

Our Ref: 19-0041

## MEMORANDUM

**DATE:** 14 August 2020  
**TO:** Australian Christian Lobby  
**FROM:** John Steenhof  
**RE:** **Sexual and Gender Identity Conversion Practices Bill 2020 (ACT)**

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1. This memorandum considers the likely legal implications of the ACT government's proposed bill to criminalise sexual orientation and gender identity conversion practices titled the *Sexuality and Gender Identity Conversion Practices Bill 2020 (Conversion Bill)*.

### Executive Summary

2. We consider that the Conversion Bill is fundamentally flawed. It goes far beyond its stated purpose of banning coercive conversion treatments for sexual orientation and gender identity issues and should not be passed.
3. The key failures of the Conversion Bill are:
  - 3.1. Because of its imprecise and ambiguous drafting, the Conversion Bill exposes a wide range of people (including parents, teachers, counsellors, pastors and religious leaders) to complaints to the Human Rights Commission of supposed "conversion practices" for benign and even beneficial activities.
  - 3.2. In addition, the Conversion Bill will potentially criminalise parents, guardians, teachers and pastors who provide moral, ethical and religious care and formation for children.
  - 3.3. The Conversion Bill contravenes fundamental rights and freedoms under international law and the *Human Rights Act 2004 (ACT)* in an unreasonable and disproportionate manner.
4. If passed, the Conversion Bill will be amongst the most extreme laws banning conversion therapy in the world. The flaws of the Bill cannot be remedied by amendment.

### Complaints of conversion therapy can be made to the Human Rights Commission

5. The Conversion Bill amends the *Human Rights Commission Act 2005* to allow complaints from anyone about conversion practices to the ACT Human Rights Commission.
6. The definition of what constitutes "conversion practices" in clause 7(1) is vague and imprecise and will apply far beyond the coercive practices by health professionals. Almost anyone is at risk.
  - 6.1. "Conversion" will be any "treatment" or "practice", which on its plain meaning will include virtually any activity, not just supposedly professional or therapeutic services of a coercive nature.

- 6.2. Conversion is defined as efforts to “change” to a “person’s sexuality or gender identity”. This definition is so broad that it will extend to pastors, parents and teachers who provide advice directed at abstinence or celibacy<sup>1</sup> or who assist people dealing with unwanted feelings of sexual attraction or who encourage people to love the body they were born with.
- 6.3. The only qualifications of the definition of “conversion practices” in clauses 7(2) and (3) of the Conversion Bill are to protect those persons counselling gender transition or providing gender transition services (including prescriptions of puberty blockers, hormones and performance of body-invasive surgeries).
7. The ACT Legislative Assembly has recognised that the Conversion Bill will not permit “the manifestation or demonstration of religious belief, or the expression of information or ideas, that seek to change a person’s sexuality or gender identity.”<sup>2</sup> It is clear that this Conversion Bill targets orthodox teachings of many religions.
8. The Conversion Bill has a very low bar for complaints to the ACT Human Rights Commission. Pretty much any complaint of conversion practices must be accepted and will subject the target of the complaint to what is often a long and costly process of investigation, conciliation and legal action in the ACT Civil and Administrative Tribunal (**ACAT**).
9. In addition, the Human Rights Commission can initiate investigations of suspected “conversion practices”.
10. ACAT proceedings can be long, costly and extremely stressful. It is particularly concerning that the Conversion Bill gives ACAT the power to order any amount of money to be paid in compensation to the complainant. It is not normal for a Tribunal to have this kind of significant power in the award of compensation.
11. The poor drafting of the Conversion Bill means that there are significant additional risks to ordinary ACT residents, including parents, guardians, teachers, counsellors and religious leaders who act in accordance with genuinely held beliefs or their sincere religious convictions.
12. Examples of the risks to ordinary people are:
  - 12.1. **Pastors.** A Pastor who counsels a member of his congregation over unwanted same-sex attraction is at risk of a conversion practice complaint. He is at risk even if the person approached him of their own volition.
  - 12.2. **Preachers.** The Conversion Bill is so broad that it can invade the preacher’s pulpit and expose him to the risk of a conversion practice complaint if the preacher teaches on the Biblically orthodox view of sexuality.

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<sup>1</sup> In the 2018 *Report on the Inquiry into Conversion Therapy* under the Health Complaints Act 2016 (Vic), the Victorian Health Complaints Commissioner states “The main aims of conversion therapy/practices are generally to suppress or eliminate a person’s sexual orientation or gender identity, **including through celibacy or abstinence...**” (emphasis added)

<sup>2</sup> The Legislative Assembly for the Australian Capital Territory, *Sexuality and Gender Identity Conversion Practices Bill 2020: Explanatory Statement and Human Rights Compatibility Statement*, p. 4

- 12.3. **Counsellors.** A Christian counsellor who counsels fellow Christians in accordance with orthodox Biblical teaching on sexuality is at risk of a conversion practice complaint. They are at risk even if the person seeks their services of their own volition.
- 12.4. **Churches.** The ACT Human Rights Commission has the power to investigate churches that hold to an orthodox Biblical position on sexuality and gender to investigate them for suspected conversion practices – even if no complaints have ever been received.
- 12.5. **Schools.** A school that is set up with a religious ethos and teaches that there are only two genders is at risk of being investigated by the ACT Human Rights Commission for conducting conversion therapy practices.

### **Criminalisation risk to Parents, Guardians and Teachers**

13. Furthermore, the Conversion Bill imposes criminal sanctions on anyone who performs a sexuality or gender identity conversion practice on a “protected person” – a child or a person with an impairment (clause 8(1)), regardless of whether there is consent or not (clause 8(2)).
14. The criminal provisions use the same flawed definition of what constitutes “conversion practices” as discussed above. Examples of conduct that could be criminal include:
  - 14.1. **Parents.** If a 5-year old biological girl tells her parents that she wants to be a boy, criminal proceedings could be brought against her parents, school, teachers and doctors if they continue to treat her as a girl or if they adopt a “watchful waiting” approach in relation to these desires. These are potential practices that seek to change this young girl’s gender.
  - 14.2. **Teachers.** Criminal proceedings for conversion practices could be brought against a Christian school that teaches children the orthodox Christian belief that sexuality should only be expressed between a man and a woman within the confines of heterosexual marriage, and that this is normative for Christians.
  - 14.3. **Religious Leaders.** A Christian pastor explaining to a Sunday School class of 13-year olds that homosexual practice is not consistent with Biblical doctrine and that all Christians are called to abstinence and celibacy outside of heterosexual marriage could be criminalised.
  - 14.4. **Counsellors.** A psychologist examining whether a 14-year old biological girl’s desire to transition to a boy might be related to their autism or arise as a result of sexual trauma would be at risk of criminal sanctions.
15. The criminal provisions of the Conversion Bill are wider in scope than most international comparators. There are comparatively few examples of jurisdictions where conversion therapy has been banned. In most other jurisdictions, conversion therapy bans extend only to mental health practitioners<sup>3</sup> or generally to health care practitioners<sup>4</sup> or to services provided for commercial gain.
16. The criminal provisions of the Conversion Bill are too wide and could have unintended dangerous consequences. Any criminal sanctions should be carefully defined to apply to

<sup>3</sup> Eg State of California, USA – Senate Bill 1172, Washington State, SB5722

<sup>4</sup> Eg Canada – Ontario (2015) Manitoba (2015), Nova Scotia (2018)

coercive and aversive clinical therapies only. The category of potential offenders should be narrowed to remove the threat to parents and teachers and religious leaders.

**The Conversion Bill is inconsistent with fundamental rights**

17. The Conversion Bill is inconsistent with the following fundamental freedoms under the *Human Rights Act 2004 (ACT)*:
  - 17.1. **Section 8 – Recognition and equality before the law:** The Conversion Bill gives unequal protection to persons promoting a single controversial practice in relation to issues of sexual orientation and gender identity and discriminates in favour of gender transition treatments that involve chemicals and hormones and invasive surgical practices.
  - 17.2. **Section 11 - Protection of the family and children:** The potential criminalisation of parents and guardians for provision of moral and ethical teaching and formation of a child on sexual orientation and gender identity issues is a breach of the fundamental rights of the family.
  - 17.3. **Section 12 – Privacy and reputation:** The family has the right not be interfered with arbitrarily. The Conversion Bill will allow unjustifiable interference with this right to privacy with a disproportionate invasion of privacy by the state.
  - 17.4. **Section 13 – Freedom of movement:** Parents and others will be criminalised where a journey outside of ACT is considered to be for the purpose of conversion practices. This is a limitation on freedom of movement.
  - 17.5. **Section 14 – Freedom of thought, conscience, religion and belief:** Any teaching by parents to children of body affirmation beliefs or the teaching of orthodox religious beliefs on sexual orientation or gender identity could be criminal “conversion practices”.
  - 17.6. **Section 16 – Freedom of Expression:** Parents and teachers will be restricted from sharing and imparting information and ideas about sexual orientation and gender identity.
  - 17.7. **Section 27A – Right to Education:** Parents will be restricted in ensuring the religious and moral education of their children in conformity with their convictions including in relation to issues of ethics, morality and personal identity.
18. The far-reaching effects of the Conversion Bill are disproportionate to the harms that the Conversion Bill seeks to prevent. Thus, the requirements of section 28 of the Human Rights Act (which sets out the reasonable limits that can be imposed on rights) are not satisfied. The Conversion Bill places unjustifiable limits on fundamental rights and freedoms that are completely unnecessary to achieve whatever legitimate aims the bill might have.
19. The rights of parents and the family and those who have the primary position of care for the wellbeing of children are of fundamental importance. A law which would criminalise parents who exercise those rights must meet a very high threshold.

### Conclusion

20. For the reasons set out in this memorandum, we consider that the proposed ACT Conversion Bill is fundamentally flawed, exposes families, schools and religious organisations to significant danger. For this reason, we consider that the Conversion Bill should be rejected.
21. Please contact us if you would like us to expand on any of the advice above.

Yours sincerely,



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