T A S M A N I A

LAW REFORM

I N S T I T U T E

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Submission to *Justice Miscellaneous (Conversion Practices) Bill 2024*

Thank you for the opportunity to make a submission to the *Justice Miscellaneous (Conversion Practices) Bill 2024*. This submission was approved by the Board of the Tasmania Law Reform Institute (TLRI) and is based on the recommendations of the TLRI contained in the 2022 Final Report 32 *Sexual Orientation and Gender Identity Conversion Practices*.

The TLRI's recommended model

The TLRI released its report in April 2022. The Report made 16 recommendations for law reform in Tasmania in relation to Sexual Orientation and Gender Identity (SOGI) conversion practices, following the release of an Issues Paper in 2020 and community consultation. There were 182 submissions accepted by the TLRI, as well as a joint submission endorsed by a petition with 377 signatures. A key recommendation of the Report was that Tasmanian law should be reformed to address harms for SOGI conversion practices (Recommendation 1).

The definition of 'conversion practice' adopted by the TLRI involved a course of conduct that aims to change, suppress or eradicate the sexual orientation or gender identity (which, under Tasmanian law, includes 'gender expression') of another person.

The Report in Chapter 4 gave consideration to the evidence relating to the efficacy and harmfulness of conversion practices and concluded that they are ineffective and harmful. As noted in the Report, the harmful effect of conversion practices was identified by the Australian Psychological Society, Australian Medical Association Tasmania, the Royal Australian and New Zealand College of Psychiatrists and the Mental Health Council of Tasmania. In this regard, conversion practices were distinguished from legitimate assessment and treatment for mental health conditions that relate to SOGI. The approach of the TLRI was to create certainty for legitimate medical professionals, by investing an expert public health officer (the Chief Civil Psychiatrist) the role of designating which professionals can legitimately assess or treat mental health conditions that relate to SOGI and the clinical rules around that treatment. This keystone of the TLRI's recommendations has been omitted from the Bill provided for consultation.

The TLRI considered that Tasmanian law should be reformed to ensure people in Tasmania are aware of their rights and duties and that public officers are able to meaningfully respond to:

(1) Direct practices, amounting to medical malpractice by health professionals or unsanctioned purported (conduct that emulates or mimics) health practices that occur outside of the clinical space or by non-health professionals.
(2) Indirect practices, involving disinformation designed to convince others that certain sexual orientations or gender identities are faulty or dysfunctional and can and should be changed, suppressed, or eradicated.

The model proposed for reform by the TLRI focused on clarifying, strengthening and expanding:

- Health law to deal with direct SOGI conversion practices and some indirect practices (Recommendations 2 – 9)
- Anti-discrimination law to deal with indirect, public acts (Recommendations 10 – 12)
- Civil law to compensate a person who has suffered damages from conduct that occurred after the introduction of law reforms (Recommendations 13 – 14)
- Criminal law to sanction conduct which causes serious and clearly foreseeable harm (Recommendation 15).

As noted, the TLRI's view was that the starting position for any Tasmanian law reform should include a broad and clear exemption for legitimate assessment and treatment by authorised health professionals. The TLRI's view was that the principal amendments should be in the *Mental Health Act*, as this was considered to provide an existing legislative basis for an adaptive, evidence-based, health service model for regulation of direct SOGI conversion practices. These reforms would create a statutory prohibition on clinical assessment and treatment for sexual orientation. In relation to gender-related disorders, the TLRI's view was that this should be legally pathologised but that law reform must not undermine, or have a chilling effect on supportive, evidence-based medical practice designed to support or treat mental health symptoms relating to gender dysphoria/incongruence. The TLRI's views were that assessing and treating gender-related disorders should be regulated by clinical guidelines set by the Chief Civil Psychiatrist under the *Mental Health Act* in consultation with appropriate professional bodies.

Other reforms were proposed to the *Anti-Discrimination Act 1998* (Tas) to clarify that indirect conversion practices are a form of incitement of hatred towards, serious contempt for or severe ridicule of another person or group of persons.

The reforms contained in the *Justice Miscellaneous (Conversion Practices) Bill 2024* address two aspects of the broader model for reform outlined in the TLRI report:

(1) the creation of a criminal offence (Recommendation 15), and

(2) amendments to the *Health Complaints Act 1995* to address complaints about direct conversion practices (Recommendations 6 – 9).

However, in isolation from the other recommendations of the TLRI, the model set out in the draft bill is problematic in several respects.

TLRI response to reforms contained in the *Justice Miscellaneous (Conversion Practices) Bill 2024*

(1) Definition of conversion practice

There are issues that can be identified with the definition adopted in clause 28 and the exclusions contained in the definition.

While the definition of conversion practice in clause 28(1) is broadly consistent with the approach taken by the TLRI, it differs in one important respect. It does not include 'suppression of sexual orientation or gender identity'. Suppression practices are included in the legislative definition of conversion practice in Victoria, Queensland and the proposed legislation in New South Wales.[1]

The definition of conversion practices in the proposed bill also contains a number of exclusions.

As noted, the TLRI's views were that criminal sanctions should contain express provisions exempting medical professionals where the conduct is a medical practice undertaken in good faith, in compliance with relevant medical standards and authorised by law. The TLRI's model for regulating conversion practices was that assessing and treating gender-related disorders should be regulated by clinical guidelines set by the Chief Civil Psychiatrist under the *Mental Health Act* in consultation with appropriate professional bodies. This has not been done in the exemption created in the Bill, which instead relies on a health service provider's reasonable judgement. In the Report, the TLRI expressed the view that 'reasonable professional judgement' may import too much subjectivity and uncertainty into the assessment of what is legitimate or not. The phrase is not consistent with healthcare regulation. It places a burden on healthcare professionals to make decisions based on their own opinion rather than with explicit reference to appropriate professional codes or standards.

Accordingly, without the corresponding amendments to the *Mental Health Act*, and the development of clinical guidelines, there is a lack of certainty for medical professionals.

A further complication is the reliance on the definition of 'health service provider' contained in the *Health Complaints Act* for the purposes of the offence provisions in the *Police Offences Act.* The definition contained in the *Health Complaints Act*, section 3 extends to 'a person who holds himself, herself or itself out as being able to provide a health service'.[2] Health service is defined in Schedule 1 Part 1 of the Act, and the amendment in the Bill in clause 7 would insert conversion therapy (a 'service provided for, or purportedly for, the assessment or treatment of a person in relation to that person's sexual orientation or gender identity including, but not limited to, attempting to change or eradicate the person's sexual orientation or gender identity') within this definition. According to the Fact Sheet, this is to allow oversight by the Health Complaints Commissioner in relation to conversion practices performed in settings such as in educational or religious facilities. However, the scope of the exemption created may mean that the reform is not effective to prohibit unqualified non-health professionals from conducting a conversion practice. The reforms appear to create an exemption for a person who holds themself out as being able to provide conversion therapy as able to rely on the exemption that

[1] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) s 5; *Public Health Act 2005* (Qld) s 213F; *Conversion Practices Prohibition Bill 2023* (NSW) cl 9.
[2] *Health Complaints Act 1995* (Tas) s 3.

the person considered (in their reasonable judgment) that the practice is clinically appropriate or enables or facilitates the provision of a conversion practice in a manner that is safe and effective.

The TLRI also considered that the offence provision should not apply if the conduct is no more than an expression of an opinion, idea or belief. In this way, the criminal offence would not apply to parents talking to their children about sexuality or gender identity issues. As noted by the TLRI, '[p]arents and guardians have the right to express views on sexuality or gender identity issues to their children and family and to guide their moral and spiritual development'. The Institute reiterates that 'expressing views about sexuality and gender identity, or disapproving of certain sexualities or gender identities, is not, of itself, a conversion practice' ([5.2.14]). Similarly, the TLRI agrees that the state has an obligation to protect freedom of religion and freedom of conscience, and only limit the manifestations of religion or belief in a justified and proportionate manner. The appropriate distinction needs to be made between conversion practice and legitimate religious practices that are expressions of opinion, ideas or beliefs.

(2) Amendment to the Police Offences Act 1935 (Tas)

The *Justice Miscellaneous (Conversion Practices) Bill 2024* creates two new summary offences relating to conversion practices. One offence makes it an offence to carry out a conversion practice that causes physical or mental harm to the recipient of that conversion practice. The second offence makes it an offence to publish or display an advertisement or notice that promotes conversion practices.

The approach taken in the *Justice Miscellaneous (Conversion Practices) Bill 2024* to the creation of a criminal offence of carrying out a conversion practice does not mirror the approach taken in any other jurisdiction. Neither does it reflect the model recommended by the TLRI.

In the TLRI's Report, its view was that criminal measures should be a backstop measure of last resort for responding to SOGI conversion practices which cause serious harm as a result of wilful or reckless conduct. An offence to be contained in the *Criminal Code* (Tas) was recommended for this reason. In addition, the TLRI's view was that any conduct should only be proceeded against under specific Code provisions with the consent of the Director of Public Prosecutions. This was to ensure that it was a measure of last resort. The TLRI wrote that '[t]he *Criminal Code* should be used as an option of last resort for serious, egregious or repeated forms of SOGI conversion practices that manifest as serious physical or mental harm (or a person is reckless about them manifesting that harm), proven beyond reasonable doubt' ([9.3.2]). As noted, the Institute did not want any criminal law response to inhibit legitimate health practices relating to sexual orientation and gender identity ([9.3.10]).The approach taken by the TLRI had some similarities with the approach in Victoria (and as proposed in New South Wales)[3] to the criminalisation of conversion practices through the creation of indictable offences with the requirement to prove a mental element specified in the provision. In Victoria, there is a hierarchy of offences with the most serious offence being where: (a) a person *intentionally* engages in a conversion practice directed towards another person, (b) that causes

[3] See *Conversion Practices Prohibition Bill 2023* (NSW).

serious injury and, (c) the person is *negligent* as to whether engaging in the change or suppression practice will cause *serious* injury.[4] There is another offence that applies where injury (rather than serious) injury is caused.[5] Consent is not a defence to either offence.[6] In contrast, however, to the approach in New South Wales and Victoria, the draft offence set out in the *Justice Miscellaneous (Conversion Practices) Bill 2024* is a summary offence. This reflects the position in Queensland and the ACT, where conversion practice offences are summary offences.[7] The Queensland offence is created in the *Public Health Act 2005* (Qld) and applies only to conversion practices performed by health service providers. The ACT offence is created in a standalone statute – the *Sexuality and Gender Identity Conversion Practice Act 2020* (ACT). The offence applies to conversion practices performed on 'protected persons', defined as a person who is a child or a person who has impaired decision-making ability in relation to a matter relating to the person's health or welfare'.[8] While these are both summary offences (as with the Tasmanian draft bill), unlike the draft Tasmanian bill, the prohibition in Queensland and the ACT relate to performing conversion therapy and there is no requirement to establish harm or any particular state of mind relating to causing harm.

Further, the proposed offence of carrying out conversion practices set out in *Justice Miscellaneous (Conversion Practices) Bill 2024* differs in several respects from the recommendations of the TLRI. Significantly, the offence that would be created by the *Justice Miscellaneous (Conversion Practices) Bill 2024*:

(1) is a summary rather than an indictable offence.

As noted above, the TLRI's view was that the criminal law should only be an option of last resort to deal with conduct which results in clearly foreseeable and serious harm that is not suitably dealt with under health or anti-discrimination law, and that great care is necessary to ensure that any provision does not have a chilling effect on legitimate health practices relating to sexual orientation and gender identity. It also does not have the oversight of the Director of Public Prosecutions in relation to the commencement of proceedings.

(2) has no requirement that the physical or mental harm caused by the conversion practice is serious as recommended by the TLRI.

The TLRI reiterates its view that the criminal law should be an option of last resort, that successful prosecutions are likely to be difficult to obtain, and that legitimate health practices relating to sexual orientation and gender identity should not be impeded by the existence of any criminal offence. As stated in the Fact Sheet, mainstream medical consensus is that conversion practices lack efficacy (they are not successful in doing what they claim to do in a safe or reliable way) and involve significant risk of causing serious and lasting harm to those

[4] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) s 10. The maximum penalty for a natural person is 10 years imprisonment or a 1200 penalty unit fine or both.
[5] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) s 11. The maximum penalty for a natural person is 5 years imprisonment or a 600 penalty unit fine.
[6] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) s5(1); *Conversion Practices Prohibition Bill 2023* (NSW) cl 11(3), 12(3).
[7] However, under the *Public Health Act 2005* (Qld) the prosecution may elect to have the matter dealt with on indictment.
[8] *Sexuality and Gender Identity Conversion Practice Act 2020* (ACT) s 3.

subject to them. Accordingly, the TLRI considers that a summary offence should not require the proof of harm given the weight of medical opinion.

(3) does not have an explicit mental element for the offence in the proposed offences in the draft bill.

It may be that the intention of the drafters was to create a strict liability offence (meaning no mental or fault element must be proved to establish criminal responsibility). However, this is not the clear outcome given the common law presumption of mens rea (see the High Court decision in *He Kaw Teh* (1985) 157 CLR 523). There is 'a presumption that *mens rea,* an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient of every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals'.[9] It could be argued that the offence is truly criminal because of the penalty imposed and because it is not merely regulatory as it relates to causing harm to the person of another. Further, it is noted that if the offence proposed for Tasmania is a strict liability offence, the defence of honest but mistaken belief of fact would apply.

The TLRI's view is that further consideration should be given to precisely setting out the fault element for the offences created by the *Justice Miscellaneous (Conversion Practices) Bill 2024* given the uncertainty as to the interpretation of the provisions as they currently stand.

(4) contains a defence of consent in the proposed offence in the draft bill (whereas the TLRI recommended that consent not be a defence).

The TLRI recommended that consent not be a defence to the criminal offence relating to conversion practices. This reflects the position in other jurisdictions where consent is similarly not a defence.[10] In contrast, the offence contained in the draft bill provides that where a person is an adult who understands that conversion practices could cause physical or mental harm, consent within the meaning of consent set out in the *Criminal Code* (Tas), s 2A provides a defence.

(3) Amendment to the Health Complaints Act 1995

The *Justice Miscellaneous (Conversion Practices) Bill 2024* makes two amendments to the *Health Complaints Act 1995* (Tas) relating to the definition of 'health service' to make sure that the Health Complaints Commissioner has oversight. First, it removes the requirement that a 'health service' must be 'for the benefit of human health'. Second, it inserts an item in the Schedule to the *Health Complaints Act 1995* (Tas) intended to address services for or purportedly for the assessment or treatment of a person in relation to their sexual orientation or gender identity that might be performed in settings such as educational or religious facilities. While this reflects the recommendation of the TLRI (see Recommendation 7) that direct SOGI conversion practices should be included as a health service under the *Health Complaints Act 1995* (Tas) and that the Health Complaints Commissioner should have oversight in relation to direct conversion practices, it is problematic for the reasons outlined above.

[9] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528.
[10] It is noted that in the ACT the offence only relates to protected persons, and so an adult without impaired decision making could consent to a conversion practice.

The TLRI also considered that there was a need for amendments to the *Anti-Discrimination Act 1998* (Tas) relating to conversion practices, and in particular that Equal Opportunity Tasmania should have oversight over indirect conversion practices. The *Justice Miscellaneous (Conversion Practices) Bill 2024* does not provide for this and instead creates a summary offence relating to promoting conversion practices.

Concluding comments

Aside from the observations made in relation to the deficiencies contained in the draft bill, the TLRI reiterates its views expressed in the Report that there is a need for funding and resources to inform the community (including health care providers, LGBTQA+ and religious communities) about what conversion practices are and the effects of the reforms (see Recommendation 16).

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