

TASMANIA
LAW REFORM
INSTITUTE

Sexual Orientation and Gender Identity Conversion Practices

ISSUES PAPER NO 31

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Executive Summary

This Issues Paper informs a community consultation on the reform of Tasmanian law to address sexual orientation and gender identity ('SOGI') conversion practices.

The Paper describes different definitions of SOGI conversion practices (pages 2–8) and adopts a working definition ([1.3.23] on page 13), being:

acts or statements that are aimed at changing, suppressing, or eradicating the sexual orientation or gender identity of another person and are based on a claim, assertion or notion, either express or implied, that non-conforming sexual orientation or gender identity is a physical or psychological dysfunction that can be suppressed or changed.

This definition is the subject of consultation and any final recommendation may adopt a narrower or wider definition ([1.3.24]–[1.3.26]).

LGBTQA+ status is not a disorder or dysfunction. Clinical studies indicate that attempts to alter or suppress LGBTQA+ status based on such a notion lack efficacy and can harm LGBTQA+ people (pages 16–21). Harms include: depression, loneliness, alienation and increased risk of drug abuse, suicidal ideation, and suicide attempts ([2.2.8]–[2.2.9]). Peak medical and psychological bodies consider SOGI conversion unscientific, ineffective and dangerous ([2.2.14]–[2.2.19]).

Generalisable national studies on SOGI conversion practices suggest such practices are likely to be occurring in Tasmania (pages 21–22).

A range of existing Tasmanian laws could potentially apply to some SOGI conversion practices (pages 25–28). However, the current law appears to be incomplete and limited ([3.2.20]).

Queensland ([3.3.2]–[3.3.6]) and the ACT ([3.3.7]–[3.3.10]) have legislated for SOGI conversion practices, and Victoria is preparing to ban them ([3.3.11]–[3.3.14]). Various foreign jurisdictions have banned or are considering banning SOGI conversion practices (pages 32–35) and international bodies have declared them to breach international laws and called for their prohibition (pages 35–36).

Questions for the community include: possible legal definitions ([1.3.27] and [1.3.28]), experiences of SOGI conversion practices in Tasmania ([2.3.5]), whether law reform is necessary ([4.2.12]), and if so, what approach and which forms of law reform ([4.2.27] and [4.2.34]) might be appropriate, and what other community measures may be needed to respond to these harms ([4.2.47] and [4.2.48]).

List of Questions

Warning for Respondents

Some questions ask respondents to describe their experiences with SOGI conversion practices. This may be distressing or traumatic for some people. It is not necessary to answer any question that makes you uncomfortable or distressed.

- Question 1** After considering the background and working definition (see [1.3.23] on page 13), in your opinion, what are and are not ‘sexual orientation and gender identity conversion practices’?
(See [1.3.27] on page 14 for possible considerations).
- Question 2** Should people be allowed to consent to SOGI conversion practices? If so, at what age and under what conditions?
(See [1.3.28] on page 14 for possible considerations).
- Question 3** Have you been involved in or offered, or are you aware of, any forms of SOGI conversion practices in Tasmania? If so, what were the effects on you, or the person exposed to them?
(See [2.3.5] on page 23 for possible considerations).
- Question 4** Do you think that Tasmanian law should be changed to address SOGI conversion practices? If so, should this be through comprehensive reform, amendment or both (a hybrid)?
(See [4.2.12] on page 42 for possible considerations).
- Question 5** Should some or all forms of SOGI conversion practices be criminalised in Tasmania? If so, which, if any, should be dealt with as serious (indictable) crimes and which, if any, should be dealt with as less serious (summary) offences?
(See [4.2.27] on page 45 for possible considerations).
- Question 6** Should some or all forms of SOGI conversion practices be made civil wrongs in Tasmania? If so, what sort of practices should people be liable for and how should those subject to such practices be compensated?
(See [4.2.34] on page 47 for possible considerations).
- Question 7** Should any existing Tasmanian laws (besides criminal laws or the *Civil Liability Act 2002* (Tas)) be amended to cover SOGI conversion practices? If so, which ones and in what way?
(See [4.2.42] on page 50 for possible considerations).

Question 8 Are there any other models or approaches that are preferable to, or should complement, changing the law?
(See [4.2.47] on page 51 for possible considerations).

Question 9 Are there any other matters that you consider relevant to this Inquiry and would like to raise?
(See [4.2.48] on page 52 for possible considerations).

List of Acronyms and Abbreviations

The following is a complete list of acronyms, abbreviations and key terms used in this Issues Paper:

APS –	Australian Psychological Society
ADA –	Anti-Discrimination Act 1998 (Tas)
ACT –	Australian Capital Territory
ACAT –	ACT Civil and Administrative Tribunal
Conversion practice –	‘acts or statements that are aimed at changing, suppressing, or eradicating the sexual orientation or gender identity of another person and are based on a claim, assertion or notion that non-conforming sexual orientation or gender identity is a physical or psychological dysfunction that is capable of being changed’: see further at [1.3.23] on page 13.
HRLC –	Human Rights Law Centre
LGBTQA+ –	Lesbian, Gay, Bisexual, Transgender, Queer, Asexual Plus
SOGI –	Sexual Orientation and Gender Identity
SOGICE Survivors –	Sexual Orientation and Gender Identity Change Efforts Survivors
TOR –	Terms of Reference
TLRI –	Tasmania Law Reform Institute

About the Tasmania Law Reform Institute

The Tasmania Law Reform Institute ('TLRI') is Tasmania's peak independent law reform body. The TLRI was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The TLRI is based at the Faculty of Law at the University of Tasmania. The TLRI undertakes law reform work and research on topics proposed by the government, the community, the University and the TLRI itself.

The work of the TLRI involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other states and the Commonwealth.

The TLRI's Acting Director is Dr Brendan Gogarty. For the purpose of this reference, the members of the Board of the TLRI are: the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania); Dr Brendan Gogarty (Chair), Professor Dianne Nicol (Head of Discipline, Faculty of Law at the University of Tasmania); Ms Kerrie Crowder (acting appointment by the Attorney-General); Mr Craig Mackie (nominated by the Tasmanian Bar Association); Ms Ann Hughes (appointed at the invitation of the TLRI Board); Mr Rohan Foon (appointed by the Law Society of Tasmania); Ms Kim Baumeler (appointed at the invitation of the TLRI Board); and Ms Rosie Smith (appointed at the invitation of the TLRI Board as a member of the Tasmanian Aboriginal community).

The Board oversees the TLRI's research, considering each reference before it is accepted, and approving publications before their release.

How to Respond

The Tasmania Law Reform Institute ('TLRI') is currently inquiring into 'sexual orientation and gender identity' ('SOGI') conversion practices. These are acts or statements that are aimed at changing, suppressing, or eradicating the sexual orientation or gender identity of another person. A preponderance of clinical evidence — summarised in this Issues Paper — indicates that SOGI conversion practices do not produce the outcomes they aim to and that they cause significant and prolonged harm to those subject to them.

As part of this Inquiry, the TLRI is consulting with the Tasmanian community about whether and how Tasmanian law might be changed to prevent these harms.

Readers of this Issues Paper are invited to respond to (one or more) questions set out in each part of this paper. You may submit your responses:

- **using the online survey form** at www.utas.edu.au/law-reform/conversion-practices
- by email to Law.Reform@utas.edu.au
- in writing, and posting them to TLRI, Faculty of Law, University of Tasmania, Private Bag 89, Hobart TAS 7001.

If you do not use the online form, please make sure to provide details about yourself or your organisation that allow us to contact you, and (if you so choose), explain your expertise, knowledge and experience about the subject matter of this Inquiry. Please explain the reasons for your views as fully as possible making sure to identify which issues or questions in this Issues Paper you are answering. You do not need to respond to all questions to submit a response. Submissions must be received by 7 January 2021.

Public submissions will be published on the Institute's website, and may be referred to, paraphrased or quoted from in a Final Report. You may make your submission anonymously or request for it to not be publicly released. Any request to remain anonymous will be respected and honoured. Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission, and name you as the source of the submission in relevant publications.
2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications, but will not identify you as the source of the submission.
3. Confidential submission – the Institute will not refer to or quote directly from the submission, but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

Responses to this Issues Paper must be received by 5pm 7 January 2021.

Background and Terms of Reference

Reference

This Inquiry was initiated by a community reference from peak Tasmanian Lesbian, Gay, Bisexual, Transgender, Queer, Asexual Plus (LGBTQA+) stakeholder bodies and representatives in 2016. This Reference Group includes:

- Working It Out
- Rainbow Communities Tasmania
- Martine Delaney
- Parents and Friends of Lesbians and Gays (PFLAG Tasmania)
- Tasmanian Council on AIDS, Hepatitis and Related Diseases (TasCAHRD)
- Tas Pride
- Bi Tasmania and
- Tasmanian Gay and Lesbian Rights Group.

The Reference was accepted by the TLRI Board in July 2018. Funding for the Inquiry was provided by the Office of the Vice Chancellor in 2019. The Inquiry began in July 2020.

Terms of Reference (TORs)

The accepted Terms of Reference for this Inquiry are to:

1. Define the nature, scope and meaning of SOGI conversion practices;
2. Review and consider peer-reviewed literature about the impact of SOGI conversion practices on people who are subjected to them and/or who have survived them;
3. Consider any other verifiable and authoritative data about the nature and prevalence of SOGI conversion practices in Tasmania;
4. Review and consider statements, policies and laws relevant to SOGI conversion practices in Australia and elsewhere;
5. Evaluate current laws that may be relevant to the prevention or regulation of SOGI conversion practices in Tasmania;
6. Consult with Tasmanians about their understanding, perception and experience of SOGI conversion practices;
7. Where necessary and possible, consult with experts from all relevant sciences about the impact of SOGI conversion practices on people who are subjected to them and/or who have survived them; and
8. Recommend appropriate regulatory and/or legislative responses to the evidence raised in the Inquiry.

This Issues Paper is addressed to TORs 1, 2, 3, 4 and 5 to set up the consultation process for TORs 6 and 7, to ultimately support the final recommendations of TOR 8.

Inquiry Process

This Report is being prepared by TLRI research staff under the guidance of an independent Expert Advisory Group drawn from relevant disciplines (human rights and discrimination law, public law, criminal law, medical science, epidemiology and health statistics) two community members (a survivor of SOGI conversion practices and a member of a community of faith). No members of the Expert Advisory Group are members of or associated with any of the bodies and representatives that are part of the Reference Group. The process of Inquiry is as follows:

- July 2020 – November 2020. Preliminary administrative and research work was conducted by the Institute, including preparation of this Issues Paper.
- November 2020 – January 2021. Open public consultation period. Community members are invited to comment on the issues and questions raised in this Issues Paper.
- SOGI Conversion Practice survivors have emphasised the need for collective rather than individual dialogue with those affected by or who have survived such practices. The TLRI may therefore consult directly with representative bodies in addition to inviting general public comment. Public feedback will be reviewed, consolidated and considered. The Institute may contact respondents for clarifications or further information during this period (if permission has been provided in advance).
- January 2021 – February 2021. The TLRI prepares a Final Draft Report for its Board.
- February 2021. The TLRI Board endorses Final Report and determines final recommendations for reform.
- March 2021. Final Report with recommendations is released.

This Issues Paper

This Issues Paper provides some background, context and questions to facilitate informed community discussion about, and feedback on, SOGI conversion practices and the law.

- Part 1 (pages 1 to 14) introduces readers to the possible definitions and meanings of ‘SOGI conversion practices’ and the TLRI’s working definition (TOR 1).
- Part 2 (pages 15 to 23) examines the peer-reviewed literature on the impacts of SOGI conversion practices (TORs 2 and 3). This was undertaken in consultation with medical and health experts (TOR 7). It also asks readers to provide feedback about their own experiences of SOGI conversion practices in Tasmania (TOR 6).
- Part 3 (pages 24 to 37) provides an overview of the law in Tasmania and the recent law reforms that have been passed or considered around Australia and the world (TORs 4 and 5).
- Part 4 (pages 38 to 52) sets out options and questions about the approach and form of law reform (TOR 6).

Ethical Conduct of Research

This Inquiry has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this Inquiry, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0016752.

Acknowledgements

This Issues Paper was prepared for the Board by Dr Brendan Gogarty and Dr Martin Clark with the research assistance of Ms Siobhan Galea and Ms Lily Russell.

Assistance and oversight of the preparation of the Issues Paper was provided by an Expert Advisory Group. For the purposes of this Issues Paper the Expert Group are Mr Chris Csabs; Mr Stuart Davey; Ms Anja Hilkemeijer; Associate Professor Amanda Neil; Professor Margaret Otlowski; Dr Jessica Roydhouse; and Rev Jeff Savage.

The paper was edited by Mr Bruce Newey. Ongoing administration and management of the Inquiry has been provided by Ms Kira White.

All images by Sharon McCutcheon, unsplash.com/@sharonmccutcheon

Nature, Scope and Meaning of SOGI Conversion Practices (TOR 1)

1.1 Overview of this Part

- This Part responds to TOR 1: define the nature, scope and meaning of SOGI conversion practices.
- It is generally accepted that SOGI conversion practices involve acts by individuals, entities or groups to alter a person's sexuality or gender identity.
- There is disagreement about the scope of acts that might constitute SOGI conversion practices and the sort of acts or statements that might be excluded from a definition of these practices.
- There is, by consequence, no agreed definition of SOGI conversion practices.
- The Institute prefers a human-rights informed, outcomes-based definition. A working definition is set out in [1.3.23] on page 13.
- A number of jurisdictions have enacted or implemented prohibitions on SOGI conversion practices. These apply a variety of definitions, approaches and regulatory tools to reduce harms from SOGI conversion practices.
- Possible legislative or regulatory definitions are set out for public consultation.



1.2 What are SOGI conversion practices?

1.2.1 The primary and overarching question referred to the TLRI is:

what, if any, reform is necessary to Tasmanian laws to deal with sexual orientation and gender identity ('SOGI') conversion practices?

1.2.2 Term of Reference 1 directs the TLRI to understand and explain the 'nature', 'scope', and 'meaning' of the term 'SOGI conversion practices'. Understanding SOGI conversion practices is central to this Inquiry and its recommendations. Defining the phrase is also key to the effectiveness of any proposed law that might be implemented by Parliament. At this stage, defining the phrase is for the purposes of this Inquiry and community consultation and not necessarily a proposed legal definition.

1.2.3 Care must be taken when defining SOGI conversion practices as,

- an overly narrow definition may result in certain acts (practices) which result in the harm the law seeks to reduce not being covered by the law; and
- an overly broad definition risks capturing acts which are not intended to achieve the ends the law seeks to address, or which do not cause harm, or might unnecessarily burden other rights or freedoms.

1.2.4 The TLRI notes that settling on a workable definition of SOGI conversion practices is essential to framing its Inquiry into them but that this is not a final or conclusive step. Evidence gathered or submitted during the research or consultation phases may result in a broader or narrower definition being adopted. The TLRI also recognises that 'SOGI conversion practices' is a term commonly used by other jurisdictions and international organisations. Unlike terms such as conversion 'therapy', with which the public might be more familiar, SOGI 'conversion practices' does not suggest any medical or therapeutic status or endorsement by the scientific community. The TLRI recognises that the terminology is not settled (see [1.3.1]–[1.3.3] on pages 8–9) and the Inquiry may conclude that another term is more appropriate to describe the subject of its recommendations.

The nature of SOGI conversion practices

1.2.5 The TLRI considers that the word 'nature' describes the essential or basic features which are common to a class of activities. There appears to be a general consensus that the nature of SOGI conversion practices are acts and statements that aim to change or suppress a person's sexual orientation or gender identity.¹ There also appears to be consensus that the focus of such

¹ Australian Medical Association, 'No Place for Conversion Therapy' (10 September 2018) <<https://ama.com.au/ausmed/no-place-conversion-therapy>>; Australian Psychological Society, 'APS Position Statement on the Use of Psychological Practices That Attempt to Change Sexual Orientation' (2015) https://www.psychology.org.au/getmedia/95cfcca4-009c-4a75-a0e7-597d68e5a55c/Position_statement_on_psychological_practices_that_attempt_to_change_sexual_orientation_members.pdf ('APS Statement'); Djordje Alempijevic et al, 'Statement on Conversion Therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 101930; Victor Madrigal-Borloz, 'Practices of So-Called "Conversion Therapy": Report of the Independent Expert on Protection against Violence and Discrimination

acts and statements are on people who identify as, are likely to identify as, or exhibit behaviours perceived to be associated with LGBTQA+ identity or orientation.²

1.2.6 SOGI conversion practice acts and statements are commonly:³

1. Motivated by an assumption that LGBTQA+ identities are the result of an underlying physical or psychological dysfunction — often attributed to sexual or psychological abuse, physical or mental illness, moral deviance/sinfulness, or psycho-somatic factors.
2. Associated with morally conservative or fundamentalist religious groups and/or doctrines.⁴ These religious groups ascribe to a doctrinal view that LGBTQA+ status, attraction, identity and expression is incompatible with the faith and inclusion in the religious community, and that it is possible to change or suppress LGBTQA+ identity or desires through prayer or other religious practices.
3. Aimed at altering or suppressing the source of the assumed dysfunction (see point 1 above), or at the least the outward expression of LGBTQA+ identity.
4. Part of a process that typically occurs over an extended period of time. Children in religious groups may be exposed to the ideas about LGBTQA+ identity explained in points 1 and 2, often from an early age, but may not be subject to — or commit themselves to — individual or group programs (see [1.2.8] on page 4) until later in life.⁵
5. Are informed or justified by reference to statements and publications about the nature, causes and changeability of sexual orientation or gender identity which are not supported by mainstream scientific, health and medical experts because they are not in the best interests of the subject (see below Part 2.2 at pages 16–17).

Based on Sexual Orientation and Gender Identity' (1 May 2020) UN Doc A/HRC/44/53, <<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportOnConversiontherapy.aspx>>; 'Ending LGBT Conversion Therapies' (2015) 385(9977) *The Lancet* 1478.

² See, eg, D Haldeman, 'Sexual Orientation Conversion Therapy: Fact, Fiction, and Fraud' in Sari H Dworkin and Mark Pope (eds), *Casebook for Counseling: Lesbian, Gay, Bisexual, and Transgender Persons and Their Families* (Wiley, 2015) 297 <<https://onlinelibrary.wiley.com/doi/book/10.1002/9781119221715>>.

³ See, eg, Douglas Haldeman, 'Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination' in *Homosexuality: Research Implications for Public Policy* (SAGE Publications, 1991) 149 <<http://sk.sagepub.com/books/homosexuality/n10.xml>>; Douglas C Haldeman, 'The Practice and Ethics of Sexual Orientation Conversion Therapy' (1994) 62(2) *Journal of Consulting and Clinical Psychology* 221; Kate Bradshaw et al, 'Sexual Orientation Change Efforts Through Psychotherapy for LGBQ Individuals Affiliated With the Church of Jesus Christ of Latter-Day Saints' (2015) 41(4) *Journal of Sex & Marital Therapy* 391. For practices reportedly in Australia, see Timothy W Jones et al, *Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia* (Human Rights Law Centre, 2018) <<https://www.hrlc.org.au/reports/preventing-harm>>; Sexual Orientation and Gender Identity Change Efforts Survivors ('SOGICE Survivors'), *SOGICE Survivor Statement* (July 2020) <<http://socesurvivors.com.au/wp-content/uploads/2020/07/SOGICE-Survivor-Statement-v4-July-2020.pdf>>.

⁴ On the connection between conservative or fundamentalist religions and SOGI conversion practices in Australia, see Jones et al (n 3) 13–19.

⁵ SOGICE Survivors (n 3) 11–12: 'Most survivors are exposed to conversion ideology from a young age and, although there are some exceptions, usually experience conversion practices when they are young adults or older. Most of the harm observed by SOGICE Survivors has been experienced by adult survivors.'

Scope of SOGI conversion practices

1.2.7 The TLRI considers the word ‘scope’ to mean the broader class of activities that are of the character or nature described above. That is, what sort of acts or statements attempt to change or suppress someone’s gender orientation or sexual identity? This is a much less certain and more contested question than the nature of SOGI conversion practices:

- At its broadest, SOGI conversion practices include statements or acts that suggest that a person’s sexual orientation or gender identity is wrong, immoral, ‘broken’ or in need of fixing.
- At its narrowest, SOGI conversion practices involve only non-consensual physically abusive acts.

1.2.8 Between these two positions are a range of activities which are reported in peer reviewed literature and by survivors and former SOGI conversion practitioners.⁶ These include:

- **False claims.** The making of false and misleading claims about the physical or medical causes of sexual orientation and gender identity. Relatedly, the making of false and misleading claims about the practices that a person can engage in (or be subject to) in order to suppress, eradicate or alter sexual orientation and gender identity.⁷ This is especially the case where:
 - the subject to such claims is vulnerable (for instance a child); and/or
 - there is a relational power imbalance or dependence between the person making the claim and the person subject to it; and/or
 - the claims are made over a substantial period of time, with the intention to influence a person’s understanding and beliefs about sexual orientation and gender identity.
- **False publications.** Encouraging, pressuring or forcing subjects to read or view materials which make pseudo-scientific and false claims about LGBTQA+ people, the ‘causes’ of LGBTQA+ identity, or otherwise pathologise LGBTQA+ sexual orientation and gender identity.
- **One-to-one practices.** Programmatic ‘counselling’ or ‘pastoral care’ of LGBTQA+ people, including faith-based support, spiritual guidance, or other religious development, that attempt to change or suppress sexual orientation or gender identity.⁸
- **Group practices.** Encouraging, pressuring or forcing subjects to attend prayer groups or scripture study groups that attempt to change or suppress sexual orientation or gender

⁶ Jones et al (n 3); Alempijevic et al (n 1); Anthony Venn-Brown, *Conversion Therapy in Australia: The State of the Nation* (2018) <<https://www.abbi.org.au/2018/05/gay-conversion-therapy-in-australia/>>.

⁷ SOGICE Survivors (n 3) 3–4.

⁸ The TLRI understands from members of the Expert Group that most religious groups would not agree that such practices would constitute genuine counselling or pastoral care of adherents.

identity. Viewing or listening to sermons, lectures or talks about LGBTQA+ people that are premised upon assertions that LGBTQA+ people are broken, sinful, immoral, pathological, or in need of fixing.⁹

- **Intensive practices.** Organised retreats, camps, online ‘courses’ and ‘conferences’ where intensive or systematic individual and/or group SOGI conversion practices are delivered and engaged in. Some of these activities involve intrastate, interstate or overseas travel to such events.
- **Aversion therapy.** Pseudoscientific use of ‘aversion therapy’ involving associating a stimulus with unpleasant results, eg: electroshocks combined with images of homosexual intimacy.¹⁰

Intersection with religious freedom and freedom of conscience and expression

1.2.9 The TLRI notes that holding or expressing religious, ethical or personal views about LGBTQA+ people is not generally considered to be necessarily a form of SOGI conversion practice. The Australian Capital Territory, which has enacted specific legislation on SOGI conversion practices, includes an explanatory note to this effect in s 7(2) of its *Sexuality and Gender Identity Conversion Practices Act 2020*:

a person has the right to freedom of thought, conscience and religion, including the freedom to demonstrate their religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private. It is not intended that a mere expression of a religious tenet or belief would constitute a sexuality or gender identity conversion practice.

1.2.10 Whilst the section cites the Territory’s *Human Rights Act 2004* as the source of freedom of thought, conscience and religion, these are recognised rights under the common law which apply in all Australian jurisdictions, including Tasmania.¹¹

1.2.11 Survivors of SOGI conversion practices have emphasised that SOGI conversion practice must be underpinned by a false ‘ideology’ that being LGBTQA+ is a form of ‘brokenness’, or caused by trauma, and that it can be altered through physical, psychological or spiritual intervention. The Sexual Orientation and Gender Identity Change Efforts Survivors’ (‘SOGICE Survivors’) *SOGICE Survivor Statement* describes this ideology to cover the following, interrelated, beliefs:

humans are born with the potential of developing into heterosexual people whose gender identity reflects their sex assigned at birth. In [LGBQTA+] people ... this development has been halted or stunted due to ... abuse, neglect, inappropriate parenting dynamics, social influence, and even spiritual issues (including

⁹ The TLRI notes that prayer or scripture study groups will not necessarily involve SOGI conversion practices.

¹⁰ The TLRI notes that this is not a recognised medical or psychological therapy, is reportedly extremely rare today, is likely not practised in Australia, and would be covered by criminal laws on assault or causing injury. The Human Rights Law Centre (‘HRLC’) report noted that only one of its 15 Australian survivor interviewees had experienced aversion therapy, and this took place in the 1980s: Jones et al (n 3) 30, 36, 63.

¹¹ *Attorney-General (NSW) v Grant* (1976) 135 CLR 587, 600 (Gibbs J) (‘*Presbyterian Church Case*’).

demonic influence) ... [LGBTQA+] people should live celibate lives or seek healing ... [t]hrough consistent long-term [acts of devotion, mentoring, abstinence, group counselling etc] ... a person will either: Experience a change in their sexual orientation and/or gender identity, or [o]vercome the causes or drivers behind their same-sex attraction or trans-identity and remain celibate ... [LGBTQA+] people may not be suited to positions of authority within their faith community.¹²

1.2.12 The *SOGICE Survivor Statement* explains each of these points and their situational/theological context in much greater detail than can be replicated here.¹³ Notably though, the *Statement* aims to distinguish between the profession of religious beliefs and ideologically motivated behaviour that is distinct from those beliefs. Specifically, the *SOGICE Survivor Statement* describes conversion ideology to include:

LGBTQA+ conversion practices [that] can be recognised and distinguished from other practices that occur in faith communities using the [above] ideology as a reference point.

Another lens through which to view conversion ideology is the false and misleading claims that it makes, none of which are grounded in factual, psychological, or scientific evidence, and are refuted by medical, psychological and secular bodies as being damaging and unfounded.¹⁴

1.2.13 While the Institute does not form a view on any position statement at this stage, it notes that the *SOGICE Survivor Statement* has been carefully drafted to distinguish between personal or group beliefs and speech or acts that cause harm. This approach is generally consistent with the protection for religious freedom under Australian law. The emphasis on ideology to distinguish from theology may also be useful and important for a general description of conversion practices. However, there are limitations to its applicability to statute, especially criminal codes/statutes.

1.2.14 The state of mind of a person is generally only relevant in a legal context to that person's knowledge of whether they were committing a wrongful act.¹⁵ It is not, to the Institute's knowledge, common for the law to describe the metaphysical character of the beliefs which drive or motivate an act.¹⁶ Indeed, the Institute was only able to find scant reference to 'ideology' in Tasmanian or Commonwealth statutes.¹⁷ Nor was ideology referred to in the legislation of other

¹² *SOGICE Survivors* (n 3) 3.

¹³ For further details, see *ibid* 3–7.

¹⁴ *Ibid* 3.

¹⁵ See discussion of 'mens rea' at [4.2.22] on page 43.

¹⁶ Anti-discrimination law looks to the conduct act of discrimination based on the prescribed characteristics of the person discriminated against. The underlying beliefs of a person that led to that discrimination are not relevant, except to act as an exception for certain forms of employment, education and training. See eg, *Anti Discrimination Act 1998* (Tas) pt 4 div 1 (discrimination) s 14(3)(c): 'For direct discrimination to take place it is not necessary ... that the person who discriminates has any particular motive in discriminating'; see also at pt 5 (Exceptions and Exemptions) divs 8–9 (exceptions relating to religious belief, affiliation or activity, and exceptions relating to political belief, affiliation or activity).

¹⁷ See, eg, *Terrorism (High Risk Offenders) Act 2017* (NSW) s 10(1A)(a): 'advocating support for a terrorist act or violent extremism includes (but is not limited to) any of the following: (i) making a pledge of loyalty

jurisdictions that have proscribed SOGI conversion practices. This is likely for a range of reasons, which include:

- There are significant challenges in ascribing an act to a belief. Ideologies are, by nature, flexible, changeable and often difficult to clearly define. This creates practical difficulties and ambiguities for detection, prosecution and enforcement of the law.
- It is questionable whether law enforcement agencies have the capacity or expertise to delve into the ideological basis of acts.
- Statutes have historically avoided targeting belief and ideology given the broad common law protection for freedom of thought and conscience.¹⁸
- Courts have expressed scepticism about the capacity of the law to effectively demarcate theological acts from beliefs and theology from ideology.¹⁹ Indeed, the High Court of Australia has noted that ‘religious belief and practice cannot be absolutely separated either from politics or from ethics’.²⁰

1.2.15 It is also important to note that there are a wide range of religions in Australia and an even wider range of denominations and that these apply differing interpretative and theological approaches to beliefs, practices and observances. There are also widely varying views of the source and character of sacred writings or prescriptive moral codes that form the basis of a religion’s belief structure. These may, for instance, be considered to be sourced in: the divine; ethical or philosophical principle; scientific investigation or practice; or a combination of these things.

1.2.16 The broad ways in which a religion can be constituted serve to limit the ways in which a clear, precise legal test can be formed to demarcate a practice as having theological or ideological foundations. The Church of Scientology, for example, is a recognised religion in Australia.²¹ In its core text, *Dianetics* — which the High Court has accepted is part of the core doctrine of the

to a person, group of persons or organisation, or an ideology, that supports terrorist acts or violent extremism ...’ *Criminal Code 1995* (Cth) pt 5.3 (terrorism) div 100.1 definitions: ‘**terrorist act** means an action or threat of action where ... the action is done or the threat is made with the intention of advancing a political, religious or ideological cause’.

¹⁸ The law recognises ‘a complete freedom of conscience in matters of religion’: *Presbyterian Church Case* (n 11) 600 (Gibbs J). However, the manifestation of this freedom of conscience and freedom of religion may be limited by legitimate laws aimed at the ‘protection of the community and in the interests of social order’: *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 155 (Starke J) (*Jehovah’s Witnesses Case*).

¹⁹ That is for several reasons. First, there is no clear definition of ‘religion’ in law. Second, there are significant differences of opinion within religious schools about what are core and essential beliefs. Finally, there is no easy way to distinguish between theology and ideology across religions. See: *Jehovah’s Witnesses Case* (n 18); *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 153 CLR 120 (*‘Scientology Case’*); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 392 (Redlich JA): ‘Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety’.

²⁰ *Jehovah’s Witnesses Case* (n 18) 125–6 (Latham CJ).

²¹ This was despite the fact that ‘in its early writings Scientology claimed to be a science rather than a religion’: *Scientology Case* (n 19) 156 (Murphy J).

Church²² — the Church’s founder claims that it is a ‘scientific fact’ that homosexuality is ‘aberrant’ and caused by physical and mental-illness and that such ‘ills can now be cured’ through techniques set out in the text.²³ Such claims are, in substance, reflective of the conversion ideology described above (see [1.2.11]–[1.2.12] on page 5) but the consequences of them being a foundational religious philosophy also makes them part of the core doctrinal beliefs of a legally recognised religion in Australia.

1.2.17 In summary, the Institute accepts that understanding the distinction between the ideological basis of SOGI conversion practices is essential to understanding their drivers, nature and character. That understanding may inform the overarching objectives of a law directed to specific practices, or the policy behind that law. It may also be important for placing a law within a broader framework of social services, community education and governance. However, the Institute notes the practical difficulties in constructing an offence around a specific ideology, rather than the character and impact of the manifestation of that ideology in words or acts.

1.2.18 The Institute welcomes feedback and input into this challenge as well as views on whether ideology should be proscribed within Tasmanian law or not.

1.3 Meaning of SOGI conversion practices

1.3.1 The TLRI understands the word ‘meaning’ directs it to recommend a meaning of SOGI conversion practices for the purposes of law reform. However, at this stage the Institute intends to settle on a meaning only for the purposes of framing the remaining discussion in this Issues Paper and for this public consultation. There are differing views on the meaning of the term. Further, there is incomplete evidence on the range of practices that may be occurring in Australia. As such, the Institute intends the question of legal meaning to be one put to the community. That consultative process may mean the Institute recommends a narrower or broader meaning than is set out in this Issues Paper.

Terminology

1.3.2 The Institute accepts the need to use consistent terminology in this Inquiry to describe SOGI conversion practices. However, it notes a diversity of terminology across domains. Actions

²² The Court accepted that Dianetics could be characterised as a ‘religious philosophy’ and a ‘system or conglomeration ... of the ideas and practices’ which its adherents are expected to ‘to accord blind reverence’. This was despite the text originally having been published and promoted as a claimed scientific treatise of the mind (but which had been discredited by mainstream science and medicine): *Scientology Case* (n 19) 164 (Wilson and Deane JJ).

²³ *Dianetics* states, ‘[i]t is a scientific fact that no psycho-somatic ill exists without an aberration... One of the psycho-somatic illnesses one would least expect to find as a psycho-somatic affair is the illness of sexual perversion. The sexual pervert (and by this term dianetics, to be brief, includes ... homosexuality, lesbianism, ...) is actually quite ill physically ... In dianetics the application of technique to relieve the engrams causing these ills has brought the uniform relief of all patients treated without relapse. In short and in brief, psycho-somatic ills can now be cured. All of them.’ L Ron Hubbard, *Dianetics: The Modern Science of Mental Health* (Bridge Publications 1978, originally published 1950) 123–4.

aimed at altering sexual orientation or gender identity have been described in a variety of ways. These include:

- ‘Change efforts’ or ‘suppression efforts’;
- ‘Conversion’ ‘practices’ or ‘therapy’;
- ‘Aversion therapy’;
- ‘Reparative therapy;’ or
- ‘Ex-gay’/‘Ex-trans’ ‘therapy’.
- Some reports suggest that SOGI conversion practice groups are moving their language away from ‘conversion’, ‘suppression’ or ‘change’ towards ideas of ‘living with’ same-sex attraction.²⁴

TLRI working terminology

1.3.3 At this stage of the Inquiry the TLRI prefers to use the term ‘SOGI conversion practices’ because:

- it captures the broadest understanding of the nature and scope of such activities;
- it is a commonly used term in international declarations (see [3.5.1]–[3.5.6] on pages 35 - 37); and
- it avoids falsely associating such practices with accepted, mainstream medical or psychological practice that might be implied by the term ‘therapy’.

1.3.4 Respondents are invited to make submissions on different or more appropriate terminology relevant to the practices described here.

Definitions of SOGI conversion practices in other Australian jurisdictions

1.3.5 In Australia, two jurisdictions, Queensland (Qld) and the Australian Capital Territory (ACT), have enacted legislation directed at the practice. Queensland appears to adopt a narrower definition than the ACT.

1.3.6 In **Queensland**, s 213F(1) of the *Public Health Act 2005* (Qld), defines ‘conversion therapy’ as ‘a practice that attempts to change or suppress a person’s sexual orientation or gender identity.’

1.3.7 The provision provides the following examples of practices which fall within the definition:

²⁴ Dr Timothy Jones, quoted in Naveen Razik, ‘Queensland Outlawed Gay Conversion Therapy. Survivors Say the Ban Doesn’t Go Far Enough’, *SBS News* (online, 14 August 2020) <<https://www.sbs.com.au/news/queensland-outlawed-gay-conversion-therapy-survivors-say-the-ban-doesn-t-go-far-enough>>.

- inducing nausea, vomiting or paralysis while showing the person same-sex images
- using shame or coercion to give the person an aversion to same-sex attractions or to encourage gender-conforming behaviour
- using other techniques on the person encouraging the person to believe being lesbian, gay, bisexual, transgender or intersex is a defect or disorder.²⁵

1.3.8 Section 213F(2) of the *Public Health Act 2005* (Qld), provides that SOGI conversion practices do not include ‘a practice by a health service provider that, in the provider’s reasonable professional judgement:

- (a) is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or
- (b) enables or facilitates the provision of a health service for a person in a manner that is safe and appropriate; or
- (c) is necessary to comply with the provider’s legal or professional obligations.

1.3.9 Section 213F(3) provides the following examples of practices which are not included in the definition:

- (a) assisting a person who is undergoing a gender transition;
- (b) assisting a person who is considering undergoing a gender transition;
- (c) assisting a person to express the person’s gender identity;
- (d) providing acceptance, support or understanding of a person;
- (e) facilitating a person’s coping skills, development or identity exploration, or facilitating social support for the person.

1.3.10 In the **Australian Capital Territory**, s 7(1) of the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) defines ‘sexuality or gender identity conversion practice’ as: ‘a treatment or other practice the purpose, or purported purpose, of which is to change a person’s sexuality or gender identity.’²⁶

1.3.11 Section 7(2) of the Territory Act provides that a SOGI conversion practice does not include a practice the purpose of which is to:

- (a) assist a person who is undergoing a gender transition; or
- (b) assist a person who is considering undergoing a gender transition; or
- (c) assist a person to express their gender identity; or
- (d) provide acceptance, support or understanding of a person; or

²⁵ Inserted by *Health Legislation Amendment Act 2020* (Qld) s 28.

²⁶ *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) s 8.

- (e) facilitate a person's coping skills, social support or identity exploration and development.

1.3.12 Additionally, s 7(3) of the Act excludes from the definition

a practice by a health service provider that, in the provider's reasonable professional judgment, is necessary to –

- (a) provide a health service in a manner that is safe and appropriate; or
- (b) comply with the provider's legal or professional obligations.

1.3.13 In **Victoria**, the Health Complaints Commissioner's investigation into SOGI conversion practices defined them as:

[a]ny practice or treatment that seeks to change, suppress or eliminate an individual's sexual orientation or gender identity ... including efforts to eliminate sexual and/or romantic attractions or feelings toward individuals of the same gender, or efforts to change gender expressions.²⁷

Definitions of SOGI conversion practices used outside of Australia

1.3.14 Three nations outside Australia provide legislative definitions that may be useful for discussing possible definitions of conversion practices. These jurisdictions use the terminology of 'therapy' or 'treatments'. The TLRI notes that 'practices' is preferred to avoid the suggestion that the practices have some kind of medical, scientific or therapeutic quality or endorsement.

1.3.15 **Malta** defined SOGI 'conversion therapy' as: 'any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression.'²⁸

1.3.16 Malta outlawed performing these practices on any 'vulnerable' person, regardless of consent, or any person who was not consenting.²⁹

1.3.17 **Germany's** 2020 law prohibiting 'conversion treatments' defines them as: 'all treatments of humans that result in the change or suppression of sexual orientation or self-perceived gender identity.'³⁰

1.3.18 Germany explicitly excludes treating 'medically recognised disorders of sexual preference' or 'surgical/medical interventions or hormone treatments aimed at expressing a

²⁷ Victorian Government, *Legislative Options to Implement a Ban of Conversion Practices* (Discussion Paper, 2019) 3 <https://engage.vic.gov.au/download_file/21176/2944>.

²⁸ *Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2015* (Malta) s 2.

²⁹ *Ibid* s 3.

³⁰ *Gesetz zum Schutz vor Konversionsbehandlungen 2020* s 1(1) (translation by the present authors). For an English-language summary, see Federal Ministry of Health, *Act to Protect against Conversion Treatments* (7 May 2020) <<https://www.bundesgesundheitsministerium.de/en/press/2020/conversion-treatments.html>>.

person's self-perceived gender identity'.³¹ Germany's law prohibits carrying out SOGI conversion practices on a person under 18 years of age or a non-consenting adult.³²

1.3.19 **Canada's** proposed Bill C-6 (formerly C-8), currently under consideration by the Canadian Parliament, defines 'conversion therapy' as:

a practice, treatment or service designed to change a person's sexual orientation to heterosexual or gender identity to cisgender, or to repress or reduce non-heterosexual attraction or sexual behaviour.³³

1.3.20 The Canadian Bill also states '[f]or greater certainty, this definition does not include a practice, treatment or service that relates (a) to a person's gender transition; or (b) to a person's exploration of their identity or to its development'.³⁴ The Bill makes it an offence to 'knowingly cause' a person to undergo conversion therapy 'against the person's will', or to 'knowingly cause' a person under 18 years to undergo conversion therapy.³⁵

TLRI's working definition

1.3.21 At this stage, the TLRI notes its preference for a principles-based approach to regulation. A principles-based approach focuses on explaining an outcome that a law seeks to regulate or prevent. It avoids detailed rules and instead looks to broader norms or obligations that all people and actors should observe.³⁶

1.3.22 A principles-based approach is, in our preliminary view, preferable because:

- The Institute accepts that SOGI conversion practices are often hidden from the general community. We cannot identify and map the full range of practices that occur.
- SOGI conversion practices may take many forms, involve a range of techniques and approaches to 'conversion', and that listing specific practices may risk not covering other practices that aim at the same result.
- In this case, there is a potential for a legal restriction on SOGI conversion practices to restrict (or be perceived as restricting) freedom of expression and freedom of religion.³⁷

³¹ *Gesetz zum Schutz vor Konversionsbehandlungen* (n 30) ss 1(2)–(3).

³² *Ibid* ss 2(1)–(2).

³³ Bill C-6: *An Act to Amend the Criminal Code (Conversion Therapy) 2020*, proposed s 320.101 of the *Canadian Criminal Code*.

³⁴ *Ibid*.

³⁵ *Ibid* proposed ss 320.102–320.103 of the *Canadian Criminal Code*.

³⁶ Principles-based regulation focuses on the purpose or rationale behind a rule, rather than providing a comprehensive list of specific, detailed acts. A rule is framed by its purpose, so that many different circumstances or acts that produce the same outcome will be covered by it. Principles-based approaches suggest definitions should focus on the intended outcomes of an act, rather than detailing the characteristics of that act. Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 191.

³⁷ While Tasmania does not presently possess a charter or bill of rights, it is, as part of the Australian Commonwealth, committed to international rights declarations and charters. The Institute also notes its continued commitment to a Charter of Rights for Tasmania to implement these international legal

Such restrictions on these non-absolute rights are legally justifiable, so long as they are in pursuit of a legitimate objective and employ means which are suitable to, and do no more necessary for the achievement of, that objective.³⁸ A principles-based approach facilitates this balancing of rights and interests by being clear and precise about the overarching objective of the rule.

1.3.23 The TLRI adopts the following working definition of ‘SOGI conversion practices’ for the purposes of this Issues Paper:

Sexual orientation and gender identity (SOGI) conversion practices means:

- (a) acts or statements;
- (b) that are aimed at changing, suppressing, or eradicating the sexual orientation or gender identity of another person; and
- (c) are based on a claim, assertion or notion that non-conforming sexual orientation or gender identity is a physical or psychological dysfunction that can be suppressed or changed.

1.3.24 The working definition covers a wide range of possible acts and statements and requires some continuity in those acts or statements. Notably, it avoids describing the acts in terms of their form (eg ‘course, study, therapy’ etc). The intended outcome — attempting to change or suppress SOGI — is central to the kinds of acts or statements covered.

1.3.25 The Institute does not describe the underlying ideology behind such acts in its working definition for the reasons set out above (see [1.2.14]–[1.2.17]) and for consistency with other jurisdictions. However, the working definition (and in particular subsection (c) of that definition) does limit acts to those which are, objectively, an evident or implied manifestation of that ideology.

1.3.26 As noted above, this working definition is relevant to this Issues Paper. The Institute is open to community views and opinions on a suitable legal definition that might be included in laws directed to SOGI conversion practices. The Institute would particularly welcome views on whether the definition should be more prescriptive as to the possible forms of conversion practices or remain broad and principles-based.

Question 1

obligations at a state level. It further recommends that the Charter operates in a manner that allows for the balancing of non-absolute rights and freedoms and the reasonable limits on rights that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. See Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Final Report No 10, October 2007) 110–18 <https://www.utas.edu.au/_data/assets/pdf_file/0003/283728/Human_Rights_A4_Final_10_Oct_2007_revised.pdf>.

³⁸ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11].

After considering the background and working definition (see [1.3.23] on page 13), in your opinion, what are and are not ‘sexual orientation and gender identity conversion practices’?

1.3.27 Possible considerations for Question 1:

1. Is ‘sexual orientation and gender identity conversion practice’ the right terminology to describe the type of acts set out above [1.2.8]?
2. What sort of acts do you think should and should not be included in a definition of SOGI conversion practices in the broadest sense?
3. When considering this question, note that a broad definition of any form of act or actions may not result in a single legal consequence.
4. A legal response can be tailored to the impact, severity or consequence of the specific form of act included in the broad definition.
5. Do any of the definitions mentioned in the Issues Paper seem convincing and appropriate? Would you suggest any changes to one that you prefer?
6. Should removing a person from Tasmania for the purpose of SOGI conversion practices conducted outside the state be included? How would this be detected and enforced?
7. What treatments or practices should be expressly excluded from the definition?

Question 2

Should people be allowed to consent to SOGI conversion practices? If so, at what age, and under what conditions?

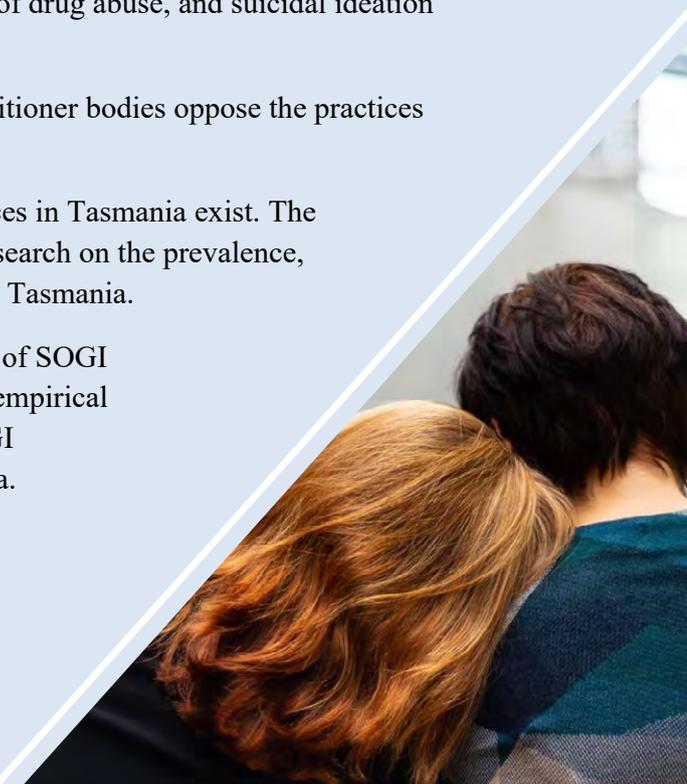
1.3.28 Possible considerations for Question 2:

1. Is it possible to ‘consent’ to SOGI conversion practices?
2. Should the law aim at protecting
 - (a) only children/young adults under 18 years of age; or
 - (b) children/young adults and any person with decision-making impairments; or
 - (c) also non-consenting adults; or
 - (d) any person, including consenting adults, or
 - (e) some other group/subject definition.
3. What role and rights, if any, should parents/guardians of children or young adults have?

Effects of SOGI Conversion Practices (TORs 2 & 3)

2.1 Overview of this Part

- This Part responds to:
 - TOR 2 (review and consider peer-reviewed literature about the impact of SOGI conversion practices on people who are subjected to them and/or have survived them) and
 - TOR 3 (consider any other verifiable and authoritative data about the nature and prevalence of SOGI conversion practices in Tasmania).
- This Part summarises available peer-reviewed literature about the effects of SOGI conversion practices on those subject to them.
- There is no convincing evidence that SOGI conversion practices are ‘effective’ in achieving their purported aims of suppressing or changing a person’s sexual orientation or gender identity.
- Peer-reviewed empirical studies indicate that SOGI conversion practices have significant and prolonged harmful effects on people subjected to them. These include depression, loneliness, alienation, increased risk of drug abuse, and suicidal ideation and suicide attempts.
- A range of peak medical and psychological practitioner bodies oppose the practices as ineffective and harmful.
- No empirical studies on SOGI conversion practices in Tasmania exist. The TLRI is limited in its capacity to conduct new research on the prevalence, nature and harm of SOGI conversion practices in Tasmania.
- While no evidence exists to show the prevalence of SOGI conversion practices in Tasmania, generalisable empirical research suggests that it is highly likely that SOGI conversion practices are taking place in Tasmania.



2.2 Effects of SOGI conversion practices

2.2.1 The TLRI has reviewed the peer reviewed scientific literature on the impacts of SOGI conversion practices. The TLRI gathered and analysed 35 scientific studies. These sources were gathered through keyword searches in major research databases,³⁹ and by following up citations in the studies found in these searches to find additional sources on the impacts of SOGI conversion practices that were missed in the initial keyword search.

2.2.2 Overall, these studies emphasise the difficulty of assessing the harm or benefits of SOGI conversion practices.⁴⁰ This is partly because they rely on self-reporting and retrospective statements by people who were subject to SOGI conversion practices,⁴¹ rather than clinical observation of participants before and after the application of the practices (which, given the self-reports of harm, would likely be unethical to conduct).

2.2.3 Although self-reporting has limitations, these limitations do not make the findings of these studies fundamentally flawed. Contemporary health science recognises the importance of individual self-reporting as a research tool. For example, there is growing recognition of the importance of patient self-reporting when evaluating new therapies, as indicated by the discussion of the role of patient-reported data in the drug development process by major regulatory agencies including the European Medicines Agency and Food and Drug Administration.⁴²

2.2.4 Self-reports can provide valuable information regarding treatment effects on patients which cannot be obtained in other ways.⁴³ Recent efforts to develop tools for patient reporting of side effects in trials further underscore this situation.⁴⁴ One motivation for this development was the recognition that clinician assessment did not fully capture the side effects patients were

³⁹ Keywords included ‘conversion practices’, as well as related terms, older terms or other descriptions of practices equivalent to SOGI conversion practices, specifically ‘conversion therapy’, ‘reorientation therapy’, (‘change’ AND ‘sexual orientation’), in *MEDLINE/PubMed*, *Google Scholar*, and *EbscoHost Megasearch*.

⁴⁰ See Judith M Glassgold et al, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) 35–43 <<http://www.apa.org/pi/lgb/publications/therapeutic-resp.html>>; Jack Drescher, ‘Can Sexual Orientation Be Changed?’ (2015) 19(1) *Journal of Gay & Lesbian Mental Health* 84, 89.

⁴¹ Elaine M Maccio, ‘Self-Reported Sexual Orientation and Identity Before and After Sexual Reorientation Therapy’ (2011) 15(3) *Journal of Gay & Lesbian Mental Health* 242; Robert J Cramer et al, ‘Weighing the Evidence: Empirical Assessment and Ethical Implications of Conversion Therapy’ (2008) 18(1) *Ethics & Behavior* 93.

⁴² European Medicines Agency, ‘Regulatory Science to 2025 Strategic Reflection’, <https://www.ema.europa.eu/en/documents/regulatory-procedural-guideline/ema-regulatory-science-2025-strategic-reflection_en.pdf>; Food and Drug Administration, ‘Incorporating Clinical Outcome Assessments into Endpoints for Regulatory Decision-Making’, <<https://www.fda.gov/media/132505/download>>.

⁴³ See Heather-Jane Au et al, ‘Added Value of Health-Related Quality of Life Measurement in Cancer Clinical Trials: The Experience of the NCIC CTG’ (2010) 10(2) *Expert Review of Pharmacoeconomics & Outcomes Research* 119.

⁴⁴ Amylou C Dueck et al, ‘Validity and Reliability of the US National Cancer Institute’s Patient-Reported Outcomes Version of the Common Terminology Criteria for Adverse Events (PRO-CTCAE)’ (2015) 1(8) *JAMA Oncology* 1051.

experiencing.⁴⁵ The use of self-reporting in these studies is thus wholly consistent with the shift toward more patient-centred care and research. It also bears noting that some early studies relied on small sample sizes,⁴⁶ and that most of these studies focused on populations in the United States.

No evidence of effectiveness of SOGI conversion practices

2.2.5 Many studies of SOGI conversion practices concluded that there was no evidence that these practices fulfilled their aims.⁴⁷ Put simply, these studies found little evidence that SOGI conversion practices can change a person's SOGI status, with most subjects reporting it was harmful and/or ineffective.⁴⁸

2.2.6 In 2009, the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation ('APA Task Force') undertook a systematic review of published works asserting or supporting the efficacy of sexual orientation change efforts (SOCE) — the term they used to describe SOGI conversion practices. On the basis of the review, the APA Task Force identified 'substantial deficiencies' in research design, reporting and claims, including:

- limitations in making causal claims due to threats to internal validity (such as sample attrition, use of retrospective pretests);
- lack of construct validity, including definition and assessment of sexual orientation; and variability of study treatments and outcome measures; and
- problems with conclusion validity (the ability to make inferences from the data) due to small or skewed samples, unreliable measures, and inappropriate selection and performance of statistical tests.⁴⁹

2.2.7 Due to these limitations, the APA Task Force concluded:

- recent empirical literature provides little basis for concluding whether SOCE has any effect on sexual orientation;⁵⁰ and

⁴⁵ Massimo Di Maio et al, 'Symptomatic Toxicities Experienced During Anticancer Treatment: Agreement Between Patient and Physician Reporting in Three Randomized Trials' (2015) 33(8) *Journal of Clinical Oncology* 910.

⁴⁶ See, eg, Annesa Flentje, Nicholas C Heck and Bryan N Cochran, 'Experiences of Ex-Ex-Gay Individuals in Sexual Reorientation Therapy: Reasons for Seeking Treatment, Perceived Helpfulness and Harmfulness of Treatment, and Post-Treatment Identification' (2014) 61(9) *Journal of Homosexuality* 1242 (sample size n=38).

⁴⁷ See, eg, A Lee Beckstead, 'Can We Change Sexual Orientation?' (2012) 41(1) *Archives of Sexual Behavior* 121; Drescher (n 40); Cramer et al (n 41).

⁴⁸ In one study of 1612 Mormons, many of whom had undergone psychotherapy to 'understand, cope with, or change' their same-sex attractions, less than 4% of participants reported any modification in their behaviour, while 42% reported it was ineffective, and 37% reported they found it moderately to severely harmful: Bradshaw et al (n 3).

⁴⁹ Glassgold et al (n 40) 34.

⁵⁰ Ibid.

- the low quality of the research on SOCE is such that claims regarding its effectiveness and widespread applicability must be viewed sceptically;⁵¹ and
- due to weaknesses in the scientific validity of research on SOCE, the empirical research does not provide a sound basis for making compelling causal claims.⁵²

Evidence of harmfulness

2.2.8 Studies suggest that SOGI conversion practices may likely have harmful impacts on people subjected to them. Shidlo and Schroeder's 2002 study was the first to document self-reported harms, with many respondents reporting low self-esteem, depression, suicidal ideation, suicide attempts, relationship problems, sexual dysfunction, alienation, loneliness and social isolation.⁵³ Clinical psychologists, such as Haldeman, have described reports of depression, misinformation, intimacy issues, sexual dysfunction, loss of a sense of masculinity and abandoning spiritual beliefs by patients who had experienced SOGI conversion practices.⁵⁴

2.2.9 Recent studies suggest the long-term effects of SOGI conversion practices can be serious. Meanley et al's 2020 study concluded that people who had undergone SOGI conversion practices reported serious cumulative psychosocial conditions like depression, internalised homophobia and post-traumatic stress disorder at a rate 2–2.5 times higher than LGBTQA+ people who had not been subject to such practices.⁵⁵ Salway et al's 2020 study concluded that people subject to SOGI conversion practices were positively associated with four out of five negative psychosocial health outcomes: loneliness, drug abuse, suicidal ideation and suicide attempts.⁵⁶

⁵¹ Ibid 27.

⁵² Ibid 28.

⁵³ The authors interviewed 202 'consumers' of SOGI conversion practice by licensed mental health practitioners, asking about their experiences. A minority (13%) perceived themselves as having been successful. Many participants reported serious psychological and interpersonal problems during and after attending conversion therapy that they attributed to the experience of SOGI conversion practices, including depression, suicidal ideation and suicide attempts, low self-esteem, sexual dysfunction, harm to their relationship with their parents and intimate partners, alienation, loneliness and social isolation, and, for the majority who were religious, harms to their spirituality: Ariel Shidlo and Michael Schroeder, 'Changing Sexual Orientation: A Consumers' Report' (2002) 33(3) *Professional Psychology: Research and Practice* 249, 254–6 (note Shidlo and Schroeder explain the limits of their data, stating they do not give percentages of participants reporting particular harms, partly due to their use of semi-structured interviews and their focus on self-reporting of harms, asking 'Do you feel that this counseling harmed you or had a negative effect on you?', as opposed to clinical assessments of actual harm).

⁵⁴ Douglas C Haldeman, 'Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies' (2002) 5(3–4) *Journal of Gay & Lesbian Psychotherapy* 117.

⁵⁵ The authors examined the psychosocial health of 1156 men who have sex with men, 15% of whom reported prior SOGI conversion practices. This study concluded that those who had experienced SOGI conversion practices were 2–2.5 times more likely to report 1 or ≥2 cumulative psychosocial conditions, such as depression, internalised homophobia or post-traumatic stress disorder than those who had not experienced SOGI conversion practices: Steven Meanley et al, 'Lifetime Exposure to Conversion Therapy and Psychosocial Health Among Midlife and Older Adult Men Who Have Sex With Men', ed Suzanne Meeks [2020] *The Gerontologist* gnaa069.

⁵⁶ The authors examined data from a 2011–12 cross-sectional survey of 8,388 Canadian sexual minority men, finding that 3.5% (approximately 294) reported being subject to sexual orientation change efforts (another term for SOGI conversion practices), although this was likely an underestimate due to the study sample not

2.2.10 There is little research on the specific impacts of SOGI conversion practices on children and adolescents. Ryan et al's 2020 study of young adults showed that exposure to SOGI conversion practices was associated with negative health outcomes, and worse problems were observed in young adults who were exposed to both parent and therapist/religious leader-led SOGI conversion practices.⁵⁷

2.2.11 Some papers claim that SOGI conversion practices are both effective and not harmful to those subjected to them. These papers are not reports of scientific studies in which participants reported 'positive' experiences with SOGI conversion practices, but rather are commentaries on studies that claim to show evidence of harm.⁵⁸ Many of these papers were published in the *Journal of Human Sexuality*, and one paper was published in *The Linacre Quarterly*.

2.2.12 The *Journal of Human Sexuality* is not a standard peer-reviewed medical or health research journal. It is a publication of a pro-conversion practices advocacy group;⁵⁹ does not provide clear blinded peer review author procedures; is not listed on *MEDLINE/PubMed*;⁶⁰ nor is it listed as a non-*PubMed* indexed journal.⁶¹ Consequently, findings published in this publication

being representative and recruiting primarily through websites for sexual minority men. Nonetheless, exposure was positively associated with 4 of 5 negative psychosocial health outcomes examined: loneliness, regular illicit drug use, suicidal ideation and suicide attempts: Travis Salway et al, 'Prevalence of Exposure to Sexual Orientation Change Efforts and Associated Sociodemographic Characteristics and Psychosocial Health Outcomes among Canadian Sexual Minority Men' (2020) 65(7) *The Canadian Journal of Psychiatry* 502, 505.

⁵⁷ The authors studied 245 young adults (aged 21–25) and concluded that those who had been subjected to attempts to change their sexual orientation while they were children — either by their parents/caregivers, or by conversion practitioner therapists or religious leaders arranged or hired by their parents — were much more likely to display poor health and adjustment outcomes in young adulthood. These impacts included depression, suicidal ideation and attempts, substance abuse, risky sexual behaviour, lower educational attainments and lower weekly income: Caitlin Ryan et al, 'Parent-Initiated Sexual Orientation Change Efforts With LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment' (2020) 67(2) *Journal of Homosexuality* 159, 167.

⁵⁸ See, eg, Christopher H Rosik, 'A Research Review of Ryan et al's Parent-Initiated Sex Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment' (2019) 10 *Journal of Human Sexuality*; Christopher H Rosik, 'The (Complete) Lack of a Scientific Basis for Banning Sexual-Orientation Change Efforts (SOCE) with Minors' (2013) 10 *Journal of Human Sexuality* 103; Philip M Sutton, 'Professional Care for Unwanted Same-Sex Attraction: What Does the Research Say?' (2015) 82(4) *The Linacre Quarterly* 351.

⁵⁹ The *Journal of Human Sexuality* was established by the National Association for Research and Therapy of Homosexuality ('NARTH'), and is currently published by NARTH's successor, the Alliance for Therapeutic Choice and Scientific Integrity. These are advocacy groups for conversion practitioners.

⁶⁰ *MEDLINE/PubMed* is the major global biomedical research repository that collects 20,000 scientific journals on health and medical research.

⁶¹ The journal frontpages claim it is peer reviewed, but there are no author guidelines that mention the peer-review standards of the journal. The frontmatter of volume 10 states, for example, 'Authors of JHS articles and reviews are held to the criteria; what is written needs to be based on a fair reading and the responsible reporting of scientific data and demonstrable professional experience.' This does not meet the ordinary standards of double-blind peer review practised by academic and scientific journals. This standard requires that the journal send an anonymised version of the submission to at least two reviewers who 1) are not told who the author(s) of the paper is and 2) are themselves experts in the relevant field of research. The journal then evaluates these reviewer comments before making a decision to accept the article, reject the article, or invite the authors to respond to the reviewers' comments and resubmit it for further review. Many articles in

cannot be regarded as having equal weight to findings from papers published in rigorous scientific journals.

2.2.13 Sutton's 2015 *Linacre Quarterly* article responds to claims by peak psychological bodies that SOGI conversion practices may harm subjects and purports to refute the scientific evidence.⁶² However, Sutton's article does not systematically review the literature or present original research. It therefore cannot be regarded as having equal weight to a peer-reviewed original research study or systematic review.

Peak bodies and organisations oppose practices as harmful

2.2.14 The TLRI examined official position statements from peak medical bodies in Australia and abroad and non-peer-reviewed surveys and reports from government and non-government agencies and bodies. These are not empirical studies on the effects of SOGI conversion practices. Peak body statements reflect the majority views of the members of these organisations, largely practising doctors, psychologists and psychiatrists. These statements reject the view that sexual orientation or gender identity is a 'choice' or could be 'changed' by 'treatment' and accept that SOGI conversion practices are likely harmful. They oppose SOGI conversion practices based on evidence of their ineffectiveness, as well as evidence of harm. Some of these statements cite some of the studies examined above.

2.2.15 Australia's peak medical body, the **Australian Medical Association**, has, since 2002, opposed the use of 'reparative' or 'conversion' therapy that is 'based upon the assumption that homosexuality is a mental disorder and that the patient should change his or her sexual orientation'.⁶³

2.2.16 Since 2015, the **Australian Psychological Society** ('APS') has released a statement which 'strongly opposes any form of mental health practice that treats homosexuality as a disorder, or seeks to change a person's sexual orientation'.⁶⁴ The APS accepted and cited Shidlo and Schroeder's 2002 study, listing possible harms from SOGI conversion practices to include depression, suicidal ideation, reduced self-esteem, sexual dysfunction, interpersonal harms, and spiritual harm (including a loss of faith, a sense of betrayal by religious leaders and excommunication).⁶⁵

2.2.17 The **Victorian Health Complaints Commissioner's** November 2018 *Report on the Inquiry into Conversion Therapy* indicated evidence of significant long-term psychological harm and distress suffered by subjects of SOGI conversion practices in Victoria. For confidentiality reasons, neither the full report nor survivor testimony is available to the public. The publicly

the *Journal of Human Sexuality* are authored by the editors themselves, and the journal solicits donations, both of which are unusual for academic and scientific journals.

⁶² Sutton provides a critical analysis of the methods, arguments and conclusions of studies that claim to provide evidence of harm. At most, this refutes those studies; this paper does not itself provide evidence of the positive effects of SOGI conversion practices: Sutton (n 58).

⁶³ Australian Medical Association, 'Sexual Diversity and Gender Identity: Position Statement' (2002) [6.10] <https://ama.com.au/sites/default/files/documents/Sexual_Diversity_and_Gender_Identity.doc>.

⁶⁴ APS Statement (n 1).

⁶⁵ Ibid.

available executive summary noted a range of common themes among survivors who were consulted:

- Survivors experience acute distress and/or ongoing mental health issues such as severe anxiety and depression;
- Survivors experience feelings of guilt and shame about their sexuality, reporting being ‘overwhelmed by guilt’ and guilt that is ‘always there’.⁶⁶

2.2.18 In 2018 the **Human Rights Law Centre’s** (‘HRLC’) interviewed 15 subjects who were religious and exposed to SOGI conversion practices in Australia. In its subsequent Report, *Preventing Harm, Promoting Justice*, the HRLC reported that subjects experienced ‘deep grief, and in some cases anger, over being told they were “broken” and needed fixing’ and each ‘experienced a profound sense of loss at the lives they had taken away from them’.⁶⁷

2.2.19 The 2020 *SOGICE Survivor Statement* reports that survivors in their network have experienced negative impacts on their lives, and that much of this harm was experienced while the survivors were adults. These survivors also state that they may wish to stay connected with their religious communities, while also maintaining that SOGI conversion practices are harmful and ineffective.⁶⁸

2.3 Nature and prevalence in Tasmania

2.3.1 The TLRI is presently unaware of data about the nature and prevalence of SOGI conversion practices in Tasmania. No scientific study has been published on the prevalence of SOGI conversion practices in Tasmania or Australia.

2.3.2 In place of scientific studies of prevalence, one Australian report offered an estimate of prevalence. The HRLC’s 2018 Report suggested that prevalence studies in the United Kingdom provide a fair comparison for likely prevalence in Australia. That is because of similar demographic conditions with respect to religious observance and LGBTQA+ people.⁶⁹ Based on these similarities — and the proportion of Australians identifying themselves as ‘extremely or

⁶⁶ For anonymity and confidentiality reasons, neither the full report nor individual/organisation submissions are publicly available. The executive summary is available here: Health Complaints Commissioner, *Report on the Inquiry into Conversion Therapy: Executive Summary* <<https://hcc.vic.gov.au/file/permalink/7019>>.

⁶⁷ Jones et al (n 3) 21.

⁶⁸ SOGICE Survivors (n 3) 7, 11, 12.

⁶⁹ The comparison was based on statistics from the UK’s 2018 National LGBT Survey that showed that 2% of respondents had undergone conversion practices and a further 5% had been offered conversion practices. Respondents from ‘multicultural and multifait’h backgrounds in the UK were up to three times more likely to have experienced conversion practices than white and non-religious respondents. Government Equalities Office, *National LGBT Survey: Research Report* (2018) 83–94 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf>.

very active' in their religion⁷⁰ — the Centre estimated that up to 10 per cent of Australians may be exposed to some form of SOGI conversion practices.⁷¹

2.3.3 On the basis of the HRLC Report and the testimony of survivor groups, it is probable that some Australian churches do engage in SOGI conversion practices. Advertisement and arrangement of SOGI conversion practices usually takes place informally and within religious groups. To the TLRI's knowledge, SOGI conversion practices are rarely advertised or provided on a fee for service basis. The general prevalence of these practices within Australia suggests that they may be taking place in Tasmania given the general ubiquity in faith adherence and practices across the country.

2.3.4 Respondents to this Issues Paper may provide anecdotal evidence on the existence of SOGI conversion practices in Tasmania based on whether they have been involved in, have been offered, or heard about others being involved in or offered SOGI conversion practices and their impacts on them.

Warning for Respondents

Question 3 (on page 23) of this Issues Paper asks about personal experiences with SOGI conversion practices.

It may be distressing or traumatic for some respondents to describe their experiences.

The TLRI advises respondents that it is not necessary to answer this question to participate in this public consultation.

Support for survivors and young LGBTQA+ people is available in Tasmania: see the Department of Health and Human Services:

<https://www.dhhs.tas.gov.au/publichealth/healthy_communities/glbti_health/services_and_groups_for_transgender_and_gender_diverse>

⁷⁰ Jones et al (n 3) 16. Twenty per cent of Australians across all religious beliefs identify themselves as 'extremely or very active' in their religious organisation. The Centre removed from this figure approximately 50 per cent of Catholics (who, according to the authors, are less likely to be exposed to conversion practices because of apparent Catholic rejections of the practice) leaving Protestant and Evangelical Christians, Hindus, Muslims, Buddhists and Jews as potentially exposed. The HRLC noted that not all denominations within these broad religious groups did endorse or were likely to engage in conversion practices, 'conservative congregations statistically have vastly higher rates of active participation than more liberal congregations'. Exposure here thus potentially includes both LGBTQA+ and non-LGBTQA+ religious practitioners.

⁷¹ Ibid.

Question 3

Have you been involved in or offered, or are you aware of, any forms of SOGI conversion practices in Tasmania?

If so, what were the effects on you, or the person exposed to them?

2.3.5 Possible considerations for Question 3:

1. Have you, or someone you know, ever been told that your sexual orientation or gender identity was a form of brokenness, or that being LGBTQA+ is caused by something negative, like past trauma or abuse?
2. Have you been involved in, heard of, or are aware of, any groups in Tasmania that describe LGBTQA+ identities as somehow disordered or offered to suppress or alter LGBTQA+ feelings or identifying status?
3. Have you, or someone you know, ever been offered materials or support that purport to help heal your LGBTQA+ status or make you whole?
4. Have you, or someone you know, ever encountered a health practitioner, therapist, counsellor or other medical practitioner that encouraged you to try to change or suppress your sexual orientation or gender identity, or claimed they could provide such a service?
5. Have you, or someone you know, ever experienced religious practices that encouraged you to try to change or suppress your sexual orientation or gender identity? Examples might include prayer ministry, pastoral care or support groups.

State of the Law: Tasmanian, Australian, Foreign and International Laws (TORs 4 & 5)

3.1 Overview of this Part

- This Part responds to:
 - TOR 4 (Review and consider statements, policies and laws relevant to SOGI conversion practices in Australia and elsewhere); and
 - TOR 5 (Evaluate current laws that may be relevant to the prevention or regulation of SOGI conversion practices in Tasmania).
- Tasmanian law does not currently define, prohibit or regulate SOGI conversion practices. Some laws, including criminal/code law, tort, anti-discrimination, consumer law, and health practitioner regulation might apply. However, there are limitations and uncertainty about the applicability and effectiveness of these laws.
- No Australian court has defined SOGI ‘conversion practices’.
- Queensland and the ACT recently banned some forms of SOGI conversion practices. Victoria is reportedly drafting a bill.
- At least a dozen foreign jurisdictions have banned or are considering banning some forms of SOGI conversion practices.
- A range of international law instruments and reports suggest that SOGI conversion practices contravene international human rights law.

3.2 Current state of the law: Tasmania

3.2.1 Tasmanian law does not presently address SOGI conversion practices as a specific category of offence. However, a range of Tasmanian laws may proscribe some forms of SOGI conversion practices.

3.2.2 Criminal laws on assault,⁷² wounding or causing grievous bodily harm⁷³ would likely apply to physical forms of SOGI conversion practices like aversion therapy. Criminal prohibitions on ill treatment of children may also apply if the subject is under 14.⁷⁴ Physical forms of SOGI conversion practices are reportedly extremely rare and possibly non-existent in Australia.

3.2.3 SOGI conversion practices might constitute a statutory offence of ‘stalking and bullying’, which criminalises a prolonged course of conduct which causes physical or mental harm.⁷⁵ This includes a wide range of repeated behaviours, such as subjecting another person to extreme humiliation, or causing them apprehension, fear or to self-harm. The offences expressly mention conduct like putting someone under surveillance, sending offensive material, making threats or abuse, and causing fear and apprehension,⁷⁶ all of which might overlap with some forms of SOGI conversion practices. Importantly, a person is deemed to have intended to stalked or bullied another person so long as they knew or ought to have known that pursuing a course of conduct would have resulted in the harms described in the provision.⁷⁷

Further information about Tasmanian Criminal/Code law may be found at:

<https://www.hobartlegal.org.au/handbook/crime-and-punishment/>

Tort and civil liability

3.2.4 Statute⁷⁸ and common laws on tort/civil liability may provide redress for harms caused by SOGI conversion practices. In particular, those subject to SOGI conversion practices may have actions against practitioners in negligence, nuisance or breach of duty.⁷⁹ However, there are a range of practical and legal barriers for complainants, in particular the time, expense and stress of pursuing a civil action in the courts. Beyond that, complainants would need to overcome a range of evidential, procedural and practical hurdles.

3.2.5 If SOGI conversion practices caused only mental harm to a person, then that would need to include a recognised psychiatric illness caused by the practices. It may take many years for

⁷² *Police Offences Act 1935* (Tas) s 35.

⁷³ *Criminal Code Act 1924* (Tas) sch 1 (*‘Criminal Code’*) s 172 (Wounding or causing grievous bodily harm).

⁷⁴ *Ibid* s 178 (ill-treatment of children under 14 years of age).

⁷⁵ *Ibid* s 192.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Civil Liability Act 2002* (Tas).

⁷⁹ *Ibid* pt 6.

those conditions to appear, raising potential issues under the Tasmanian *Limitation Act*.⁸⁰ Furthermore, pure mental harm claims involve a higher duty of care requirement that might not include some relationships like counselling or pastoral care, and might only apply to medical practitioners providing SOGI conversion practices.⁸¹

3.2.6 Another evidential barrier is the requirement for causation. That is, the requirement to prove a causal link between the defendant's conduct and the harm suffered by the plaintiff.⁸² This might be assessed by the application of a 'but for' test: that, but for the defendant's conduct, the plaintiff would not have suffered the harm. Wider 'common sense connection' tests might not help overcome this problem.⁸³

3.2.7 For some psychiatric conditions, it may be difficult to show that exposure to SOGI conversion practices was indeed the factor 'but for which' the harm would not have been suffered. That is particularly difficult if it has taken several years for the condition to emerge. The experience of giving evidence needed to establish harm, duty and causation may be retraumatising to survivors. Overall, tort law does not provide a strong legal avenue for redress for harms from SOGI conversion practices.

Further information about tort and civil liability may be found at:

<https://www.hobartlegal.org.au/handbook/accidents-and-insurance/negligence/negligence-and-duty-of-care/>

Tasmanian anti-discrimination law

3.2.8 Anti-discrimination law may prohibit some forms of SOGI conversion practices. Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) provides that a person 'must not engage in any conduct which offends, humiliates, intimidates or ridicules another person' on the basis of, among other things, sexual orientation, lawful sexual activity or gender identity.⁸⁴

3.2.9 The standard is objective. The conduct is prohibited if a reasonable person, having regard to all the circumstances, would have anticipated that the person subjected to the conduct would be offended, humiliated, intimidated, insulted or ridiculed.⁸⁵

⁸⁰ *Limitation Act 1974* (Tas) s 5A stipulates that damages claimed by the plaintiff for the negligence, nuisance or breach of duty where the damages claimed consist of, or include, damages in respect of personal injuries to any person, must not be brought after the expiration of **3 years** commencing on the date of discoverability. This is unless the damages arose from the serious physical or mental abuse of the person when they were a child (s 5B).

⁸¹ *Civil Liability Act 2002* s 33. Note that s 34 modifies the duty of care for mental harm, providing that a duty to take care only exists if a reasonable person in the position of the defendant should have foreseen that a person of 'normal fortitude' might suffer a recognised psychiatric illness if reasonable care was not taken.

⁸² *Strong v Woolworths Ltd (trading as Big W)* (2012) 246 CLR 182.

⁸³ *March v E & MH Stramare* (1991) 171 CLR 506.

⁸⁴ *Anti-Discrimination Act 1998* (Tas) s 17(1). The attributes are contained in ss 16(c), (d), (ea).

⁸⁵ *Ibid* s 17(1).

3.2.10 SOGI conversion practices that depict LGBTQA+ status in an offensive, insulting, humiliating way, or ridicules LGBTQA+ people or would be intimidating to them may contravene s 17(1).

3.2.11 Section 19 of the *Anti-Discrimination Act 1998* (Tas) prohibits a ‘public act’ that ‘incite[s] hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of’ sexual orientation or gender identity. Public act includes ‘any form of communication to the public’ or ‘any conduct observable by the public’ or ‘the distribution or dissemination of any matter to the public’.⁸⁶

3.2.12 It is not clear that many forms of SOGI conversion practices would be covered by these provisions because:

- Section 17 focuses on feelings experienced as a result of exposure to discriminatory language or behaviour (for example, feeling ridiculed, humiliated) towards a person’s sexuality and gender identity. SOGI conversion practices are presented as being ‘helpful’, ‘constructive’, ‘healing’ and so on. Indeed, engagement may be voluntary, and the subject believe that the practices are in their best interests. In many cases, the harms from the practices are manifested after exposure, sometimes years later. Furthermore, harms are arguably not best described in terms of feelings or reactions, but rather manifested psychologically or physically.
- The acts and statements, despite likely being harmful and often motivated by anti-LGBTQA+ ideas, are unlikely to meet the higher threshold of inciting hatred, serious contempt or ridicule under s 19.
- Many SOGI conversion practices are not ‘public acts’, and thus would not be covered by s 19. They are conducted in private, either as individual counselling or small group events.

3.2.13 Section 20 of the *Anti-Discrimination Act 1998* (Tas) prohibits a person from publishing or displaying signs, notices or advertisements that promote, express or depict discrimination or prohibited conduct. This would not cover word of mouth, referrals, or other private communications directed to potential SOGI conversion practice subjects.

3.2.14 The religious exceptions in ss 51, 51A and 52 of the *Anti-Discrimination Act 1998* (Tas) do not appear to apply to SOGI conversion practices. Those exceptions relate to religious requirements for employment, enrolment as a student or participation in activities/rituals. They do not relate to a wider religious exception that justifies discrimination on the basis of, say, sexual orientation or gender identity.

Further information about Tasmanian anti-discrimination law may be found at:

<<https://equalopportunity.tas.gov.au>>

⁸⁶ Ibid s 3.

Consumer protection

3.2.15 General principles of contract and consumer law might apply to paying for counselling services that are misleading and deceptive,⁸⁷ unconscionable,⁸⁸ or involve undue harassment or coercion in connection with the ‘service’.⁸⁹ For example, promising to ‘cure’ homosexuality, or discover and treat its ‘causes’ (eg, past trauma and abuse), when such treatments and views are thoroughly discredited by Australian medical bodies might contravene the *Competition and Consumer Law Act 2010* (Cth) sch 2 (*Australian Consumer Law*).

3.2.16 SOGI conversion practices that are not provided for a fee (eg, offered by a religious leader as part of free youth counselling) would not be considered a consumer service, and thus some forms may not be covered by the *Australian Consumer Law*. The TLRI understands that SOGI conversion practices are predominantly delivered for free. That means most practices would not be covered by the *Australian Consumer Law*.

Further information about *Australian Consumer Law* may be found at:

<<https://consumerlaw.gov.au>>

Health practitioner regulation

3.2.17 National regulation of health practitioners may stop Tasmanian health practitioners from offering SOGI conversion practices.

3.2.18 Tasmania’s implementation of the National Health Practitioner Regulation Law in the *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas) is the main statute on the accreditation and regulation of registered health practitioners. Its complaints mechanisms would likely offer one means to investigate health practitioners who offered SOGI conversion practices as treatments.

3.2.19 The Tasmanian *Health Practitioner Regulation* does not expressly define or prohibit SOGI conversion practices, but they may be covered under the broader obligations to provide evidence-based, professional and non-discriminatory health services. Health practitioners offering SOGI conversion practices in Tasmania might also contravene other professional standards and obligations.

Further information about health practitioner regulation can be found at:

<<https://www.healthpractitionertribunal.tas.gov.au>>

⁸⁷ *Competition and Consumer Act 2010* (Cth) sch 2 s 18 (*Australian Consumer Law*).

⁸⁸ *Ibid* ss 20–21.

⁸⁹ *Ibid* s 50.

Uncertainty about the effectiveness of Tasmanian law

3.2.20 None of the above laws have yet been applied to a matter involving SOGI conversion practices in Tasmania. The Institute is not aware of any complaints being raised under existing laws. Nor is the Institute aware of any complaints about SOGI conversion practices being considered by a court or tribunal in Australia.⁹⁰ Without further evidence it is not possible to draw conclusions about the lack of complaints, prosecutions or judgments. However, the Institute notes that the following factors suggest the current law is not appropriately directed and tailored to the nature and scope of SOGI conversion practices:

1. **No statement that practices are contrary to community interests.** The law lacks a clear, objective articulation by the state Parliament, that SOGI conversion practices are harmful and contrary to public interests or personal rights.
2. **No declaratory statement that practices are wrong.** Relatedly (to point 1 above), the absence of a specific offence means that the law is not clear and precise about the wrongness of SOGI conversion practices. This means there is no signal to those engaging in the practices that they are harmful or wrong. Nor is it clear to those who are vulnerable, or being subject to harmful practices, that there are lawful means for addressing the harm.
3. **No principle to measure legal effectiveness in reducing harm.** Because there is no clear statement in the law about SOGI conversion practices, it is not possible for the TLRI to state whether the law ‘effectively’ deals with the practices. In the simplest and broadest terms, the effectiveness of a legal system is tested by reference to whether ‘it ensures that

⁹⁰ Westlaw AU – ‘conversion practice’ returned two judgments: *ACN 074 971 109 Pty Ltd v National Mutual Life Association of Australasia Ltd* (2013) 41 VR 476, an insurance matter involving price conversions, no relevance; *Singtel Optus v Almad* [2013] NSWSC 1427, a matter on the tort of conversion, no relevance. Westlaw AU – ‘conversion therapy’ returned three cases: *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, a social security/family law case on a transgender husband to wife, Black CJ at 337 noting the use of expert expressions ‘sex conversion therapy’ in relation to transgender people, but meaning what today would be called gender re-assignment surgery, not relevant to SOGI conversion practices; *A-G (Cth) v Kevin* (2003) 172 FLR 300, a constitutional law and family law case on the meaning of marriage where one party was transgender, using ‘sex conversion therapy’, quoting Black CJ in *SRA* above, not relevant to SOGI conversion practices; *Nicholas v Jimenez* [2020] NSWDC 71, a tort personal injury/motor vehicle accident case involving whether the plaintiff suffered from a psychiatric/neurological condition called a ‘conversion disorder’ as a result of the accident, no relevance. Lexis Advance – ‘conversion practice’ returned the same two judgments as WestlawAU and ‘conversion therapy’ returned the same three judgments as WestlawAU. AustLII – ‘conversion practice’ returned the same two judgments as Westlaw AU as well as *1113757* [2012] RRTA 955, a refugee protection visa matter, quoting (at [96]) an Indian government report mentioning religious ‘conversion practices’ (ie, rituals for converting a person’s religion, not linked to sexual orientation or gender). AustLII – ‘conversion therapy’ returned the same three judgments as Westlaw AU, as well as several refugee cases at the Australian Administrative Appeals Tribunal, each of which related to reports of ‘conversion therapy’ that was relevant to changing sexual orientation or gender identity, but which was occurring outside of Australia and relevant to the applicant’s homosexuality. None of these cases involved a definition or analysis of the meaning of ‘conversion therapy’, and the term was used in passing: *1601459* [2017] AATA 2005; *1509885* [2017] AATA 3924; *1709743* [2020] AATA 970; *1705390* [2020] AATA 1661; *1700793* [2019] AATA 6743; *17005353* [2019] AATA 6825; *2010249* [2020] AATA 3638; *1704734* [2020] AATA 1214.

the chosen policy goal is achieved in practice'.⁹¹ From a regulatory perspective there is no statutory objective to measure the effectiveness of the law against. At best, Tasmanian law may be said to be inferentially addressed to reducing the harms caused by SOGI conversion practices, but the exact forms of practices, the degree of protection and the exact rights of those subject to them are unclear and vague.

4. **The law is inappropriate and inefficient to deal with a common class of practices and harms.** Assuming the present law can be interpreted to proscribe harmful SOGI conversion practices, it is arguably inefficient in achieving that end. To the extent that disparate parts of the law might be relevant to SOGI conversion practices, their application is likely to be ad hoc, unpredictable and difficult for victims and complainants to access. The diffuse and uncertain nature of the present law is likely to produce inefficiencies in detection, management and enforcement.⁹² In a broader setting it means the law lacks transparency, accessibility and congruence which are criteria of effective legal design.⁹³

3.3 Current state of the law: other Australian jurisdictions

3.3.1 Tasmania's legislative approach can be contrasted with other Australian and international jurisdictions which have enacted laws, policies or procedures about SOGI conversion practices.

Queensland: health practitioner-only criminal offence

3.3.2 On 13 August 2020, Queensland became the first state to ban and criminalise SOGI conversion practices.

3.3.3 The *Health Legislation Amendment Act 2020* (Qld) amends the *Public Health Act 2005* (Qld) to define 'conversion therapy' (the legislative term Queensland opted to use to describe SOGI conversion practices) and prohibit it.⁹⁴

3.3.4 The definition and scope of SOGI conversion practices under the Queensland *Public Health Act 2005* are set out above (see [1.3.6]–[1.3.9] on page 9).

3.3.5 Queensland opted to make performing SOGI conversion practices a criminal offence:

- Section 213H makes it a misdemeanour offence, triable before a magistrate, for a health service provider to perform conversion therapy on another person.
- The severity of the maximum penalty depends on the status of the subject of the practice. If the subject is a child or other vulnerable person, the maximum penalty is 18 months in prison or a \$20,000 fine. If the subject is not a vulnerable person, the maximum penalty is 12-months imprisonment or a \$13,345 fine.

⁹¹ Karen Yeung, 'Towards an Understanding of Regulation by Design' in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart Publishing, 2008) 79, 91.

⁹² Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, 2.

⁹³ Colin Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *Yale Law Journal* 65, 67.

⁹⁴ *Health Legislation Amendment Act* (n 24) s 28.

3.3.6 Queensland's prohibition applies specifically and only to 'health service providers'.⁹⁵ Consequently, the ban likely would not apply to religious groups offering conversion counselling, programs or camps. It might, however, apply to religious doctors; for example, a general practitioner who, for religious reasons, counsels a patient to control homosexual urges.

Australian Capital Territory: hybrid approach

3.3.7 On 27 August 2020, the ACT Legislative Assembly passed the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) to criminalise SOGI conversion practices. The definition and scope of conversion practices under the Territory Act are set out above (see [1.3.10]–[1.3.12] on page 10). The ACT's criminal offence applies to everyone, not just health services providers as in the Queensland Act. The Territory Act imposes fines of up to \$24,000 or 12-months imprisonment.

3.3.8 The ACT's criminal offence only applies where the subject is a child or person with impaired decision-making abilities. Under s 8, a person who performs a sexuality or gender identity SOGI conversion practice on a 'protected person' commits an offence. A protected person means a child or a person with impaired decision-making ability. The recipient's consent, or the consent of the recipient's parent or guardian, is no defence. Section 9 criminalises removing a protected person from the ACT for the purpose of subjecting them to a SOGI conversion practice.

3.3.9 Adults who were subjected to SOGI conversion practices may make complaints about conversion practitioners to the ACT Human Rights Commission.⁹⁶

3.3.10 The Territory Act includes an exception for health services that, in the practitioner's reasonable professional judgment, is a health service that is safe and appropriate and complies with their legal and professional obligations.⁹⁷

Victoria: drafting a ban

3.3.11 Victoria is reportedly preparing a draft bill to ban SOGI conversion practices.⁹⁸ At the time of writing the details of this draft bill have not been published. Notably however, Victoria has, to some extent, already regulated some forms of SOGI conversion practices through its Health Complaints Commissioner.

3.3.12 Following a Health Complaints Commissioner's investigative report into SOGI conversion practices,⁹⁹ in February 2019 the Victorian Government 'committed' itself to prohibiting SOGI conversion practices.

⁹⁵ Ibid, inserting Queensland, 'Public Health Act' s 213H(1).

⁹⁶ *Human Rights Commission Act 2005* (ACT) s 43, div 4.2D.

⁹⁷ *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) s 7(3).

⁹⁸ Engage Victoria, 'Conversion Practices: Legislative Option to Implement a Ban' <<https://engage.vic.gov.au/conversion-practices-ban>>.

⁹⁹ Health Complaints Commissioner (n 66).

3.3.13 Victoria is currently analysing community feedback, and a final report was due in February 2020 but is yet to be published. At the time of writing the TLRI understands the Victorian bill will prohibit SOGI conversion practices on both adults and children.¹⁰⁰

3.3.14 Since 2016, the Health Complaints Commissioner has been empowered to receive and consider complaints from people who have used ‘health services’, which is broadly defined and includes some forms of SOGI conversion practices. The Commissioner can investigate suspect therapies and make prohibition orders and public warnings. These powers were used for the Commissioner’s 2018 inquiry into SOGI conversion practices.¹⁰¹

Other states and territories, and Commonwealth

3.3.15 There are some political commitments to prohibiting SOGI conversion practices in other Australian states, including NSW,¹⁰² Western Australia,¹⁰³ and South Australia,¹⁰⁴ but the Institute is unaware of any formalised reform process in those states.

3.3.16 At the federal level, the Commonwealth Government is currently consulting on a wider religious freedoms bill.¹⁰⁵ It is not yet clear what this bill will contain, or if it will progress further. It may affect or limit current and future state and territory laws relating to SOGI conversion practices by religious organisations, though the Commonwealth Attorney-General has explicitly insisted it will not have that effect.¹⁰⁶

3.4 Select foreign and international laws

3.4.1 Germany, Malta, Albania, Ecuador, Brazil, Taiwan, and 20 states in the US have criminalised, banned or regulated SOGI conversion practices. Several other countries are contemplating bans and regulation. United Nations bodies and officials have issued several reports urging states to ban SOGI conversion practices.

¹⁰⁰ Bec Symons, ‘Gay Conversion Practices to be Outlawed by the Victorian Government’, *ABC News* (online, 8 November 2020) <<https://www.abc.net.au/news/2020-11-08/victoria-moves-to-ban-gay-conversion-practices/12851294>>.

¹⁰¹ Ibid.

¹⁰² Jenny Noyes, ‘NSW Government “on the Same Page” as Victoria on Gay Conversion Therapy’, *Sydney Morning Herald* (online, 24 February 2019) <<https://www.smh.com.au/national/nsw/nsw-government-on-the-same-page-as-victoria-on-gay-conversion-therapy-20190223-p50zu6.html>>.

¹⁰³ ‘Queensland and Western Australia One Step Closer to Outlawing LGBT+ “conversion Therapy”’, *Amnesty International* (online, 19 July 2018) <<https://www.amnesty.org.au/qld-wa-conversion-therapy/>>.

¹⁰⁴ Stephanie Richards and Angela Skujins, ‘SA Move to Outlaw Conversion Therapy’, *In Daily* (online, 16 July 2020) <<https://indaily.com.au/news/2020/07/16/sa-move-to-outlaw-conversion-therapy/>>.

¹⁰⁵ ‘Religious Freedom Bills — First Exposure Drafts: Consultation’, *Commonwealth Attorney-General* (2 October 2019) <<https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-first-exposure-drafts>>.

¹⁰⁶ Paul Karp, ‘Religious Discrimination Bill Will Not Override Laws to Ban Gay Conversion Therapy, Porter Claims’, *The Guardian* (online, 15 October 2019) <<https://www.theguardian.com/world/2019/oct/15/religious-discrimination-bill-will-not-override-laws-to-ban-gay-conversion-therapy>>.

Bans and criminalisations: Malta, Germany, Ecuador, United States

3.4.2 The strongest bans involve criminal offences, fines and imprisonment.

3.4.3 In 2015, **Malta** defined SOGI conversion practices as ‘any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person’s sexual orientation, gender identity and, or gender expression’.¹⁰⁷ Malta outlawed performing SOGI conversion practices on ‘vulnerable people’ regardless of consent, or on any non-vulnerable person who does not consent.¹⁰⁸

3.4.4 Malta also banned advertising of these practices and made it unlawful for health professionals to either provide SOGI conversion practice services or make referrals to conversion practitioners.¹⁰⁹ Individuals can be fined 1000–5000€ or sentenced to 1–5 months imprisonment, and health professionals can be fined 2000–10000€ or sentenced to 3–12 months imprisonment.¹¹⁰

3.4.5 In March 2018, the **European Parliament** passed a resolution that condemned SOGI conversion practices and urged member states to enact national laws to ban it.¹¹¹ This statement is non-binding on member states and does not define SOGI conversion practices.

3.4.6 **Germany**’s 2020 reforms made it a criminal offence for anyone, including health professionals, to perform SOGI conversion practices on a child, non-consenting adult, or an adult whose consent was obtained by coercion, threat, deception or error. It also bans advertising and providing or arranging the practices. The penalties are a fine of up to 30,000€ or 12 months imprisonment. Germany has also established a national counselling service for survivors and their families and to guide health professionals.¹¹²

3.4.7 **Ecuador**’s *Penal Code* makes proscribes certain forms of SOGI conversion practices as a form of torture, and carries a penalty of 10–13 years imprisonment,¹¹³ though reports suggest SOGI conversion practices are still ongoing and no prosecutions have been pursued.¹¹⁴

3.4.8 In the **United States**, 20 states and approximately 70 cities and counties have banned various forms of SOGI conversion practices,¹¹⁵ with a further 10 states currently considering

¹⁰⁷ *Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2015* (Malta) s 2.

¹⁰⁸ *Ibid* s 3.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid* s 4.

¹¹¹ European Parliament, *Resolution on the Situation of Fundamental Rights in the EU in 2016* (No 2017/2125(INI), 1 March 2018) [65] <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0056_EN.html>.

¹¹² Federal Ministry of Health (n 30).

¹¹³ Aengus Carroll and Lucas Ramón Mendos, International Lesbian, Gay, Bisexual, Trans and Intersex Association, ‘State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition’ (Report, May 2017, 12th ed) 67.

¹¹⁴ Anastasia Moloney, ‘Gays in Ecuador Raped and Beaten in Rehab Clinics to “cure” Them’, *Reuters* (online, 9 February 2018) <<https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QO>>.

¹¹⁵ The Trevor Project, ‘50 Bills 50 States Progress Map’ (27 November 2019) <<https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/progress-map/>>.

legislative bans. Federal bills to ban the practice nationwide have been introduced since 2015 but have not yet passed.¹¹⁶

Health regulation prohibitions: Albania, Brazil, Taiwan

3.4.9 Other countries have banned the practice through health professional body regulations.

3.4.10 In **Albania**, the Order of Psychologists, the professional peak body, has banned SOGI conversion practices (specifically ‘therapy’), which amounts to an effective ban given that therapists must be members of the group to practice.¹¹⁷

3.4.11 In **Brazil**, the Federal Council of Psychologists has banned SOGI conversion practices among its members since 1999, though a 2017 appeal by a psychologist who had her license revoked for offering SOGI conversion practices was successful, with the judge overruling the 1999 ban.¹¹⁸

3.4.12 News reports indicate that in **Taiwan** in 2016, the Ministry of Health and Welfare sought to amend the *Physicians Act* to criminalise SOGI conversion practices by healthcare workers with penalties of fines or the cancellation of practising licenses. However, this amendment was never enacted on the basis of an official decision that SOGI conversion practices could not be regulated under that Act because they are not legitimate medical treatments.¹¹⁹ Instead, the Ministry announced that conversion practitioners may be prosecuted under the general criminal code and the *Protection of Children and Youths Welfare and Rights Act*, though no amendment has been made to specifically prohibit SOGI conversion practices.¹²⁰

Jurisdictions currently considering bans: Canada, UK, Israel, Ireland, Chile, Mexico

3.4.13 Other foreign jurisdictions are currently considering bans and criminalisation.

3.4.14 On 1 October 2020, the **Canadian** Government introduced Bill C-6 (a reintroduction of an earlier Bill, C-8, which did not pass in the previous session). This Bill would amend the *Criminal Code* to add the offences of subjecting a child or unwilling adult to SOGI conversion

¹¹⁶ See, most recently, ‘H.R.3570 - Therapeutic Fraud Prevention Act of 2019’ (27 June 2019) <<https://www.congress.gov/bill/116th-congress/house-bill/3570>>.

¹¹⁷ Ryan Thoreson, ‘Albanian Psychologists Prohibit Anti-LGBT “Conversion Therapy” Becomes Third European Country to Ban the Practice’, *Human Rights Watch* (online, 20 May 2020) <<https://www.hrw.org/news/2020/05/20/albanian-psychologists-prohibit-anti-lgbt-conversion-therapy>>.

¹¹⁸ Jill Langlois, ‘Thousands Protest Ruling to Overturn Ban on “Conversion Therapy” for Gays and Lesbians in Brazil’, *Los Angeles Times* (online, 22 September 2017) <<https://www.latimes.com/world/mexico-americas/la-fg-brazil-gay-conversion-therapy-20170922-story.html>>.

¹¹⁹ Shanghaiist.com, ‘Taiwan Finalizes Conversion Therapy Ban’ (25 February 2018) <<https://medium.com/shanghaiist/taiwan-finalizes-conversion-therapy-ban-adb417e5ff44>>.

¹²⁰ Noah Buchan, ‘Rainbow Crossing: Conversion Therapy by Another Name?’, *Taipei Times* (online, 19 December 2019) <<http://www.taipetimes.com/News/feat/archives/2019/12/19/2003727797>>.

practices, advertising conversion services, and doing anything for the purpose of removing a child from Canada to be subjected to SOGI conversion practices overseas.¹²¹

3.4.15 In the **United Kingdom**, in 2018 the Government promised to ban ‘conversion therapy’. These efforts had stalled until the Prime Minister reiterated that pledge on 20 July 2020, stating that the Government planned to study its prevalence and weigh options to ban it.¹²²

3.4.16 On 23 July 2020, **Israel’s** Parliament passed a Bill to ban conversion therapy through its first reading (requiring two further votes before it is enacted).¹²³

3.4.17 In 2018, an **Irish** Bill to criminalise SOGI conversion practices was introduced. It is currently under consideration by the Irish Senate and is yet to pass Ireland’s legislative assembly.¹²⁴

3.4.18 Campaigns are also active in **Chile** and **Mexico**, with some of these efforts leading to city- or state-level bans.¹²⁵

3.5 International laws: human rights, torture, anti-discrimination

3.5.1 No international treaty deals specifically with SOGI conversion practices or LGBTQA+ rights in general. However, UN experts and bodies have declared forms of SOGI conversion practices to breach a range of international laws and declarations.

3.5.2 In May 2020, the UN Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz, submitted his report to the **UN Human Rights Council** on SOGI conversion practices. The Independent Expert concluded that SOGI conversion practices are ‘by their very nature degrading, inhuman and cruel and create a significant risk of torture’. He found that depending on how these practices are manifested, they may be in breach of international human rights laws, including:

- the right to health,¹²⁶

¹²¹ Bill C-6 (n 33).

¹²² ‘Boris Johnson Pledges Ban on “Gay Conversion Therapy”’, *BBC News* (online, 20 July 2020) <<https://www.bbc.co.uk/news/uk-politics-53477323>>.

¹²³ Jonathan Lis, Chaim Levinson and Aaron Rabinowitz, ‘Israeli Parliament Bans LGBTQ “Conversion Therapy” in Preliminary Vote, Risking Coalition Crisis’, *Haaretz* (online, 22 July 2020) <<https://www.haaretz.com/israel-news/.premium-israel-bans-lgbtq-conversion-therapy-in-preliminary-vote-risking-coalition-crisis-1.9012364>>.

¹²⁴ Prohibition of Conversion Therapies Bill 2018.

¹²⁵ See Oscar Lopez, ‘“My Spirit Broken”: Mexicans Battle to Ban Conversion Therapy’, *Reuters* (online, 18 August 2020) <<https://www.reuters.com/article/us-mexico-lgbt-conversiontherapy-idUSKCN25D2AQ>>.

¹²⁶ ‘Every person, without distinction, should be able to enjoy the highest attainable standard of physical and mental health and freedom from non-consensual medical treatment. Furthermore, the right to sexual and reproductive health encompasses the right of persons to be fully respected for their sexual orientation and

- the prohibition on torture and ill-treatment,¹²⁷ and
- the rights of the child.¹²⁸

3.5.3 Consequently, the Independent Expert recommended that states ban SOGI conversion practices through legal or administrative means, with appropriate sanctions for non-compliance.¹²⁹

3.5.4 In 2019, the **Office of the High Commissioner for Human Rights** released the *Born Free and Equal* Report, which examined the application of international human rights law to LGBTQA+ people around the world.¹³⁰ The Report recommended all states prevent the torture and ill-treatment of LGBTQA+ people by prohibiting SOGI conversion practices, investigating any instances of them, punishing perpetrators, and providing redress to victims, and that failing to take steps against these practices would violate a state's human rights obligations.¹³¹ The Report also recommended that states ensure healthcare professionals and public officials receive training to respect LGBTQA+ human rights.¹³²

gender identity. In that regard, the Committee on Economic, Social and Cultural Rights found that regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients or requiring that they be “cured” by so-called “treatment”, were a clear violation of their right to sexual and reproductive health.’: Madrigal-Borloz (n 1) [60].

¹²⁷ ‘United Nations entities and human rights mechanisms have expressed concern about practices of “conversion therapy”, and the United Nations anti-torture machinery has concluded that they can amount to torture, cruel, inhuman or degrading treatment. ... The Independent Expert observes that all practices of “conversion therapy” take as a point of departure the belief that sexually diverse or gender-diverse persons are somehow inferior – morally, spiritually or physically – than their heterosexual and cisgender siblings and must modify their orientation or identity to remedy that inferiority. ... All practices of “conversion therapy” however share the premise that sexual orientation and gender identity can be extricated – expelled, cured or rehabilitated – as if they were alien to the person, a most inhuman understanding of human existence. The overwhelming evidence available on the psychological and physical suffering inflicted on victims, as well as its lasting effects, leads the Independent Expert to conclude that perpetrators must act on callous disregard for human suffering.’: *ibid* [62]–[64].

¹²⁸ ‘The Independent Expert recalls States’ obligations to protect children from violence, harmful practices and cruel, inhuman or degrading treatment and torture, to respect the right of the child to identity, physical and psychological integrity, health and freedom of expression and to uphold the core principle of the best interests of the child at all times. Moreover, the Committee on the Rights of the Child has clarified that the right of the child to identity, which includes sexual orientation and gender identity, must be respected and taken into consideration when assessing the child’s best interests. ...The Independent Expert therefore concludes that the imposition of practices of “conversion therapy” on children runs counter to States’ obligation to protect them from violence, harmful practices and cruel, inhuman or degrading treatment, to respect the right of the child to identity, physical and psychological integrity, health and freedom of expression and to uphold the core principle of taking the best interests of the child as a primary consideration at all times.’: *ibid* [72]–[74].

¹²⁹ *Ibid* 21 [83].

¹³⁰ United Nation Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (No HR/PUB/12/06/Rev.1, 2019)
<https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf>.

¹³¹ *Ibid* 35.

¹³² *Ibid* 38.

3.5.5 In 2019, the Interim Report of the **Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, Nils Melzer, investigated SOGI conversion practices in the context of investigating wider harmful practices against LGBTQA+ people.¹³³ That Interim Report concluded that because SOGI conversion practices do not have medical justifications and are frequently imposed without free prior and informed consent, they can amount to torture or other cruel, inhuman or degrading treatment or punishment.

3.5.6 Several earlier UN reports and statements from former Special Rapporteurs, the **Committee on Economic, Social and Cultural Rights**, and the Office of the High Commissioner for Human Rights dating back to 2015 have pointed to the harms of SOGI conversion practices, noted that they may amount to human rights violations or torture, and called on states to ban the practices.¹³⁴

¹³³ Nils Melzer, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (No A/74/148, 12 July 2019).

¹³⁴ Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN Doc No A/HRC/31/57, 5 January 2016) 13 [48]; Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* (UN Doc No E/C.12/GC/22, 2 May 2016) [23]; Office of the High Commissioner for Human Rights, *Living Free and Equal* (No HR/PUB/16/3, 2016) 47; Office of the High Commissioner for Human Rights, 'Pathologization – Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness' (17 May 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>>; Committee Against Torture, *Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (No CAT/C/57/4, 22 March 2016) 16 [81]; Office of the High Commissioner for Human Rights, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity* (UN Doc No A/HRC/29/23, 4 May 2015) 5 [13]-[14]; United Nations, 'Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People' (September 2015) <https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.pdf> (a joint statement by the ILO, OHCHR, UNAIDS Secretaria, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, and WHO).

Options for and Questions about Law Reform (TOR 6)

4.1 Overview of this Part

- This Part informs the Institute's response to TOR 6: Consult with Tasmanians about their understanding, perception and experience of SOGI conversion practices.
- The Institute seeks the community's views on whether Tasmanian law should be reformed, and, if so, what approach and form that should take.
- An explanation of the general considerations, approach and forms available are set out to inform the consultation.



4.2 Considerations, approach and form

4.2.1 If the law is to be reformed to reduce harms from SOGI conversion practices, then a range of factors will need to be taken into account, including:

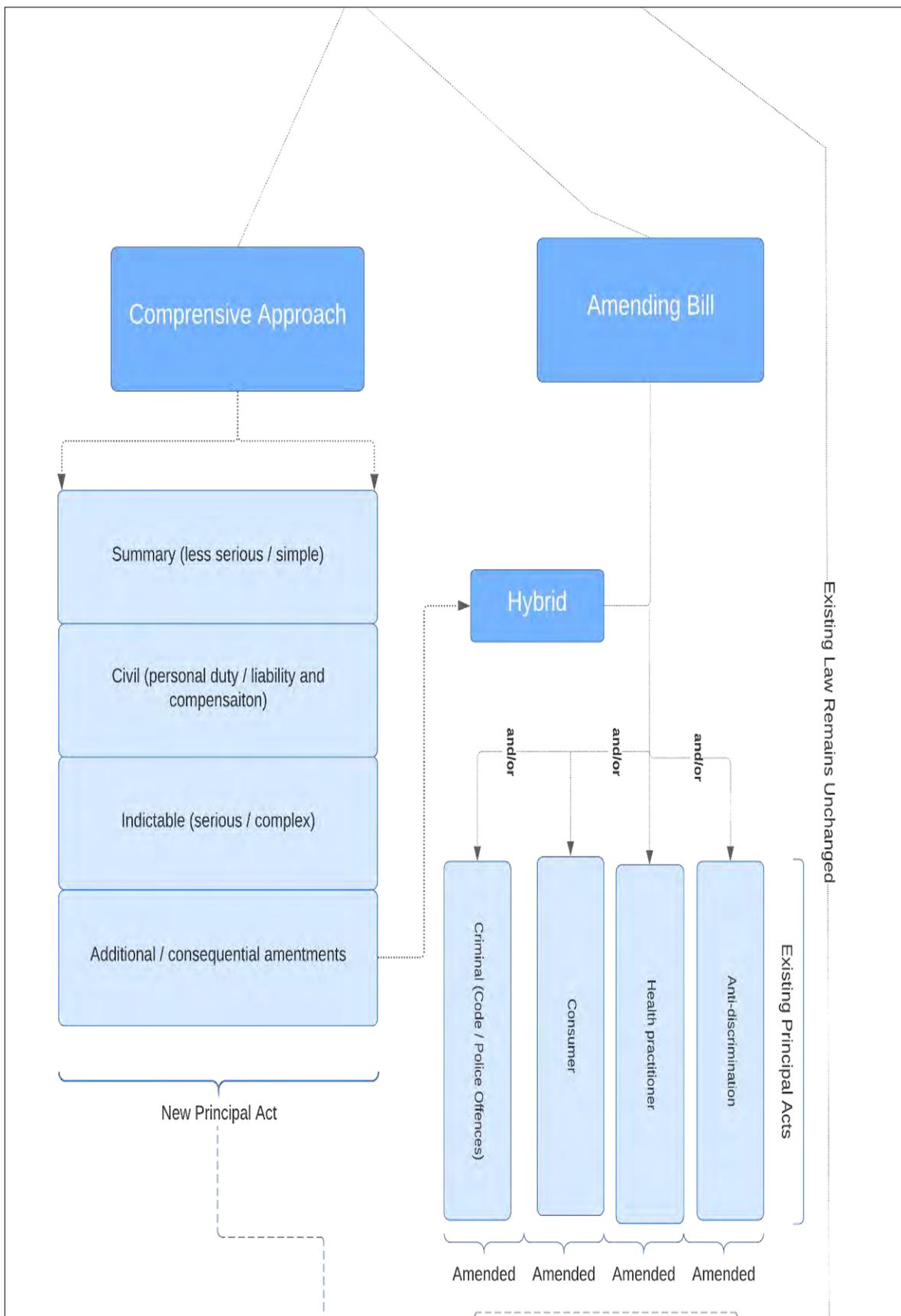
- How broadly SOGI conversion practices are defined under the law;
- Community views on the gravity of the harms caused by some or all SOGI conversion practices (and therefore the severity of the law and the proportionality of the punishment);
- The object of the law (to punish, compensate, mediate, promote the public interest etc);
- The desire for consistency and uniformity with other jurisdictions and with international laws, declarations and conventions;
- The constitutional capacity of the Tasmanian Parliament to make laws on certain subject matters;
- The practical, legal and resource limitations on making laws with extra-territorial effect (eg, the ability of Tasmanian authorities to police online content, or to prosecute people outside the state who are engaged in prohibited conduct against those inside the state).

4.2.2 These factors will influence two separate law reform questions.

- The first is the **approach** to law reform (a comprehensive principal act, an amendment act, or a hybrid approach).
- The second is the **form** of law or laws used (broadly criminal or civil).

4.2.3 [Figure 1 : Options for Reform](#) on page 40 sets out the possible pathways to reforming the law. More details about possible approaches and forms of law reform are set out after that figure (pages 41–45).

Figure 1 : Options for Reform



Approach to law reform

4.2.4 There are different ways that Parliament may approach the question of law reform.

4.2.5 The Parliament may choose not to reform the law, for example because it considers that the existing law is adequate, or that the subject matter does not require special statutory intervention.

4.2.6 Alternatively, Parliament may adopt a **comprehensive approach** to law reform. This would involve passing a principal Act, which establishes a new legislative scheme specific to SOGI conversion practices.

4.2.7 A new Principal Act sets up a new legislative regime. This would be a standalone statute that introduces new legal provisions to deal with SOGI conversion practices. For example, it might be titled the *Sexual Orientation and Gender Identity Conversion Practices Act*, and contain several sections that:

- announce the objects of the legislation (the purposes that the statute aims to achieve or promote);
- provide a legal definition of SOGI conversion practices;
- provide a legal definition of what SOGI conversion practices do not include;
- provide a criminal offence that bans SOGI conversion practices (eg, ‘Section 3: A person who performs a SOGI conversion practice on a minor or non-consenting adult commits an offence. The maximum penalty is 12-months imprisonment’);
- provide guidance for the community, law enforcement, lawyers and courts in the form of examples of conduct that would or would not be a SOGI conversion practice;
- provide exceptions to the offence like defences or particular authorisations.

4.2.8 One potential advantage of a comprehensive approach is that it contains all relevant provisions on a subject matter in a single statute. This may be seen as more declaratory than, say, amending the *Criminal Code Act 1924* (Tas) (*‘Criminal Code’*), or *Public Health Act 1997* (Tas). It may also be simpler to understand the law given the complexity and heterogeneity of the subject matter.

4.2.9 An **amendment approach** would expand existing legislation by amending one or more current laws, as opposed to introducing a new statutory regime. It might insert, modify or remove sections in those Acts. An amending Act is generally repealed after those changes are implemented. For example, it might be titled the *Sexual Orientation and Gender Identity Conversion Practices Amendment Act*, and contain several sections that:

- Insert a legal definition of SOGI conversion practices into Tasmania’s existing public health (*Public Health Act 1997* (Tas)) or anti-discrimination laws (*Anti-Discrimination Act 1998* (Tas)), tailored to the regulatory approaches within those statutes.
- Insert a new criminal offence into the *Criminal Code*.

4.2.10 The potential advantage of an amending approach is that it relies on existing legal frameworks to implement changes that are specifically directed to SOGI conversion practices. It is simpler and fits into current regulatory structures more easily than a new statutory instrument.

Queensland adopted an amendment approach. It amended the Queensland *Public Health Act 2005* to prohibit health service providers from performing ‘conversion therapy’ (ie SOGI conversion practices).

Relevant sections of the *Health Legislation Amendment Act 2020* (Qld) are reproduced in Annex 1

4.2.11 A **hybrid approach** combines the comprehensive and amending act approaches. It would be a standalone Act that might contain substantive provisions like a criminal offence. But it would also makes changes to other Acts, for example, a new provision in the *Anti-Discrimination Act* clarifying that SOGI conversion practices are a form of discrimination that may be sanctioned or remedied using the mechanisms currently in place in the *Anti-Discrimination Act*.

Relevant sections of the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) are reproduced in Annex 1

Question 4

Do you think that Tasmanian law should be changed to address SOGI conversion practices? If so, should this be through comprehensive reform, amendment or both (a hybrid)?

4.2.12 Possible considerations for Question 4:

- Are existing Tasmanian laws, discussed in Part 3 (pages 25–28) sufficient to deal with the harms caused by SOGI conversion practices?
- Do any gaps exist in the current Tasmanian law?
- Is the current Tasmanian law sufficiently tailored to the forms of harm caused by SOGI conversion practices?
- Are there certain groups or classes of people who should be protected (eg, children, young adults, vulnerable people)?
- Are there certain people who should be excluded from a changed law (eg, parents, guardians)?

Form of law reform

4.2.13 The **form** of any law reform relates to the category of law used to control, remedy or conciliate in relation to the subject of SOGI conversion practices. The three most common forms

are criminal (eg harassment and stalking), civil (negligence or nuisance) and regulation through legislative instruments (eg an anti-discrimination complaint or the removal of a medical license). Note that these taxonomies are helpful in thinking about the possible form a law may take, but they are not strict and often overlap with each other in practice.¹³⁵

4.2.14 Each form of law contains a range of different possible options, detailed below. For example, criminal offences could involve several alternative provisions that are tailored to the severity or gravity of different conduct, each attracting different penalties. Further, the categories are not exclusive, nor often clearly distinct from each other — it is possible to regulate a subject matter in a range of forms. For example, some forms of SOGI conversion practices may be considered serious and warrant criminal sanctions, whereas others may be best dealt with by a conciliation process under anti-discrimination law.

Criminal Laws

4.2.15 Criminal laws are generally reserved for serious offences. They prohibit particular conduct and provide for sanctions such as financial penalties (fines) and/or imprisonment.

4.2.16 Criminal laws sanction behaviour that is considered wrong by the community. Criminal offences are prosecuted on behalf of the community by the police/Crown Prosecutor who act on behalf of, and are responsible to, the State of Tasmania.

4.2.17 Crimes are not generally prosecuted by individual citizens (for example the victim of a crime, or that person's family), though that person may likely be involved in a criminal trial as a witness providing evidence to prove the offence was committed. Sanctions focus on punishing the person who committed the offence, rather than compensating a victim of the offence.

4.2.18 The state must prove that a criminal offence was committed beyond a reasonable doubt. This usually involves proving two 'elements' of an offence.¹³⁶

4.2.19 The **actus reus** is the physical element of a crime. This is the act or conduct that is prohibited. This can be very wide, and often focuses on the effects of an act rather than the form of the act.¹³⁷ The actus reus might also be non-physical, like words or speech (eg, bullying), or repeated conduct or a course of acts (as in stalking and harassment). It might also involve an omission (a criminal failure to act in accordance with a duty, eg failure to disclose knowledge of money laundering), or a location (eg, trespassing on private property), or state of affairs relating to a person (eg, possessing a banned substance).

4.2.20 The **mens rea** is the mental element of a crime. This is the mental state that attaches to the physical act to make a person criminally at fault. Mens rea can describe the intention to commit the physical act of a crime, or their knowledge of circumstances or results that will likely

¹³⁵ Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) 84.

¹³⁶ See David Lanham et al, 'The Anatomy of a Crime' in *Criminal Laws in Australia* (Federation Press, 2006) Ch 1C, <<https://www.federationpress.com.au/pdf/Lanham%20Ch1C.pdf>>.

¹³⁷ For example, the actus reus for murder and manslaughter could be a range of things (punching, shooting, stabbing), but the common requirement is that the act must cause the death of another person.

occur as a result of that act,¹³⁸ and can thus be one way of differentiating the gravity of serious crimes. For instance, Canada's Bill C-6 limits the offence to 'knowingly causing a person to undergo conversion practices' (see [1.3.19]).

4.2.21 **Strict liability offences** do not require any mental state be proven; it is sufficient that the act is done. For example, speeding offences do not require proof of the driver's intention or recklessness as to the act of speeding, only that there is proof that the vehicle was travelling over the speed limit.

4.2.22 Given that SOGI conversion practices cause harm regardless of the intentions of the person doing them, it may be appropriate not to require an intention. The Queensland and ACT provisions do not specify a mental element relevant specific to harm, so that the question of mens rea will be concerned solely with the intention to commit SOGI conversion practices on another person.

4.2.23 Another possibility is to use a **deeming provision**, as in the case of stalking and bullying (see [3.2.3] on page 25), where a person who has engaged in a course of conduct that is stalking or bullying is deemed to have had the requisite intent 'if at the relevant time the person knew, or ought to have known' that the course of conduct would likely cause harm.¹³⁹

4.2.24 The most common criminal offences are **summary offences**. These are less serious crimes that are tried before a magistrate, with a prosecutor and defence lawyer, and without a jury. Well-known examples include unlawful entry on land (trespassing) and common assault. In Tasmania, summary offences are largely contained within the *Police Offences Act 1935* (Tas). Maximum penalties of fines or imprisonment (for example, a maximum of 3 years imprisonment) can be specified for particular summary offences. The magistrate will weigh a range of factors in deciding on an appropriate sentence; just because an offence carries an imprisonment term does not mean that imprisonment will be ordered. Notably, summary offences generally have a limitation period of six months: a complaint must be made and prosecuted within that time period.

4.2.25 **Indictable offences** are serious offences that usually lead to a jury trial conducted by a Supreme Court judge. In Tasmania, they are collected in the *Criminal Code Act 1924* (Tas) and include crimes like murder, manslaughter, wounding or causing bodily harm, dangerous driving, sexual offences, persistent family violence, stealing, and robbery. In Tasmania, a conviction for any indictable offence is punishable by imprisonment of up to 21 years. Sentencing judges do, however, scale penalties for a conviction to the gravity of the offence and the particular conduct in that case, and can make other orders like probation, community service orders or suspended sentences. Unlike summary offences, indictable offences predominantly have no statutory limitation period that requires they be prosecuted within a set timeframe.

¹³⁸ Common mens rea descriptions include intention, recklessness or criminal negligence. For example, if A does an act that causes B's death, and A's intention in doing that act was to cause B's death, then A has committed murder. If A is merely reckless about whether their act might cause a person to be seriously harmed or killed, and B is indeed killed by that act, then A has committed manslaughter.

¹³⁹ *Criminal Code* s 192(3).

4.2.26 **Election** offences are those that may be either summary or indictable, depending on how the accused chooses to be tried (ie, they may choose to be tried either by magistrate without a jury, or by judge with a jury). Queensland's ban on conversion practices includes an election offence provision.¹⁴⁰ Tasmania law contains few offences that allow for this choice. More common is to use **parallel provisions**. These are different versions of the same basic criminal conduct that include specific definitions that indicate their greater or lesser severity. Parallel provisions might also make the more serious version an indictable offence and the less serious version a summary offence. For example, 'causing grievous bodily harm' is the more serious, indictable version of common assault, with a higher requirement that the injury (be likely to) endanger life or cause (or be likely to cause) serious injury to health.¹⁴¹

Canada's Bill C-6 adopts a criminal law approach. It will amend the Canadian *Criminal Code* to **create a criminal offence** for knowingly causing a person to undergo SOGI conversion practices, which may be punished either as an indictable or summary offence. Relevant sections of Bill C-6 are reproduced in Annex 1.

Question 5

Should some or all forms of SOGI conversion practices be criminalised in Tasmania?

If so, which, if any, should be dealt with as serious (indictable) crimes and which, if any, should be dealt with as less serious (summary) offences?

4.2.27 Possible considerations for Question 5:

1. How serious do you think a criminal offence provision for SOGI conversion practices should be? Should this be an indictable offence or a summary offence? Or should there be parallel offences depending on the severity of the harm?
2. What would the appropriate maximum punishment be? For example, is imprisonment appropriate, and for what length of time? Would a fine be appropriate? Would restraining orders, suspended sentences, community service or probation be appropriate?
3. What kinds of behaviour should be included in a criminal offence? For example, must the behaviour be prolonged or cause severe harm or both? How would any elements be established? For example, what might constitute proof that a SOGI conversion practice is 'severe'?

¹⁴⁰ *Public Health Act 2005* (Qld) s 213I: '(1) A proceeding for an offence against section 213H(1) may, at the prosecution's election, be taken summarily or on indictment. (2) A magistrate must not hear a proceeding for an offence against section 213H(1) summarily if, at any stage of the hearing, the magistrate is satisfied on the application of the defendant, the offence should not be heard summarily because of exceptional circumstances.' Section 213I gives examples of these exceptional circumstances, such as the defendant being also tried for indictable offences, if there is an important issue of law involved, or if there is general 'community importance or public interest' in holding a jury trial.

¹⁴¹ See, eg, *Criminal Code* ss 1, 172 (definition of 'grievous bodily harm').

4. What kind of consequences should be intended or caused within the act of performing a SOGI conversion practice?
5. What form should the mental element take? Should there be a mental element at all, or should this be a strict liability offence? (see above [4.2.20]–[4.2.22])
6. Should any persons or entities be excluded from liability under a possible criminal offence? For example, should parents, health practitioners or other people be exempt from this offence? Should the offence only relate to health practitioners or should it apply generally (ie, any person performing a SOGI conversion practice may be committing an offence)?
7. Should the criminal offence only apply if the subject is vulnerable? For example:
 - Should the offence require that the subject of SOGI conversion practices be a child, or a person under guardianship? Or
 - Should the offence apply regardless of whether the subject is a child or adult?
8. Should a more serious offence apply if the subject is a child?
9. Note that criminal offences can be complemented by civil wrongs (see Question 6).

Civil Wrongs

4.2.28 A civil wrong is generally an act that causes harm to another person and warrants some form of compensation. Like criminal offences, civil wrongs can be laid out in statutes.

4.2.29 Civil wrongs operate in addition to and alongside criminal offences. The purposes, procedures and aims of civil wrongs differ, however, from criminal offences.

4.2.30 Unlike the prosecutor’s ‘beyond reasonable doubt’ standard, a civil wrong claimant need only show that the defendant caused the claimant harm ‘on the balance of probabilities’. This is a considerably lower standard than ‘beyond reasonable doubt’. This means the evidence required to ‘prove’ a civil wrong need not be as strong as that needed to prove a crime.

4.2.31 A defendant is found ‘liable’ for a civil wrong, rather than ‘guilty’ of a crime. Whereas criminal penalties seek to ‘punish’ defendants, civil penalties aim to remedy harm to the claimant. The remedy ordered by the court aims to compensate the claimant. This generally means attempting to put them in the position they would have been in, to the extent it is possible to do so, had the defendant’s harm never occurred. Most often this involves ordering the defendant to pay the claimant a sum of money that represents or compensates the harm done to the claimant (for example, medical bills, lost income, pain and discomfort).

4.2.32 Civil wrongs can be sourced in the common law or statutes. Potential common law protections, such as the tort of negligence or breach of contract, were set out at [3.2.4]–[3.2.7] on pages 25–26). In Tasmania, many of these civil protections are now modified, regulated or clarified by the *Civil Liability Act 2002* (Tas), which converts common law wrongs into statutory civil wrongs. Other statutory civil wrongs like consumer protection laws or health practitioner laws are set out at [3.2.3]–[3.2.20].

4.2.33 Reform might not involve creating a new civil wrong. It may involve expanding or clarifying an existing civil wrong. For instance, the *Civil Liability Act 2002* (Tas) has been amended to clarify the duty of care of community organisations, good Samaritans, food donors, volunteers or accommodation providers. In some cases, the amendments limit liability, in others they clarify and expand on the responsibility of these bodies towards others. This occurred most recently in respect of child sex abuse with provisions being added to the *Civil Liability Act 2002* (Tas) to clarify that organisations that have responsibility for children are negligent if they fail to exercise a duty of care to prevent child abuse while that child is in their care. The amendments make the duty of care between the organisation and children clearer and remove barriers to people abused while in the care of organisations to proving responsibility for child abuse. The amendments also clarify that abuse may occur in different ways and result in both physical and mental harm. The amendments also clarify the individual liability of individuals associated with the organisation who may have failed to exercise a duty of care to prevent the abuse.

Further information about tort and civil liability may be found at:

<https://www.hobartlegal.org.au/handbook/accidents-and-insurance/negligence/negligence-and-duty-of-care/>

Question 6

Should some or all forms of SOGI conversion practices be made civil wrongs in Tasmania?

If so, what sort of practices should people be liable for and how should those subject to such practices be compensated?

4.2.34 Possible considerations for Question 6:

1. What sort of harms should warrant compensation under tort (civil liability law)?
2. What sort of acts should not be covered/compensated for by tort (civil liability law)?
3. People seeking compensation under civil law ordinary must bring a legal action within three (3) years of the date of injury. In some cases, the limitation period is much longer (up to twelve (12) years).
 - If you think there should be a civil offense for SOGI conversion practices, consider whether the ordinary limitation period is appropriate.
 - One specific consideration is that it may take some years after the practices are performed for the mental harm from SOGI conversion practices to (fully) manifest.

4. Civil wrongs require some financial risk to claimants, unlike criminal offences which are prosecuted by the state at the state's expense.¹⁴²
5. Civil wrongs can be complemented by criminal offences (see question 5). A criminal prosecution does not prevent the victim of a crime from bringing a civil claim for compensation for the harm they have suffered.

Legislative instruments

4.2.35 Beyond criminal sanctions (broadly being punitive actions initiated by police) and civil wrongs (broadly actions by an injured person for compensation against another person) are a third category of legislative instruments which are:

- set out in statutes outside of the *Criminal Code* consolidated indictable crimes), *Police Offences Act 1935* (Tas) (consolidated summary offences), and *Civil Liability Act 2002* (Tas);
- generally are administered by bodies other than the police;
- designed to achieve a public policy outcome (eg, to act as a deterrent like criminal law) but often simultaneously provide remedies to injured or affected parties (eg, providing compensation for harm caused by certain proscribed actions like civil wrongs).
- not adversarial,¹⁴³ in that they are not initially determined by judicial officers in the courts, but instead by a decision of an administrative officer (such as a regulator, commissioner or standards agency).

4.2.36 There is much debate in Australia about what these legislative instruments should be called and how they should be taxonomically described.¹⁴⁴ That debate falls well outside the scope of this Inquiry. For the purposes of this Issues Paper, the Institute describes these legislative instruments as 'regulatory' because they seek to regulate the behaviour of entities and individuals to achieve a policy outcome. These legislative instruments seek to implement broader social policy objectives than civil liability (tort) law can achieve. That is, the community has determined that certain acts breach fundamental values which harm society generally and therefore must be prospectively prohibited. However, legislators may choose not to use the criminal law to achieve those policy objectives because either the acts do not warrant inclusion in

¹⁴² Legal costs may be part of a compensation order. This means that a claimant's legal fees may be covered by a defendant who is found liable. Bringing an action can, however, involve a significant financial cost and risk, including the risk of paying a defendant's legal costs if the claimant's action is unsuccessful. It is also possible that claimants and defendants may negotiate to settle a claim out-of-court, in which case each party ordinarily bears its own costs.

¹⁴³ *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, 532 [12] (Gleeson CJ), 531 [37] (McHugh J), 540 [71] (Gummow and Hayne JJ); Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (AIJA, 2006) 9–10.

¹⁴⁴ See, eg, Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper No 62, 1999) [2.24].

the *Criminal Code*, or because making them criminal offences may actually limit the ability of the state to achieve its policy objective of reducing the harmful behaviour.

4.2.37 Given the perceived seriousness of criminal law, enforcement bodies can be more reluctant to prosecute offenders than if, say, the offence is described as ‘civil’ and does not result in a criminal conviction.¹⁴⁵ Legislators may also be wary of making an offence a crime because of the prosecutorial, evidentiary, or procedural rules that apply to that form of law. Regulation by legislative instrument allows the application of civil standards to proceedings. These lower evidentiary thresholds and procedures make investigation, evidence gathering and decision making much easier for regulators. Perhaps most importantly, legislative instruments are not restricted to the conventional punitive sanctions used by criminal law. Instead, they can include a range of regulatory tools to achieve one or more policy outcomes (be that deterrence on behalf of the community or remedy for an individual who has been harmed).

4.2.38 Regulatory tools that are available include:

- administrative **sanctions** (such as the loss of a medical license); and/or
- monetary **penalties** which do not give rise to a criminal conviction, and thus serve as a deterrence rather than a punishment; and/or
- enforceable **undertakings** (a voluntary admission that an entity has breached the law, along with a commitment not to breach the law in that way again and/or put in place preventative actions to stop future breaches);¹⁴⁶ and/or
- formal, facilitated or mandated **alternative dispute resolution** including mediation, conciliation and arbitration between two or more parties; and/or
- remedial **orders** (for instance, orders to: not repeat certain conduct; redress any loss, injury or humiliation; pay compensation; make a public apology; receive certain education and training). These are made by an appropriate expert administrative body and are only enforceable by a court if the person they apply to fails to comply with them;¹⁴⁷ and/or
- so-called ‘**civil penalties**’, which are punitive, predominantly financial, sanctions prosecuted by the police and imposed by the courts ‘otherwise than through the normal criminal process’.¹⁴⁸
- conventional **criminal penalties** (imprisonment or fines) in the case of serious breaches of the law.

4.2.39 Notably, Question 7 below does not specifically ask about whether respondents consider SOGI conversion practices should be regulated by legislative instrument per se, but rather whether they should be dealt with by amending existing Tasmanian regulatory frameworks. This

¹⁴⁵ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2011) 38.

¹⁴⁶ See, eg, *Work Health and Safety Act 2012* (Tas) Pt 11.

¹⁴⁷ See, eg, *Anti-Discrimination Act 1998* (Tas) ss 89–90.

¹⁴⁸ M Gillooly and N Wallace-Bruce, ‘Civil Penalties in Australian Legislation’ (1994) 13(2) *University of Tasmania Law Review* 269, 269–70.

is because the Institute considers it impracticable and unlikely that a new, comprehensive regulatory regime would be established to deal specifically with SOGI conversion practices.

4.2.40 While SOGI conversion practices are harmful and may warrant a legal response, there is insufficient evidence of the level of prevalence that would justify a standalone legislative instrument to deal solely with such practices as a category of law. Rather, it is much more likely that, if there is need for a regulatory response it will be administered by an existing agency under an existing legal framework. In other words, if SOGI conversion practices are to be regulated by legislative instrument, then, in the Institute's opinion, they are most likely to be implemented through an amendment or hybrid approach to law reform. The statutory regimes which are most suitable for amendment were set out in Part 3 above, namely:

- Anti-discrimination (see [3.2.8]–[3.2.14]);
- Consumer protection (see [3.2.15]–[3.2.16]);
- Health and allied practices regulation (see [3.2.17]–[3.2.20]).

4.2.41 As the Institute considered that each of these regimes was limited in its applicability to SOGI conversion practices, respondents may consider that a specific provision on SOGI conversion practices might be added to one or more of these principal Acts, and one or more regulatory tools listed above ([4.2.38]). For instance, the Australian Capital Territory adopted a hybrid approach to law reform, establishing a principal Act which proscribed SOGI conversion practices as a criminal offence, but also amending the Territory's *Human Rights Commission Act 2005* (ACT), to allow for a conciliation or referral to the Territory's ACT Civil & Administrative Tribunal ('ACAT'),¹⁴⁹ which may order:

- that the person complained about not repeat or continue the harmful practice;
- that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the harmful practice;
- that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the harmful practice;
- any other order the ACAT considers appropriate.

Question 7

Should any existing Tasmanian laws (besides criminal laws or the *Civil Liability Act 2002* (Tas)) be amended to cover SOGI conversion practices? If so, which ones and in which ways?

4.2.42 Possible considerations for Question 7:

1. Existing laws that are already relevant to SOGI conversion practices are set out in Part 3. These included anti-discrimination; consumer protection; health and allied practices regulation. The Institute considered that each of these regimes was limited in its applicability to SOGI conversion practices.
2. Note that Tasmania has limited legislative control and practical control over:

¹⁴⁹ *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT), Sch 1.

- Medical and allied health practices;
 - Advertising, especially online advertising.
3. Note that SOGI conversion practices are often not provided in exchange for money or publicly advertised; arrangement of them occurs through informal referrals or networks.
 4. Note that many SOGI conversion practices are private acts that may not fit within the Tasmanian Anti-Discrimination law framework.

4.2.43 Finally, the Institute notes that bare law reform is likely to be ineffective unless it connects to existing or new appropriate administrative, social and community services. This is especially the case where practices are ‘hidden’, conducted within close-knit communities, or where social stigma or other risks may dissuade or prevent a vulnerable member of that community from raising a complaint. People are also less likely to make a complaint if they are unaware of the appropriate mechanisms to do so (that is, who they can make a complaint to and how). If there are no support services to help individuals through the complaint process, explain the law and procedure, or assist them in dealing with the social consequences that may attach to exercising a legal right to make a complaint about harmful behaviour, then those people are much less likely to use the law for redress. While these considerations are beyond the scope of a law reform inquiry per se, they are necessarily related to the success of any law in achieving its aims of protecting individuals and achieving public policy objectives.

4.2.44 It is also important to remember that SOGI conversion practices are predominantly fringe activities and are not supported by reputable religious or social organisations. In that case, some people may consider it more appropriate to work with those bodies, for instance, by developing codes of practice, or self-regulation frameworks which might complement existing or new legal options. The law will be most effective where there is wide community trust and support, particularly by those parts of the community that are more likely to be in contact with people who may adhere to the ideology that informs conversion practices.

4.2.45 Given that conversion practices are driven by an underlying ideology that is not supported by mainstream scientists, medical professionals, psychologists or health experts, education will also be key to reducing social harms from such practices. While the law can play an educative role, there are other more direct and effective ways of engaging the public on such matters.

4.2.46 The Institute welcomes community insights on how to make any law reform more effective in a holistic and complete way.

Question 8

Are there any other models or approaches that are preferable to, or should complement, changing the law?

4.2.47 Possible considerations for Question 8:

1. What is the best way to detect or report SOGI conversion practices?
2. Do you think enforcing the law may be difficult?

3. What other community support services should complement any change to the law? What services could prevent or minimise harms?
4. Well-funded community support services, such as advice hotlines, complaints mechanisms, ombudsperson investigations, crisis or refuge accommodation, youth/LGBTQA+ community organisations, and advice to religious organisations to ensure they understand any new laws, may be important complements to changes in the law.

Question 9

Are there any other matters that you consider relevant to this Inquiry and would like to raise?

4.2.48 Possible considerations for Question 9:

1. What are the possible risks of criminalisation or regulation?
2. Are you concerned criminalisation may drive SOGI conversion practices further 'underground'?
3. What would be effective about the approach you think is best suited?
4. What might be less effective about the approach you think is appropriate?
5. How should Tasmanian law balance harm prevention with other civil/political rights like religious freedom or freedom of association and expression?
6. What other matters do you think are relevant for designing an effective law on SOGI conversion practices?

Annex 1: SOGI Conversion Practice Reform Legislation Extracts

Queensland: Health Legislation Amendment Act 2020 (Qld), amending Part 5 of the Public Health Act 2005 (Qld):

28 Insertion of new ch 5B [of the *Public Health Act*]

After chapter 5A—

insert—

Chapter 5B Conversion therapies

213E Definitions for chapter

In this chapter—

conversion therapy see section 213F.

gender identity, of a person, see section 213G.

health service provider see the *Health Ombudsman Act 2013*, section 8.

sexual orientation, of a person, means the person's capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender.

213F Meaning of conversion therapy

- (1) Conversion therapy is a practice that attempts to change or suppress a person's sexual orientation or gender identity.

Examples—

a practice attempting to change or suppress a person's sexual orientation or gender identity by—

- inducing nausea, vomiting or paralysis while showing the person same-sex images
- using shame or coercion to give the person an aversion to same-sex attractions or to encourage gender-conforming behaviour
- using other techniques on the person encouraging the person to believe being lesbian, gay, bisexual, transgender or intersex is a defect or disorder

- (2) *Conversion therapy* does not include a practice by a health service provider that, in the provider's reasonable professional judgement—

- (a) is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or
- (b) enables or facilitates the provision of a health service for a person in a manner that is safe and appropriate; or

- (c) is necessary to comply with the provider's legal or professional obligations.
- (3) Without limiting subsection (2), the following are examples of the types of practices to which that subsection may apply—
- (a) assisting a person who is undergoing a gender transition;
 - (b) assisting a person who is considering undergoing a gender transition;
 - (c) assisting a person to express the person's gender identity;
 - (d) providing acceptance, support or understanding of a person;
 - (e) facilitating a person's coping skills, development or identity exploration, or facilitating social support for the person.

Examples of the types of practices—

- exploring psychosocial factors with a person or probing a person's experience of sexual orientation or gender identity
- providing a speech pathology or gender transition service for a trans-gender or gender-diverse person wishing to alter the person's voice and communication to better align with the person's gender identity
- advising a person about the potential side effects of sex-hormonal drugs or the risks of having, or not having, surgical procedures

213G Meaning of *gender identity*

- (1) Gender identity, of a person, is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth.
- (2) Without limiting subsection (1), the gender identity, of a person, includes—
- (a) the person's personal sense of the body; and
 - (b) if freely chosen—modification of the person's bodily appearance or functions by medical, surgical or other means; and
 - (c) other expressions of the person's gender, including name, dress, speech and behaviour.

213H Prohibition of conversion therapy

- (1) A person who is a health service provider must not perform conversion therapy on another person.

Maximum penalty—

- (a) if the other person is a vulnerable person—150 penalty units or 18 months imprisonment; or
 - (b) otherwise—100 penalty units or 12 months imprisonment.
- (2) An offence against subsection (1) is a misdemeanour.
- (3) In this section—

vulnerable person means—

- (a) a child; or
- (b) a person who has impaired capacity within the meaning of the *Guardianship and Administration Act 2000* for making decisions about a particular service offered by a health service provider; or
- (c) a person with an impairment that is likely to significantly limit the person's ability to understand a particular service offered by a health service provider.

213I Proceedings for indictable offence

- (1) A proceeding for an offence against section 213H(1) may, at the prosecution's election, be taken summarily or on indictment.
- (2) A magistrate must not hear a proceeding for an offence against section 213H(1) summarily if, at any stage of the hearing, the magistrate is satisfied on the application of the defendant, the offence should not be heard summarily because of exceptional circumstances.

Examples of exceptional circumstances—

- 1 There is sufficient connection between the offence the subject of the charge, and other offences allegedly committed by the defendant and to be tried on indictment, to allow all the offences to be tried together.
 - 2 There is an important issue of law involved.
 - 3 An issue of general community importance or public interest is involved, or the holding of a trial by jury is justified in order to establish contemporary community standards.
- (3) If subsection (2) applies—
 - (a) the magistrate must proceed by way of an examination of witnesses for an indictable offence; and
 - (b) a plea of the person charged at the start of the proceeding must be disregarded; and
 - (c) evidence brought in the proceeding before the magistrate decided to act under subsection (2) is taken to be evidence in the proceeding for the committal of the person for trial or sentence; and
 - (d) before committing the person for trial or sentence, the magistrate must make a statement to the person under the *Justices Act 1886*, section 104(2)(b)

[end]

Australian Capital Territory: Sexuality and Gender Identity Conversion Practices Act 2020 (ACT)

5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

6 Objects of Act

The objects of this Act are—

- (a) to affirm that—
 - (i) all people have characteristics of sexuality and gender identity; and
 - (ii) no combination of those characteristics constitutes a disorder, disease, illness, deficiency, disability or shortcoming; and
- (b) to recognise and prevent the harm caused by sexuality and gender identity conversion practices.

Note A person may make a complaint to the human rights commission about sexuality and gender identity conversion practices (see *Human Rights Commission Act 2005*, s 43 and div 4.2D).

Part 2 Sexuality and gender identity conversion practices

7 Meaning of sexuality or gender identity conversion practice

- (1) In this Act:

sexuality or gender identity conversion practice means a treatment or other practice the purpose, or purported purpose, of which is to change a person's sexuality or gender identity.

- (2) However, sexuality or gender identity conversion practice does not include a practice the purpose of which is to—
- (a) assist a person who is undergoing a gender transition; or
 - (b) assist a person who is considering undergoing a gender transition; or
 - (c) assist a person to express their gender identity; or

- (d) provide acceptance, support or understanding of a person; or
- (e) facilitate a person's coping skills, social support or identity exploration and development.

Examples—s (2)

- diagnosis and assessment of a person with gender dysphoria or gender non-conforming behaviour or identity
 - support for a person with social adjustments related to gender dysphoria
 - gender-affirming hormone treatment
 - other gender transition services, for example, speech pathology services for a transgender or gender-diverse person who wishes to alter their voice and communication to better align with their gender identity ...
- (3) Also, sexuality or gender identity conversion practice does not include a practice by a health service provider that, in the provider's reasonable professional judgment, is necessary to—
- (a) provide a health service in a manner that is safe and appropriate; or
 - (b) comply with the provider's legal or professional obligations.

- (4) In this section:

health service—see the *Health Act 1993*, section 5.

health service provider—see the *Health Act 1993*, section 7.

8 Offence—performing conversion practice on protected person

- (1) A person commits an offence if—
- (a) the person performs a sexuality or gender identity conversion practice on another person (the recipient); and
 - (b) the recipient is a protected person.

Maximum penalty: 150 penalty units, imprisonment for 12 months or both.

- (2) A person commits an offence against subsection (1) whether or not the recipient, or a parent or guardian of the recipient, consented to the practice.

9 Offence—removing protected person from ACT for conversion practice

A person commits an offence if—

- (a) the person removes another person (the recipient) from the ACT; and
- (b) the recipient is a protected person; and
- (c) the removal is for the purpose of a sexuality or gender identity conversion practice being performed on the recipient.

Maximum penalty: 150 penalty units, imprisonment for 12 months or both.

Schedule 1 Human Rights Commission Act 2005—Consequential amendments

[1.1] New section 21 (1) (c) (vi)

insert

(vi) a conversion practice complaint;

[1.2] New section 42 (1) (ec)

insert

(ec) a conversion practice complaint;

[1.3] Commission’s obligation to be prompt and efficient New section 45 (2) (eb)

insert

(eb) if the complaint is a conversion practice complaint and the commission decides not to refer the complaint for conciliation—tell the complainant, in writing, that the complaint will not be referred for conciliation and include a conversion practice referral statement with the notice; and

[1.4] New division 4.2D

insert

Division 4.2D Conversion practice complaints to ACAT [ACT Civil and Administrative Tribunal]

53Z Meaning of person complained about—div 4.2D

In this division:

person complained about means the provider of a sexuality or gender identity conversion practice.

53ZA Conversion practice complaints—referral

(1) This section applies if—

(a) either—

(i) a complainant is given a conversion practice referral statement under section 45 (2) (eb); or

(ii) a statement under section 82C (1) is included in a final report in relation to a complaint; and

(b) within 60 days after the day the statement is given, the complainant requires the commission to refer the complaint to the ACAT.

(2) The commission must—

(a) refer the complaint to the ACAT; and

(b) tell the complainant and the person complained about, in writing, about the referral.

Note The commission must also close the complaint (see s 78 (2) (d)).

53ZB Conversion practice complaints—late application in exceptional circumstances

- (1) This section applies if—
 - (a) a complainant has been given a statement under section 45 (2) (eb) or section 82C (1); and
 - (b) the complainant has not required the commission to refer the complaint to the ACAT within 60 days after the day the statement is given to the complainant.
- (2) The complainant may apply to the ACAT for the complaint to be heard by the ACAT.
- (3) The ACAT may grant the application only if satisfied on reasonable grounds that exceptional circumstances prevented the complainant from requiring the complaint to be referred to the ACAT within the 60-day period.
- (4) If the ACAT grants the application, the complaint is, for this Act, taken to have been referred to the ACAT.

53ZC Conversion practice complaints—parties to ACAT proceeding

The following are parties to a complaint referred to the ACAT under this division:

- (a) the complainant;
- (b) the person complained about;
- (c) if, on application by the commission, the ACAT joins the commission as a party to the complaint—the commission.

53ZD Conversion practice complaints—commission to give information etc to ACAT

The commission must give the ACAT (if asked by it) any information or copies of documents in relation to a complaint referred to the ACAT under this division, other than—

- (a) a communication or document to which section 66 (Admissibility of evidence) applies; or
- (b) information, a document or something else relevant to a consideration in relation to a complaint given to the commission under section 73 (Power to ask for information, documents and other things); or
- (c) information given to the commission under section 74 (Requiring attendance etc).

53ZE Conversion practice complaints—ACAT orders

- (1) This section applies if—
 - (a) the commission refers a complaint to the ACAT under this division; and
 - (b) the ACAT is satisfied that the person complained about engaged in a harmful practice.
- (2) The ACAT may make 1 or more of the following orders:
 - (a) that the person complained about not repeat or continue the harmful practice;

- (b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the harmful practice;
 - (c) unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the harmful practice; (d) any other order the ACAT considers appropriate.
- (3) In making an order under subsection (2) (c), the ACAT—
- (a) must consider—
 - (i) the inherent dignity of all people and the impact of the sexuality or gender identity conversion practice on the person’s dignity; and
 - (ii) the nature of the sexuality or gender identity conversion practice; and
 - (iii) any mitigating factors; and
 - (b) may consider any other matter the ACAT considers relevant.

Examples—par (a) (i)—impact of sexuality or gender identity conversion practice

distress, humiliation, loss of self-esteem, loss of enjoyment of life

Example—par (a) (iii)

a public apology

- (4) In this section:

harmful practice means a sexuality or gender identity conversion practice that caused, or is likely to cause, harm to a person or otherwise has adversely affected, or is likely to adversely affect, a person’s rights, interests or welfare.

representative complaint means a complaint that is dealt with by the commission as a representative complaint under section 71.

53ZF Conversion practice complaints—no monetary limit on jurisdiction of ACAT

The ACAT is not, in exercising the jurisdiction conferred on it by this division, limited in the amount of money that it may order to be paid.

...

[1.9] Dictionary, new definitions

insert

conversion practice complaint means a complaint about a sexuality or gender identity conversion practice that may be made, or is made, under section 43.

conversion practice referral statement—see section 88C.

...

[end]

Canada: Bill C-6: An Act to Amend the Criminal Code (Conversion Therapy)

Preamble

Whereas conversion therapy causes harm to the persons, and in particular the children, who are subjected to it;

Whereas conversion therapy causes harm to society because, among other things, it is based on and propagates myths and stereotypes about sexual orientation and gender identity, including the myth that a person's sexual orientation and gender identity can and ought to be changed;

And whereas, in light of those harms, it is important to discourage and denounce the provision of conversion therapy in order to protect the human dignity and equality of all Canadians;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

R.S., c. C-46

Criminal Code

1 (1) Subsection 164(1) of the *Criminal Code* is amended by striking out “or” at the end of paragraph (d), by adding “or” at the end of paragraph (e) and by adding the following after paragraph (e):

(f) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is an advertisement for conversion therapy.

2018, c. 29, s. 12(2)

(2) Subsections 164(3) to (5) of the Act are replaced by the following:

Owner and maker may appear

(3) The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, child pornography, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, may appear and be represented in the proceedings to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied, on a balance of probabilities, that the publication, representation, written material or recording referred to in subsection (1) is obscene, child pornography, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, it may make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication, representation, written material or recording referred to in subsection (1) is obscene, child pornography, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, it shall order that the matter be restored to the person from whom it was seized without delay after the time for final appeal has expired.

2014, c. 25, s. 46(4)

(3) Subsection 164(7) of the Act is replaced by the following:

Consent

(7) If an order is made under this section by a judge in a province with respect to one or more copies of a publication, a representation, written material or a recording, no proceedings shall be instituted or continued in that province under section 162, 162.1, 163, 163.1, 286.4 or 320.104 with respect to those or other copies of the same publication, representation, written material or recording without the consent of the Attorney General.

(4) Subsection 164(8) of the Act is amended by adding the following in alphabetical order:

advertisement for conversion therapy means any material — including a photographic, film, video, audio or other recording, made by any means, a visual representation or any written material — that is used to advertise an offer to provide conversion therapy contrary to section 320.104; (*publicité de thérapie de conversion*)

2014, c. 25, s. 46(5)

2 (1) The portion of subsection 164.1(1) of the Act before paragraph (a) is replaced by the following:

Warrant of seizure

164.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material — namely, *child pornography* as defined in section 163.1, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or *computer data* as defined in subsection 342.1(2) that makes child pornography, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy available — that is stored on and made available through a *computer system* as defined in subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

2014, c. 25, s. 46(6)

(2) Subsection 164.1(5) of the Act is replaced by the following:

Order

(5) If the court is satisfied, on a balance of probabilities, that the material is child pornography as defined in section 163.1, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or computer data as defined in subsection

342.1(2) that makes child pornography, the voyeuristic recording, the intimate image, the advertisement of sexual services or the advertisement for conversion therapy available, it may order the custodian of the computer system to delete the material.

2014, c. 25, s. 46(7)

(3) Subsection 164.1(7) of the Act is replaced by the following:

Return of material

(7) If the court is not satisfied that the material is *child pornography* as defined in section 163.1, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or *computer data* as defined in subsection 342.1(2) that makes child pornography, the voyeuristic recording, the intimate image, the advertisement of sexual services or the advertisement for conversion therapy available, the court shall order that the electronic copy be returned to the custodian of the computer system and terminate the order under paragraph (1)(b).

3 Paragraph (a) of the definition *offence* in section 183 of the Act is amended by

(a) adding the following after subparagraph (xlvi):

(xlvi.1) section 273.3 (removal of child from Canada),

(b) adding the following after subparagraph (liii):

(liii.1) section 320.102 (forced conversion therapy),

(liii.2) section 320.103 (causing child to undergo conversion therapy),

2019, c. 25, s. 98

4 Paragraph 273.3(1)(c) of the Act is replaced by the following:

(c) under the age of 18 years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 155, subsection 160(2) or section 170, 171, 267, 268, 269, 271, 272, 273 or 320.103 in respect of that person; or

5 The Act is amended by adding the following after section 320.1:

Conversion Therapy

Definition of conversion therapy

320.101 In sections 320.102 to 320.106, *conversion therapy* means a practice, treatment or service designed to change a person's sexual orientation to heterosexual or gender identity to cisgender, or to repress or reduce non-heterosexual attraction or sexual behaviour. For greater certainty, this definition does not include a practice, treatment or service that relates

(a) to a person's gender transition; or

(b) to a person's exploration of their identity or to its development.

Forced conversion therapy

320.102 Everyone who knowingly causes a person to undergo conversion therapy against the person's will is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) guilty of an offence punishable on summary conviction.

Causing child to undergo conversion therapy

320.103 (1) Everyone who knowingly causes a person who is under the age of 18 years to undergo conversion therapy is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) guilty of an offence punishable on summary conviction.

Mistake of age

(2) It is not a defence to a charge under subsection (1) that the accused believed that the person was 18 years of age or older, unless the accused took reasonable steps to ascertain the person's age.

Advertising conversion therapy

320.104 Everyone who knowingly advertises an offer to provide conversion therapy is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) guilty of an offence punishable on summary conviction.

Material benefit from conversion therapy

320.105 Everyone who receives a financial or other material benefit, knowing that it is obtained or derived directly or indirectly from the provision of conversion therapy, is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) guilty of an offence punishable on summary conviction.

[end]

Germany: Gesetz zum Schutz vor Konversionsbehandlung [A Law to Protect Against Conversion Therapy] 2020

§ 1 Scope of the Law

- (1) This law applies to all treatments carried out on humans that result in the change or suppression of sexual orientation or self-perceived gender identity ('conversion treatment').
- (2) This Act does not apply to treatment of medically recognized sexual preference disorders.
- (3) Conversion treatments do not include surgical medical interventions or hormone treatments aimed at expressing a person's self-perceived gender identity or a person's desire for a more masculine or more feminine physical appearance corresponding thereto.

§ 2 Prohibition of Performing Conversion Treatments

- (1) It is prohibited to carry out a conversion treatment on a person who is under 18 years of age.
- (2) For persons over age of 18, it is prohibited to carry out a conversion treatment on a person who has not consented to it.

§ 3 Prohibition of Advertising, Offering and Brokering

It is forbidden to advertise, offer or mediate conversion treatment.

§ 4 Establishment of an Advisory Service

- (1) The Federal Center for Health Education will establish a telephone and online advice service. The advice service is aimed at
 1. all persons who are or may be affected by conversion treatments and their relatives and
 2. all persons who, for professional or private reasons, dealt with or advise on sexual orientation or self-perceived gender identity.
- (2) Counseling will be offered anonymously and in several languages.

§ 5 Penal Provisions

- (1) Anyone who violates § 2 performs a conversion treatment
- (2) Paragraph 1 does not apply to persons who act as parents or legal guardians, provided the act does not involve a gross violation of their duty of care.

§ 6 Regulations on Fines

- (1) An administrative offense is committed by anyone who, contrary to § 3, advertises or offers conversion treatment.
- (2) The administrative offense can be punished with a fine of up to €30,000

§ 7 Entry into Force

This law comes into force on the day after its promulgation. [end]

Malta: An Act to Prohibit Conversion Therapy, as a Deceptive and Harmful Act or Practice Against a Person's Sexual Orientation, Gender Identity and, or Gender Expression, and to Affirm Such Characteristics 2015

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows: —

Title.

1. The title of this Act is the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2015.

Definitions.

2. In this Act, unless the context otherwise requires:

“conversion therapy”, means treatment that aims to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression. Provided that any counselling related to the exploration of one's identity with regard to any of the characteristics being affirmed by this Act is excluded from this definition;

“gender expression” refers to each person's manifestation of their gender identity, and/or the one that is perceived by others;

“gender identity” refers to each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and, or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms;

“professional” refers to a person who is in possession of an official qualification and, or a warrant to practice as a care worker, counsellor, educator, family therapist, medical practitioner, pathologist, psychologist, psychotherapist, psychiatrist, social worker, and, or youth worker;

“sexual orientation” refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender or the same gender or more than one gender;

“mental disorder” shall have the meaning assigned to it in the Mental Health Act;

“vulnerable person” means any person:

- (a) under the age of 18 years;
- (b) suffering from a physical or mental infirmity;
- (c) considered by the court to be particularly at risk when taking into account the person's age, maturity, health, disability, social or other conditions including any situation of dependence, as well as physical or psychological consequence of the offence on that person.

The Affirmation of Sexual Orientation, Gender Identity and Gender Expression.

In accordance with the provisions of this Act all persons have a sexual orientation, a gender identity and a gender expression, and no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability and, or shortcoming.

Unlawful Conversion Therapy.

3. (1) It shall be unlawful-

(a) For any person to:

- i. perform conversion therapy on a vulnerable person;
- ii. perform involuntary and, or forced conversion therapy on a person;
- iii. advertise conversion therapy;

(b) For a professional to:

- i. offer conversion therapy on any person irrespective of whether monetary compensation is received in exchange;
- ii. refer any person to other professionals and, or to any other person to perform conversion therapy.

Criminalisation of Conversion Therapy

4. (1) Those found guilty under subarticle (a) of the previous article shall on conviction be liable to a fine (multa) of not less than one thousand Euros (€1,000) and not exceeding five thousand Euros (€5,000) or to imprisonment for a term from 1 month to 6 months, or both such fine and imprisonment;

(2) Those found guilty under subarticle (b) of the previous article shall on conviction be liable to a fine of not less than two thousand (€2,000) and not more than ten thousand Euros (€10,000) or to imprisonment for a term from 3 months to 1 year, or both such fine and imprisonment;

Provided that if a professional is found guilty under subarticle (2) the Court shall direct the Registrar of the Criminal Courts and Tribunals to transmit a copy of the judgment to the council or body regulating that profession.

(3) the punishments prescribed in this article shall be increased by 1 to 2 degrees in those instances where any person performs conversion therapy on a vulnerable person;

Objects and Reasons

The main object of this bill is to provide for a ban on professional conversion therapy against variations of sexual orientation, gender identity and, or gender expression; and an outright ban on conversion therapy on vulnerable persons, as well as to affirm and protect these characteristics of a person.

[end]