Summary of legal advice: NI Conversion Practices (Criminalisation) Bill

Aidan O'Neill KC's critique of Eóin Tennyson's Conversion Practices (Criminalisation) Bill is devastating. O'Neill argues that the proposals are fundamentally illiberal, poorly drafted, and pose a severe threat to basic civil liberties. He ultimately concludes that the Bill likely exceeds the legislative competence of the Northern Ireland Assembly.

Full legal opinion available here

Flawed legal mechanics

O'Neill characterises the proposals as "jellyfish legislation" – the concepts used are impossible to grasp and the drafting is vague, yet the offences carry a sting in the tail in the form of severe criminal penalties (up to two years in prison).

- **Undefined key terms:** The Bill would criminalise attempts to "change or suppress" a person's "sexual orientation or gender identity", yet entirely fails, or fails clearly, to define these fundamental terms.
- **No intent to harm required:** An individual could be criminalised even if they acted from benevolent motives and genuinely believed they were helping.
- **Subjective criminality:** Non-coercive conversations could be caught by the criminal offences simply if the recipient later feels "fear, alarm or distress".
- **Equating advice with abuse:** The Bill misleadingly lumps together violent and coercive behaviours that are already illegal with standard talking therapy and pastoral care.

Criminalising parents

A primary concern raised by O'Neill is the lack of any carve-outs for parents. By outlawing 'suppression' of identity, the Bill would effectively criminalise normal parental authority and guidance.

- **Outlawing loving caution:** Parents who lovingly advise their children against socially or medically transitioning could be criminalised for failing to affirm their child's self-identification.
- **Criminalising discipline:** Because the Bill applies to non-LGBTQ identities as well, parents could face prosecution for ordinary restrictions. Examples include forbidding a teenager from wearing sexually provocative clothing, or blocking a child's access to hardcore pornography, as these could be framed as "suppressing" their identity or expression.

Threats to civil liberties and religion

O'Neill warns that the legislation would mandate adherence to state dogmas on sex and gender, creating a massive chilling effect on free speech and religious practice.

- **Outlawing pastoral care:** Mainstream pastoral work, prayer and confessional conversations in churches would be criminalised if they advocate orthodox views on sexuality or biological sex.
- **Enforced affirmation:** Outside of strictly regulated healthcare environments, the only legally permitted speech regarding someone's gender or sexuality would be unquestioning affirmation. Medical professionals, feminist groups and political bodies that dissent could face criminal sanctions.

Conclusion on legislative competence

O'Neill concludes that there are very strong arguments that the Bill is beyond the legislative competence of the NI Assembly. This is because of the sweeping breadth of the Bill's provisions, their internal incoherence, and their disproportionate intrusion into private and family life, freedom of religion, and freedom of expression (all of which are necessary conditions of a liberal democracy).

Key extracts from the legal opinion

(paragraph numbers are as in the legal opinion)

No requirement to show harm was intended

3.2 Importantly for the statutory offences under this proposed legislation to be established in court it will not be necessary to show that the perpetrator had any ***intention*** to cause any form of harm to the victim (or to be reckless as to whether harm would occur).

3.3 And indeed, even if the person charged with a statutory offence positively proves that they had no intention to cause harm of any sort and were instead acting from wholly benevolent motives of seeking to help the individual whom they had counselled in relation to issues around their claimed sexual orientation and/or gender identity they can still be found guilty of an offence under this proposed legislation.

Introduces a form of Self-ID

3.5 For the purposes of this proposed legislation an individual may have a particular "sexual orientation" or "gender identity" by reason of that individual's own self-identification or assertion.

3.6 But the same individual may have – according to this legislation – a different sexual orientation or gender identity from their own self-ID, determined instead by another's ascription or assumption about the gender identity of sexual orientation of that individual.

3.10 Criminal conversion practices under this proposed legislation can therefore be carried out even by those who genuinely believe that the relevant change in another sexual orientation or gender identity is impossible (even if desirable) but who are content, instead, to encourage that for the other's claimed sexual orientation or gender identity not to be acted upon (and instead supressed). …

Expands and goes beyond existing equality law

3.11 Clause 6(2) of the NI Conversion Practices (Criminalisation) Bill specifies that "a victim's sexual orientation includes the victim having ***no*** sexual orientation towards other persons".

3.12 The NI Conversion Practices (Criminalisation) Bill's definition of "sexual orientation" to encompass those who claim to be "asexual" therefore goes beyond the definition employed heretofore in Northern Ireland. Regulation 2(2) in both the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 provide that "sexual orientation" means a sexual orientation towards–

(a) persons of the same sex;

(b) persons of the opposite sex; or

(c) persons of the same sex and of the opposite sex …

'Gender identity' undefined, used for the first time in NI law

3.14 More startlingly, the NI Conversion Practices (Criminalisation) Bill itself does *not give any* definition of what is said constitute under this proposed legislation "gender identity" which, if passed into law, will make a criminal offence to "change or suppress".

3.15 The term "gender identity" is ***not*** one which is currently used with equality legislation applicable within Northern Ireland.

3.26 In any event in using the undefined "gender identity" rather than the elsewhere defined (at least in devolved Scottish legislation and Westminster sentencing legislation) term of "transgender identity" it may reasonably be presumed that the proposed NI legislation as contained in this Bill is intended to go wider, and criminalise not only attempts to change or supress an individual's claim to have a "transgender identity", but also any claims *not* to be "transgender", whether that be

- assertions to be "non-gendered" (that one's "gender identity" is *neither* male nor female), or
- a declaration of being "non-binary" (that one's "gender identity" is being not *solely* male or female), or even
- confirming that one is just "cisgendered" (which is to say that there is *no* asserted mismatch or disjunction between one's actual sex and one's "gender identity").

Lumps together criminal abuse with counselling and advice

3.31 So the drafting technique of the NI Conversion Practices (Criminalisation) Bill in employing a portmanteau of "conversion practices" is consciously (and misleadingly) to lump together (and implicitly to equate) behaviours which are already criminal offences (such as threats of violence, physical abuse, sexual abuse, coercion and abusive control) with the heretofore non-criminal provision of therapies such as counselling or any form of talking therapy, coaching or instruction, or the provision of treatment including the prescription of medication.

No exemptions outside the medical sphere

3.36 Outside of therapy carried out under the auspices – and in accordance with the professional ethical standards – of and only of, the relevant NI Department of Health approved regulatory body, *only* the expression of beliefs or opinions intended "to *affirm* a sexual orientation or gender identity which the victim considers is, or may be, their sexual orientation or gender identity" is permitted by this legislation.

3.37 Otherwise, the draft legislation purports to criminalise any form of counselling or talking therapy, non-coercive coaching or instruction done – or any expression of beliefs or opinions where these beliefs or opinions are expressed – with the intention of "directing" any other person "towards a particular sexual orientation or gender identity".

Impact of the Bill's vagueness

4.1 As we have noted there is *no* definition given in this NI Conversion Practices (Criminalisation) Bill of "gender identity". However the scheme of this NI Conversion Practices (Criminalisation) Bill is predicated on "gender identity" being a specific characteristic of individuals, which is distinct (and identifiable) from that person's actual sex.

4.2 This NI Conversion Practices (Criminalisation) Bill also proceeds on the basis that others may make (right or wrong) presumptions about what another's gender identity is, or may be.

4.3 This NI Conversion Practices (Criminalisation) Bill is also drafted on the basis that any individual may be unsure or uncertain as to what their own current "gender identity" might, or might not, be, in taking outside the scope of the criminalisation of therapy or coercive behaviour anything intended to *affirm* a sexual orientation or gender identity which an individual "considers is, or *may be*, their sexual orientation or gender identity".

4.4 But the failure in the NI Conversion Practices (Criminalisation) Bill to define "gender identity" and/or to give any indications as to how "gender identity" might be identified (whether by the courts or by the police or relevant local authorities or by individuals) immediately raises particular concerns since the NI Conversion Practices (Criminalisation) Bill, if enacted into law, criminalises behaviour which is said to be intended to "change" what is or may be or is presumed by another to be a person "gender identity". …

'Distress' is subjective

4.5 The NI Conversion Practices (Criminalisation) Bill would criminalise, within the context of a person's expression of belief or opinion to another all and any instances of any person non-coercively saying to, or otherwise communicating with, another (even just once) with the intention (however vainly) of changing or suppressing that other's (lack of) sexual orientation and/or gender identity, provided that it can be established that this talk or communication made the addressee afraid, alarmed and/or distressed, even presumably after the event (and how long after the event?). …

Criminalises orthodox belief

4.6 The criminalisation of conduct under NI Conversion Practices (Criminalisation) Bill would extend to a situation where a parent – without any relevant professional background or purported recognised expertise – offers their own child parental counselling or coaching or instruction which does not positively affirm their child's claim to be transgender. A parent will be criminalised for advising against their child denying their actual sex. A parent will be criminalised by directing their child against any attempts by that child to "transition" (whether socially and/or medically) to a new "gender identity" inconsistent with their child's basic biology.

4.7 Similarly any minister of religion who has (informal) conversations or even formal counselling sessions (including, for example, within the context of the confessional, within Roman Catholic practice) with someone setting out orthodox doctrinal views in relation to, say their religion's views on the "proper" expression of sexuality and/or the (non-) existence of the concept of "gender identity" distinct from biological sex will be criminalised under this proposed *legislation*.

4.8 So statements of belief or opinion such as:

- sexual activity outside of the bonds of a lifelong monogamous marriage between two individuals of the opposite sex is sinful or
- transgender identity does not exist, or
- people who claim to be bisexual people are in denial, because they are ashamed of being gay, or
- people who claim to be asexual are just confused and have not met the right person yet

which ***are*** made in relation to any particular individual outside of a state-approved regulated professional therapeutic environment and context, with a view to directing the person being counselled towards a particular sexual orientation or gender identity ***will*** be criminalised under this legislation. …

4.9 There would be no need in the case of any individual counsellor (be they parent or priest) for it to be alleged that any form of *coercion* was also applied in their provision of counselling for this to become a criminal offence. So advice that was non-*violent*, non-*threatening*, which did not amount to an attempt to control, regulate or monitor that other person's day-to-day activities, or to deprive or restrict that other person's freedom of action, and which was not experienced by the recipient at the time as humiliating or intimidating or intended to punish, would still be criminalised. Nor would it be any defence for the parent to say that the individual child or congregant specifically sought their advice. …

Impact of including undefined 'suppression'

4.11 But perhaps the most fundamental problem with this proposed NI Conversion Practices (Criminalisation) Bill is that it leaves it entirely open and undefined just what it might mean to seek to *suppress* another's sexual orientation or gender identity, when you are ***not*** seeking to change it. Including suppression is intended to widen the scope of this proposed legislation, by including restrictions or limitations imposed on someone specifically to repress or prevent the development of another's sexual orientation or gender identity, even if they accept that this cannot fundamentally be changed.

4.12 Suppression is then clearly a key term in this proposed legislation. Yet the NI Conversion Practices (Criminalisation) Bill contains *no* guidance or definition as to what is meant by behaviour which is intended to "suppress" an individual's gender identity. And the draft legislation contains *no* guidance or definition as to what is meant by behaviour which is intended to "suppress" an individual's (lack of) sexual orientation towards another person. It presumably means any behaviour which might be said to thwart or inhibit or discourage an individual from *expressing* their sexual orientation or gender identity in all and any such manner as they might otherwise choose or wish to. …

Outlaws normal parenting

4.14 This means that any discussions, questioning, guidance or general parental direction, guidance, controls and restrictions in relation to a person's sexuality and/or their claimed or presumed gender identity which the Police Service of Northern Ireland or all and any who might seek to mount prosecutions under this proposed legislation would deem to be "directive" *or* "coercive", *will* in principle be able to be criminalised.

4.15 Thus all and any attempt by parents to *direct* their children towards any sexual orientation or gender identity which a child's parents consider to be "preferable" will be outlawed in Northern Ireland under this proposed NI legislation. …

4.16 It is clear that it will be no defence for a parent to say that they acted out of love and with a view to help their child and that they had no intention by their intervention to cause their child to suffer fear or alarm or distress or any kind of harm. …

4.17 It is clear that what might fall within this definition would be acts by a parent which might be said to regulate, restrict, or monitor their own child's behaviour or otherwise deprive them of their own freedom of action. For example, this might include forbidding their child from dressing in a way that the child claims reflects their sexual orientation or their gender identity; or warning their child against associating with certain people or undertaking certain activities considered to be linked to their sexual orientation or gender identity. …

4.19 This definition of coercion would clearly therefore include parents seeking to control how their child "presents" in terms of, say clothes, make-up, and hairstyle or imposing restrictions on where their child might go and whom they might see. Thus parents who actively and consistently and directly oppose their child's decision to, for example, present as a different gender from that given at birth would be committing a criminal offence.

4.20 Were the NI Conversion Practices (Criminalisation) Bill to be passed into law by the NI Assembly, this would have the undoubted effect of criminalising much mainstream pastoral work of churches, mosques, synagogues and temples. Prayers and pastoral discussions could be criminalised if their content did not conform to the new state requirements *only* to affirm, validate and support the identity and lived experience as expressed and stated by an individual from time to time (but never to question or give direction or raise concerns about an individual's expression of their sexuality, or their "gender expression" or assertion of their "gender identity"). …

4.22 Indeed these proposals could also criminalise parents who, lovingly and in good faith and in accordance with their own best judgment and conscience, seek to caution and direct their children against acting on any stated intention to embark on "gender affirmatory"/"gender transition" treatment in respect of their currently experienced discomfort or dysphoria in relation to their sex and/or sexuality.

The legislation also impacts non-LGBT young people

4.23 The NI Conversion Practices (Criminalisation) Bill will also, from its terms, include *suppression* efforts directed at those who are heterosexual or "cisgender" (i.e. those who do not claim that there is any asserted mismatch or disjunction between their sex and their "gender identity"). Thus this Bill if passed into law will also directly impact not just parents faced with their children identifying as trans and/or gay and/or queer/questioning, but also those parents of those children identifying as straight and as happy and comfortable in their actual biological sex.

4.25 Accordingly *any* child who wishes to explore and express their sexual/gender identity as they (and *not* their parents) wish in their behaviour and clothing and comportment and associations may be able to pray in aid the provisions of this Bill if brought into law against their parents.

4.26 Thus, for example, a parent's inflexible and absolute ban forbidding, say, their 14 year old daughter, going out publicly dressed in what might be regarded by her parents as an overly sexualised and sexually provocative and explicit way could, in principle, be criminalised under this proposed legislation on the basis that the parental action is stopping the child from living or acting in accordance with how their child wishes to express their (hetero)sexual orientation and/or (cis)gender identity.

4.27 Similarly, the actions of parents engaging in a course of conduct such as forbidding their heterosexual adolescent son from displaying on his bedroom wall pornographic images of women (which images his parents consider to be demeaning of and for women), and/or seeking systematically to police and block his online access to hardcore heterosexual pornography and/or directing him from or against downloading and listening to podcasts by, say, Andrew Tate could also all, in principle, be criminalised under this legislation.

Imposes state dogma

5.1 If legislation as proposed by Eóin Tennyson MLA in his Bill were passed into law by the NI Assembly this would criminalise parents who sought to exercise any form of parental authority or guidance in relation to their children as regards issues around sexuality and gender which conflicted with the official position which may be adopted from time to time by the NI state authorities. …

5.2 Separately if these proposals were passed into law by the NI Assembly, then the law would have a chilling effect on the ability and willingness of religious bodies - and separately, among others, gender critical feminist individuals or groups - to teach and preach and lobby and proselytise, on any matters relating to sexuality and/or gender, which conflicted with any of the official positions now adopted by the state. …

'Jellyfish legislation'

5.3 Like the (subsequently abandoned) Scottish draft Bill these proposals for NI legislation are perhaps best described as "jellyfish legislation". The concepts they use are impossible to grasp; the limits of the proposed legislation are wholly undefined; the proposed legislation for Northern Ireland contains a sting in the tail in the form of criminal sanction of up to 2 years and steep fines, without the possibility of seeking a trial before a jury of one's peers. If passed into law, this statute will have an undoubted and intended effect of dissuading persons from ever even entering the now murky waters of what may or may not constitute unlawful "conversion practices".

5.4 And these criminal sanctions could be imposed, among others:

- on parents who in bringing up their children, do not conform to the Northern Ireland state authorities' new dogmas on sex, sexuality and gender identity;

- on religious bodies whose teaching and preaching and religious practices in the area of sex, sexuality and gender identity run contrary to the state's approved doctrine on these matters;

- on political bodies, feminist groups and associations and NGOs and individuals who publicly disagree with, and seek to challenge and change the Northern Ireland state's new orthodoxies on sexual orientation and/or gender identity;

- on medical professionals who in their medical practice would dispute and dissent from what the Northern Ireland state authorities would now stipulate as, to use an Orwellian term, "goodthink" in relation to sex, sexuality and gender identity.

5.6 The proposals have serious consequences for individuals subject to the law, but if passed into law it would suggest the NI legislature has forgotten its duty to take seriously its obligations to maintain the conditions

of and for a liberal democracy, preferring instead to impose, by virtue of its possession of a monopoly on legitimate violence, its own vision of the good life.

An impossible law to navigate

5.10 The proposals for this legislation simply fail to define what are to become criminal "conversion practices". It will thus become impossible for individual parents and faith groups and medical practices and political associations to be able to know how to regulate their behaviour to avoid falling foul of the criminal law. The legislation fails too to define crucial terms as to just what constitute an individual's "gender identity", and just what behaviour is to be regarded as (attempted) "suppression" of either sexual orientation or gender identity.

5.11 In sum, if these individual Member's proposals for a Bill were to be enacted into legislation by the NI Assembly to criminalise "conversion practices", it would result in legislation which is ill-thought out, confused and confusing, and fundamentally illiberal in intent and effect.

Beyond legislative competence

5.12 I conclude, therefore, that there are very strong arguments indeed that, should these proposals for a private Member Bill promoted by Eóin Tennyson MLA before the Northern Ireland Assembly be passed into law in Northern Ireland, they would be beyond the legislative competence of that devolved legislature, primarily because of their over-breadth, their disproportionate intrusion into private and family life and freedom of religion and freedom of expression, but also because of their fundamental internal incoherence.