RE: PROPOSED AMENDMENT NC30 TO THE CRIMINAL JUSTICE BILL

(TABLED BY ALICIA KEARNS MP)

“CONVERSION PRACTICES: PROHIBITION”

SUMMARY

ADVICE

This document is a short-form advice, and is abstracted from a fuller analysis of this amendment and similar proposals.

INTRODUCTION

1. I am asked to advise the Labour Women’s Declaration Working Group on the legal issues arising from an amendment (NC30) to the Criminal Justice Bill proposed by Alicia Kearns MP. The amendment is entitled “Conversion practices: prohibition” and seeks to criminalise “conduct or activities carried out with the premeditated intent to change, replace, or negate an individual’s actual or perceived sexual orientation or gender identity (or lack thereof)”. The offence would be triable only in the Magistrates’ Court and would carry a maximum penalty of an unlimited fine. For the purposes of this advice, I am addressing my analysis overwhelmingly to the proposal as it relates to Gender Identity, although some of my observations will apply *mutatis mutandi* to the proposal as it relates to sexual orientation.

2. The amendment is now in its second iteration. Changes have been made, but it remains poorly drafted, imprecise, reliant on undefined and contested terminology and impracticable. I note that the policy objectives to Conversion Practices (Prohibition) Bill (22 of 2023) state: “The Bill aims to avoid clashing with existing laws focused on harm and look at the intent of the actions.” Given the broad similarities between this amendment and that Bill, I have proceeded from the assumption that they share this stated objective. Practices involving violence, sexual and physical abuse, child cruelty, coercive control, false imprisonment, or harassment are already prohibited by the criminal law. I have been unable to find any data on any prosecutions for such behaviour in the context of attempts to convert a victim’s sexual orientation or gender identity. In the circumstances, the amendment may be seen to be more gestural in its nature than a practical response to a pressing social need.

3. SUMMARY

I have identified the following areas of concern. References to infringements of Convention Rights should be read as infringements of the corresponding Convention Rights as introduced by s.1 of the Human Rights Act 1998:

(i) The lack of definitions for Gender Identity and Transgender Identity (neither of which is a defined legal concept) fails the requirement of “quality of law”, resulting in an infringement of Article 7 (No punishment without law).

(ii) Gender Identity is a belief, extending far beyond the parameters of the Gender Recognition Act 2005 or s.7 of the Equality Act 2010. It is also a belief which is subject to contest from a number of different philosophical and political positions, some mainstream, others less so. Legislation to criminalise attempts to change someone’s belief will involve very a serious infringement of Articles 9 (freedom of conscience) and 10 (freedom of expression).

(iii) State interference by way of criminal prohibition in the conduct of an important, ongoing, public and political debate will create a chilling effect in the ordinary, democratic business of the “marketplace of ideas”. It risks creating a category of compelled speech. The wider impact on any prospect of mutual respect or compromise between the various sides of the debate is unlikely to be positive. It offends against and damages the principle of

pluralism.

(iv) The lack of clarity about what Gender Identity is, and whether the protection extends to Gender Expression, is a part of the failure to achieve "quality of law", which will create significant practical difficulties in the consistent enforcement of the proposed offence. Members of the public, complainants, suspects, witnesses, magistrates and police officers will be confused and unsure as to how and when the offence is made out. This will make the processes of investigation and litigation uncertain, cumbersome and likely to expend disproportionate amounts of police and court time.

(v) The amendment raises the possibility of a highly complex conflict with the terms of the Equality Act 2010, which will require intense judicial scrutiny if any resolution is to be achieved.

(vi) The amendment raises the possibility of criminalising 'misgendering' and 'deadnaming', which in turn would create a category of compelled speech and infringe Article 9 and 10.

(vii) Because Gender Identity is so contested a concept, the guarantee of an impartial tribunal may be almost impossible to achieve. This is likely to amount to an infringement of Article 6 (right to a fair trial).

(viii) Because of the tone of debate on Gender Identity, this offence is highly likely to be misused by way of penalising political opponents. The burden on police time, and the already hard-pressed resources of the CPS and criminal courts, will inevitably be increased without achieving any legitimate purpose. The increased risk of miscarriages of justice should be a matter of real concern.

(ix) The additional drain on court resources will be further exacerbated by the fact that there is no safeguard against private prosecutions. None of the protective "filtering" provided by the CPS will be available unless and until a defendant requests that the CPS take the prosecution over. By this point, the defendant may well have incurred significant costs obtaining legal advice and representation, as well as suffering unnecessary distress.

(x) Infringement of Article 8 for family members who do not have parental responsibility.

(xi) The defences in (6) are largely ineffective and inadequate to the task of protecting the Convention rights.

I have seen an advice written by Jason Coppel KC, on behalf of the Christian

Institute. Mr. Coppel KC provides a meticulous and, in my view, entirely correct analysis of this amendment as it is likely to affect the domestic and Convention rights of those whose religious beliefs are incompatible with a belief in Gender Identity. In the circumstances, I can do no better than to commend his work.

4.1 Definitions

There are no definitions for the objects of protection. Sexual orientation is defined in the Equality Act 2010 and may easily be interpreted as such. Transgender identity is referred to in the Sentencing Act 2020 but finds no definition there; the Act simply states that "transsexual", as defined by the Equality Act 2010, is included in the term. Gender identity is not defined anywhere in law. A statutory definition is essential for any new legal concept. In the circumstances of this proposal, the absence of definition is highly likely to infringe Article 7(1) ECHR[1].

4.2 Legal Status of Gender Identity

In the absence of any definition, the only practicable approach is to recognise Gender Identity as a belief, and Transgender Identity as a subset of Gender Identity. The overwhelming majority of those who enjoy the legal fiction of a Gender Recognition Certificate, or the protected characteristic of Gender Reassignment adhere to a belief in Gender Identity, but one is not legally coterminous with the other and this amendment cannot operate to extend the application of s.7 Equality Act 2010 or the Gender Recognition Act 2005 to everyone who believes in Gender Identity. This amendment, therefore, addresses itself to a mischief which amounts to attempting intentionally to change someone's mind about a belief. This will result in an exceptionally wide prohibition on aspects of political speech which, when applied to any other belief, are not regarded as abusive, nor do they cross any threshold of legality. This is almost certain to infringe Articles 9 & 10 ECHR. It is important to note that the exclusion in (6)(1)

[1] No punishment without law: Insufficient "quality of law", ie precision and foreseeability concerning the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the Convention (*Kafkaris v. Cyprus* [GC], §§ 150 and 152.

will be of no effect in cases where someone is expressing a belief (eg: "No one is born in the wrong body. Your belief that you are is objectively incorrect, meaningless and dangerous nonsense.") with the intention of changing a person's belief in Gender Identity. This would isolate beliefs about Gender Identity in the domestic legal framework, elevating the legal status and protection of those beliefs significantly above any other religious, spiritual, philosophical, metaphysical or political belief. Arguably, it breaches the obligation of the State to remain neutral in matters of belief. *"…a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention. …but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."*[2]

4.3 Article 10: Criminalising Belief/Lack of Belief

The ostensible parity of protection between Gender Identity or "the lack thereof" permits of two starkly different interpretations, both with serious consequential difficulties. The first interpretation is that a person who does not believe in Gender Identity lacks Gender Identity, making the protection universal where the belief is not. This would result in a wider stultification of political/philosophical speech and a very substantial chilling effect, which would be very likely to fall outside a court's interpretive powers and result in a declaration of incompatibility. It would impact quantitively on the infringement of Articles 9 & 10 by widening the number of people likely to be affected. It would have the unintended consequence of creating 'no-go' areas for the debate, discouraging good faith argument and driving those with differing beliefs into 'echo-chambers'[3]. The second interpretation is that a person who

[2] *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96 at §78

[3] "What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to

does not believe in Gender Identity cannot lack something in which they do not believe. This would limit the protection to those who believe in Gender Identity, thus creating an unjustifiable asymmetry in rights on the basis of belief. This interpretation would incur an infringement of Articles 9 & 10 for a smaller number of people, but also risk the infringement of Articles 14[4] and 17[5]. If the meaning of "lack thereof" is not disambiguated, the term would have to be interpreted in litigation. The first interpretation is the most likely in light of the courts' obligation under s.3 Human Rights Act 1998 to read legislation compatibly with the rights.

4.4 Article 9: Belief and Manifestation

It is not clear whether the target of the prohibited intention "to change" etc is confined to the victim's belief or whether it can also encompass their conduct. For many people, their ability to manifest a belief is essential to the integrity of that belief. The importance of this nexus is recognised in Article 9[6]. In the case of Gender Identity, this manifestation is often referred to as "Gender Expression". Commonly, this will be adopting a stereotypically "cross-sex"[7] or androgynous presentation and requesting others to use that person's chosen name and pronouns but there are, unsurprisingly, many variants. If the amendment is drafted to penalise conversion practices directed at a person's belief, but to leave untouched the lawfulness of analogous practices directed at a person's manifestation of his/her belief, I foresee serious consequential problems in the enforcement of the offence. The difficulties in distinguishing between a belief and its manifestation for members of the public (including complainants, suspects and witnesses, police officers and magistrates) provide an example of the inadequate "quality of law" for the purposes of Article 7. The police, prosecutors and the court will be entitled to take into account a complainant's manifestation in assessing the honesty and reliability of an

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ensure that the competing groups tolerate each other" *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 §116

[4] Prohibition of discrimination

[5] Prohibition of abuse of rights

[6] Where relevant, Article 9 states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his … belief and freedom, either alone or in community with others and in public or private, to manifest his … belief, in… teaching, practice and observance."

[7] Eg: a male who wears a tight dress, make up, long hair, high heels and adopts a female-coded name.

assertion of Gender Identity. This would mean that a person who did not manifest their Gender Identity through Gender Expression, and who would be entitled to the protection of this amendment ,would be less likely to persuade the court to the criminal standard of his/her belief because of the absence of 'manifestation evidence' and would therefore be less likely to receive the intended protection. By the same token, where a defendant's conduct is directed exclusively to that manifestation ("You will have to dress like a man to come into this house to see your family"), the proposed offence would have no effect, although it is foreseeable that such prosecutions will still be brought, however erroneously.

4.5 Conflict with Equality Act 2010

If Gender Identity is to include a person's chosen manifestation, further confusion and conflict will arise, likely to result in complex litigation. Access to single-sex services (where those services are provided for the other sex) may be a part of the chosen manifestation of a complainant's Gender Identity, and a currently lawful refusal to allow access may amount to a premeditated intention to "negate" his/her Gender Identity. Whether, and to what extent, this would conflict with provisions of the Equality Act 2010[8] expressly permitting single-sex service (and the exclusion of one sex necessary to maintain them) would be likely to require intense judicial scrutiny[9].

4.6 Compelled Speech

Similarly, where the adoption of a chosen name and pronouns are a part of a person's manifestation of Gender Identity, acts such as deliberate "misgendering" and "deadnaming" would arguably amount to a negation of Gender Identity. The effect of a belief as radically subjective as Gender Identity will be similarly subjective. Where a complainant understands the effect of their belief to include being perceived and treated as their chosen gender, the deliberate refusal of another to behave accordingly can be said to "negate" that

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[8] Ss104 (Selection of candidates), 193 (Charities), 198 (Sport); Sch 3, §24, 26-30 (Provision of services and public functions), Sch 9 (1) (Occupational requirements) , Sch 16 (Associations) and Sch 23(3) (Communal accommodation)

[9] *Re S* [2005] 1 AC 593

Gender Identity. The picture becomes yet more complex when taking account of the parity of protection for those who do not believe in Gender Identity and the use of language such as the prefix “cis” in attempts to persuade them that they are in possession of an identity which makes them a subset of the sets “men” and “women”, whose membership is determined by Gender Identity, not sex. The criminalisation of these forms of speech would be a stark infringement of Article 9 and 10, introducing a form of compelled speech and a serious chilling effect on the freedom of speech. They would create another risk of a declaration of incompatibility.

4.7 Article 6: Impartial Tribunal

The arguments about Gender Identity engage participants from multiple positions. Many police forces and the CPS have relied on EDI training which proceeds exclusively from the position of adherence to the belief in Gender Identity, resulting in a confused understanding of law and guidance. Such training even seems to have been provided to some members of the judiciary. There is a serious risk that cases will be pursued/decided on the basis of the beliefs of police, prosecutors and magistrates, rather than on the basis of an assessment of the evidence. Defendants are highly likely to raise the issue of proportionality where their Convention rights are engaged. Notwithstanding the absence of a requirement to prove harm in the offence, magistrates who share the belief in Gender Identity are likely to assess impugned conduct as being more serious than magistrates who do not share the belief. This will have the effect of rendering their decisions political, and therefore partial. A partial tribunal is a clear breach of Article 6.

4.8 Misuse of Law

The debate around Gender Identity and its conflict with women’s rights, radical feminist beliefs, religious beliefs, sceptical beliefs and others has already seen

the misuse of both criminal law[10] and civil law[11] to achieve ideological aims. An offence whose unwavering focus is a person's intention, and without any required proof of harm, will invite misuse. Coupled with the difficulties identified in 4.4 and 4.7 above, in particular the pro-Gender Identity premise of EDI training delivered within police forces and the CPS, the ability of investigators and prosecutors to fulfil their obligations of neutrality in assessing the evidence is likely to be inconsistent, and frequently compromised. Miscarriages of justice will increase, as will the frequency with which people are subject to improper decisions to charge and prosecute. The costs of falling victim to a vexatious or groundless criminal allegation can be enormous. Financial expense, personal disruption, reputational damage and high levels of distress are routine for those who suffer these experiences.

4.9 Private Prosecutions

Notwithstanding my expressed concerns about its ability consistently to function as such, the CPS remains a 'filter' for groundless or vexatious criminal allegations. Defendants will have to ask the CPS to take over the prosecution of such allegations, although they may have suffered appreciable damage by the time they are in a position to do so. This amendment should provide the same safeguards as those set out in the Conversion Practices (Prohibition) Bill (22 of 2023) requiring the consent of the DPP before any prosecution is started.

4.10 Article 8: Parental Responsibility

The category of relatives capable of having parental responsibility is limited by s.2 Children Act 1989, and the scope is set out in s.3 of the same. It ends when that child attains the age of 18. This fact, however, does not bring to an end the operation of Article 8 rights (the right to respect for private and family life, home and correspondence). Confining the defence in (6)(b) to such a limited category of family members ignores the fact that many families spread the

[10] Eg: Kate Scottow; JK Rowling; Caroline Farrow; Harry Miller, Jennifer Swayne; Linda Bellos & Venice Allen.

[11] Eg: multiple actions in defamation, harassment, misuse of personal information and claims for injunctive relief by Stephanie Hayden against the numerous Defendants.

responsibilities of raising children, particularly for those whose cultural norm is the extended family, or those where the parents have to work particularly long hours to support the family, and rely on the older children, more distant relatives and close family friends to deal with many of the duties which fall under parental responsibility. To criminalise attempts by parents or other family members to persuade a child to desist from holding (and manifesting) a belief in Gender Identity is, in my view, a disproportionate interference with the right to family life and an infringement on Article 8, particularly where that belief is closely associated with serious medical and surgical interventions, with long term/permanent consequences.

4.11 The Defences

The defences set out in (6)(a)(i) & (ii) and (6)(e) are of no effect. They state that the offence is not committed in circumstances where the offence has not been committed. Neither "disapproval" nor "acceptance" imply attempts to administer etc. a conversion practice. These terms conspicuously fail to address a situation where a person expresses *disbelief* in someone's Gender Identity, notwithstanding the fact that this disbelief is both widespread and of central importance to many people, including those with Gender Critical views. The term "health practitioner" in (6)(c) requires definition and, ideally, particularisation. The defence in (6)(c)(i) imposes a burden on an accused to prove compliance with regulatory and professional standards. In a regulatory setting, the burden of proving non-compliance with such standards would fall on the regulator. There is no apparent reason why the State should be relieved of this burden in the more serious context of a criminal charge. To avoid any violation of Article 6, I would expect this provision to be interpreted as meaning that there is a legal burden on the accused to raise the issue, with the evidential burden then falling on the prosecution. The recent public concern about the reliability of guidance from WPATH, an organisation which has widely been treated as setting the gold standard for the care and treatment of people with gender-related distress, should prompt a thorough examination of the extent to which extant regulation and standards are taken from WPATH materials.

5. Finally, having read some of the debate at the first reading of Conversion Practices (Prohibition) Bill (22 of 2023), I note the contributions of Mr. Lloyd Russell-Moyle on the interpretation of the language used in the definition of "conversion practices". It is a fundamental principle of statutory interpretation that words should carry their ordinary English meaning. Unless the desired meanings of those words are stipulated in the statute, such assertions will carry no force in the implementation of this provision. The Oxford English Dictionary provides the following meanings for the transitive verbs used in the (2) of this amendment:

   Change: To substitute or exchange; to replace with something else; to alter, modify or transform; to make or render different.

   Replace: To restore to a previous place or position; to provide a substitute for; to put an equivalent in place of.

   Negate: To render ineffective or invalid, to nullify, cancel out; to destroy; to deny the existence or truth of; to deny.

   These definitions will determine the breadth of the *mens rea* in this proposed offence and, when applied to a belief, create a very wide compass of intentions.

6. The legal effect of this proposed amendment (as it relates to Gender Identity) passing into law would be to occasion numerous infringements of Articles 6, 7, 8, 9 and 10. This fact would be almost certain to result in a declaration of incompatibility under s.4 of the Human Rights Act 1998.

Sarah Vine KC

Doughty Street Chambers

17th March 2024