

Discussion Paper

Legislative options to implement a ban of conversion practices

The purpose of this discussion paper is to seek the community's views on the best way/s to implement a ban of conversion practices. This discussion paper raises issues and questions that are designed to assist you to make a submission. Information gathered through this process will inform the government's approach to banning conversion practices. Responses can be submitted through Engage Victoria at <https://engage.vic.gov.au/conversion-practices-ban>.

A range of support services are available if you or anyone you know needs help:

- **Switchboard at switchboard.org.au/get-help/ or on 1800 184 527**
- QLife at qlife.org.au
- Lifeline on 13 11 14
- Kids Helpline on 1800 551 800
- MensLine Australia on 1300 789 978
- Suicide Call Back Service on 1300 659 467
- Beyond Blue on 1300 22 46 36
- Headspace on 1800 650 890
- ReachOut at au.reachout.com


Background

This discussion paper uses the term 'conversion practices' to refer to any practice or treatment that seeks to change, suppress or eliminate an individual's sexual orientation or gender identity, including efforts to reduce or eliminate sexual and/or romantic attractions or feelings toward individuals of the same gender, or efforts to change gender expressions. This term is preferred to 'conversion therapy' which suggests that there are therapeutic benefits to such practices. 'Conversion therapy' is only used where necessary to accurately reflect the titles of reports and approaches in other jurisdictions.

In November 2018 the Health Complaints Commissioner completed her Report on the Inquiry into Conversion Therapy (HCC Report). The HCC Report sets out the long-term psychological harm and distress experienced by people who have undergone conversion practices, which include increased incidence of suicide. It made a number of recommendations, including:

- Introduction of legislation that clearly and unequivocally denounces conversion practices and prohibits conversion practices from occurring in Victoria.
- Establishment of sources of funding for counselling/support services by appropriately trained providers, for survivors of conversion practices.

Prior to the HCC Report, in October 2018, the Human Rights Law Centre, La Trobe University and Gay & Lesbian Health Victoria published Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia (HRLC Report). The HRLC Report highlighted the severity of the harms occasioned through conversion practices. It made recommendations to the state government, the Commonwealth government and health associations, and promoted a multi-faceted strategy to respond to conversion practices, including a specific legislative ban to prohibit conversion practices.



In February 2019 the government publicly responded to the HCC Report and the HRLC Report. The government announced that it will bring in laws to denounce and prohibit LGBT¹ conversion practices together with funding further research and providing funding support for conversion therapy survivors. This announcement was welcomed by survivors of conversion practices and the authors of the HRLC report.

The Victorian Government is committed to policy change to better protect LGBT Victorians from the harm caused by conversion practices but acknowledges that the Commonwealth has recently released an exposure draft of a Religious Discrimination Bill, which, if passed, may impact on the policy options available to the state.

Conversion practices in Australia

The HRLC report contained the first academic research on the nature and extent of conversion practices in Australia.² It estimated that 10% of LGBT Australians are vulnerable to harmful conversion practices.

It found that conversion practices blend self-help, behavioural, psychoanalytic, and religious practices and often involves 12 step programs, individual, group and online counselling, residential camps and exercises, as well as, prayer, scripture reading, fasting, spiritual healing and deliverance.

It also found that conversion practices emerged in religious communities in Australia in the early 1970s at the same time mainstream medical practice was declassifying homosexuality as a mental illness and beginning to consider clinical practices which focused on the need to cure or change a person's sexual orientation as unethical.

Between 1970s-1990s the central messages of 'ex-gay' ministries was that homosexuality was harmful, sinful and tragic, and that it was possible through faith and effort to be free of homosexuality. Between the 1990s-2012 the central messages of religious conversion practices shifted to include a greater emphasis on agency. During this period Australian groups became more closely linked to the international 'ex-gay' movement. Assistance with 'unwanted same-sex attraction' was offered through sexual orientation change efforts (SOCE). The view that it was not possible to be LGBT and a person of faith was maintained, with homosexuality treated as a form of personal brokenness for which healing should be sought. SOCE suggested that LGBT individuals should live chaste and celibate lives until such time as they were healed.

Since 2012 there have been some shifts globally particularly in the US where Exodus International (US) has admitted the impossibility of sexual reorientation, issued an apology, and closed down. Australia's 'ex-gay' organisations have not made similar repudiations, instead maintaining that LGBT persons are disordered, pathological and sinful, and offering help for LGBT persons to live chaste and celibate lives.

Conversion practices have been promoted by some religious groups including during debates around marriage equality.³


Previous responses to LGBT conversion practices

The *Health Complaints Act 2016* (HCA) was intended to enable the HCC to respond to gay conversion practices where they are performed by a health service. "Health service" is broadly defined under the HCA and includes therapeutic counselling and psychotherapeutic services. Support services necessary

¹ The HCC Report and the HRLC Report focus on gay conversion therapy with some reference to conversion practices that affect transgender individuals. While intersex medical interventions are an important issue the concerns they raise are being considered separately. Consequently this discussion paper is focused on LGBT conversion therapy.

² This section provides a summary of this aspect of the HRLC report. For further information see Jones, T, Brown, A, Carnie, L, Fletcher, G, & Leonard, W. Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia. Melbourne: GLHV@ARCSHS and the Human Rights Law Centre, 2018, pp 11-19.

³ HRLC Report, p 18.



to implement health services, and services ancillary to health services, for example laundry services, cleaning services and catering services, are also included in the definition.

The previous Minister for Health, the Hon Jill Hennessy MP, referred gay conversion practices or 'ex-gay' ideology for inquiry by the HCC under section 103 of the HCA which enables the Minister to refer any health service matter to the HCC for inquiry.

Both the HCC Report and the HLRC Report indicate that there are gaps and limitations in existing regulation of conversion practices, particularly those practices promoted by 'ex-gay' ministries that do not involve health services or counselling.

Key Questions

The key questions for consideration in determining how best to implement the proposed ban of conversion practices are set out below. The discussion of these questions includes reference to international examples:

- USA – 18 states have banned conversion therapy provided to children by health professionals. The most recent law was passed in Colorado and will come into effect on 1 August 2019.
- Canada – 3 provinces and the city of Vancouver have passed legislation banning health professionals from providing conversion therapy to minors. The most recent law was passed in Nova Scotia in September 2018 - Sexual Orientation and Gender Identity Protection Act.
- Malta – the *Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016* affirms that no sexual orientation or gender expression is a disease or illness and bans conversion practices which are involuntary or provided to vulnerable people, defined to include children, those with mental disorders, or those that lack legal competency. It also bans conversion practices performed by professionals provided to any person. The penalty is a fine of between 1,000 and 5,000 Euros and/or imprisonment of 1-5 months.
- Ireland – introduced a Prohibition of Conversion Therapies Bill 2018 which has passed through to the second, or committee, stage, in the Seanad. The Bill would ban any person from performing conversion therapy and impose penalties of up to 12 months imprisonment.

What is banned?

Conversion practices can be defined narrowly or broadly, and certain practices may need to be excluded from the definition.

- The HCC Report defines conversion practices relatively broadly as:
 - i. any practice or treatment that seeks to change, suppress or eliminate an individual's sexual orientation or gender identity,
 - ii. including efforts to eliminate sexual and/or romantic attractions or feelings toward individuals of the same gender, or efforts to change gender expressions.This definition is similar to that adopted in the international jurisdictions mentioned above although many do not include the second part.
- Nova Scotia's definition is differently drafted, 'change effort' is defined as any counselling, behaviour modification techniques, administration or prescription of medication or any other purported treatment, service or tactic used with the objective of changing a person's sexual orientation or gender identity.
- All of the international jurisdictions used as examples exclude practices that provide acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development. Assistance to a person undergoing gender transition is also excluded.

- Colorado additionally excludes sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counselling does not seek to change sexual orientation or gender identity.

Do you agree with the HCC's definition?

Would you suggest any changes?

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

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

Who is protected?

Protection could be limited to a specific group or apply broadly. The protections could be focused on children, persons experiencing vulnerability, persons who have not consented to such practices, or could cover all persons. When thinking about who is protected it is important to reflect on the extent to which those engaging in conversion practices are in a position of power and influence in relation to those subject to such practices.

International examples:

- It is most common to ban conversion practices aimed at children. This is the approach adopted in the USA.
- Nova Scotia bans the practice in relation to persons under 19 (although persons over 16 who are capable of consenting and do consent are not protected). Conversion practices aimed at any person are declared to be uninsured and public money cannot be spent on the cost of conversion practices.
- Malta has the broadest ban for vulnerable persons – anyone under 16, suffering from a mental disorder, or otherwise considered vulnerable by a court. Involuntary and forced conversion practices, and practices performed by professionals are banned in relation to all persons and advertising conversion practices is also banned.
- The Irish Prohibition of Conversion Therapies Bill would make conversion therapy offered to or performed on any person an offence. Advertising or removing a person from Ireland for the purposes of conversion therapy would also be banned.

Some examples from Victoria:

Other schemes offering legislative protection from harm may provide useful models to consider. Some existing schemes could be amended to include protection from conversion practices.

For example in Victoria, children are protected from abuse through specific criminal offences, the child protection system, and the reportable conduct scheme. All of these aim to protect children from a range of harm including significant emotional or psychological harm.

Certain conversion practices may already amount to child abuse due to the harm they cause. It would also be possible to amend existing child abuse regulation to clarify that they include conversion practices.

Other laws are designed to protect members of the community in general – regardless of age or particular vulnerability. Examples would include civil laws of negligence that require a person who has a duty of care to another person to take reasonable care to avoid injury or loss. The criminal law also creates general offences to protect all community members.

Who do you think should be protected?

Should protection be limited to children and people experiencing vulnerability? If so, what

vulnerable groups should be included?

Should protection be available to all members of the community?

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

Who is regulated?

Regulation could focus on particular professionals or apply to any person. Liability could extend only to individuals or to organisations.

International examples:

- The Irish Prohibition of Conversion Therapies Bill is broad and makes it unlawful for any person to perform or offer to perform conversion therapy or to advertise conversion therapy. Higher penalties apply for professionals.
- In Colorado only mental health care providers are regulated.
- Malta regulates all persons in relation to conversion therapy performed on vulnerable persons. Professionals are banned from performing conversion practices on any person or referring any person for conversion practices. Professionals is defined to include person in possession of an official qualification and/or a warrant to practise as a counsellor, educator, family therapist, medical practitioner, nurse, pathologist, psychiatrist, psychologist, psychotherapist, social worker, and/or youth worker.
- In Nova Scotia both regulated health professionals and persons in a position of trust or authority towards a young person under 19 are regulated.

Some examples from Victoria:

Victoria's criminal law applies to all people, although special rules apply to children under 14 years of age. Victorian law already has some regulatory schemes in place for particular professionals or service providers. Some could be adapted or offer models for use in the context of conversion practices. These are discussed below.

Regulation of Health Services

Health Complaints Commissioner (HCC) – In Victoria the HCC regulates 'health services' which include therapeutic counselling and psychotherapeutic services, as well as support services necessary to implement health services and services ancillary to health services. This may extend to some conversion practices including prayer or pastoral care that occurs in conjunction with counselling (although not those that consist only of pastoral care or prayer).

Family violence

In Victoria individuals are protected from violence perpetrated by a family member. Family violence intervention orders made by a court under the *Family Violence Protection Act 2008* can protect a person from emotional or psychological abuse, defined as behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.

This may already cover some conversion practices performed by a family member but this could be clarified, for example by including 'subjecting a person to practices to change, suppress or eliminate an individual's sexual orientation or gender identity' as a statutory example of family violence under s7 of the *Family Violence Protection Act 2008*. A recent amendment to this legislation included dowry related abuse as a statutory example of family violence. This amendment has been the basis of a new community education campaign.

Negligence

A claim for negligence may be brought where a person who has a duty of care for another, fails to take reasonable care and causes injury or loss to that person. It is not currently clear whether survivors of conversion practices would be able to make a claim in negligence.

If conversion practices were not prohibited by law, it may be possible to amend the *Wrongs Act 1958* to clarify that persons offering conversion practices owe a duty of care. This could be limited to professionals or cover all people who provide conversion practices.

It could also be possible to create a duty of care for certain institutions to take reasonable steps to ensure that individuals within their institutions do not provide conversion practices. This could include schools, health services, but also religious organisations.

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

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

If only professionals are regulated, must the conversion practices be within the scope of their professional practice?

Regulation could be limited to professional settings or include private conduct.

International examples:

- The Irish Prohibition of Conversion Therapies Bill does not appear to be limited and would apply to conversion practices performed anywhere.
- Malta's law also appears to apply to conversion practices performed anywhere.
- Colorado is much more limited with mental health care providers only regulated in their provision of mental health care.
- Nova Scotia similarly regulates regulated health professionals in the course of their scope of practice.

Some examples in Victoria:

Child abuse mandatory reporting requirements only apply to relevant professionals in the course of practising their profession or carrying out the duties of their office, position or employment.

The reportable conduct scheme only applies to organisations covered by the scheme which include schools, disability service providers, in-patient mental health service providers, in-patient drug or alcohol treatment services, housing services, child protection services, religious bodies, hospitals, public health services, children's services, education and care services, and certain art centres, libraries, museums, zoos, parks and gardens.

Child abuse offences regulate behaviour wherever it occurs and a claim in negligence could be made wherever the behaviour occurs provided the other requirements are met.

The HCC is generally concerned with public places, like a health service although a health service provider may provide services within a home or church setting.

In contrast, family violence laws focuses on violence that occurs within family relationships whether the conduct is in public or in private.

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

Should conversion practices be regulated by the criminal law or the civil law or both?

Once key decisions are made about what is regulated; who is protected; who is regulated; when and where is conduct regulated, then we can consider how to regulate this conduct. Broadly, prohibited activities tend to be regulated by the criminal law, civil law or a combination of both.

The key differences between these different mechanisms are described below:

Criminal regulation

- Investigation and prosecution is by police or specially appointed enforcement officers with powers of search and arrest.
- Prosecutors bear the costs of prosecution.
- Courts decide whether a person is guilty beyond reasonable doubt.
- Courts can convict, impose penalties like fines, community based orders or imprisonment.
- Victims may be entitled to state funded compensation or the offender may be ordered to pay compensation to the victim.

International examples:

Malta's legislation and the proposed Bill in Ireland create criminal offences which would be investigated by police.

Options for Victoria:

Existing regulation of family violence and child abuse includes criminal offences. Regulating conversion practice through a new criminal offence, or by clarifying the application of existing criminal offences, would send a clear message about the unacceptability of such behaviour in the Victorian community. As criminal offences are investigated by police, this approach is not as reliant as some civil schemes on individuals coming forward with complaints.

However, crafting criminal offences so that they only capture the intended prohibited behaviour can be difficult. For example, how would a criminal offence treat someone subjected to conversion practices who, as part of that conversion practice, also provided conversion practices to others?

Also past experience of criminalising religious practices, such as offences for performing female genital mutilation, suggest they can be difficult to investigate, prosecute and obtain convictions, given the required standard of proof.

Civil regulation frameworks


- Individuals make complaints to a regulator.
- Regulators investigate or audit a person governed by the scheme.
- Regulators decide whether laws have been broken, usually on the balance of probabilities.
- Regulators may have powers to impose civil penalties, limit rights to operate, put conditions on operation. They can deregister or impose disciplinary action.
- Costs of regulation are usually borne by those being regulated by industry or professional fees.

International examples:

In jurisdictions where only health professionals are banned from performing conversion practises contraventions are detected through the professional regulator.

Options for Victoria:

The HCC may investigate a complaint made by any one that has used a health service or by someone on their behalf. The HCC may also undertake investigations on its own motion. The HCC has a range of



powers to take action to prevent health services from continuing to provide services like making public health warning statements, and prohibition orders.

The *Health Complaints Act 2016* could be amended to clarify the position. It could expressly state that conversion practices are banned in Victoria and that the HCC powers under that Act extend to conversion practices.

Under the child abuse reportable conduct scheme, heads of organisations covered by the scheme must report reportable conduct to the Commissioner for Children and Young People (CCYP) within 3 business days of becoming aware of a reportable allegation. In response to a report the CCYP may:

- give the organisation responding to the allegation support and guidance.
- check that the organisation is handling the allegation in a timely manner.
- refer a substantiated allegation to Working With Children Check or a professional accreditation body.

Regulating conversion practices through an existing civil scheme may enable a ban of conversion practices to be more nuanced than is possible under a criminal offence. However, inclusion in a regulatory scheme may not be a sufficiently strong declaration to the community that conversion practices are not acceptable.

Both the HCC and CCYP are well established in their respective regulatory areas. However, the HCC is limited to health services and the CCYP to certain reportable conduct. Both would require amendment to clearly incorporate conversion practices. A new regulator would not have these limitations but would also not have established practice and reputation.

Civil schemes generally rely on complaints being brought by those affected. Both the HCC and HLRC Reports acknowledge that survivors of conversion practices face considerable difficulty due to the harms they have suffered in coming forward with complaints.

Civil laws such as negligence

- Individuals sue the person who owes them a duty of care and seek compensation for injury or loss.
- A court decides if compensation should be paid, on the balance of probabilities.
- The individual bringing the case to court pays the costs of the case unless the court orders the other party to pay. If the individual loses the case the court may order that they pay their own costs and those of the other party.

Options for Victoria:

Regulating conversion practices through clarifying that a duty of care is owed by those performing such practices relies on a survivor bringing an action in negligence and be involved in the determination of the matter before a court.

As discussed in relation civil regulatory schemes this may be very difficult for many survivors. However, extending the duty of care to particular organisations may enable a focus on institutional failings rather than individuals, and also provide better access to appropriate levels of damages.

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

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

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

How do we address concern about freedom of religion?

Both the HCC and HRLC Reports highlight that many modern LGBT conversion practices are religious rather than medical in nature in that they involve, or consist entirely of, pastoral and prayer activities. Manifestation of religious belief through religious practice is protected by the right to freedom of religion. This right to manifest is not absolute and a number of commentators argue that it is not clear that it extends to practices that seriously harm others.⁴ The impact of a ban of conversion practices on the right to freedom of religion may be justified given the nature and extent of the harm described in the HCC and HRLC Reports. Legislation to implement the government announced ban on conversion practices needs to demonstrate that it is necessary, effective, and proportionate to protect LGBT individuals from harm.

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

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

Are there other matters that you consider critical for the design of legislation or effective implementation?

⁴ See for example, E Chemerinsky and M Goodwin, 'Religion is not a Basis for Harming Others', *University of California School of Law Legal Studies Research Paper Series*, NO. 2015-78 and H Levin, A Jacobs, and K Shah Arora, 'To Accommodate or not to Accommodate: (When Should the State Regulate Religion to Protect the Rights of Children and Third Parties)', *University of Georgia School of Law Research Paper Series*, no. 2015-24.

