THE CHRISTIAN INSTITUTE

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the proposal by Eóin Tennyson, MLA (Alliance Party) for a Member's Bill to be introduced and promoted before the Northern Ireland Assembly with a view to outlawing in Northern Ireland "Conversion Practices" related to individuals' sexual orientation and separately to their "gender identity"

ADVICE

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1. INTRODUCTION

1.1 I refer to the E-mails of 22 January 2025 and 4 March 2025 from my instructing solicitor, Sam Webster of The Christian Institute.

1.2 My advice is sought by The Christian Institute in relation to a proposed individual Member's Bill before the Northern Ireland Assembly being promoted by Eóin Tennyson MLA (Alliance Party) in relation to the outlawing in Northern Ireland of "Conversion Practices" related to individuals' sexual orientation and separately to their "gender identity".

2. THE PROPOSED MEMBER'S BILL TO OUTLAW CONVERSION PRACTICES IN NI

2.1 The proposed Bill is currently termed the "Conversion Practices Prohibition (NI) Bill". Its avowed intent is

> "to end conversion practices in Northern Ireland; sending a clear signal that practices which attempt to change or suppress an individual's sexual orientation and/or gender identity are wrong, that they are harmful to individuals and society, and will constitute an offence".

2.2 The proposal as published relies upon the definition of "conversion practices" put forward by the NI LGBTQI+ Strategy Expert Advisory Panel which is said to be to the following effect:

> "techniques intended to *change or suppress* someone's sexual orientation or gender identity, recognising that this includes attempts to stop someone *expressing* their sexual orientation or gender identity." [1]

[1] The Northern Ireland Executive's LGBTQI+ Strategy Expert Advisory Panel publication *Themes and Recommendations* (December 2020) more fully provides at para 3.12 as follows:

> **"3.12 Conversion Therapy**

2.3 In justification for this measure, reference is also made to, and reliance placed upon, the United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity ("IESOGI") report which states that "conversion therapy" is used as an umbrella term to describe interventions of a wide-ranging nature, all of which have the common belief that a person's sexual orientation or gender identity can and should be changed.

2.4 The promoter of this proposed Member's Bill also noted in relation to the situation at a UK level:

> "The UK Government committed in its 2018 LGBT Action Plan to end the practice of conversion therapy and published a consultation in October 2021. However, a Bill has *not* been included in the UK Government's legislative programme for the UK 2023-2024 parliamentary session."

2.5 As regards the position in relation to devolved institution of government in Northern Ireland, the promoters note that in an NI Assembly Opposition Day debate on the subject on 4 June 2024, the Minister did *not* commit to bringing forward legislation to ban conversion practices before the end of the Assembly mandate. Legislation to ban conversion practices has not appeared in the Assembly's legislative programme for 2024-2025. And certainly the response to the promoter from the Minister for

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There is currently no internationally accepted definition of 'conversion' or 'reparative' therapies, but they can broadly be defined as 'techniques intended to *change* someone's sexual orientation or gender identity'. They may *also* seek to *stop* a person *expressing* their sexual orientation or gender identity (for example, by persuading individuals to deny their sexual orientation *and be celibate*, or to stop dressing in their affirmed gender).

Conversion therapy (CT) can take many forms, ranging from pseudo-psychological treatments, aversion therapies as well as practices that are religiously based (such as 'healing prayer' or deliverance ministry). At its most extreme, there is evidence that this can also involve so-called 'corrective' rape.

The term 'conversion therapy' encompasses all medical, psychiatric, psychological, religious, cultural or any other interventions that seek to erase, repress or change the sexual orientation and/or gender identity of a person, including aversive therapies or any other procedure that involves an attempt to convert, cancel or suppress sexual orientation, gender identity and/or gender expression. In its 'therapeutic' forms it is a scientifically discredited, unprofessional and dangerous practice.

Conversion therapy does *not* include practices that:
- *assist* a person who is undergoing a gender transition;
- *assists* a person who is considering undergoing a gender transition;
- *assist* a person to express their gender identity;
- provide *acceptance*, support and understanding of a person; or
- facilitate a person's coping skills, social support and *identity exploration* and development."

Communities, Gordon Lyons MLA in his letter of 14 September 2024, is somewhat non-committal, noting (emphasis added):

> "As Minister with responsibility for development of the Executive's Sexual Orientation Strategy, *I am fully aware that a ban on conversion practices is a complex, sensitive and, in my view, cross-cutting issue*. Officials within my Department have carried out initial work, which commenced in the last mandate, on the formulation of policy around this issue.
>
> The development of effective legislation takes time and the necessary steps must be taken to ensure that it is robust, precise and fit for purpose. The extent of the complexity of any potential ban is evidenced by the work in other jurisdictions on the issue and there is currently no existing legislation which exclusively bans conversion practices in any part of the UK. A draft Bill to ban conversion practices, extending to England and Wales, was set out in the recent King's Speech. The Scottish Government have completed a public consultation on proposals for legislation to end conversion practices.
>
> I and my officials will continue to closely monitor and take account of developments in other jurisdictions regarding their proposals for such a ban."

2.6 Apparently undaunted, the promoter of the proposed Member's Bill also references what is termed as a "Growing momentum to tackle Conversion Practices in neighbouring jurisdictions" in noting as follows:

> "The Scottish Government in its 2022-23 Programme for Government committed to introducing a Bill on ending conversion practices and launched a public consultation on the planned laws in January 2024.
>
> The Welsh Government announced in April 2022 that it intends to establish a dedicated campaign to address conversion practices.
>
> In Ireland, Minister for Children, Equality, Disability, Integration and Youth, Roderic O'Gorman, announced in January 2023 that the Irish Government is committed to bringing forward a ban on the use of 'conversion therapy' and legislation is being prepared. Priority drafting commenced in Autumn 2023."

2.7 It is the (currently apparently stalled) legislative proposals put forward by the Scottish Government in 2024 to:

- create a new criminal offence of engaging in conversion practice, as well as an offence of removing a person from Scotland for the purposes of conversion practice;
- create a new statutory aggravator pertaining to conversion practice; and
- create new conversion practice civil protection orders

which are said by the promoter of this proposed NI Bill to be the most useful template for the proposed legislation for NI and to "provide a potential model upon which legislation for Northern Ireland could be developed", with the promoter noting, however, that in Northern Ireland:

- any provisions pertaining to statutory aggravators may be more appropriately progressed via an amendment to the Executive's proposed Sentencing Bill; and
- the introduction of civil protection orders is likely to carry significant resource implications for the justice system, and so would be most appropriately progressed by the Department of Justice.

2.8 Accordingly in an attempt to avoid a situation whereby the contents of the NI Bill may be considered to be "cross-cutting" and/or to carry significant financial implications, the promoter suggests that the focus of his proposed Member's Bill be primarily on the creation of new conversion practice related criminal offences in Northern Ireland, namely:

(1) a new statutory offence of engaging in conversion practice; and

(2) a new statutory offence of removing a person from Northern Ireland for the purposes of conversion practice.

The promoter observes that in his view such a purely criminal justice approach would mean that the Department of Justice would be the appropriate legislative lead department (given its responsibility for criminal justice matters in Northern Ireland).

2.9 The promoter indicates that this proposed new offence of engaging in conversion practice would require both a specific and identified individual "victim" and that the conversion practice at issue pertain to the accused causing that victim physical or psychological harm.

2.10 In developing the "harm" requirement for the purposes of the offence, the promoter indicates that he considered and took into account the relevant provisions of the Protection from Stalking Act (Northern Ireland) 2022. [2]

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[2] Sections 1 and 6 of the Protection from Stalking Act (Northern Ireland) 2022 provide, so far as relevant, as follows:

"1.— Offence of stalking

(1) A person ('A') commits an offence (in this Act referred to as the offence of stalking) where—

(a) A engages in a course of conduct,

(b) A's course of conduct—

(i) causes another person ('B') to suffer *fear, alarm or substantial distress*, or

(ii) is such that a reasonable person, or a reasonable person who has any particular knowledge of B that A has, would consider to be likely to cause B to suffer fear, alarm or substantial distress ...

...

6.— Meaning of act associated with stalking and risk associated with stalking

...

(6) A reference to being a victim of acts associated with stalking is a reference to being a target of the acts *or to suffering physical or psychological harm* because of, or otherwise being a victim of, the acts"

2.11 By way of *mens rea* on the part of the individual accused of engaging in conversion practices, it is proposed that there must be an ***intention*** that the sexual orientation or gender identity of the person subjected to these conversion practices would be either *suppressed* and/or *changed*.

2.12 It is proposed that the *actus reus* needed to constitute *unlawful* conversion practice requires either "a course of *coercive* behaviour" or "the provision of a service".

2.13 In defining "coercive behaviour" for the purposes of this proposed legislation, the promoter refers both to the definition of "abusive behaviour" already set out in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021, [3] and the similar definition employed in the proposed Scottish legislation, namely:

- behaviour directed at B that is violent,
- behaviour directed at B that is threatening,
- controlling, regulating or monitoring B's day-to-day activities,
- depriving a person of freedom of action,

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[3] Section 2 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 provides as follows:

> **"2.— What amounts to abusive behaviour**
> (1) This section contains provision for determining for the purposes of this Chapter when behaviour
> of a person ('A) is abusive of another person ('B').
>
> (2) Behaviour that is abusive of B includes (in particular)—
> (a) behaviour directed at B that is violent,
> (b) behaviour directed at B that is threatening,
> (c) behaviour directed at B, at a child of B or at someone else that—
> (i) has as its purpose (or among its purposes) one or more of the relevant effects,
> or
> (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects.
>
> (3) The relevant effects are of—
> (a) making B dependent on, or subordinate to, A,
> (b) isolating B from friends, family members or other sources of social interaction or support,
> (c) controlling, regulating or monitoring B's day-to-day activities,
> (d) depriving B of, or restricting B's, freedom of action,
> (e) making B feel frightened, humiliated, degraded, punished or intimidated.
>
> (4) In subsection (2)—
> (a) the reference in paragraph (a) to violent behaviour includes both sexual violence and
> physical violence,
> (b) in paragraph (c), 'child' means a person under 18 years of age.
>
> (5) None of the paragraphs of subsection (2) or (as the case may be) (3) is to be taken to limit the meaning of any of the other paragraphs of that subsection."

- making a person feel frightened, humiliated, degraded, punished or intimidated.

2.14 In separately outlawing even the provision of a *non-coercive service* the intended outcome of which is that a person's sexual orientation or gender identity will be changed or suppressed, the promoter states that his approach draws on jurisdictions that have focused legislation on medical interventions or formal treatments or services, such as Canada and Germany.

2.15 The promoter says this provision is intended "to address a situation whereby a conversion practice is undertaken by a person who *claims* to have a particular knowledge, skill or expertise and where the act is purported to be delivered as, or used as, a method to effect a change or suppression" but "it is not the intention that the Bill interfere with the legitimate provision of medical or psychological care that is conducted ethically by a healthcare professional according to relevant rules and guidelines".

2.16 In order to ensure this distinction between "legitimate and ethical provision of medical or psychological care by a healthcare professional according to relevant rules and guidelines" (which, it is asserted, continues to be allowed under this legislation) and the conversion practices that are to be outlawed, which are carried out by a person who "*claims* to have a particular knowledge, skill or expertise and where the act is purported to be delivered as, or used as, a method to effect a change in or suppression" of an individual's sexual orientation and/or their "gender identity", it is suggested by the promoter (without further elaboration) that an "'avoidance of doubt clause' could be included in this respect, drawing on the Scottish experience."

2.17 Expressly continuing to draw on the proposed Scottish legislation, the promoter also suggests that in Northern Ireland the following sentencing range should be considered:

- on summary conviction: imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.
- on conviction on indictment (solemn procedure): imprisonment for a term not exceeding 7 (seven) years, or to an unlimited fine, or both.

2.18 It is said that provision is to be made for a statutory defence to the effect that the accused's conduct was reasonable in the circumstances.

2.19 As regards the second new offence of "removing a person from Northern Ireland for the purposes of conversion practice", it is proposed that a new offence is created to cause

someone who is habitually resident in Northern Ireland to leave Northern Ireland, with the intention that they will undergo conversion practices. Once again it is expressly said to draw on the proposed Scottish Bill to include illustrative examples of behaviours which are likely to demonstrate that one person *forced* another to leave Northem Ireland for the purposes of conversion practice, such as:

- Paying travel and accommodation costs;
- Making travel arrangements.

2.20 In relation to this distinct offence of "removing a person from Northern Ireland for the purposes of conversion practice" the promoter proposed that the following sentencing range be considered:

- on summary conviction: imprisonment for a term not exceeding 12 (twelve) months, or a fine, or both
- on conviction on indictment: imprisonment for a term not exceeding 3 (three) years. or a fine, or both.

2.21 On 5 December 2024 the Alliance Party and Eóin Tennyson as the individual Alliance MLA promoting the proposed Member's Bill to ban conversion practices in Northern Ireland launched their own public consultation on these proposals. This consultation runs for fifteen weeks until 20 March 2025. The consultation document effectively re-presents for public comment the proposals for the Bill as outlined above, introduced by the following remarks (among others):

> "Conversion Practices, which aim to change or *suppress* an individual's sexual orientation or gender identity, are inherently harmful and violate the human rights of those subjected to them. Alliance MLA Eóin Tennyson is proposing a Private Members' Bill to end conversion practices in Northern Ireland, and protect individuals and society from the harm that they cause.
>
> In developing these proposals, we have considered and learned from the approach taken in the Domestic Abuse and Civil Proceedings Act 2021, proposed legislation to ban conversion practices in Scotland, as well as the approach taken in other jurisdictions.
> ...
> Not all forms of conversion practices are currently covered by existing offences, for example, talking therapy aimed at suppressing or changing someone's sexual orientation or gender identity is not likely to be prosecutable under existing law. The proposed Bill would create two new criminal offences to address gaps in existing law:
> (1) An offence of engaging in conversion practice; and
> (2) An offence of removing a person from Northern Ireland for the purposes of conversion practice."

2.22 The NI Department of Justice, in its reply to this proposal and public consultation, has noted that following devolution of justice matters in 2010, authority for the development and introduction of criminal and civil offences and penalties was devolved to *each* Northern

Ireland Assembly Department. Therefore, the private member was advised that it falls to the particular Department said to "own" the overarching policy area to consider any related proposals, including how issues should be dealt with by the criminal and civil justice systems.

2.23 On the basis that the substantive policy in relation to Conversion Practices in Northern Ireland rests with the Department for Communities, the NI Justice Minister states that the NI Department of Justice has no plans to legislate on this issue.

2.24 In her letter to Eóin Tennyson MLA dated 16 December 2024, the NI Justice Minister Naomi Long MLA nonetheless states that she is "fully supportive of the proposals in your Private Members' Bill. As you rightly outline, conversion practices are harmful and erode the dignity and human rights of those subjected to them".

2.25 She also notes that, in the view of the Department of Justice, the proposed offences and penalties are consistent and proportionate as they have drawn on existing offences in the Domestic Abuse & Civil Proceedings Act (NI) 2021 and the Protection from Stalking Act (NI) 2022.

2.26 She finally advises that, as both of the proposed offences carry penalties on summary conviction for more than 6 months, then: a consequential amendment will be required to Article 29(1) of the Magistrates' Court (Northern Ireland) Order 1981 for exemption from jury trial purposes; and that both new offences will need to be listed under Article 29(1) of the Magistrates' Court (NI) Order 1981.

3. THE APPLICABLE PROCEDURE FOR LEGISLATION OF THE NI ASSEMBLY

3.1 It appears to be a matter of agreement between the NI Justice Minister and the NI Minister for Communities that given that it is the Department for Communities which has responsibility for development of the NI Executive's Sexual Orientation Strategy then – and notwithstanding that this proposed Member's Bill will take a purely criminal justice approach to the issue of conversion practices – it is the Department for Communities which would be the appropriate legislative lead department.

3.2 It may also be noted in this regard that the December 2020 publication "Themes and Recommendations" authored and produced by the Northern Ireland Executive's LGBTQI+ Strategy Expert Advisory Panel contains the following opening remarks:

"**Theme 1. LGBTQI+: Rationale for the Strategy Name**

The Panel agreed that the title of the Strategy should the 'LGBTQI+ Strategy' - Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex + - encompassing the diversity of the LGBTQI+ community beyond simply the issue of sexual orientation.

Some people argue that sexual orientation and gender identity issues should be kept separate as the experiences of these communities can be incomparable. It was the view of the Panel that these issues are inseparable for a number of reasons.

- Many of the issues experienced across our communities are similar or connected.
- Many trans people are gay, lesbian, bisexual or another minority sexual orientation.
- Trans people have always been present in the LGB+ community."

3.3 This LGBTQI+ Strategy Expert Advisory Panel appears to consider that any legislation involving the regulation of Conversion Practices in Northern Ireland should also involve the NI Department of Health. It specifies as among its Recommendations for LGBTQI+ Strategy Outcomes (under both its Theme 3 "Healthcare" and its Theme 6 "Rights and the Law") that "Conversion therapy has ended in Northern Ireland", giving the following narratives as the basis for this recommendation

"**6.2 Conversion or Reparative Therapy (CT)**
Conversion therapy (CT) is any practice designed to change a person's sexual orientation or gender identity. It can be distinguished from other practices designed to provide guidance and support to LGBTQI+ people provided by psychotherapists, counsellors or faith leaders because it operates under the premise that a specific sexual orientation, gender identity, or gender expression is pathological and/or evidence of a mental illness that can be cured. Unlike therapies that facilitate a person's open and autonomous exploration of their sexual and gender futures, these therapies are discriminatory from the outset because CT designates identities into normal and abnormal categories. As such, it is proscriptive because it attempts to modify identity into traditional heterosexual and cis-gendered models. It includes both pseudo-psychological treatments and physical interventions. In its 'therapeutic' forms it is a scientifically discredited, unprofessional and dangerous practice.
...
Practices of CT target a specific group on the exclusive basis of sexual orientation and gender identity, with the specific aim of interfering with a person's autonomy. In that sense, such practices are intrinsically discriminatory. As CT is an unscientific practice and based on prejudicial ideas that the person is sick, diseased, and abnormal, research confirms that its effects include feelings of powerless and extreme humiliation, feelings of shame, guilt, self-disgust, and worthlessness, suicidal ideation, suicide attempts, and PTSD.

Minors are particularly vulnerable to CT and research has shown that it amplifies the shame and stigma so many LGBTQ+ young people already experience. The State has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by CT.

As it creates long-term harm to the individual, it increases the costs of health care as resources must be spent on repairing its psychological and physical effects.

In terms of possible actions for LGBTQI+ Strategy, the research suggests that the following should be illegal.

- Any practice (medical, therapeutic or otherwise) aimed at changing or suppressing a person's sexual orientation or gender identity.
- Attempts to rebrand or reshape CT practices in order to subvert legal prohibitions.
- Causing a person to undergo CT against their will.
- Causing a minor to undergo CT.
- Profiting from providing CT.
- Advertising an offer to provide CT.

In addition, a robust system for investigating claims of CT practice is required. The Department of Health should ensure the following:

- The Department does not commission or provide funding for practices that seek to change a person's sexuality or self-defined gender identity to a normatively 'preferred' model.
- Practitioners offering counselling or therapeutic services to LGBTQI+ clients or patients have adequate knowledge and understanding of gender and sexual diversity and are free from any agenda that favours one gender identity or sexual orientation as preferable over other gender and sexual diversities.
- Organisations with practice members will ensure through training and/or published guidelines that the relevant principles in their statements of ethical practice are applied when working with LGBTQI+ clients, as pertaining to standards of professional competent and non-discriminatory practice.
- Licence to practise is suspended pending investigation of a complaint and may be withdrawn if CT is offered or practised.
- Free access to appropriate medical services for those who continue to experience the harmful psychological and physical effects of CT."

3.4 It would appear therefore that any proposed legislation in this area of regulating or outlawing conversion practices in Northern Ireland would involve "cross-cutting" legislative change, that is to say that the subject of the proposed Bill raises issues which cut across the responsibilities of two or more Ministers of the NI Executive in that the "matter affects the exercise of the statutory responsibilities of one or more other Ministers *more than incidentally*": qv subsection 20(8) of the Northern Ireland Act 1998 ("NIA 1998"). Accordingly the subject matter of the proposed Bill engages the functions of the Executive Committee under and in terms of Section 20(3) NIA 1998, [4] read with paragraph 19 of Strand One of the Belfast Agreement which provides that:

> "19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which *cut across the responsibilities of two or more Ministers,* for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships)."

[4] Section 20 NIA 1998 provides, so far as relevant, as follows:

> **"20.— The Executive Committee.**
> (1) There shall be an Executive Committee of each Assembly consisting of the First Minister, the deputy First Minister and the Northern Ireland Ministers.
>
> (2) The First Minister and the deputy First Minister shall be chairmen of the Committee.
>
> (3) The Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement. …"

3.5 Separately the Bill's proposals for the regulation/ending/outlawing of Conversion practices in Northern Ireland may be said to be a significant or controversial matter that is clearly outside the scope of the current programme (incorporating an agreed budget linked to policies and programmes) which has been agreed by the Executive Committee and approved by the NI Assembly, after scrutiny in Assembly Committees on a cross-community basis, all under and in terms of paragraph 20 of Strand One of the Belfast Agreement. [5] Accordingly the subject matter of the proposed Bill engages the functions of the Executive Committee under and in terms of Section 20(4)(a) NIA 1998. [6] As has been noted by the Court of Appeal of Northern Ireland in its decision *Re No Gas Caverns Ltd's Application for Judicial Review* [2024] NICA 50 at paras 45, 52-53:

> [45] The relevant section clearly refers to any significant or controversial matter. Thus, applying ordinary and natural meaning to the provision it seems clear to us that a matter does <u>*not*</u> have to be *both* significant and controversial to require referral to the Executive Committee. It can be significant or controversial or both.
> ...
> [52] An obvious starting point is the Oxford Dictionary definition of significant and controversial:
>
> > "Significant means sufficiently great or important to be worthy of attention; noteworthy."
> >
> > "Controversial means giving or likely to give rise to controversy or public disagreement; subject to (heated) discussion or debate; contentious."
>
> [53] How these words relate to a particular project is a matter of fact and degree, involving some element of judgment by the decision maker within the context of what arises in a particular ministerial portfolio.

3.6 This also means that the proposals concerning Conversion Practices as set out in the Member's Bill bring into play section 2.4(i) and (v) of the NI Ministerial Code (which has

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[5] Paragraph 20 of Strand One of the Belfast Agreement provides that:

> "20. The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis."

[6] Section 20(4) NIA 1998 provides, so far as relevant, as follows:

> **"20.— The Executive Committee.**
> ...
> (4) The Committee shall also have the function of discussing and agreeing upon–
>
> > (a) where the agreed programme referred to in paragraph 20 of Strand One of that [Belfast] Agreement has been approved by the Assembly and is in force, any significant or controversial matters that are clearly outside the scope of that programme;
> >
> > (aa) where no such programme has been approved by the Assembly, any significant or controversial matters;
> >
> > (b) significant or controversial matters that the First Minister and deputy First Minister acting jointly have determined to be matters that should be considered by the Executive Committee"

been given statutory effect by Section 28A(1) NIA 1998 as amended) and which provides as follows:

> "**Duty to bring matters to the attention of the Executive Committee**
> 2.4 Any matter which:
> (i) cuts across the responsibilities of two or more Ministers;
> ...
> (v) is significant or controversial and is clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Agreement
> ...
> shall be brought to the attention of the Executive Committee by the responsible Minister to be considered by the Committee.
> ...
> Regarding (i), Ministers should, in particular, note that:-
> - the responsibilities of the First Minister and deputy First Minister include standards in public life, machinery of government (including the Ministerial Code), public appointments policy, *EU issues*, economic policy, *human rights, and equality*. Matters under consideration by Northern Ireland Ministers may *often* cut across these responsibilities."

3.7 Again in *Re No Gas Caverns Ltd's Application for Judicial Review* [2024] NICA 50 the Court of Appeal of Northern Ireland observed (at para 46) in its decision

> "[P]aragraph 2.4 of the Ministerial Code (alongside section 28A NIA 1998) is clear that a matter *must* be referred [to the Executive Committee] if it is cross-cutting in the sense of affecting the exercise of the statutory responsibilities of more than one minister more than incidentally."

3.8 And the Ministerial Code, subsection 28A(10) NIA 1998 (when read together with subsection 28A(5) NIA 1998) provides, in effect, that

> "a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code .... requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4) [NIA 1998], to be considered by the Committee"

3.9 What this all means in terms of the settlement for devolved government in Northern Ireland under the NIA 1998 (as amended notably by the Northern Ireland (St Andrews Agreement) Act 2006 and by the Executive Committee (Functions) Act (Northern Ireland) 2020) and its associated national and international agreements was set out in *Re Buick's Application for Judicial Review* [2018] NICA 26 where the Court of Appeal of Northern Ireland (Morgan LCJ, Stephens LJ and Treacy LJ) observed as follows:

> "22. ... The [Belfast] Agreement provides that all of the Northern Ireland Departments are to be headed by a Minister. Ministers have to affirm the Pledge of Office undertaking to discharge effectively and in good faith all the responsibilities attaching to their office. Unlike the position in the other jurisdictions it was intended that Ministers should have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole. *The intent of the Agreement, therefore, was that*

there should be no collective responsibility in respect of the areas allocated to individual Ministers

…

32. … By virtue of section 17(3) of the Northern Ireland Act 1998 the First Minister/Deputy First Minister were to ensure that the functions exercisable by those in charge of the different Northern Ireland Departments were exercisable by the holders of the *different* Ministerial offices. That clearly reflects the intention of the Agreement that Ministers should head Departments and be politically accountable for what happened within those Departments.

…

52. … There is no support in the Agreement for the suggestion that cross-cutting matters can be dealt with by departments in the absence of ministers and the allocation of responsibility for such matters within the 1998 Act to the Executive Committee can only be properly interpreted as *excluding the departments from the determination of such matters*

…

[58] The decision made by the Department was crosscutting, significant and controversial. It was, therefore, a decision which could *only* be taken by the Executive Committee."

3.10 Separately paragraph 29 of Strand 1 to the Belfast (Good Friday) Agreement 1998 specifies that "Legislation [of the Northern Ireland Assembly] could be initiated by an individual, a Committee or a Minister". Standing Order 30 of the Northern Ireland Assembly accordingly refers to the possibility of individual MLAs initiating NI legislation by introducing Members' Bills. But the NI Assembly has resolved that a Member's Bill is *not* an appropriate vehicle "to progress significantly complex or cross-cutting legislative change".

3.11 However it remains the case that any MLA remains entitled to prepare a Bill for Introduction outside of the Assembly Committee-supported process. The Assembly has agreed with the recommendation contained in the Committee on Procedures' Inquiry Report on Members' Bills (which was agreed by the Assembly on 14 March 2022) that privately-drafted Members' Bills must undertake a public consultation (with minimum 12-week period of consultation) and engage with the relevant Minister(s) on their intention to legislate and seek views.

3.12 It is stated in the *Handbook for Members' Bills for the 2022 to 2027 Mandate* (which was published in May 2024 and which sets out the Arrangements for the Development of Members' Bills for Introduction to the Northern Ireland Assembly) that no privately-drafted Bill will be processed for Introduction before the Assembly without satisfying these requirements. Further any Member's Bill must incorporate into it an Explanatory and Financial Memorandum ('EFM'). The completion of the EFM is the responsibility of the

Member and this process is not assisted in the way Assembly Committee-supported Bills are. The Members Handbook also contains the following admonition:

"113. Bills which are not drafted by experienced legislative drafters carry increased risks of deficiencies and potentially unidentified issues around legislative competence etc. Members should bear this in mind when determining how they wish to draft their Bill.

"114. Even if policy issues appear simple, there are often complex legal issues to be navigated.

Every law that is passed must interact with existing laws in a coherent and effective way and there are often unforeseen issues to be addressed.

Legislation which is simply cut and pasted from other jurisdictions without further consideration may not be compatible with the law in Northern Ireland.

The importance of the Assembly making effective legislation goes to its standing as a parliamentary institution."

4. LIMITS ON THE LEGISLATIVE COMPETENCE OF THE NI ASSEMBLY

4.1 Section 6 NIA 1998 relevantly provides as follows in relation to the limits on the legislative competence of the NI Assembly:

"**6.— Legislative competence.**
(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.

(2) A provision is outside that competence if any of the following paragraphs apply—
(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;
(b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;
(c) it is incompatible with any of the Convention rights;
(ca) it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);
(d) **[…]**
(e) it discriminates against any person or class of person on the ground of religious belief or political opinion;
(f) it modifies an enactment in breach of section 7 [NIA 1998]…".

4.2 Separately Section 29 NIA 1998 sets out the following statutory limitation on the powers of the (Ministers of the) Northern Ireland executive.

24.— Convention rights etc.
(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—
(a) is incompatible with any of the Convention rights;
(aa) is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);

(b) ...
(c) discriminates against a person or class of person on the ground of religious belief or political opinion;
(d) in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground; or
(e) in the case of legislation, modifies an enactment in breach of section 7.

(2) Subsection (1)(c) and (d) does not apply in relation to any act which is unlawful by virtue of the Fair Employment and Treatment (Northern Ireland) Order 1998, or would be unlawful but for some exception made by virtue of Part VIII of that Order.

Continuing relevance of EU law in an NI context

4.3 The UK/European Union Withdrawal Agreement is an international treaty, concluded between the UK and the European Union (on behalf of its Member States). It formalises the UK's exit from the EU. The Agreement was signed on 24 January 2020 and entered into force on 1 February 2020. Built into the Agreement was a transition period, whereby it was agreed that EU law would remain applicable in the UK until 23:00 on 31 December 2020. It is on that date that the general corpus of EU law ceased to have effect in the UK as it had while the UK was a Member State.

4.4 Nonetheless, contained within the EU/UK Withdrawal Agreement is an obligation placed as a matter of international law on the UK for it to give full effect to applicable EU law, even after Brexit and the end of the post-Brexit implementation/transition period. The relevant provision here is article 4, which is in the following terms:

"**Methods and principles relating to the effect, the implementation and the application of this Agreement**
1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

4.5 Article 2 of the Protocol on Ireland/ Northern Ireland in the EU/UK withdrawal agreement (which is referred to in Section 6(2)(ca) and 24(1)(aa) NIA 1998 as setting limits on the powers of the NI Assembly and NI Ministers and Department) provides as follows:

"Rights of individuals

1.The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 [Good Friday or Belfast] Agreement [between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations which is annexed to the British-Irish Agreement of the same date (the "British-Irish Agreement")] entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area *of protection against discrimination*, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

2.The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

4.6 The Rights, Safeguards and Equality of Opportunity provisions contained within the Belfast/Good Friday Agreement include the following:

"**HUMAN RIGHTS**

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.

United Kingdom Legislation

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

[…]

A Joint Committee

10. It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other

matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland."

4.7 The Northern Ireland Human Rights Commission ("NIHRC") and the Equality Commission for Northern Ireland ("ECNI") are both charged under Section 78A and 78B NIA 1998 respectively with the duty of monitoring and reporting on the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement. Section 78E NIA 1998 provides that the NIHRC and the ECNI "may arrange for any of their functions under sections 78A to 78D to be carried out by one of them acting on behalf of the other (or by them acting jointly)".

4.8 The EU-UK Withdrawal Agreement was incorporated into domestic UK law by the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020. Section 7A of the 2018 Act incorporated EU law with ongoing effect into UK domestic law post-Brexit, including rights, obligations, remedies etc arising "by or under" the Withdrawal Agreement.

4.9 In *Re Dillon's Application for Judicial Review* [2024] NICA 59, the Court of Appeal of Northern Ireland in a judgment handed down on 20 September 2024, held that Section 7A of the European Union (Withdrawal) Act 2018 performed the same constitutional function as had previously been performed by Section 2 of the European Communities Act 1972 such as to maintain, within the sphere of at least the Ireland/Northern Ireland Protocol to the Withdrawal Agreement the principle of the primacy of EU law over all and any incompatible provisions of UK law (whether contained in statutory regulations or in primary Acts of Parliament) as well as the direct effect of EU law allowing its clear, precise and unconditional provisions to create EU law rights of individuals which could be prayed in aid horizontally (against all parties) or vertically (only as against "emanations of the State"). [7] The Northern Ireland Appeal Court noted as follows (at paras 65, 68-69):

"65. In essence, then, section 7A [of the 2018 Act] transfers, by way of 'conduit pipe', the relevant provisions of EU law deemed applicable into the domestic law of the UK. This includes rights, obligations, remedies, etc. arising "by or under" the Withdrawal Agreement. The Withdrawal Agreement itself has essentially replaced the Treaties as the means by which EU law obligations may arise and/or continue to apply within the

[7] See Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1 where the European Court of Justice first ruled that a provision of the Treaty may, as a matter of Community law, have direct effect within the national legal orders of the Member States. To have such direct effect the Community law provision in question had to be (i) clear, (ii) unconditional (in the sense of not allowing for any reservations on the part of the Member States) and (iii) not dependent on any subsequent further implementation measures to be adopted by the Member State or by the Community.

UK, either arising from the terms of the Withdrawal Agreement itself or under its provisions. This includes, article 4 WA, article 2(1) of its Ireland/Northern Ireland Protocol [also now known as the "Windsor Framework"] and a variety of other obligations arising in or under the Withdrawal Agreement.

The condition in section 7A(1) is simply that the relevant obligations "in accordance with the withdrawal agreement are without further enactment to be given legal effect." Whether that is the case in relation to a particular obligation will have to be answered by considering its wording and construing the withdrawal agreement, particularly by reference to articles 2 and 4 WA. The key question, pursuant to article 4(1) WA, will be whether the relevant obligation meets the conditions for direct effect under EU law.

...

68. The omnibus conclusion of both courts in *in Re Allister and Others v Secretary of State for Northern Ireland* [2022] NICA 15 [2023] NI 107 which was upheld on appeal to the UKSC in *Re Allister's JR* [2023] UKSC 5 [2024] AC 1113 was that the Ireland/Northern Ireland Protocol was given effect by section 7A of the EUWA 2018.

69 Of course, the context of *Allister*, which asked whether section 7A displaced article VI of the Union with Ireland Act 1800 and which was principally concerned with trade, was different from the context of the instant case, where we are concerned about the potential diminution of human rights protections. However, the pronouncements made in *Allister* clearly illustrate the potential legal effect of section 7A and, as a result of it, the Ireland/Northern Ireland Protocol. The *Allister* case proceeded on the basis that section 7A gave effect to the Ireland/Northern Ireland Protocol and, in turn, gave effect to the will of Parliament that the Ireland/Northern Ireland Protocol should have powerful legal effects within the UK, including the possibility of prevailing over primary legislation. This starting point is of intrinsic value to the analysis in the present case."

4.10 The NI appeal court in *Dillon* also reaffirmed and endorsed the approach which it had set out in its decision in *Re SPUC's Application* [2023] NICA 35 [2024] 2 CMLR 20. In the earlier case the court presented a structured way to determine whether or not any particular post-Brexit legal development constituted a "diminution of rights" in breach of Article 2 of the Ireland/Northern Ireland Protocol to the EU/UK Withdrawal Agreement. The court noted in *Re SPUC* as follows at paras 54-55:

"54 The appellant, in making this challenge, has to establish a breach of Article 2 [of the Ireland/Northern Ireland Protocol] satisfying the six elements test, namely:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
(iii) That Northern Ireland law was underpinned by EU law.
(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.
(v) This has resulted in a diminution in enjoyment of this right; and
(vi) This diminution would not have occurred had the UK remained in the EU.

55 Each one of these elements described above must be demonstrated for the ground to succeed. The relevant part of the first aspect is whether a right included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged. The relevant part of the 1998 Agreement itself states:

> "The parties affirm their commitment to the mutual respect, the civil rights, and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm, in particular, … the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.""

5. EXISTING POSITIVE OBLIGATIONS OF THE STATE UNDER THE ECHR AS REGARDS HOMOPHOBIA AND TRANSPHOBIA

5.1 The European Court of Human Rights case law is now to the effect that legal measures, whether they are directly enshrined in the law or adopted in case-by-case decisions, which are to the effect that the State authorities have a preference for some types of relationships and families over others – that they see different-sex relationships as more socially acceptable and valuable than same-sex relationships (thereby contributing to the continuing stigmatisation of the latter) - are incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

5.2 The Strasbourg Court has dismissed, as lacking any evidentiary basis, the claim that individuals may become homosexual as a result of being exposed to positive images of, or positive attitudes towards, homosexuality. [8] And a prohibition in national law against the dissemination of information "creating a distorted image of traditional and non-traditional sexual relationships as socially equivalent" has been found by the court to embody nothing more than bias on the part of a (heterosexual) majority against a (homosexual) minority. Such bias cannot justify in Convention terms the interference with individuals' rights to freedom of expression caused by such a prohibition.[9]

5.3 Indeed, the presentation of same sex relationships as being essentially morally equivalent to those between persons of different sexes has been said by the court properly to advocate respect for, and acceptance of, all members of a given society on this fundamental aspect of their lives. Thus in *Macatė v. Lithuania* (2023) 55 BHRC 277 the Grand Chamber of the European Court of Human Rights unanimously and unequivocally re-stated that contracting states are obliged under the ECHR to afford equality of respect as between same sex relationships and opposite sex relationships, noting (at § 214)

> "214. … [T]he Court makes clear that *equal and mutual respect for persons of different sexual orientations is inherent in the whole fabric of the Convention*. It follows that *insulting, degrading or belittling persons on account of their sexual orientation, or promoting one type of family at the expense of another is never acceptable under the Convention*…. [T]o depict, as the applicant did in her writings, committed

[8] *Bayev v. Russia* (2018) 66 EHRR 10 at §§ 74, 77 and 78

[9] *Bayev v. Russia* (2018) 66 EHRR 10 at §§ 68-69

relationships between persons of the same sex as being essentially equivalent to those between persons of different sex rather advocates respect for and acceptance of <u>all</u> members of a given society in this fundamental aspect of their lives…..

215. Moreover, the Court is firmly of the view that measures which restrict children's access to information about same-sex relationships solely on the basis of sexual orientation have wider social implications. Such measures, whether they are directly enshrined in the law or adopted in case-by-case decisions, demonstrate that the authorities have a preference for some types of relationships and families over others – that they see different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, are incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

216. In the light of the foregoing, the Court finds that where restrictions on children's access to information about same-sex relationships are based solely on considerations of sexual orientation – that is to say, where there is no basis in any other respect to consider such information to be inappropriate or harmful to children's growth and development – they do not pursue any aims that can be accepted as legitimate for the purposes of art 10(2) of the Convention and are therefore incompatible with art 10.."

5.4 And in *Romanov v. Russia* [2023] ECtHR 58358/14 (Third Section, 12 September 2023) the European Court of Human Rights reiterated (at § 70) that:

"Article 1 ECHR [which provides that The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention], taken in conjunction with Article 3 ECHR [which specifies that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"], imposes positive obligations on the States to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited by Article 3 ECHR, *including where such treatment is inflicted by private individuals*."

5.5 Thus, subjecting an individual to "physical or mental violence, injury, or abuse", or subjecting another to "torture or to inhuman or degrading treatment or punishment", already undoubtedly constitute criminal conduct in Northern Ireland.

5.6 A positive obligation has been said to be inherent in Article 3 ECHR (and in the right to respect for private and family life protected under Article 8 ECHR) requiring ECHR States to enact criminal-law provisions providing for effective punishment in respect of serious sexual offences inflicted on individuals, and to apply these provision *in practice* through effective police investigation and prosecution before the courts. (That said, however, there is no absolute Convention right to <u>*obtain*</u> the prosecution or conviction of any particular person.) [10] The measures required as a result of the positive obligations imposed under Article 3 ECHR "should, at least, provide effective protection in particular of children and

[10] *Szula v. United Kingdom* (2007) 44 EHRR SE19 237 at pp 239-240

other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge." [11]

5.7 And the case law of the European Court of Human Rights is clear that Article 3 ECHR cannot be limited to acts of physical ill-treatment; it may also cover the infliction of psychological suffering. [12] For example in *Hanovs v. Latvia* [2024] ECtHR 40861/22 (Fifth Section, 18 July 2024) the court observed as follows (at paras 42-43:

> "42 The Court considers that attacks on LGBTI individuals, triggered by expressions of affection, constitute an affront to human dignity by targeting universal expressions of love and companionship.
>
> The concept of dignity goes beyond mere personal pride or self-esteem, encompassing the right to express one's identity and affection without fear of retribution or violence. The attacks such as the one in the present case not only undermine the victims' physical safety but also their emotional and psychological well-being, turning a moment of intimacy into one of fear and trauma.
>
> Furthermore, they humiliate and debase the victims, conveying a message of inferiority of their identities and expressions, and therefore fall within the scope of Article 3 ECHR.
>
> 43. Beyond constituting an affront to human dignity, attacks on LGBTI individuals motivated by displays of affection profoundly affect their private lives. The fear and insecurity that such acts instil inhibit the victims' ability to express fundamental human emotions openly and force them towards invisibility and marginalisation. The threat of violence compromises their ability to live authentically and compels them to conceal essential aspects of their private lives to avoid harm.
>
> Consequently, such attacks may restrict their freedom to enjoy the right to respect for private life under Article 8 ECHR, as freely as different-sex couples, thereby imposing a differential standard on their expression of identity and relationships
> ....
>
> 48. ... [T]he Court finds that from the early stages of the proceedings the domestic authorities were presented with clear *prima facie* evidence of violence motivated by the applicant's sexual orientation. According to the Court's case-law, this required a rigorous application of domestic *criminal law mechanisms* capable of taking into account the homophobic overtones behind the attack and of prosecuting and if appropriate, adequately *punishing* those responsible
> ....
>
> 51. ... [T]he fact remains that, even after the applicant exhausted all domestic appeals to hierarchically superior prosecutors, the perpetrator was neither charged nor prosecuted for the hate-motivated attack....

[11] *Women's Initiatives Supporting Group and Others v. Georgia* [2021] ECtHR 73204/13 & 74959/13 (Fifth Section, 16 December 2021) at § 68

[12] See e.g. *Oganezova v. Armenia* (2022) 75 EHRR 20 at § 68

> "90. The Court has already found in several other cases concerning allegations of ill-treatment motivated by homophobia where the applicants had *not* suffered actual physical injuries that the threshold of Article 3 of the Convention had been attained"

52. … By resorting to administrative-offence proceedings in the present case, the domestic authorities trivialised the incident, treating a hate-motivated attack as equivalent to minor disturbances of public order, such as a drunken brawl. This approach suggests a failure to provide a robust response to an attack motivated by the applicant's sexual orientation, fostering a sense of impunity for hate-motivated offences rather than affirming a clear and uncompromising stance against such acts.

53. The Court concludes that the respondent State failed in its obligation under Articles 3 and 8 ECHR, read in conjunction with Article 14 ECHR, to provide adequate protection for the applicant's dignity and private life by ensuring the effective prosecution of the attack against him, while taking into account the hate motive behind the attack.

The Court emphasises the crucial importance for Contracting States to address impunity in cases of hate crimes, as they pose a significant threat to the fundamental rights protected by the Convention. Failure to address such incidents can normalise hostility towards LGBTI individuals, perpetuate a culture of intolerance and discrimination and encourage further acts of a similar nature.

54. There has accordingly been a violation of Articles 3 and 8 of the Convention, read in conjunction with Article 14."

5.8 In sum, the case law of the European Court of Human Rights is to the effect that treatment can be qualified as "degrading" (and thus fall within the scope of the prohibition set out in Article 3 ECHR):

- if it causes in its victim feelings of fear, anguish and inferiority;
- if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes (whether or not that was the aim);
- if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience; or
- if it shows a lack of respect for, or diminishes, human dignity. [13]

[13] Cf *Agdhgdomelashvili v. Georgia* (2021) 72 EHRR 15 at §§ 42, 44:

"42 The Court reiterates that article 3 ECHR cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, treatment can be qualified as "degrading"—and thus fall within the scope of the prohibition set out in article 3 ECHR —if it causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes, whether or not that was the aim, if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows a lack of respect for, or diminishes, human dignity. … Since interference with human dignity strikes at the very essence of the Convention, any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of art.3 of the Convention.

…

44. … Finally, the Court emphasises that treating violence and brutality with discriminatory intent, irrespective of whether they are perpetrated by state agents or private individuals, on an equal footing with cases that have no such overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with article 14 ECHR."

5.9 As we have seen from the decision in *Hanovs v. Latvia* noted above, Article 3 ECHR may also in certain circumstances be prayed in aid together with the prohibition against discrimination in the enjoyment of the substantive Convention rights set out in Article 14 ECHR. In *Minasyan and Others v. Armenia* [2025] ECtHR 59180/15 (Fourth Section, 7 January 2025) the European Court of Human Rights noted (at § 61)

> "Article 14 ECHR affords protection against discrimination in the enjoyment of the rights set forth in the Convention. According to the Court's case-law, the principle of non-discrimination is of a fundamental nature and underlies the Convention together with the rule of law, and the values of tolerance and social peace. In cases where the impugned statements are *prima facie* discriminatory in intent, the Court's analysis must also be coloured by the duties stemming from Article 14 of the Convention – in particular the duty to combat discrimination, including on the basis of one's sexual orientation, which the Court has repeatedly included among the "other grounds" protected under that provision"

5.10 More particularly, in a case involving a state's failure to protect a gay bar owner and activist from homophobic arson, physical and verbal attacks and to carry out effective investigation, the Strasbourg Court has held that:

> "discriminatory treatment can in principle amount to degrading treatment within the meaning of Article 3 ECHR where it attains a level of severity such as to constitute an affront to human dignity. More specifically, *treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3 ECHR*." [14]

5.11 The European Court of Human Rights has also acknowledged that:

> "[G]ender and sexual minorities required special protection from hateful and discriminatory speech because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected.
> ...
> [E]xpression that promotes or justifies violence, hatred, or intolerance in its gravest forms falls under Article 17 ECHR [which under the heading "Prohibition of abuse of rights" provides that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention] and is excluded entirely from the protection of Article 10 ECHR [which provides that "Everyone has the right to freedom of expression. ...."].
>
> As regards less grave forms of "hate speech", although they do not fall entirely outside the protection of Article 10 ECHR, it is permissible for the Contracting States to restrict them. The Court has accepted that it <u>*may*</u> be justified to impose even criminal-law sanctions in cases of hate speech or incitement to violence." [15]

[14] *Oganezova v. Armenia* (2022) 75 EHRR 20 at § 81

[15] *Nepomnyashchiy and Others v. Russia* [2023] ECtHR 39954/09 and 3465/17 (Third Section, 30 May 2023) at §§ 59, 74

5.12 Further, the Strasbourg Court has confirmed that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can, in certain circumstances, be sufficient for the authorities to favour combating hate speech in the face of freedom of expression exercised in an irresponsible manner. [16] This applies equally to hate speech directed against others' sexual orientation and what the European Court of Human Rights refers to as others' "sexual life". [17] Comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on their face, may in principle require the States to take certain positive measures. [18]

5.13 The Human Rights Act 1998 and the NIA 1998 when read together require, among other public authorities, the Northern Ireland Assembly, the NI Executive, the Police Service of Northern Ireland (PSNI) and the Public Prosecution Service for Northern Ireland (and separately the courts in Northern Ireland) to act in a Convention compatible

[16] See *Minasyan and Others v. Armenia* [2025] ECtHR 59180/15 (Fourth Section, 7 January 2025) at §§ 67-68:

> "67. … [T]he protection afforded by Article 10 ECHR to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. Article 10 ECHR does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of that provision, the exercise of this freedom carries with it "duties and responsibilities", which particularly apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there are attacks on the reputation of private individuals and the "rights of others" are undermined.
>
> 68. In the present case, the author of the article, believing homosexuality was a 'perversion' which should be stopped from becoming the norm in Armenia, vented his anger at the applicants because of their activism and their show of support for the LGBT community. The author in essence incited intolerance, hostility and discrimination against LGBT persons and those, like the applicants, who promoted their rights, with the obvious intention of frightening the applicants into desisting from their public expression of support for the LGBT community. In doing so, he used stereotypical and stigmatising labels such as "homosexual rights lobbyists" and "gay-campaign-supporting zombies", branded the applicants as "internal [enemies] of the Nation and the State" and advocated that they be blacklisted and subjected to specific acts of discrimination.
>
> 69. The Court cannot accept as an example of responsible journalism an article propagating hatred, hostility and discrimination against a minority, in this case the LGBT community, which, at the material time, appeared to be one of the main targets of widespread hostility, hate speech and hate-motivated violence in the country (see *Oganezova v. Armenia* (2022) 75 EHRR 20 at §§ 87-122, as well as the ECRI report and the third-party submissions in paragraphs 33 and 51 above respectively), and against those, like the applicants, who were active in promoting and defending the rights of that minority."

[17] *Association Accept v. Romania* (2022) 75 EHRR 15 at §§ 119, 123

[18] *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022) at § 119

manner (which includes taking such action as may be required as a matter of an ECHR positive obligation).

5.14 Accordingly, under the law as it currently stands in Northern Ireland, where individuals make credible assertions to the relevant authorities in Northern Ireland that they have suffered treatment infringing the standards set out in Article 3 ECHR, any unjustified failure or refusal by the PSNI to carry out, or the PPS to order, an effective investigation - and separately any decision by the PPS (as the public authority responsible for criminal prosecutions in Northern Ireland) to refuse to prosecute [19] - should, in principle, be able to be challenged before the courts in Northern Ireland (whether by way of separate satellite judicial review, or in the course of a criminal appeal. [20])

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[19] See Article 11 of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the "Victims of Crime Directive") which provides as follows

> *Article 11*
>
> **Rights in the event of a decision not to prosecute**
>
> 1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
>
> 3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.
>
> 4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.
>
> 5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out- of-court settlement, in so far as national law makes such provision.

This provision is implemented in Northern Ireland by the Victim Charter Victim Charter.pdf which was brought before the NI Assembly on 14 September 2015 and given the force of law by the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015 (SI 2015/370): qv Dillon's Application for Judicial Review [2024] NICA 59 at para 35:

> "[35] We have also considered the Victim Charter, as given effect by the Victim Charter (Justice Act (Northern Ireland) 2015) Order (Northern Ireland) 2015 and made pursuant to sections 28 and 31(3) of the Justice Act (Northern Ireland) 2015. The Explanatory Note that accompanies the 2015 Order expressly provides that the Charter "implements a range of obligations arising out of the EU Directive (2012/29/EU) [the VD] establishing minimum standards on the rights, support and protection of victims of crime.""

[20] See e.g.: *Re JR76's Application for Judicial Review* [2019] NIQB 93; *Re B's Application for Leave to Apply for Judicial Review* [2020] NIQB 76; *Re Duddy's Application for Judicial Review* [2022] NIQB 23; and *Re Bassalat's Application for Leave to Apply for Judicial Review* [2023] NIKB 8

5.15 The basis for any such challenges might be of a failure by the relevant State authorities in Northern Ireland to comply with their positive obligations under Article 3 ECHR. [21] Indeed, such failure or refusal to act may itself form the basis for a damages action against the PSNI or the PPS - at least if and insofar as their refusal or failure to act could be shown to be motivated by discriminatory reasons, such that a finding of "malice" might reasonably be inferred.

6. PRESSING SOCIAL NEED FOR THE LEGISLATIVE CHANGES IN THE PROPOSED MEMBER'S BILL ?

6.1 The ECHR (and EU law) proportionality of the legislative changes proposed to be introduced in Northern Ireland under and in terms of the proposed Member Bill promoted by Eóin Tennyson MLA (and which was at the time of writing still being publicly consulted upon) has to be assessed against the background of how the law in Northern Ireland may

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[21] In *Szula v. United Kingdom* (2007) 44 EHRR SE19 237 at pp 239-240 the Strasbourg Court noted as follows:

> "[T]he obligation of the High Contracting Parties under Article 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3 ECHR, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *A v United Kingdom* (1999) 27 EHRR 611 at [22]; *Z and Others v United Kingdom* [GC] (2002) 34 EHRR 3 at [73]–[75] and *E and Others v United Kingdom* (2003) 36 EHRR 31).
>
> Positive obligations on the State are also inherent in the right to effective respect for private life under Article 8 ECHR; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 ECHR in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.
>
> Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v Netherlands* (1986) 8 EHRR 235 at [23]–[24] and [27] and *August v United Kingdom* (2003) 36 EHRR CD115 (dec.) N o.36505/02, January 21, 2003).
>
> In a number of cases, Article 3 ECHR has also been held to give rise to a positive obligation to conduct an official investigation (see *Assenov and Others v Bulgaria* (1999) 28 EHRR 653 at [102]). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by state agents (see, *mutatis mutandis*, *Calvelli and Ciglio v Italy*).
> ...
> [T]he Court found in *MC v Bulgaria* No.39272/98, (2005) 40 EHRR 20 at [153] that states had a positive obligation inherent in Article 3 ECHR and Article 8 ECHR to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. These considerations apply equally to serious sexual offences inflicted on children. That said, however, there is no absolute right to obtain the prosecution or conviction of any particular person."

be said already to deal with the issues around preserving and protecting the dignity of individuals in respect of their sexual orientation and/or gender identity.

6.2 Given its undoubted impact on private and family life protected under Article 8 ECHR (and, within the ambit of EU law by Article 7 of the EU Charter of Fundamental Rights) and on freedom of religion and belief under Article 9 ECHR (and Article 10 of the Charter) and on freedom of expression under Article 10 ECHR (and Article 11 of the Charter), what has to be established - in order for the Bill to be a seen as proportionate as a matter of ECHR and EU law - is that there is a pressing social need for the further legislative changes which the Member Bill proposes.

6.3 As regards reference to the provisions of the EU Charter the following position of the Northern Ireland Appeal Court which it expressed in *Re Dillon's Application for Judicial Review* [2024] NICA 59 should be kept in mind:

> "[137] It is only in one respect that we depart from the trial judge in relation to this appeal. Insofar as he did so by proceeding on the basis that any breach of Convention rights found was equivalent to a breach of the CFR [Charter of Fundamental Rights] (presumably within an EU competence) which, in turn, would give rise to a remedy of disapplication through section 7A of the EUWA 2018 we disagree. The trial judge rightly (and in our view correctly) dealt with this to some extent when finding that the CFR right to human dignity contained within article 1 was too imprecise to be justiciable in its own right. We will not add to an already lengthy judgment by examining this question of the content of CFR rights any further given that the Victims Directive 2012/29/EU avails the applicants in this case. However, it is necessary to state our conclusion that to say that the CFR provides a freestanding justiciable right in this way goes too far. Rather, we adopt the position that the CFR acts as an aid to interpretation of relevant EU law provisions.
> ...
>
> [146] We have also considered section 5(4) of the EUWA 2018 which expressly provides that the CFR is no longer part of domestic law. Although this provision must itself take effect subject to section 7A, to our mind it indicates a Parliamentary intention that the CFR is not intended to operate on a free-standing basis and ought to be restricted in its application as far as possible consistent with the meaning and intention of section 7A and article 2 WF.
>
> [147] We further note that Humphreys J has recently reached a similar conclusion in *Re Esmail's Application* [2024] NIKB 64, at paras [35]-[43] when dealing with the application of the CFR."

6.4 In this regard - in addition to the undoubted obligation of public authorities under the Human Rights Act 1998 (and potentially too under the NIA 1998) to act in an ECHR compatible manner and the obligations imposed under reference to Article 2 of the Protocol on Ireland/ Northern Ireland in the EU/UK withdrawal agreement - the following

aspects of the law might already be said to apply to unwanted or unwelcome approaches intended to change or suppress someone's sexual orientation or "gender identity".

Offences under the Protection from Stalking Act (Northern Ireland) 2022 and Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021

6.5 The Protection from Stalking Act (Northern Ireland) 2022 specifies that it is a criminal offence for, among other things, a person ("A") acting on two or more occasions in a way that a reasonable person, or a reasonable person who has any particular knowledge of another individual ("B") that A has, would expect would cause B to suffer fear, alarm or *substantial* distress (meaning "distress that has a substantial adverse effect on B's day to day activities").

6.6 Separately the provision of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 criminalises - as between two persons "A" and "B" who are connected to each other by marriage, civil partnership or other family or intimate personal relationship – conduct which is defined as abusive, which is to say: violent or threatening conduct; or conduct which has the intended or reasonably foreseeable effect of (a) making B dependent on, or subordinate to, A, (b) isolating B from friends, family members or other sources of social interaction or support, (c) controlling, regulating or monitoring B's day-to-day activities, (d) depriving B of, or restricting B's, freedom of action or (e) making B feel frightened, humiliated, degraded, punished or intimidated, whether or not the conduct at issue has any of these effects and whether or not the abusive conduct at issue actually causes B to suffer any physical or psychological harm.

Obligations imposed under the Equality/Non-discrimination regulations applicable in Northern Ireland

6.7 Regulation 6A when read with Regulation 30(2A) both of the Sex Discrimination (Northern Ireland) Order 1976 (as amended) outlaws as harassment by a service provider in connection with their provision of goods, facilities or services to the public conduct that is related to a person's sex, or to gender reassignment or is of a sexual nature.

6.8 The prohibition against harassment may in principle arise where the behaviour is held to constitute "discrimination" (in the sense of less favourable treatment because of sex or gender reassignment). [22] It also applies where the harassment consists in "unwanted

[22] qv *Porcelli v. Strathclyde Regional Council* [1986] ICR 564, CSIH and *Unite the Union v. Nailard* [2017] ICR 121, EAT

conduct" related to the protected characteristic of "sex" and/or "gender reassignment". The purpose or effect of this unwanted conduct has to be shown either to violate the other's dignity *or* to create an intimidating, hostile, degrading, humiliating or offensive environment for that other person.

6.9 In *Macdonald v. Ministry of Defence* [2003] UKHL 34 [2003] ICR 937 the House of Lords disapproved of arguments seeking to encompass discrimination because of sexual orientation within the existing provisions outlawing sex discrimination. Thus express provision against harassment related to sexual orientation had been made in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 but in *Re Christian Institute's and others' Judicial Review* [2007] NIQB 66 [2008] NI 86 Weatherup J ordered that the harassment provisions in the 2006 regulations be quashed on the basis of a failure in proper prior public consultation on these specific provisions before they had been brought into force. Nothing appears to have been done to replace these quashed provisions.

6.10 Separately regulation 3A when read with Regulations 27 and 32 of the Fair Employment and Treatment (Northern Ireland) Order 1998 characterises as unlawful harassment certain conduct by bodies in charge of further and higher educational establishment and separately by or in relation to barristers where, on the ground of religious belief or political opinion, A engages in unwanted conduct which has the purpose or effect of–

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

6.11 In deciding whether the unwanted conduct has these adverse effects, the courts take into account all of the following:— the perception of the person subject to the conduct, the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. Separately the law also outlaws the less favourable treatment of another because of their rejection of (or submission to) unwanted conduct related to the protected characteristic of gender reassignment.

Obligations imposed on medical professionals at common law

6.12 The courts have also held that treating physicians are required to acknowledge and respect an individual's right of involvement and self-determination in relation to their own medical treatment. This "human rights informed" approach has been said to "point away from a model of the relationship between the doctor and the patient based upon medical

paternalism" and instead to "point towards … an approach to the law which… treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices" meaning that "[a]n adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken": *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [2015] AC 1430 at §§ 81 and 87.

6.13 In the case of the possible prescription to children of puberty blocking drugs and/or cross-sex hormones on grounds of their reported experience of gender dysphoria the Court of Appeal of England and Wales has observed in *R (Bell) v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363 [2022] PTSR 544 (at §§ 92-93) that

> "92. Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of evolving research and understanding of the implications and long-term consequences of such treatment. *Great care is needed to ensure that the necessary consents are properly obtained*. …
>
> 93. … [C]linicians *must* satisfy themselves that the child and parents appreciate the short- and long-term implications of the treatment upon which the child is embarking …. it is for the clinicians to exercise their judgement knowing how important it is that consent is properly obtained according to the particular individual circumstances … and by reference to developing understanding in this difficult and controversial area."

6.14 Picking up on the concluding quoted reference from the Court of Appeal of England and Wales decision in *Bell* (at § 93) to "*developing understanding* in this difficult and controversial area" Geoffrey Vos MR in the Court of Appeal of England and Wales in *O v. P* [2024] EWCA Civ 1577 [2025] 4 WLR 9 noted (at para 18) the following developments since its decision in the *Bell* case:

(i) the Cass Interim Review in 2022 led to the closure of the Tavistock clinic that had been in issue in *Bell v Tavistock*;
(ii) on 12 March 2024, NHS England published a clinical policy concluding that there was not enough evidence to support the safety or clinical effectiveness of puberty blockers to make the treatment routinely available (outside a research protocol);
(iii) as the judge [below Judd J in [2024] EWHC 1077 (Fam)] recorded at [58], NHS Scotland had announced before the hearing that persons under 18 would not be prescribed cross-sex hormones;
(iv) on 21 March 2024, NHS England published a clinical commissioning policy laying down stringent eligibility and readiness requirements to be met before cross-sex hormones could be administered to those over 16;
(v) on 9 April 2024, NHS England wrote to all NHS gender dysphoria clinics asking them to defer offering first appointments to those under 18 "as an immediate

response to Dr Cass's advice that 'extreme caution' should be exercised before making a recommendation for [cross-sex hormones] in [children]";

(vi) on 10 April 2024, the Cass Review was published; and

(vii) on 11 December 2024 (the day before the hearing before the Court of Appeal), the government announced that the temporary embargo on the use of puberty blockers would be made indefinite (subject to a review in 2027)."

6.15 This rapidly "developing understanding" [23] by medical professionals, lawyers, judges, politicians and the general public in the area of what might constitute (im)proper therapeutic approaches to any diagnosis of gender dysphoria, makes it plain that any legislature will be entering on to very difficult and dangerous ground if and insofar as it proposes legislation seeking to impose, in in the name of outlawing "conversion therapy", overall bans or general regulation on what are to be regarded as permissible therapies and treatments undertaken in this area.

Conclusion as to the existing law in Northern Ireland relevant to abusive conversion practices

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[23] Cf *Re JR 111's Application for Judicial Review* [2021] NIQB 48 [2022] NI 173 where Scofield J on the basis of the received wisdom and apparent consensus as it stood in May 2021 held that the definition in s 25(1) of the Gender Recognition Act 2004 which required an applicant for a Gender Recognition Certificate ("GRC") to prove themselves to have or have had a disorder was an unnecessary affront to the dignity of a person applying for gender recognition through the legal process set out for that purpose by Parliament. He noted (at paras 140, 141, 145):

> "140 … On the basis of the 2004 Act as it stands at present, it is incumbent on an applicant for a GRC to show that they have, or have had, a '*disorder*'. This requirement is imposed on them in circumstances where the Government does not now contend that a transgender person necessarily has, or has ever had, a disorder: indeed, its public-facing documents say the opposite. … The definition in s 25(1) of the 2004 Act which requires an applicant for a GRC to prove themselves to have or have had a disorder is a legacy of the Act being drafted at a time when a different approach to these matters prevailed. It is now an unnecessary affront to the dignity of a person applying for gender recognition through the legal process set out for that purpose by Parliament.
>
> 141. .. Parliament has determined that, in the United Kingdom, transgender persons are entitled to obtain a GRC changing their gender in law to that of their acquired gender, without gender reassignment surgery, in order to respect and give effect to this aspect of their private life, bearing in mind the principle of autonomy. … There is no reason why the grant of such recognition should or must be conditional on an applicant proving that that element of their private life amounts to a disorder. Although there may be those who take that view on moral or religious grounds, crucially the respondent has not sought to stand over it. The result is that applicants for a GRC face a quandary: in order to assert their legal rights to gender recognition, they must denigrate that aspect of their identity which the 2004 Act is in principle designed to vindicate.
>
> …
>
> [145] Even if a change in the required diagnosis may be (on one view) 'symbolic', on the evidence available to me the importance of such symbolism should not be underestimated. Words can and do matter in this context. On the other hand, I can discern no material interest on the part of the community, independent of those discussed above in support of the general requirement that some diagnosis be provided, in an applicant being required to provide a diagnosis of a disorder rather than merely a condition related to sexual health."

6.16 In sum, it is *already* the case in Northern Ireland that conduct towards another which constitutes degrading treatment and which results in the infliction of psychological suffering on that other, is illegal and in breach of the criminal law. Such conduct could include degrading or belittling persons on account of their sexual orientation or on the basis of their having the protected characteristic of gender reassignment.

6.17 And the police and prosecution authorities in Northern Ireland are already obliged to provide effective protection (in particular of children and other vulnerable persons) against such conduct and should take reasonable steps to *prevent* such ill-treatment of which the authorities had or ought to have had knowledge.

6.18 More particularly the PSNI are obliged in their investigations to examine the role, if any, played by homophobic and/or transphobic motives in the alleged ill-treatment. If such homophobic and/or transphobic motives are substantiated then the prosecution authorities are obliged to take these into account in making its prosecution decision in relation to the complained of degrading ill-treatment.

6.19 In addition, the equality/non-discrimination regulations applicable in Northern Ireland outlaw harassing behaviour which constitutes less favourable treatment because of sex, sexual orientation, gender reassignment, religion or belief, or political opinion. Separate provision is made in these NI equality/non-discrimination provisions to make unlawful - in certain circumstances and in relation to some of the protected characteristics - *unwanted conduct* which has the purpose or effect either of violating another's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person. And less favourable treatment of another because of their *rejection of or submission to* the unwanted conduct related to the relevant protected characteristics is also, in some circumstances, made a statutory wrong under these regulations.

6.20 Finally, in relation to any proposed medical interventions, the law recognises adult persons of sound mind are entitled to decide which, if any, of the available forms of treatment to undergo. The law has to respect the informed consent of adults and separately the informed consent of those children who, clinicians adjudge, are capable of understanding the nature and possible short and long term consequences of the procedure or treatment.

6.21 However, in relation specifically to the prescription to children of puberty blocking drugs and/or cross-sex hormones on grounds of their reported experience of gender

dysphoria, it is to be noted that this is a rapidly developing situation. In particular the Cass Review published in April 2024 made a number of recommendations including: at recommendation 8 that NHS England should review the policy on masculinising/feminising hormones. The option to provide masculinising/feminising hormones from age 16 is available, but the Review would recommend extreme caution. There should be a clear clinical rationale for providing hormones at this stage rather than waiting until an individual reaches 18; recommendation 9 is to the effect that every case considered for medical treatment should be discussed at a national Multi-Disciplinary Team ("MDT") hosted by the National Provider Collaborative replacing the Multi Professional Review Group ("MPRG"); and recommendation 26 is that the Department of Health and Social Care and NHS England should consider the implications of private healthcare on any future requests to the NHS for treatment, monitoring and/or involvement in research. This needs to be clearly communicated to patients and private providers.

7. THE SCOTTISH GOVERNMENT PROPOSALS FOR NEW LEGISLATION CONCERNING HARMFUL CONVERSION PRACTICES

7.1 As we have noted the promoter of this proposed Member Bill concerning conversion practices in Northern Ireland leans and relies heavily on the earlier Scottish proposals for such legislation.

7.2 In its January 2024 publication *Ending Conversion Practices in Scotland: A Scottish Government Consultation*, the Scottish Government repeatedly draws parallels between its proposals for the criminalisation of "conversion practices" and earlier Scottish Parliament legislation concerning domestic abuse (the Domestic Abuse (Scotland) Act 2011, the Domestic Abuse (Scotland) Act 2018, and the Domestic Abuse (Protection) (Scotland) Act 2021), forced marriage (Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011), and female genital mutilation (Prohibition of Female Genital Mutilation (Scotland) Act 2005 as amended by the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020).

7.3 The Scottish Government clearly considers what it terms "conversion practices" to be social evils akin to domestic abuse, forced marriage and female genital mutilation. On the basis that the current law does not sufficiently counter the social evil of conversion practices the Scottish Government had indicated that it was minded to introduce and

promote before the Scottish Parliament a Scottish Government Bill which it is envisaged would contain provisions along the following lines:

"1. Offence of engaging in conversion practice

(1) A person ("person A") commits an offence in relation to another person ("person B") if—

(a) person A engages in—

(i) behaviour (whether a course of behaviour or behaviour on a single occasion) which constitutes (or is part of) provision of a service in relation to person B, or

(ii) a course of behaviour which is coercive of person B,

(b) person A engages in the behaviour with the intention mentioned in subsection (2), and

(c) the behaviour *causes* person B to suffer physical or psychological harm.

(2) The intention is that any sexual orientation or gender identity which (at any time the behaviour is engaged in)—

(a) person B considers is (or *may be*) person B's sexual orientation or gender identity, or

(b) person A *presumes* to be person B's sexual orientation or gender identity,

will be changed or suppressed.

2. Further provision in relation to offence of engaging in conversion practice

(1) Subsections (2) to (5) contain examples and other material to assist in the interpretation of section 1.

(2) Examples of behaviour which may constitute (or be part of) provision of a service in relation to person B include—

(a) person A counselling or providing any other form of talking therapy to person B,

(b) person A coaching or instructing person B,

(c) person A carrying out a purported treatment in relation to person B.

(3) Examples of behaviour which, if it forms part of a course of behaviour, may indicate that the course of behaviour is coercive of person B include—

(a) person A directing behaviour that is violent, threatening or intimidating towards person B,

(b) person A controlling person B's day-to-day activities,

(c) person A manipulating or pressuring person B to act in a particular way,

(d) person A frightening, humiliating, degrading or punishing person B.

(4) In subsection (3)(a), the reference to violent behaviour includes reference to sexual violence as well as physical violence.

(5) It does not matter for the purposes of section 1—

(a) whether any behaviour engaged in *changes*, or *is capable of changing*, person B's sexual orientation or gender identity,

(b) whether behaviour is engaged in free of charge or in exchange for payment (of any kind),

(c) whether, on any occasion on which behaviour is engaged in, it is engaged in only in relation to person B or in relation to person B and other persons at the same time.

(Please note that section 2 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

3. Interpretation

In this Part—

(a) references to behaviour—

(i) do not include reference to a person failing to do things in relation to another person,

but

(ii) otherwise include reference to behaviour of any kind (including, for example, saying or otherwise communicating something as well as doing something),

(b) a course of behaviour—

(i) involves behaviour on at least two occasions,

(ii) may involve—

(A) the same behaviour being engaged in on a number of occasions, or

(B) different behaviour being engaged in on different occasions,

(c) psychological harm includes fear, alarm and distress,

(d) reference (however expressed) to a person's sexual orientation includes reference to the person having no sexual orientation towards other persons.

(Please note that section 3 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

4. Further provision in relation to offence of engaging in conversion practice: intention

(1) For the avoidance of doubt, examples of behaviour being engaged in <u>*without*</u> the intention mentioned in section 1(2) *include*—

(a) the provision, by a healthcare professional *in the course of employment as such*, of healthcare, including—

(i) medical treatment intended to align person B's physical characteristics with person B's gender identity,

(ii) any medical treatment that causes or addresses a <u>*lack*</u> of sexual desire on person B's part,

(b) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists <u>*entirely*</u> of behaviour which—

(i) <u>*affirms*</u> a sexual orientation or gender identity which person B considers is (or <u>*may be*</u>) person B's sexual orientation or gender identity, or

(ii) is <u>*not*</u> intended to <u>*direct*</u> person B towards any particular sexual orientation or gender identity (including, in particular, any such behaviour which consists entirely of conversation, whether or not extending to the provision of advice and guidance, of a therapeutic, spiritual or any other nature),

(c) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists <u>*entirely*</u>

of person A expressing opinions or beliefs, *without intending to direct person B towards any particular sexual orientation or gender identity*.

(Please note that section 4 will also apply for the purposes of the offence of taking a person outside Scotland for conversion practices and conversion practice protection orders.)

5. Defence of reasonableness

(1) In proceedings for an offence under section 1, it is a defence for person A to show that person A's behaviour was, in the particular circumstances, reasonable.

(2) For the purposes of subsection (1), it is shown that person A's behaviour was, in the particular circumstances, reasonable if—

(a) evidence adduced is enough to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

6. Offence of taking person outside Scotland for conversion practice

(1) A person ("person A") commits an offence in relation to another person ("person B") if—

(a) person B is habitually resident in Scotland,

(b) person A causes person B to leave Scotland, and

(c) person A intends—

(i) that, while person B is outside Scotland, behaviour of a type mentioned in subsection (2) will be engaged in (whether by person A or another person) in relation to person B,

and

(ii) that, by the behaviour being engaged in, the outcome mentioned in subsection (3) will be secured.

(2) The behaviour is—

(a) behaviour (whether a course of behaviour or behaviour on a single occasion) which constitutes (or is part of) provision of a service in relation to person B, or

(b) behaviour which is coercive of person B.

(3) The outcome is that a sexual orientation or gender identity which (at the time person B leaves Scotland)—

(a) person B considers is (or *may be*) person B's sexual orientation or gender identity, or

(b) person A presumes to be person B's sexual orientation or gender identity,

will be changed or suppressed.

7. Further provision in relation to offence of taking person outside Scotland for conversion practice

(1) Subsections (2) and (3) contain examples and other material to assist in the interpretation of section 6.

(2) Examples of behaviour which *may indicate* that person A caused person B to leave Scotland include—

(a) person A accompanying person B on a journey outside Scotland,

(b) person A—

(i) paying all, or a substantial portion of, the costs incurred by person B in leaving and being outside Scotland (for example, person B's travel or accommodation costs), or

(ii) making arrangements in relation to person B's leaving and being outside Scotland (for example, person A booking travel tickets or accommodation for person B).

(3) It does *not* matter for the purposes of section 6 whether the behaviour which person A intends will be engaged in in relation to person B while person B is outside Scotland is in fact engaged in.

8. Defence of reasonableness

(1) In proceedings for an offence under section 6, it is a defence for person A to show that person A's behaviour was, in the particular circumstances, reasonable.

(2) For the purposes of subsection (1), it is shown that person A's behaviour was, in the particular circumstances, reasonable if—

(a) evidence adduced is enough to raise an issue as to whether that is the case, and

(b) the prosecution does not prove beyond reasonable doubt that it is not the case.

9. Aggravation of offence involving conversion practice

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence committed by a person ("person A") in relation to another person ("person B") is aggravated by being committed with the intention mentioned in subsection (2), and

(b) proved that the offence is so aggravated.

(2) The intention is that a sexual orientation or gender identity which (at the time the offence is committed)—

(a) person B considers is (or may be) person B's sexual orientation or gender identity, or

(b) person A presumes to be person B's sexual orientation or gender identity,

will be changed or suppressed.

(3) It does not matter for the purposes of subsection (1)(a) whether person A's commission of the offence changed, or was capable of changing, person B's sexual orientation or gender identity.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated as mentioned in subsection (1)(a).

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated as mentioned in subsection (1)(a),

(b) record the conviction in a way that shows the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(6) The reference in subsection (1)(a) to an offence does not include reference to an offence under section 1 or 6.

10. Conversion practices protection orders

(1) A "conversion practices protection order" is an order—

(a) which, for a purpose mentioned in subsection (2), requires persons specified in the order to do, or prohibits persons so specified from doing, things described in the order,

and

(b) which is made on an application to a court under section 11.

(2) A court may make a conversion practices protection order only if satisfied that the order is necessary for one of the following purposes—

(a) to prevent, *or reduce the likelihood of*, a person who is habitually resident in Scotland and who is identified in the order being harmed by behaviour mentioned in subsection (3) being engaged in in relation to the person,

(b) to otherwise prevent or reduce the likelihood of persons, who are habitually resident in Scotland, *generally being harmed by behaviour mentioned in subsection (3) being engaged in*.

(3) The behaviour is behaviour (whether a course of behaviour or behaviour on a single occasion)—

(a) which—

(i) constitutes (or is part of) provision of a service to another person, or

(ii) is coercive of another person, and

(b) which is engaged in with the intention mentioned in subsection (4).

(4) The intention is that any sexual orientation or gender identity which (at the time the behaviour is engaged in)—

(a) the person in relation to whom the behaviour is engaged considers is (or may be) the person's sexual orientation or gender identity,

or

(b) the person engaging in the behaviour presumes to be the sexual orientation or gender identity of the person in relation to whom the behaviour is engaged,

will be changed or suppressed.

(5) A conversion practices protection order may impose a requirement or prohibition on a person only if—

(a) the court considers the particular requirement or prohibition to be necessary for the purpose for which the order is made,

(b) where the requirement or prohibition is imposed on an individual, the individual is aged 18 or over,

(c) where the order is made for the purpose mentioned in subsection (2)(b), the court is satisfied that the person has, on at least one previous occasion—

(i) engaged in behaviour mentioned in subsection (3), or

(ii) with the intention mentioned in section 6(1)(c), caused a person who is habitually resident in Scotland to leave Scotland.

(6) The requirements and prohibitions which *may* be imposed on a person by a conversion practices protection order *include*—

(a) a prohibition on approaching or contacting, or attempting to approach or contact, any protected person,
(b) a prohibition on engaging in behaviour mentioned in subsection (3),
(c) a prohibition on attending such place as is specified in the order,
(d) a prohibition on taking any protected person from, or to, such place as is specified in the order,
(e) a requirement to facilitate or otherwise enable any protected person to return or go to such place as is specified in the order within such period as is so specified,
(f) a prohibition on causing any protected person to leave Scotland,
(g) a requirement to submit to the court such documents as are specified in the order (which may include passports, birth certificates or other documents identifying a person and travel documents),
(h) a prohibition on advertising or promoting a service mentioned in subsection (3).

(7) A conversion practices protection order may include requirements and prohibitions relating to behaviour outside (as well as, or instead of, behaviour within) Scotland.

(8) In this Part, "protected person" means a person identified in a conversion practices protection order as mentioned in subsection (2)(a).

11. Application for conversion practices protection order

(1) The following persons may apply to the court for the making of a conversion practices protection order—

(a) where the application is for an order to be made for the purpose mentioned in section 10(2)(a)—

(i) any person who would, were the order made, be a protected person,
(ii) a relevant local authority,
(iii) the chief constable,
(iv) with the leave of the court, any other person,

(b) where the application is for an order to be made for a purpose mentioned in section 10(2)(b)—

(i) a relevant local authority,
(ii) the chief constable.

(2) In deciding whether to grant a person ("the applicant") leave to make an application for a conversion practices protection order as mentioned in subsection (1)(a)(iv), the court is to have regard to all the circumstances, including—

(a) the applicant's connection with any person who would, were the order made, be a protected person,
(b) the applicant's knowledge of that person and the person's circumstances,
(c) *the wishes and feelings of such a person so far as they are reasonably ascertainable*,
(d) any reason why the application is being made is being made [sic] by the applicant and not such a person.

(3) The *court is only required to have regard to a person's wishes and feelings as mentioned in subsection (2)(c) so far as it considers it appropriate to do so, having regard to the person's age and understanding*.

(4) The court may permit—

(a) any person who would, were the order made, be a protected person to be a party to proceedings relating to an application made under subsection (1).

(b) any other person mentioned—

(i) in subsection (1)(a) to be a party to proceedings relating to an application made, for the purpose mentioned in section 10(2)(a), by another person mentioned in that subsection,

(ii) in subsection (1)(b) to be a party to proceedings relating to an application made, for the purpose mentioned in section 10(2)(b), by another person mentioned in that subsection.

(5) In this Part, a "relevant local authority" is—

(a) the local authority in the area of which a person who would, were the order made, be a protected person is present, or

(b) any local authority in the area of which there is a risk of behaviour of the type mentioned in section 10(3) being engaged in.

12. Determination of application

(1) A court to which an application under section 11 is made must hold a hearing prior to determining the application.

(2) The hearing must include an opportunity for any of the following persons who wish to make representations to the court about the application to do so—

(a) the person who made the application,

(b) any person who would, should the application be granted, be a protected person,

(c) any person on who any requirement or prohibition would be imposed, should the application be granted,

(d) any other person who is a party to the proceedings.

(3) In determining the application (including what requirements and prohibitions to impose, should the application be granted), the court must have regard to all the circumstances, including in particular the need to secure the health, safety and well-being of any person who would, should the application be granted, be a protected person.

(4) In ascertaining the well-being of any such person the court must——

(a) to such extent as the court considers appropriate having regard to the person's age and understanding, have regard to the person's wishes and feelings (so far as reasonably ascertainable), including whether the person wishes the application to be granted, and

(b) where the person does not wish the application to be made, any reasons for that view of which the court is aware."

7.4 It appears, at least at the time of writing, that the Scottish Government has now decided to put these proposals on hold and to do nothing on this matter until it has seen what, if any, legislation the UK government might be proposing on the outlawing of conversion practice, and whether it might be extended to Scotland. In the King's Speech of 17 July 2024 the UK Government stated its intention to bring forward a draft trans-inclusive Conversion Practices Bill to cover England and Wales. The UK Government provided the following further account of this as follows:

What does the draft [UK] Bill do?

● The draft Conversion Practices Bill will propose new offences to target acts of conversion practices that are not captured by existing legislation. The Government wants to ensure that the criminal law offers protection from these abusive practices, while also preserving the freedom for people, and those supporting them, to explore their sexual orientation and gender identity. This will mean those providing medical care and support are in no way impacted by this Bill.

● We are clear that any ban must not cover legitimate psychological support, treatment, or non-directive counselling. It must also respect the important role that teachers, religious leaders, parents and carers can have in supporting those exploring their sexual orientation or gender identity.

● This is a government of change, which will give respect and dignity to everyone. That is why the ban will be fully trans-inclusive. We are committed to listening to all viewpoints and concerns with respect.

● This Government is getting on with delivering a conversion practices ban. There is genuine cross party and cross society consensus to see these practices banned. But to ensure we have a ban that works and achieves that for the long term, we need to work closely with everyone and bring everyone with us as we do so - because no one thinks the status quo is acceptable.

7.5 But in any event, whatever position may eventually be taken by the UK Government in relation to England and Wales, the following may be noted from the outset in relation to the Scottish legislation as it was originally proposed:

(1) The draft Scottish legislation contains in Section 3(d) of the Bill a novel definition of "sexual orientation" which does *not* map on to that contained in the Equality Act 2010 in that it "includes reference to the person having *no* sexual orientation towards other persons", whom the Scottish Government refers to in their consultation document as "asexuals".

(2) There is *no* definition given in the proposed Scottish legislation of "gender identity". However the scheme of the proposed Scottish legislation is predicated on "gender identity" being a specific characteristic of (at least some) individuals which is distinct from that person's "physical characteristics". The proposed Scottish legislation also proceeds on the basis that others may make (right or wrong) presumptions about what another's gender identity is, or may be. Yet the proposed Scottish legislation 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. But the failure in the Scottish draft legislation 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 proposed Scottish

legislation 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".

(3) The proposed Scottish legislation would criminalise, within the context of the provision of a "(free) service" 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. The Scottish Government Consultation states (at § 98) that its

> "*intention* is that, in order to fall within this part of the offence, the provision of advice, guidance or support will need to reach a level of formality, professionalism or expertise for it to be considered a service. …"

But there is nothing on the face of the draft Scottish legislation which clarifies what is meant by the provision of a service in the manner set out in this guidance.

(4) In any event the criminalisation of conduct under draft Scottish legislation is *not* confined to those offering a service. The Scottish Government consultation says this (at § 98, 103):

> "For example, where a parent *without any relevant background or purported expertise* researches and carries out something they consider to be "therapy", they are *not* providing a service.
>
> Nor is a religious leader who has an *informal conversation* with someone about doctrinal views in relation to their sexual orientation or gender identity.
>
> These situations *may fall within the legislation if they form part of a coercive course of behaviour*.
> …
> [T]he provision of advice and guidance by a religious leader *or restrictions and pressure from parents over a period of time*, could only be captured by the definition of the course of conduct where *coercion* is also applied. There would also need to be specific *intent* to change or suppress the person's sexual orientation or gender identity and the actions *must have caused harm*.
>
> For example, advice and guidance from a religious leader which includes statements of traditional faith beliefs and sexual ethics would also have to be demonstrably coercive through evidence of *emphatic directives* accompanied by *forceful or threatening* statements intended to pressure the individual person into changing or suppressing their orientation or identity."

(5) The Scottish Government propose the following sentencing range for convictions under this principal offence:

- on summary conviction: imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum (£10,000), or to both
- on conviction on indictment (solemn procedure): imprisonment for a term not exceeding 7 years, or to an unlimited fine, or both

(6) The draft Scottish legislation would also criminalise anyone accompanying an otherwise habitual Scottish resident on a journey outside Scotland - or simply booking and/or paying for tickets for another's travel and/or for accommodation outside Scotland - where the intention (whether or not it in fact happens) that the trip outside Scotland will provide an occasion or opportunity for some form of behaviour to occur which is intended (however vainly) to change or suppress that other's (lack of) sexual orientation and/or gender identity. The Scottish Government proposes a maximum term of imprisonment on summary conviction of 12 months (and/or a fine) and a maximum 3 years term of incarceration for conviction of this offence on indictment (and/or a fine).

7.6 The Scottish Ministerial foreword to the Scottish Government's January 2024 publication *Ending Conversion Practices in Scotland: A Scottish Government Consultation* states that there exists "a significant *gap* in our law – which can allow *forms of conversion practices to fall through the cracks*".

7.7 But given the reach of the existing law, such "gaps" in the law can only be in relation to behaviour that does *not* reach the Article 3 ECHR threshold such as to constitute "degrading treatment", does *not* constitute the infliction of physical abuse or mental or emotional abuse such as to be already civilly actionable at common law, and does *not* constitute harassment because of sexual orientation or gender reassignment which, in Scotland, is already covered by the EA 2010.

7.8 The other supposed "gap" in the current law which the Scottish Government would appear to wish to change is the principle that an adult person of sound mind (and a child of sufficient understanding) is entitled to decide on and consent to any treatment. [24]

[24] See for argument by way of justification for this approach Richard Wagenlaender "The [UK] Government's proposals on banning conversion therapy: the danger of the informed consent loophole" [2022] *European Human Rights Law Review* 49-64 at 54:

> "Allowing an 'informed consent' exception will in practice place a far higher burden of proof on victims to not only prove the act and *mens rea* of the perpetrator, but to also prove a lack of consent to a criminal standard of proof. Under a total ban, the victim would only have to prove that a person conducted a practice that was directed at an individual with the purpose of changing that person's sexuality or gender identity. Contrastingly, the [UK] Government's

7.9 The Scottish Government sets out its own ideological stall as follows by way of justification/explanation for this proposed new legislation (at §§ 13, 83, 160 of its consultation document – emphasis added):

> "13. Conversion practices *are* harmful to individuals subjected to them. *They are promoted within an ideology that views LGBTQI+ identities as wrong and believes that they can be changed. Their existence contributes to this way of thinking even further*.
>
> This legislation specifically aims to protect people from the *harm* of conversion practices and, in doing so, contributes to the broader protection of human rights and respect for the dignity of LGBTQI+ people.
> ...
> 83. ... Conversion practices are often driven by a desire to help or protect the person being subjected to them even though harm is *ultimately* caused. Because of this, the proposed offence does *not* require it to be proven that the perpetrator to *intend* to cause harm to the victim or to be reckless as to whether harm would occur.
>
> However, for the offence of engaging in a conversion practice to be committed, *harm will need to have resulted nonetheless*.
> [...]
> 160. .... The main aim of this legislation is to protect people from the *harm* of conversion practices and protect the human rights and dignity of LGBTQI+ people."

7.10 From the Scottish Government's own account (see § 28) the entities most likely to be affected by its proposals to criminalise "conversion practices" are "faith groups", followed by "health professionals" and "parent, guardian, other family members" noting (at § 29) that the evidence indicates that "conversion practices often happen in religious, community and family settings" and (at § 34) that "an individual's culture and race may play a part in their experience of conversion practices".

7.11 The Scottish Government gives as example of what it considers to be "gaps" in the existing law the following examples (at §§ 74-5):

> "74. ... For example, talking therapy, or coaching someone to change or suppress their sexual orientation or gender identity *are unlikely to be prosecutable under the existing criminal law*. While these are generally reasonable and non-harmful everyday actions

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approach would entail the weight and focus being on the issue of consent in settings in which societal coercion and threats often occur verbally and
in a close-knit environment.

A profound worry is that this could lead to 'therapists' or 'healers' requiring patients to sign liability waivers and forms which explain the risks, whilst verbally reassuring the efficacy of their treatment. This, again, would place the burden on victims, who may be coerced to sign liability waivers, to prove a lack of consent retrospectively, which is unlikely to be too successful. As such, providers of conversion therapy could continue as usual, just with liability waivers briefly outlining the risks. Victims would be left having to prove to a criminal standard that they did not consent, fighting an uphill battle to achieve minimal justice. It is this likely outcome which illustrates the real risks in the [UK] Government's proposed informed consent exception. The idea of truly free and informed consent in relation to conversion therapy is flawed and would risk a great number of potential victims."

in the majority of circumstances, *when used with the intent to change or suppress the sexual orientation or gender identity of another, they can become harmful*.

75. Even where the act that was being carried out might relate to an existing criminal offence, a conversion practice might not meet all of the requirements of that offence. For example, to be convicted of *stalking* a person must cause their victim to suffer fear and alarm. They must also *intend to cause the victim fear or alarm or know, or ought to know in all the circumstances, that their actions would likely have this effect*. This would *not* apply to many cases of conversion practices as the perpetrators often believe that they are helping the victim. In such a case, it may be difficult to prove an intention or recklessness to cause fear and alarm.

In addition, the harmful effect of conversion practices *is less likely to be fear and alarm but more often resemble post-traumatic stress which may manifest in different ways and over a longer period*."

7.12 This is, to say the least, a rather confused passage. The Scottish Government is here indicating that it is intending to promote a Bill before the Scottish Parliament which will criminalise what it describes as "generally reasonable *and non-harmful* everyday actions" (such as talking therapy or counselling). Such behaviour will be criminalised under this proposed Scottish legislation in situations where there is *no* subjective intention to cause another fear or alarm, and indeed where no fear or alarm results. And the fact that there is simply no evidence of any harm, fear or alarm resulting from any such supposed attempt to change or suppress another's sexual orientation or gender identity is deemed to be irrelevant. This is because it appears to be presumed (or deemed) that individual harm will (inevitably?) result, if not immediately then in the longer term in the form of post-traumatic stress disorder.

7.13 And on whether there is any need to prove "harm" resulting in order to criminalise conversion practices, the Scottish Government appear also to assert that harm *necessarily* and *always* comes from conversion practices, even if those subject to them are not (immediately) aware of it, noting (at §§ 35-36, 38-40) that

"What harm do conversion practices cause?
35. Conversion practices are *inherently harmful*. They deny people's right to be themselves and *send a message to the LGBTQI+ community as a whole that their identity is wrong and can and should be fixed or suppressed*.

36. The impact of conversion practices on people can be lifelong. *Often, the harm is not immediately apparent*. People who have experienced conversion practices have reported severe mental health consequences, including suicidal ideation, depression, and anxiety. As pointed out in the EAG report, undergoing these practices can result in feelings of shame, self-loathing and a crisis of identity. Survivors have also reported a negative impact on their relationships, work and career. The EAG report stressed that this negative impact can affect every aspect of life, stating that 'survivors have difficulty building a life after conversion practices.
…

38. A report from the United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity (IESOGI), titled *Report on Conversion Therapy*, highlights that

> '*all* practices attempting conversion are *inherently humiliating, demeaning and discriminatory*. The combined effects of feeling powerless and extreme humiliation generate profound feelings of shame, guilt, self-disgust, and worthlessness, which *can* result in a damaged self-concept and enduring personality changes.'

39. Testimonies provided to the EHRCJ committee [of the Scottish Parliament] by individuals with lived experience of conversion practices describe PTSD, nightmares, bulimia, self-harm, shame, and panic attacks as some of the long-term effects caused by being subjected to conversion practices.

40. The trauma associated with conversion practices can present itself at different times for each person. Often, trauma can appear in adulthood despite the practices happening in childhood. In taking a trauma-informed approach we are mindful of where an individual may be affected by trauma, and the need to respond in ways which minimise distress and support recovery through a safe and compassionate response. *We are also mindful of the importance of not retraumatising those who have suffered harm from conversion practices or expecting them to denounce their families, communities or loved ones."*

7.14 But if conversion practices are indeed (as the Scottish Government stipulates after this review of essentially anecdotal claims) "inherently harmful", then the proposed new offence of engaging in a conversion practice may be committed without the need to prove that any "harm" has indeed resulted, since the Scottish Ministers are operating on the basis of what appears to be an irrebuttable presumption that harm inheres in such conversion practices, even if not immediately manifest in or to the individual subject to such conversion practices.

7.15 It appears to be on the basis of an application of irrebuttable presumption that harm inheres in such conversion practices, even if not immediately manifest in or to the individual subject to such conversion practices, that the Scottish Government has proposed that there be *no defence of consent* available in relation to a conversion practices charges under its proposed legislation. This is the because the Scottish Government considers (at § 136) that

> "*harmful conduct* cannot be consented to".

7.16 The Scottish Government instead *deems* that no individual (regardless of age or capacity) is capable of consenting to undergoing conversion practices: everyone is to be rendered statutorily *incapax* on this matter.

7.17 One explanation for this approach appears to be the Scottish Government's further stipulation that very existence of conversion practices causes harm to the broader Lesbian, Gay, Bisexual, Trans, Queer/Questioning, Intersex/Inquiring, Asexual plus allies ("LGBTQIA+") *community*, regardless of whether or not any individual person who has been subject to such practices is aware of any harm having been caused thereby to them as individuals.

7.18 The draft Scottish legislation seeks to *exclude* from its to-be-criminalised "conversion practices" the provision by medics, with a view to gender re-assignment, of therapy, puberty blocker, hormones and surgery, and the provision by medics of medicines and therapy to those complaining of loss of libido. Specifically, it excludes "the provision, by a healthcare professional in the course of employment as such, of healthcare including"

(i) "medical treatment" which is intended to "align" a person "physical characteristics" with that person's asserted "gender identity",

and

(ii) any medical treatment provided that "causes or addresses" a person's *lack* of sexual *desire*".

7.19 Currently any person who aids, abets, counsels, procures or incites in Scotland an act of "female genital mutilation" will be guilty of an offence under Section 3(1) of the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

7.20 Yet if these Scottish draft legislative proposals concerning the criminalisation of "conversion practices" come into law, any person who obstructs, counsels against, discourages or otherwise seeks to prevent an act of (male or female) genital mutilation where that act is avowedly intended to "align" a person's "physical characteristics" with that person's asserted "gender identity" will, in principle, be guilty of an offence**.**

7.21 The Scottish Government then states (at §40) that it *believes* "that *any* effort to *change* a person's sexual orientation or gender identity is harmful, *regardless of how an individual identifies*." Indeed "a conversion practice may be directed against a person who states that they are unsure of, or exploring, their gender identity, to *change* them to have a *fixed identity*" (§ 48 of the consultation). The Scottish Government states that it therefore intends to promote the enactment of legislation which will criminalise anything other than what it describes (at § 45) as

"*non-directive and ethical* guidance and support to a person who might be questioning their sexual orientation or gender identity or experiencing conflict or distress, whether that is provided by a healthcare practitioner, a family member, or a religious leader."

7.22 The draft Scottish legislation accordingly seeks to exclude from its to-be-criminalised "conversion practices" any behaviour which is said *entirely* to *affirm* the sexual orientation or gender identity which another currently considers to be, or *may* be, their sexual orientation or gender identity. However statements such as

> "that being gay is sinful or that transgender identity does not exist, that bisexual people are in denial, or [other] statements of belief"

which *are* made in relation to any particular individual *will* be criminalised under this legislation: see § 85 of the consultation. And at §§ 59-60 of the consultation the Scottish Government says that:

> "59. .. We also intend to include conversion practices undertaken against asexual people.
>
> 60. For example, a bisexual or asexual person may experience a type of conversion practice based on cultural perceptions, *often* referred to as bisexual or asexual erasure, that these orientations do not really exist and that the individual is 'confused' or ashamed of being gay."

7.23 The Scottish "Expert Group" whose recommendations have been largely adopted by the Scottish Government in this consultation document proposing new legislation says this (at Section 8 of its report):

> **"8. Intent**
> Our proposed definition requires that conversion practices be carried out with the *intent* of changing, suppressing and/or eliminating a person's sexual orientation, gender identity and/or gender expression.
>
> The definition of conversion practices should *not* limit the practice to those who genuinely believe that the relevant change of sexual orientation, gender identity and/or gender expression is possible and desirable, nor should it require an intent to cause harm.
>
> The United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity defines conversion practices as:
>
> > 'an umbrella term to describe interventions and acts of a wide-ranging nature, all of which have in common the *belief* that a person's sexual orientation or gender identity can and should be changed. Such practices aim (or claim to aim) at changing people from gay, lesbian, or bisexual to heterosexual and from trans or gender diverse to cisgender'
>
> In practice, however, those carrying out conversion practices may do so for a number of different reasons and with a range of motivations, for example, commercial providers who seek financial gain. *Conversion practices can therefore be carried out*

not only by those who genuinely believe that the relevant change is possible and desirable, but also by those who are motivated by different reasons." [25]

7.24 Yet the law cannot *require* the impossible. And no-one can be said to have the necessary criminal intent (*mens rea*) to do that why they know to be impossible. Accordingly any attempt on the part of any legislature to criminalise an intention to do what the perpetrator does not believe to be possible is, to say the least, highly problematic.[26] As the philosopher of action Stuart Hampshire has observed:

> "To intend something to happen (as the result of my activity) is at least to believe that it may or could happen. It would be self-contradictory to say "I intend that to happen but I am sure that it will not" or "I believe it to be impossible". [27]

Accordingly one cannot be said to have acted with the *intention* of *changing* another's sexual orientation or gender identity when one is acting *in the knowledge, or with the belief, that any such change is simply not possible*.

7.25 Apparently aware of these conceptual difficulties, the Scottish Government proposes that this draft Sottish legislation should *broaden* the ambit of behaviour to be criminalised under it. So what is to be criminalised is not just (however vainly) acting with the intention of *changing* another's sexual orientation or identity, but all and any actions done with the intention of "suppressing" another's sexual orientation or gender identity. The Scottish Ministers give the following explanation for this:

> 53. .... [L]egislation which does *not* account for suppression *may fail to address conversion practices that are more prevalent in racialised minorities*.
>
> 54. Including suppression means that there would be a wider net of protection for LGBTQI+ people. Legislation would address harmful conduct that was motivated by both an intention to change, or to suppress an individual's sexual orientation or gender identity. For example, talking therapy designed to suppress an individual's sexual orientation *which acknowledges that changing sexual orientation is not possible* would be included, where other legal tests were met.
>
> 55. In either a civil or criminal process, [those carrying out conversion practice] *could argue that they know that it is not possible to change a person's sexual orientation or gender identity, and this change was therefore not their intention. This would create a potential loophole in our legislation.*

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[25] Expert Advisory Group on Ending Conversion Practices Report and Recommendations

[26] *R v. Bentham* [2005] UKHL 18 [2005] 1 WLR 1057 in which the House of Lords considered the question of whether a person who places his hand in a zipped-up jacket to give the impression that he has a gun, can be held to have in his possession an imitation firearm within the meaning of s17(2) of the Firearms Act 1968. The House of Lords held that a person cannot possess something which is not separate and distinct from himself.

[27] Stuart Hampshire *Thought and Action* (1959) at page 134

56. Including suppression would widen the scope of legislation, by including restrictions or limitations imposed on someone specifically *to repress or prevent the development of their sexual orientation or gender identity*.

7.26 Suppression is clearly a key term in this legislation. Yet the draft legislation 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. 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.

7.27 Thus subsection 1(2) of the draft Scottish Bill, subject only to a vague and unspecified reasonableness defence in Section 5, in principle criminalises *all* of the following (on the assumption that physical or psychological harm results):

(i) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own sexual orientation

(ii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own *lack of* sexual orientation

(iii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own sexual orientation

(iv) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own *lack of* sexual orientation

(v) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what they *presume* to be another person's sexual orientation

(vi) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what they *presume* to be another person's *lack of* sexual orientation

(vii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *to be* their own gender identity

(viii) All and any behaviour by a person or persons which is intended to effect a *change* in, or of, what another person considers *may* be their own gender identity

(ix) All and any behaviour by a person or persons which is intended to effect a change in, or of, what they *presume* to be another person's gender identity

(x) All and any behaviour by a person or persons intended to *suppress* what another person considers to be their own sexual orientation

(xi) All and any behaviour by a person or persons intended to *suppress* what another person considers to be their own *lack of* sexual orientation

(xii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own sexual orientation

(xiii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own *lack of* sexual orientation

(xiv) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's sexual orientation

(xv) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's *lack of* sexual orientation

(xvi) All and any behaviour by a person or persons intended to *suppress* what another person considers *to be* their own gender identity

(xvii) All and any behaviour by a person or persons intended to *suppress* what another person considers *may* be their own gender identity

(xviii) All and any behaviour by a person or persons intended to *suppress* what they *presume* to be another person's gender identity

7.28 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 Scottish Government deems to be "directive" or "coercive" *will* be criminalised. Thus a*ll 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 Scotland under this proposed Scottish legislation. This is on the basis that under the proposed legislation such parental intervention will be regarded as evidencing an intention to change or suppress their child's identification or development of their own sexual orientation or gender identity (of which they may still be questioning or unsure).

7.29 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. The Scottish Government states (at § 104) that its definition of a coercive course of behaviour in the context of conversion practices will include acts that are "controlling of the victim's day-to-day activities" and continues (at § 105) as follows:

> "By controlling, we refer to actions that regulate, restrict, or monitor a person's behaviour or otherwise deprives them of their own freedom of action. *For example, preventing someone from dressing in a way that reflects their sexual orientation or gender identity, associating with certain people or undertaking certain activities considered to be linked to their sexual orientation or gender identity.*
>
> In the context of conversion practices, controlling actions are used deliberately to restrict, prevent, or limit people from living or acting in accordance with their sexual orientation or gender identity. Controlling actions, by their nature, apply a degree of force and give a person no choice other than to regulate their behaviour accordingly."

7.30 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" (see § 108) would be committing a criminal offence.

7.31 Were the Scottish Government's proposals adopted by the Scottish Parliament and legislation introduced and passed to give them effect, this would have the undoubted effect of criminalising much mainstream pastoral work of churches, mosques and 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".

7.32 The proposals, if they came into law, could also criminalise medical practitioners who express a professional opinion seeking to dissuade an individual against undergoing or undertaking medical procedures (such as puberty blockers, hormone treatment and/or surgeries) which are associated with, and intended to further, gender reassignment.

7.33 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.

7.34 But perhaps the most fundamental problem with this proposed Scottish legislation 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. The Scottish Government consultation document states (at § 44):

> "although the proposals are ***mainly*** intended to address harmful practices that affect LGBTQI+ people, they will apply to everyone equally. This includes ***change*** efforts directed at those who are heterosexual or cisgender."

7.35 The proposed Scottish legislation will also *necessarily*, from its terms, include *suppression* efforts directed at those who are heterosexual or cisgender. Thus since the Scottish Government's proposals are intended, in the name of equality also to cover any efforts to change *or suppress* the "sexual orientation" or "gender identity" which may be "directed at those who are heterosexual or cisgender" (per § 44 of the consultation document) then the legislation if passed will 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.

7.36 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 this legislation against their parents.

7.37 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.

7.38 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.

7.39 The parents would have difficulty in essaying or praying in aid the possible carve outs set out in subsection 4(1)(b) and 4(1)(c) of the draft Scottish legislation. This gives as *examples* of behaviour which can be engaged in *without* the criminal intention set out in section 1(2) the following:

> "(b) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of behaviour which—
>
> (i) *affirms* a sexual orientation or gender identity which person B considers is (or *may be*) person B's sexual orientation or gender identity,
>
> or
>
> (ii) is *not* intended to *direct* person B towards any particular sexual orientation or gender identity (including, in particular, any such behaviour which consists entirely of conversation, whether or not extending to the provision of advice and guidance, of a therapeutic, spiritual or any other nature),
>
> (c) person A engaging in behaviour (whether a course of behaviour or behaviour on a single occasion) in relation to person B which consists *entirely* of person A expressing opinions or beliefs, *without intending to direct person B towards any particular sexual orientation or gender identity*."

7.40 The Scottish Government consultation explains these proposed provisions in their consultation document thus (at §§ 116-117):

> "116. .. [C]ertain other behaviour will not be carried out with the requisite intention for the offence. These are situations where the service or course of behaviour *affirms* the sexual orientation or gender identity that another person considers themselves to be.
>
> 117. We will also be clear that the intent requirement is not met where there is no intention to direct person B towards any particular sexual orientation or gender identity – particularly where this involves conversations or where the behaviour *only* involves the expression of opinions or beliefs. The intention requirement ensures that it will not fall under the legislation where a person such as a family member or someone expressing their views in the street states negative views about a particular sexual orientation or gender identity *without a specific intention to change or suppress those characteristics of another person*."

7.41 Thus subsection 4(1)(b) of the proposed Scottish legislation appears to be intended to exclude *affirmatory and/or non-directive* counselling about sexuality or gender identity from the ambit of the to-be-criminalised conversion practices. Subsection 4(1)(c) appears to be directed at excluding *mere* expression of opinions or beliefs on matters of sexuality or gender from being criminalised as "conversion practices", providing always that the expression of these opinions or belief is *not* done with the intention of *directing* anyone towards any particular sexual orientation or gender identity. The Scottish Government advises that "shouting abuse at someone about their sexual orientation or gender identity, where there was *no intention* to change or suppress that specific person's sexual orientation or gender identity" would *not* be criminalised under this proposed new law (§ 81). However, the consultation fails to mention, any such "shouted abuse" about another's sexual orientation or gender identity may instead *already* be criminalised in Scotland under Section 4(2) of the Hate Crime and Public Order (Scotland) Act 2021.

7.42 In any event the parental actions outlined above *are precisely about* parents *directing* their children. They are *not* simply giving their opinions or offering counselling. They are *telling* their children what to do in matters which undoubtedly relate to their children's experience and expression of their sexuality and/or gender identity.

7.43 Such parental action may well also be said to be intended to *direct* their children *towards* their children's proclaimed (hetero)sexual orientation and/or (cis)gender identity, while seeking to *suppress* their children's chosen explorations and expressions of this sexuality and "gender identity" to a manner which their parent consider acceptable.

7.44 Yet the parents' actions cannot be said, for the purposes of Section 4(1)(b) of this drat Scottish Bill, to consist *entirely* of behaviour which *affirms* their child's sexual orientation or gender identity. Instead they are seeking to *suppress* their children's choices as to how they might wish to express and experience their proclaimed (hetero)sexual orientation and/or (cis)gender identity in how they dress or comport themselves or who they associate with or what they watch online. The parents may not be seeking to *change* their child's currently avowed sexual orientation or gender identity but they are seeking to *control* their child's sexuality and/or gender identity by preventing or impeding that child from expressing the sexual orientation and/or gender identity with which the child currently identifies in a way which feels most authentic to that child.

7.45 And if the parents' actions constitute a course of conduct seeking to question impede or change their children's choices on how they wish to express, explore and develop their proclaimed (hetero)sexual orientation and/or (cis)gender identity then the parental action

could be judged under this legislation to constitute coercive control against their daughter or son.

7.46 Thus decisions made by parents which relate to and seek to direct their children on matters of sexuality and gender identity can be brought before the courts under this proposed legislation such as to require the parents, in order to avoid criminal liability for their decision, to satisfy the court that their behaviour was, in the particular circumstances, what the court would regard as being "reasonable".

7.47 In addition to placing basic parenting decision under the shadow of potential prosecution before the criminal courts, under these proposals the courts are to be granted sweeping powers to pronounce coercive requirements and prohibitory civil conversion practices protection orders against others (legal persons or individuals). Such requirements or prohibitions may be ordered when the court is satisfied that they are necessary to prevent - or at least reduce the likelihood of - either an identified individual or people in general in Scotland from being "harmed" by behaviour intended to change or *suppress* others' (lack of) sexual orientation and/or gender identity.

7.48 Although the Scottish Government recognises (at § 140) that legislation mandating advertising bans or restrictions are matters reserved to the UK apparently it considers that a person who advertised or promoted those conversion practices may, depending on the particular circumstances, be found to have aided and abetted in the commission of the offence (at § 142) and further envisage (at § 141) orders from the courts under this provision to prohibit informal promotion and advertising of conversion practices simply by word of mouth which may take place in particular familial and community environments.

7.49 It is also envisaged that the courts in Scotland will be able to make orders with an extra territorial effect or scope, specifically: to include conditions preventing a person from being taken out of Scotland for the purpose of conversion practices; and to include requirements or prohibitions in relation to conduct that takes place outside of Scotland.

7.50 The order-making powers would require evidence to be proved on the balance of probabilities (the civil court standard of proof) which is a much lower threshold than that applied in the criminal courts (beyond reasonable doubt). And yet breach of the terms of such conversion practices protection orders as may be pronounced by the court will be made a criminal offence. The Scottish Government are proposing the following sentencing range for breaching a conversion practices civil order: on summary conviction:

imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum, or both; on conviction on indictment (solemn procedure): a sentence of imprisonment not exceeding 2 years, a fine, or both.

7.51 Applications to the court for conversion practices protection orders which are specifically to protect an identified individual from "harm" may be sought, with the leave of the court, by *any* person (not just by the police or local authorities).

7.52 The draft Scottish legislation imposes no requirements and specifies no test in the legislation by which the standing of any person to seek such an order in relation to another is to be determined. And the court is empowered to grant such order even against the wishes (and feelings) of the to be "protected person". The Scottish Government gives this explanation/justification (at § 193)

> "[I]t is essential that family, friends, or a support organisation are able to apply for an order in relation to a person at risk. *This is particularly important as individuals may not be aware that they are victims of conversion practices*. For example, if the conduct is being carried out by a family member or trusted member of their community."

7.53 The mere *existence* of "conversion practices" is regarded as necessarily *always* harmful to the (LGBTQIA+) community at large (even if the individual subject of these practices does not realise or appreciate or experience it). It is this approach and claim that informs the creation of the possibility of the court in Scotland pronouncing *general* conversion practices protection orders. These are intended "to otherwise prevent or reduce the likelihood of persons, who are habitually resident in Scotland, *generally being harmed by behaviour" deemed under the legislation to be a "conversion practice"*: Section 10(2)(b) of the proposed legislation. So, as we have seen, even where an adult who is not lacking in capacity and is not otherwise vulnerable, gives informed consent to the conversion practices, these will still constitute criminal offences under this proposed legislation.

7.54 Further, although providing for a "reasonableness defence" the draft Scottish legislation provides no definition or test or example of what may be considered to be "reasonable" such as to constitute a defence against a prosecution for behaviour otherwise apparently criminalised under this proposed Act of the Scottish Parliament. The consultation says this:

> **"Defence of reasonableness**
> 119. We propose that the offence will include a defence that the accused's conduct was reasonable in the particular circumstances. This test is whether the accused's behaviour was reasonably objective, meaning that it is not determinative that the accused person considers their behaviour was reasonable based on their own values.
> …

121. We are clear that practices that seek to change or suppress the sexual orientation or gender identity of someone else are abhorrent and have no place in our society.

...

123. While it may be difficult to envisage circumstances in which behaviour meeting each of the four tests set out above (relating to an individual, provision of a service/coercive course of behaviour, intention to change or suppress, cause of harm) would ever be "reasonable", this provision ensures that where someone behaves in an objectively reasonable way, but their behaviour nonetheless technically amounts to the commission of the offence of engaging in conversion practices, they are not criminalised by the offence.

124. We anticipate this defence may potentially arise where the immediate safety of the victim was at risk, and acts were carried out to protect them from imminent harm. For example, where someone is at immediate risk of suicide as a result of distress related to their sexual orientation or gender identity, requests and is supported to find a short-term coping mechanism.

It could also ***potentially*** apply in situations where the specific day-to-day controls implemented by a parent were to *prevent a child from engaging in illegal or dangerous behaviour*."

7.55 But this last example makes no sense in terms of how the proposed Scottish legislation is currently drafted. The doctrine of double effect posits that if the primary intention of a parent in implementing any specific day-to-day controls were to prevent their child from engaging in illegal or dangerous behaviour, then it might be said to be a foreseeable (though not necessarily intended) ***effect*** that the child might subjectively experience these restrictions as what the legislation would term "coercive suppression" of the child's sexual orientation or gender identity. But that, on the legislation's own terms, would ***not*** be sufficient to establish the requisite *mens rea* for the parent to be found guilty of the offence of engaging in "conversion practices". In such circumstances the reasonableness defence would simply not apply.

7.56 The Scottish Government then says this about this reasonableness defence (at §§ 161, 165):

"161. ... In developing the proposals set out in this consultation we have carefully considered their impact on rights protected by the ECHR, in particular the right to family and private life; freedom of thought, conscience and religion; and freedom of expression.

In line with the requirements of the ECHR, interference with these rights must be necessary and proportionate to the aim to be achieved, in this case, protection of the rights of LGBTQI+ people.

...

165. The offence also includes a defence of reasonableness. This acts as an additional protection by allowing, for example, an accused person to put forward a justification as to why their behaviour was reasonable, *which could include the exercise of their Convention rights*."

7.57 It is clear, then, that the Scottish Government is aware that the provisions of this proposed Act of the Scottish Parliament impact on among other Convention rights: the rights of parents under Article 8 ECHR to respect for their private and family life; the rights of individuals and of Churches to respect for the free exercise of religion under Article 9 ECHR; and the rights of free expression as protected under Article 10 ECHR.

7.58 In order to be Convention compatible (and so within the statutorily limited devolved competence of the Scottish Parliament and the similarly statutorily limited devolved competence of the Scottish Ministers) it is *not enough* that passing reference is made, in consultation documents, to the ECHR. The legislation itself has to be "in accordance with law" in order to be shown to be justified interferences in the identified Convention rights under Articles 8, 9 and 10 ECHR which the Scottish Government agree are engaged by this proposed legislation. As the UK Supreme Court noted in *Christian Institute v. Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at §§ 79

> (iii) *In accordance with the law*
> "79. In order to be 'in accordance with the law' under Art 8(2) of the ECHR, the measure must not only have some basis in domestic law — which it has in the provisions of the Act of the Scottish Parliament — but also be accessible to the person concerned and foreseeable as to its effects.
>
> These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual — if need be with appropriate advice — to regulate his or her conduct *(Sunday Times v UK* (A/30) (1979–80) 2 EHRR 245, § 49; *Gillan v UK* (2010) 50 EHRR 1105, § 76).
>
> Secondly, it must be sufficiently precise to give legal protection <u>*against arbitrariness*</u>:
>
> > '[I]t must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law … for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation— which cannot in any case provide for every eventuality — depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.' (*Gillan v UK* (2010) 50 EHRR 1105, § 77; *Peruzzo v Germany* (2013) 57 EHRR SE17 § 35.)
>
> 80. Recently, in *R (on the application of T) v Chief Constable, Greater Manchester Police* [2014] UKSC 35 [2015] AC 49 this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation."

7.59 Finally (at §§ 205-206) the Scottish Government concludes its consultation document with the following statement of intent as regards future educational work to be done

"205. We will explore how best to educate children and young people as well as the general public on what conversion practices are, and the detrimental impact they have on victim's lives, as part of our wider work on LGBTQI+ visibility.

Tailored and targeted community outreach programmes will also be considered to ensure that no area of society is left out."

7.60 Education is itself the subject of distinct provision in the ECHR. Among the Convention rights listed in Schedule 1 of the Human Rights Act 1998 is Article 2 of Protocol No. 1 to the European Convention ("A2P1 ECHR") which is in the following terms:

"Right to education
[i] No person shall be denied the right to education

[ii] In the exercise of any functions which it assumes in relation to education and to teaching, the State *shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*."

7.61 As regards the second sentence of A2P1 ECHR concerning the duty of the State to "respect the right of parents to ensure such education and teaching *in conformity with their own religious and philosophical convictions*" the United Kingdom has accepted this right under express reservation which has been incorporated into UK law by Section 15(1)(a) and Part II of Schedule 3 to the Human Rights Act and is to the following effect:

"the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom *only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure".*

7.62 The Strasbourg court takes a broad view of what constitutes education, the right to which is protected under and in terms of A2P1 ECHR, noting in one early case as follows:

"33. .... [T]he education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development .... [and] the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.
...
40. ... Article 2 (P1-2) constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education. [28] ....[T]here is also a substantial difference between the legal basis of the two claims, for one concerns a right of a parent and the other a right of a child. The issue arising under the first sentence is therefore not absorbed by the finding of a violation of the second.

[28] See the above-mentioned *Kjeldsen, Busk Madsen and Pedersen* judgment, pp. 25-26, § 5

41. The right to education guaranteed by the first sentence of Article 2 (P1-2) by its very nature calls for regulation by the State, *but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols* [29]" [30]

7.63 Accordingly, the declaration by the Scottish government of its intention to "educate children and young people" about and against the necessarily detrimental impact of what it considers to be "conversion practices" will be lawful (and within the powers of the Scottish Government) only insofar as compatible with the A2P1 ECHR right of parents to ensure their children's education and teaching is in conformity with the parents' own religious and philosophical convictions.

Does the proposed Scottish Conversion Practices legislation fall within the legislative competence of the Scottish Parliament ?

7.64 Like the Northern Ireland Assembly and Ministers in, and Departments of, the Northern Ireland Executive, neither the Scottish Parliament nor the Scottish Ministers have power to act in a manner which is incompatible with any of the Convention rights listed in Schedule 1 of the Human Rights Act 1998. To attempt to do so would breach the vires limitations laid down in the NIA 1998 and in the Scotland Act 1998 respectively.

7.65 The proposed Scottish legislation outlawing conversion practices which the Scottish Government has consulted on would, if passed into law, effect radical changes in the current law. They will also involve a marked intrusion and expansion in the powers of the State into the private realm of families, and over the expression of orthodox religious teaching by faith groups.

7.66 The importance of protecting parents' rights and duties from an over-expansive State is expressly set out in preamble and Articles 5 and 18(1) of the UN Convention on the Rights of the Child ("UNCRC") as follows:

"Convinced that the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community

....

Article 5: State parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacity of the child appropriate

[29] See the judgment of 23 July 1968 on the merits of the *"Belgian Linguistic"* case, Series A no. 6, p. 32, § 5

[30] *Campbell and Cousens v. United Kingdom* (1982) 4 EHRR 293 at §§ 33, 40-1

direction and guidance in the exercise by the child of the rights recognised in the present Convention

Article 18: Parents … have the primary responsibility for the upbringing and development of their child: the best interests of the child will be their basic concern."

7.67 And the domestic UK and Strasbourg caselaw is replete with judicial statements about not merely the centrality of parents in decisions about their children, but also as to why a legislature obliged to conform to the requirements of the ECHR ***must*** in the vast majority of situations respect and uphold the parents' views and decision making about their children and their upbringing.

7.68 Thus parents' rights in relation to their children are undoubtedly too part of family life to which protection is given by Article 8(1) ECHR which provides that "everyone has the right to respect for his private and family life, his home and his correspondence". And in *Lautsi v. Italy* the Strasbourg Grand Chamber in a case which concerned the issue of whether the hanging of crucifixes on the walls of the classrooms of State run schools violated the A2P1 ECHR right of parents to educate their children in conformity with their own religious and philosophical convictions, and the right of their children to believe or not to believe - observed that:

"The state is ***forbidden*** to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the states must not exceed." [31]

7.69 These legislative proposals also implicate Article 9 ECHR, which guarantees freedom of religion and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance. In *TC v. Italy* (2022) 75 EHRR 24 the following was observed (at § 30):

"The Court considers that for a parent to bring his or her child up in line with one's own religious or philosophical convictions may be regarded as a way to 'manifest his religion or belief, in teaching, practice and observance'. It is clear that when the child lives with his or her parent, the latter may exercise Article 9 ECHR rights in everyday life through the manner of enjoyment of his or her Article 8 ECHR rights"

7.70 Also relevant is Article 10 ECHR, which guarantees freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference. A further immediately relevant Convention right is Article 11 ECHR which guarantees to everyone the right to freedom of peaceful assembly and to freedom of

[31] *Lautsi v. Italy* (2012) 54 EHRR 3 (18 March 2011)

association with others. In *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12 the Strasbourg Court observed at § 93:

> "religious associations are not merely instruments for pursuing individual religious ends. In profound ways, *they provide a context for the development of individual self-determination and serve pluralism in society*. The protection granted to freedom of association for believers enables individuals *to follow collective decisions to carry out common projects dictated by shared beliefs*."

7.71 In order to be able to challenge the validity of legislation passed by a devolved legislature as being beyond its legislative competence because Convention incompatible it is necessary for the court to be satisfied that the legislation at issue was simply not capable of being applied (at least in most cases) in a Convention compliant manner. [32] As the decision in *The Christian Institute v. Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 concerning the Scottish "named person" legislation shows, this is a high, but not insurmountable hurdle to overcome. [33]

7.72 It is clearly impossible to *finalise* possible arguments against the validity of this legislation unless and until there is legislation which has been passed by the relevant devolved legislature. But given the undoubted impact that this proposed legislation passed by a devolved legislature would have on a host of Convention rights, if a court challenge is brought as to the validity of this legislation, the onus will then be placed on the State authorities in the relevant part of the United Kingdom to satisfy the court that the legislation is, in all the circumstances, Convention proportionate and separately "in accordance with law" to the standards required by the European Court of Human Rights. This will require these State authorities to produce cogent and reliable evidence before the court sufficient to satisfy the court on these points.

7.73 In this regard the devolved State authorities have to show – against the background of the existing law covering this area - that there is indeed a pressing social need for this further legislation. Separately the new legislation if enacted in the terms as set out in the draft Bill has to be shown to set out rules of sufficient precision to enable any individual to regulate his or her conduct, and to afford individuals protection against the possibility of <u>*arbitrary*</u> interferences by public authorities with their Convention rights.

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[32] *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505

[33] See too *AB v Her Majesty's Advocate*[2017] UKSC 25, 2017 SC (UKSC) 101 in which the UKSC upheld a Convention incompatibility challenge to the terms of section 39 of the Sexual Offences (Scotland) Act 2009 (which deprived a person, A, who is accused of sexual activity with an under-aged person, B, of the defence that he or she reasonably believed that B was over the age of 16, if the police had previously charged A with a relevant sexual offence).

7.74 On this point of potential arbitrariness, the proposals in this legislation for conversion practices protection orders (which may be applied for by private parties) echo, in some ways, the approach which has been taken in a number of States in the United States, exercising their restored legislative competence on matters of abortion since the decision in *Roe* v. *Wade*, 410 US 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 US 833 (1992) was overturned and reversed by the US Supreme Court in *Dobbs v. Jackson Women's Health Organization* 597 US 215 (2022). Since the Dobbs decision a number of State legislatures, notably that of Texas, has passed abortion law which are enforced not directly by the State but by "private citizen enforcers". Thus under the Texas Heartbeat Act of 2021/Texas Senate Bill 8 private citizens are given legal standing to sue any individual or organization who assists a woman to obtain an abortion otherwise outlawed under the Act. The incentive for such private enforcement civil action is that if the claimant establishes on the civil standard of proof that the individual or organization has indeed assisted a woman to obtain an abortion which is otherwise outlawed under the Act then the claimant is given a right to an award of damages of not less than $10,000. [34]

7.75 Under the Scottish Government's proposals for a law outlawing conversion practices to be passed by the Scottish Parliament, although no right of damages is given and standing is also given to the authorities to enforce, the fact remains that any private body (whether an individual activist or, for example, an LGBTQIA+ advocacy organisation), will be able to *threaten* civil court action against other individuals (for example parents of children) or organisations (such as churches) whom they accuse of engaging in illegal "conversion practices" in relation to their child or a member of their church. And the fact that the person who is the subject of these conversion practice does *not* wish, or actively objects to, such court action being brought to protect them against their parents, their church or themselves is no barrier to such court action being threatened, and if permission given by the court to the private citizen enforcer, initiated.

7.76 This all necessarily brings a certain (and arguably Convention incompatible) arbitrariness in enforcement since the class of potential "private activists" who might threaten supposed enforcement actions against individual parents or doctors or churches is not defined, and hence their number not limited. Further such private activists are not bound by public law principles of consistency or any requirement to promulgate and follow

[34] See Meredith Johnson "The Texas Heartbeat Act: how private citizens are given the power to violate a woman's right to privacy through an unusual enforcement mechanism" (2021) 23 The *Georgetown Journal of Gender and the Law* 1-10

policies of enforcement, so an individual or association or church or professional body cannot predict when or why or by whom court action might be threatened against them.

7.77 Distinct from the Convention rights based challenges to the legislative competency of the measures in this draft Scottish Bill were they to be passed as proposed and unchanged into law, successful challenges to the validity of any such resulting Scottish legislation can also be envisioned based on the following:

(1) Certain provisions of this proposed Scottish legislation, notably as regards the offences and prohibition against travel outside of Scotland purport to have extra-territorial effect contrary to the provisions of Section 29(2)(a) of the Scotland Act 1998 ("SA 1998") which state "a provision [of an Act of the Scottish Parliament] is outside that [legislative] competence so far as … it would … confer or remove functions exercisable otherwise than in or as regards Scotland".

(2) Contrary to the provisions of Section 29(2)(b) SA 1998 (which state "a provision [of an Act of the Scottish Parliament] is outside that [legislative] competence so far as …. it relates to reserved matters") the provisions of this legislation relate to the reserved matters of equal opportunities which is defined (in § L2 of Schedule 5 SA 1998) as

> "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions." [35]

(3) In its disregard of the constitutional principle of subsidiarity by requiring parents of children and religious organisations either to keep silent their own views on sexual orientation and/or gender identity or actively to adopt and promote and give voice to only the views of the Scottish Government on these matters, the legislation at issue has the intent and effect of *abrogating fundamental rights recognised at common law and/or violating the rule of law* in breach of the common law limitations on the powers of the Scottish Parliament spoken to in *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122.

7.78 In sum, there are major issues with, and serious questions arising concerning the lawfulness of, the proposed Scottish measures outlawing conversion practice as set out by the Scottish Ministers in their draft Bill.

[35] Cf *For Women Scotland Ltd. v. Lord Advocate* [2022] CSIH 4, 2022 SC 150

7.79 If the NI Assembly were to enact into law the Member's Bill on the terms currently as proposed by Eóin Tennyson MLA (which he states is explicitly modelled on the criminalisation provisions set out in the draft Scottish Bill) those same issues as to lawfulness would equally arise.

7.80 Given the clear and unresolved problems which have been identified above with the approach set out in the Scottish draft Bill it would hardly appear to be the most sound model for legislation to be passed by the NI Assembly if it is to remain within the limits of the legislative competence of that devolved legislature as set out in the NIA 1998.

8. Conclusion on the proposed NI legislation to criminalise "Conversion practices"

8.1 If legislation as proposed by Eóin Tennyson MLA 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. But as has been noted:

> "[L]egislation achieved through the advocacy of the transgender movement does not necessarily convey a consistent understanding of gender. On the one hand, it is an identity that exists in a person from birth and awaits discovery when they are old enough. On the other, it is socially constructed. On the one hand, gender is fluid, but on the other, it is immutable." [36]

8.2 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. But as has also been noted:

> "[M]any of the claims of the transgender movement are based upon beliefs and values that are discordant with medical and scientific understanding of sexual dimorphism. They involve issues about the particular use of language, or views about categorization.
>
> Given that the issue of gender identity is so much an issue of belief and worldview, inevitably, responses to a person who declares a gender identity different to natal sex are likely to be influenced by a person's own beliefs and ethical positions. Such responses do not, and cannot occur, within a belief or value-free zone.

[36] Patrick Parkinson "Gender Identity Discrimination and Religious Freedom" (2023) 38 *Journal of Law and Religion* 1 10–37 at 30

For that reason alone, religious exemptions need to remain, insofar as they allow faith based organizations the freedom not to have to treat someone as a gender different to their natal sex." [37]

8.3 Like the 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 both in Scotland and for Northern Ireland contains a sting in the tail in the form of criminal sanction of up to 7 years and unlimited fines; and thus it 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".

8.4 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. [38]

8.5 If the proposals become law this would involve the Northern Ireland state authorities using the full weight of the State's coercive powers of expropriation, incarceration and humiliation against individuals and associations in Northern Ireland deemed guilty - even

[37] Patrick Parkinson "Gender Identity Discrimination and Religious Freedom" (2023) 38 *Journal of Law and Religion* 1 10–37 at 36-37

[38] See too the Gender Recognition Reform (Scotland) Bill, which was passed by a majority in the Scottish Parliament on 22 December 2022. In *Scottish Ministers v. Advocate General for Scotland - re gender recognition reform* [2023] CSOH 89, 2024 SC 173 the Lord Ordinary, Lady Haldane, upheld the lawfulness of the decision of the UK Secretary of State for Scotland to make an order under section 35 of the Scotland Act 1998 to block Royal Assent to this Bill and so prevent it from becoming law. The Scottish Government did not seek to appeal against this decision.

at an individual's request, or with their consent – of performing, offering, promoting, authorising, prescribing or arranging for ***any*** treatment, practice or effort that is deemed to be ***aimed*** at changing, suppressing and/or eliminating that person's (expression of) their avowed sexual orientation (whether heterosexual, homosexual, bisexual or, if following the Scottish proposals, asexual) and/or "gender identity" (whether congruent or incongruent with their actual sex).

8.6 The proposals have serious consequences for individuals subject to the law, but if passed into law it would suggest the 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.

8.7 But a *liberal* democracy is one in which the State gives space to, and affords respect for, other forms of life, and visions for society. Such alternative views may be embraced by individuals, embodied in families, and given voice in and by voluntary associations of people choosing to come together with a common purpose. These might be, say, feminist groups; or recreational clubs; or political entities; or religious bodies. A liberal democracy is a society in which a multiplicity of diverse voices can be heard, and where freedom of expression is honoured. It is space in which dissent thrives and where a free and open and ultimately tolerant and pluralist society flourishes because of, not in spite of, contradiction and opposition. [39] The criticisms which were voiced in the judgment of

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[39] For an opposing argument see Kenneth McK Norrie "What level of respect does opposition to same-sex marriage deserve in a democratic society?" (2023) 74 *Northern Ireland Legal Quarterly* 417

> "Homophobia, in essence, is the assumption of heterosexual superiority – the spoken or unspoken belief that the holder of the belief, because heterosexual, is morally better and socially more valuable than those who are not, irrespective of any intent to discriminate against or otherwise harm any individual or group. Lady Hale, in *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49 [2020] AC 413 spoke to the lived experience of millions when she said that
>
> > 'it is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics'.
>
> The affront to dignity lies in the necessary implication that a person – or a whole community – is worth less than others, merely on account of their race, gender, disability or sexual orientation. Homophobia in this broader sense, because it denies the dignity of those it assumes to be inferior, offends 'the very essence of the Convention' just as much as violent or extreme homophobia does, if in a different (but more insidious) way: it causes real and enduring harm to every LGBT person.
>
> So even if the owners of the Ashers Baking Company Ltd act respectfully to LGBT individuals that they come across in their professional and personal lives, and even when it would not cross their minds (as good Northern Ireland Christians) to encourage violence or hatred against anyone, their belief in their own heterosexual superiority may justly be described as homophobic, and as harmful to those who do not share their sexuality.

Baroness Hale, Lord Reed and Lord Hodge in *The Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 (when the UK Supreme Court unanimously struck down Scottish legislation which required the universal appointment of State guardians to children in Scotland - which legislation had been passed without any dissenting votes by the democratically elected and accountable Scottish Parliament) can be applied equally to the proposals at issue in the present case. The UK Supreme Court there noted (at § 73) that:

> "The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."

8.8 As we have noted above, it is not clear from these proposals just what the concept of harm play in them. Are "conversion practices" to be regarded as being "inherently harmful" such that harm inevitably results from them, even if not to the individual subject to them but to the wider community?

8.9 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.

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

8.11 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

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Lee v Ashers Baking Company Ltd may not have been about an act of discrimination against someone because of their sexual orientation, but it was fundamentally about the extent to which homophobic belief was worthy of respect in a democratic society. Though obscured by the UK Supreme Court's focus on the defendants' right not to express a belief that they did not actually hold, the defendants were in essence asserting their right to deny the equal worth of homosexuality and heterosexuality as aspects of the human condition. This is no different from the claim to racial superiority that lies at the heart of racism, and courts often point to homophobia and racism being regarded in the same light, and as equally unworthy of respect."

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.

8.12 I have nothing more to add at this stage. I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor and client. Those instructing me should not hesitate to revert to me if there is anything arising from the above on which I might usefully further advise, whether in writing or at a consultation.

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4 March 2025

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