the legitimate aim pursued."*[92] 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.'"[93]

75. The same obstacles face the Scottish government 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 or pastoral care on their own volition and they have mental capacity to do so, and specifically, 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 consultation document is to provide any indication, also sweeps up the good practitioners, who pursue practise 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.

76. 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

[92] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38.
[93] *Supra fn.* 67.

be drafted sufficiently precisely to limit overreach or the unfettered discretion of authorities from interfering with the rights of practitioners. Bans on advertising or travel, for example, would be a form of overreach which the government would have a difficult time defending under a Protocol 1, Article 1 analysis.[94]

77. Suffice it to say, the Scottish 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 the there is no evidence supporting the efficacy of existing counselling for unwanted same-sex attraction or gender incongruency, 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.

Criminal Prohibition to Travel Out of Scotland to Engage in Conversion Practices

78. People who wish to engage in consensual conversations, pastoral care or counselling without risk of prosecution should be allowed to leave Scotland in order to do so. The proposed prohibition of taking someone outside of Scotland to provide counselling, pastoral care or ministry related to sexual orientation or gender identity is illogical, discriminatory and arbitrary and creates a political barrier allowing some people to go abroad freely for services not legal in Scotland, while criminalising it for others. For example, while assisted suicide is criminal in Scotland, it is not unlawful to bring someone with capacity and who consents, to a jurisdiction where it is legal to end their lives. In another example, when abortion was largely illegal in Northern Ireland, women were encouraged to go to England to end their pregnancies and organisations existed to facilitate such efforts. Criminalising assisting someone to get assistance abroad may very well breach the Convention.[95]

79. It is of note that the consultation document states that "*[i]t would not matter whether the conversion practice was carried out.*" This would make some people guilty for the

[94] *See e.g.*: See 6.1 https://www.gov.uk/government/consultations/banning-conversion-therapy/banning-conversion-therapy.
[95] *See e.g.*: ECHR, *Case of Open Door and Dublin Well Woman v Ireland*, application nos. 14234/88 and 14235/88, judgment of 29 October 1992.

mere intention of having a consensual conversation, even though the conversation itself did not actually take place. Such state of affairs would be despotic.

80. Moreover, there would be serious concerns about how such measures would be policed and whether overly invasive investigative measures would be introduced which would interfere with fundamental privacy rights.

Advertising

81. As the consultation document correctly states, the regulation of advertising and online harms is a reserved matter for Westminster. Therefore, its proposals to work around those reserved powers by prohibiting advertising through the criminal and civil law are both disingenuous and nefarious.

82. It is appropriate to recall that protection for freedom of expression pertains to all views and opinions, whether spoken in private or made publicly by way of advertisement.[96] Ideas have generally enjoyed strong protection. This Court has held that the dissemination of ideas, even those strongly suspected of being false, enjoy the protections of Article 10.[97] The responsibility of discerning truth from falsehood has in this sense been placed on the proper figure, the listener. Overall, this Court has thus recognized that the cure to bad speech is more speech and intelligent dialogue.

83. The ECHR has addressed pre-emptive discipline for potentially harmful speech as being disproportionate to serving a pressing social need: "In the Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need"."[98] It further held that: "In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto."[99]

[96] *Goodwin*, 1996-II Eur. Ct. H.R. at 500 (discussing the "[p]rotection of journalistic sources" as a part of freedom of expression).
[97] *Salov v. Ukraine*, 2005-VIII Eur. Ct. H.R. 143, 180.
[98] ECHR, Vajnai v Hungary, application no. 33629/06, judgment of 08 July 2008, para. 55.
[99] *Id.,* para. 57.

84. In Malta, Matthew Grech who identifies as ex-gay, is facing a criminal prosecution for sharing his story about how he left his former gay lifestyle in a radio interview. No one, as a basic Convention principle, should be at risk of committing a criminal offence for sharing their story of how their sexual orientation or gender identity was changed. Ex-gay falls under the umbrella of sexual orientation [100], garnering protections under both the Human Rights Act and Equality Act. Mr Grech's prosecution serves no public policy interest and punishes him for sharing an experience which he views as highly personal and objectively factual. The only result of such prosecutions is to protect the LGBT community from the reality that others have changed their behaviour and/or inclinations. That is not a proportionate means of restricting freedom of speech.

85. As noted above, 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.[101] 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 practices.[102] In a pluralistic society, where one group suggests that certain counselling or wider practices causes harm, those who have been helped by that very counselling have an equal right to tell their own story.

Conversion Practices as an Aggravating Act

86. Offences may already be aggravated by prejudice on the grounds of sexual orientation or gender identity. No new aggravating factor is, therefore, needed.

87. The consultation document recognises that those engaging in 'conversion practices' in many cases will "*not bear malice or ill-will towards the specific victim, but is motivated by helping them.*" Yet the Scottish government still proposes that even with a motivation of helping someone conversion practices should still be an aggravating factor in a criminal offence.

[100] *Supra fn.* 84.
[101] *Supra fn.* 80.
[102] 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.

88. The proposal will be abused by overzealous prosecutors who wish to score political points in how they charge those they suspect of conversion practices, whatever the intent or outcome of those practices may have been. It further creates this straw man of anyone who engages in this type of counselling or ministry, even with the best of intentions, or those motivated by faith, as monsters. Inevitably, because of the malleability of language, those not using coercive methods and where consent has been freely given, will get caught up in unnecessary prosecutions. Lives and reputations will be ruined.

Civil Protection Orders

89. The standard being proposed by the Scottish government of someone who 'may be at risk' or 'may suffer harm', even though they need not present evidence of having engaged in so-called conversion practices is absurd in that it can literally be applied to anyone. The Courts in England, for example, have on a number of occasions come to a judicial finding that members of the LGBT community are a *de facto* vulnerable minority. Applying the Scottish government's proposal to this judicial finding, anyone who identifies as LGBT would be eligible for a protection order without further procedural requirements. The potential to abuse such orders by campaigners seeking to 'out' conversion practitioners is immense and unacceptable.

90. Creating civil protection orders on the basis of someone who 'is at risk' suggests that victimhood is self-defined and subjective. This is undefined and wide open to abuse. Someone who, for example, simply did not agree with a church's orthodox teaching on these issues could apply for a Protection Order to silence churches from manifesting their deeply held beliefs and doctrines.

91. The thresholds suggested to obtain an order are vague and can be applied to anyone. The orders create an existential threat to well-meaning counsellors and ministries who may be targeted by overzealous individuals on a crusade to end what they believe to be conversion practices, regardless of whether those practices are lawful. The balancing of competing rights, therefore, is unacceptably skewed by the proposal in a way which injures the Article 9 and 10 rights of those who undertake any number of professions, including prayer ministry or ordinary pastoral care.

Criminal Law

92. As noted at length above, criminal law already prohibits any practice which would reach to the level of degrading or inhumane treatment, and which would disproportionately impact a person's private life and right to self-determination. The criminal law also bans physical or mental abuse which attains to the appropriate level of severity. Civil law also provides monetary redress to would-be victims.

93. The above analysis has already discussed the issues of lack of proportionality and necessity, as well as lack of legal clarity and overreach which would plague any new criminal sanction attached to conversion practices.

94. Of equal import is that the proposed changes to the criminal law opens up the possibility of people or the police spying on citizens to see whether their private consensual conversations could possibly be described as conversion practices. This is a serious breach of privacy. The Grand Chamber of the European Court of Human Rights recently found the United Kingdom to be in breach of Article 8 in how its surveillance methods are overly broad and not in accordance with the law. *Case of Big Brother Watch and Others v the United Kingdom* [GC], application nos. 58170/13, 62322/14, and 24960/15, judgment of 25 May 2021. Given this ruling, it strains credulity to create new measures which would only serve to further interfere with the private lives of Scots and those residing in the jurisdiction.

(III) The Equality Act 2010

95. As a preliminary note, the application of the Equality Act 2010 to conversion practices is far more limited than that of the Human Rights Act. For the Equality Act to apply, there must be a provision of services involved. While formal counselling would be caught up by the Act, informal conversations, pastoral care, or religious ministry would not.

96. That being said, any proposed ban on counselling for unwanted same-sex attraction or gender incongruency may engage the Equality Act 2010. As detailed above[103], the

[103] *Supra fn.* 85.

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

97. 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.

98. One of the key considerations involved in looking at an overly broad ban of counselling under the general umbrella of conversion practices is proportionality. Just as with the question of necessity when looking at this issue under Articles 8,9, 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 practices or

regulation rather than an outright ban, a case for indirect discrimination may be made out.[104]

99. Similar to the doctrine of margin of appreciation utilised by the Strasbourg Court, domestic courts also allow public bodies a *"discretionary area of judgment."*[105] 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."*[106]

100. 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[107], a lack of proportionality will be found where the measure was *"manifestly without reasonable foundation."*[108]

101. 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 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.*

102. Nonetheless, the courts have still found that the initial burden of proof remains on the claimant.[109] This burden however is relatively low, with a claimant merely needing to

[104] *Naeem v. The Secretary of State for* Justice, UKEAT/0215/13/RN.
[105] *R(AR) v. Chief Constable of Greater Manchester Police* [2018] UKSC 47.
[106] *Id., § 53.*
[107] *See e.g.*: *R (Countryside Alliance and others) v Attorney General & Another* [2007] UKHL 52.
[108] *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.
[109] *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].

evidence a provision criterion or practice (PCP), group disadvantage and personal disadvantage for the burden to shift onto the respondent.[110]

103. The reason why the PCP puts those struggling with unwanted same-sex attraction or gender confusion 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."*[111]

104. The pool chosen (the disadvantaged) should be of such a nature as to suitably test the particular discrimination being complained of.[112] In the instant matter, that pool would likely be liberally defined, particularly given how open ended the existing definition of conversion practices is. It would include anyone with unwanted same-sex attraction choosing to explore counselling, or alternative forums including consensual conversations, 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.

105. 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.[113] 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 all forms of conversion practices. But, for the yet to be clearly defined ban on conversion practices, those struggling with unwanted same-sex attraction or gender confusion are forbidden from

[110] *Bethnal Green and Shoreditch Education Trust v Dippenaar*, UKEAT/0064/15.
[111] *Haq v Audit Commission*, [2012] EWCA 1621, at para. 22.
[112] *Grundy v British Airways Plc*, [2007] EWCA Civ 1020, at para. 27.
[113] *Cf. Naeem v. The Secretary of State for* Justice, UKEAT/0215/13/RN.

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.

106. The justification given for such measures under the MOU is non-existent. The Scottish government's consultation document, which largely utilises only anecdotal evidence without any specific control variables or methodological safeguards and relies heavily on the results of the English survey on conversation therapy, is not much better. There is in fact no way of knowing whether the data collected by the government for that earlier study was factual, given by activists, embellished or remotely representative of the actual state of play for conversion practices. Given that the worst instances of conversion practices, those which include acts of physical or mental 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.

107. 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 Scottish government to create a ban reflect no sense of proportionality or necessity in relation to the rights they are interfering with. It is the 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 Scottish government's consultation document, would fail to pass muster under a Section 19 analysis.

(IV) Gender Identity

The Issue of Definitions

108. Consistent with the MOU, the Scottish government seeks to criminalise conversion practices relating to gender identity. This is opposed to more precise terms such as gender dysphoria, gender reassignment, or transgenderism, and 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.

109. 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.[114] 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 unique combination of characteristics the person possesses.[115]

110. 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.[116]

111. 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.[117] More than 20% of the genes in the human genome are specific to one sex or the other.[118] In most tissue, there are over 6500 protein-coding genes with specific sex-differential expression.[119] 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.[120] Men and women differ

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[114] *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.
[115] Lawrence S. Mayer, Paul R. McHugh, *Sexuality and Gender,* The New Atlantis, Issue 50, Fall 2016, A Journal of Technology and Society, p. 88.
[116] *See*: Francisco I. Reyes *et al*., *Studies on Human Sexual Development*, 37 J. of Clin. Endocrinology & Metabolism 74-78 (1973).
[117] Fauci, Anthony S.; Harrison, T. R., eds. (2008). *Harrison's principles of internal medicine* (17th ed.). New York: McGraw-Hill Medical. pp. 2339–2346.
[118] Prof. Pietrokovski, Shmuel; Dr. Gershoni, Moran. *The Landscape of Sex-Differential Transcriptome and Its Consequent Selection in Human Adults*, BMC Biology (2017) 15:7.
[119] *Id.*
[120] *Id.*

in their predisposition to certain diseases precisely because of this genetic architecture in our tissue.[121] 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.[122]

112. The central underlying basis for sex is the distinction between the reproductive roles of males and females.[123] This basis is not unique to humans and is used in the categorisations of all biological creatures.

113. 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."*[124] The consultation document does define several related terms which are common within the philosophical belief system of gender identity belief:

> ***Transgender/trans*** *refers to people whose sense of personal identity and gender does not correspond with the sex assigned to them at birth.*
> ***Cisgender*** *refers to a person whose sense of personal identity and gender does correspond with the sex assigned to them at birth.*

114. 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. What is equally troubling is that the Scottish government's definition of transgender does not correspond to either definition of transgender as found in English law; not s. 1 of the Gender Recognition Act 2004 or s 7 of the Equality Act 2010.

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[121] 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.
[122] Prof. Pietrokovski, Shmuel; Dr. Gershoni, Moran, *The Landscape of Sex-Differential Transcriptome* (*see fn.* 20).
[123] 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.
[124] *Memorandum of Understanding on Conversion Therapy in the UK* (Version 2), October 2017, para. 2(ii).

115. 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 to the Gender Recognition Act 2004. The applicant seeking legal recognition of their gender reassignment must be 18 years of age[125] and must have lived in the acquired gender for a period of at least 2 years ending with the date the application is made.[126] Evidence of gender dysphoria is also required, provided either by a medical practitioner practising in the field of gender dysphoria or a charted psychologist in the field.[127] A Gender Recognition Panel must then determine if the evidence provided is sufficient to grant the Certificate.[128]

116. 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.*

117. 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 or suggested by the Scottish government's consultation document. 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.

118. It is worth noting that the terms gender reassignment, gender expression and gender identity are not recognised by EU primary law.

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[125] *Gender Recognition Act 2004 (c.7)*, § 1(1).
[126] *Id.*, § 2(1)(b).
[127] *Id.*, § 3(1)(a-b).
[128] *Id.*, § 1(3).

119. 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*[129], 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., Garcon and Nicot v. France*[130], 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.

120. 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 Scottish government goes well beyond the law and enters the realm of gender identity belief.

121. Moreover, while the devolved government 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.

122. 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,

[129] Case C-13/94, judgment of 30 April 1996.
[130] Application nos. 79885/12, 53471/13 and 52596/13, judgment of 06 April 2017, paras. 149-154.

which are among the most LGBT-affirming nations in the world.[131] This statistically debunks the notion that lack of acceptance is the cause of suicide among transsexuals.[132]

123. 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.[133] 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.[134] 39 percent reported serious psychological stress just in the month prior to completing the survey.[135] The rates of HIV among those surveyed was 5 times the national average in the United States (1.4 percent versus 0.3 percent).[136] 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.[137] The report also evidenced astronomically higher rates of domestic violence victimisation[138], poverty[139], unemployment[140] and homelessness[141].

The Conflation of Gender Identity Belief and Gender Reassignment

124. One of the key problems with the government's use of the term gender identity, rather than using the legally protected categories of gender reassignment or transgenderism, is that the government ties gender identity to a philosophical belief rather than something concrete and scientific. The anaemic nature of such a 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

[131] 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.
[132] Those who have undergone gender reassignment surgery.
[133] 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).
[134] *Id.,* p. 5.
[135] *Id.*, p. 5.
[136] *Id.*, p. 10.
[137] *Id*., p. 164.
[138] *Id.*, p. 10.
[139] *Id*., p. 9.
[140] *Id*.
[141] *Id.*, p. 17.

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 so far provided by the government.

125. 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 belief.[142]

126. 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 identity as transgender.[143] The people not covered would presumably include those relying exclusively on gender identity belief rather than meeting any of the conditions set out in the Equality Act or Gender Recognition Act to be legally identified as transgender.

Conclusion

127. Legislating against a vaguely perceived threat is inevitably a troublesome exercise. At the moment, there is no satisfactory definition of conversion practices 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.

128. 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 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

[142] *Forstater v CGD Europe & Ors,* [2021] UKEAT 0105 20 1006, at §§ 108-110.
[143] *Forstater*, *op. cit.*, at §118.

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.

129. 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, or any broader behaviour caught up by the proposed legislation, which disproportionally 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.

130. The Scottish government notes in its consultation document that Westminster has also consulted about banning conversion therapy and thereafter took no further substantive action. This is almost certainly because of the legion of legal and evidentiary obstacles, many highlighted in this Opinion, any such legislation would attract. Given that, it is odd that the Scottish government has taken an even more invasive approach, broadening the scope of who would be caught up by the ban, and including a restriction regarding travelling outside of Scotland.

131. At the end of the day, it is not for the government to protect private citizens from themselves, by preventing certain categories of people from accessing the care they want and for the very personal reasons they may have for doing so. Respecting rule of law in paramount. Paternalism is not lawfulness, and as it stands, the legal basis supporting any proposed ban looks much more like the latter than the former.

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