RE: PROPOSED AMENDMENT NC30 TO THE CRIMINAL JUSTICE BILL

(TABLED BY ALICIA KEARNS MP)

"CONVERSION PRACTICES: PROHIBITION"

ADDENDUM TO SUMMARY ADVICE:

COMPARATIVE ANALYSIS OF NC30 & BILL 22 OF 2023

---

1. I am asked by Labour Women's Declaration to provide a comparative analysis of the risks presented by NC30 moved by Ms Alicia Kearns MP, as against the Private Member's Bill 22 of 2023 moved by Mr. Russell-Moyle MP. Both proposals seek to criminalise conversion practices in respect of sexual orientation and Gender Identity, but there are differences between them which, in my view, means that NC30 presents more, and greater, risks than the PMB. As should be evident from my Summary Advice of 17th March 2024, I am of the firm view that neither the amendment, nor the PMB as currently drafted will be held by the senior courts to be compatible with the Human Rights Act 1998. There are several human rights challenges to each.

2. The PMB is more cautious than the amendment and contains safeguards absent from NC30. The terminology in both is problematic, but the language used in NC30 is confusing and inconsistent. NC30 is wider in its scope and creates greater difficulties for enforcement, as well as an elevated risk of bad faith complaints which drain resources for investigators, prosecutors and courts at all levels, lead to miscarriages of justice, and cause unnecessary harm and distress to victims. It is more likely to promote division than harmony,

and the possibility that the proposed offence will be weaponised by participants in the current political debate is certainly foreseeable.

3. In the definition of "conversion practices", NC30 stipulates "any conduct or activities". Quite obviously, the lower the evidential bar, the easier it is for such complaints to be pursued and convictions returned for infractions which would otherwise be regarded as slight. The PMB contains a requirement that a "*course* of conduct or activity" is proven, thereby excluding single acts, and reducing the risk of vexatious complaints (such as those based on a single social media interaction) being prosecuted. At the risk of repeating myself, whilst the safeguard is welcome, the risk of complaints made in bad faith being carried through to trial remains significantly higher than normal with a criminal offence.

4. Intention

In NC30, the language of intention is wider, including the terms "replace" and "negate", but omitting the term "suppress". The term "negate" is the most problematic in the context of the subject matter. The Oxford English Dictionary defines "negate" as follows: "To render ineffective or invalid, to nullify, cancel out; to destroy; to deny the existence or truth of; to deny." The application of prosecutions pursued on this basis will trigger complex and iterative legal challenges about what is meant by the "effect" or "validity" of a Gender Identity, the extent to which those features amount to the manifestation of the belief, and where the balance is to be struck between the protection by criminal law of that manifestation and the protection by human rights and equality law of an accused's own right to manifest her or his belief. Because the manifestation of Gender Identity is entirely individual and therefore almost limitlessly variable, it will be impossible for the upper courts to provide reliable guidance.

5. Gender/Transgender Identity

NC30 uses both "Gender Identity" and "Transgender Identity" in ways which are difficult to interpret. "Gender Identity (or lack thereof)" is used for the

definition of conversion practice. That definition is foundational for understanding the scope of the offence since it defines the target of the impugned intention(s). This gives rise to the vexed question (set out in 4.3 of the Summary Advice) as to who is embraced by the words "lack thereof". The phrase "Gender Identity (or lack thereof)" is also used in the exception at (6)(c)(ii) which covers "health practitioners". However, the remaining exceptions are expressed using the narrower "Transgender Identity". Consequently, a person will be protected from conviction where the conduct which would otherwise be a conversion practice comes by way of expressing disapproval/acceptance of a Transgender Identity or lack thereof, but not where they are expressing disapproval/acceptance of a Gender Identity or lack thereof. The drafting of this indicates an intention that a distinction should be drawn between the lack of a Gender Identity and the lack of a Transgender Identity. Without any definition offered for either term, this falls far short of the "quality of law" and infringes Article 7. Attempting to enforce this proposal with reference to this conflicting terminology will be difficult to the point of impracticability for investigators, prosecutors, and magistrates. It will be frankly impossible for the vast majority of people to understand and therefore quite improper to expect ordinary members of the public who are neither lawyers nor gender theorists to understand where the line of prohibition sits.

6. The PMB consistently uses the term "transgender identity", a consistency which improves the internal logic of the proposed statute and avoids the problem at §5 above. Unfortunately, the definition of "conversion practice" means that it will remain lawful to pursue a predetermined intention to persuade someone who is not trans that they do, in fact, have a Transgender Identity. The focus of this Bill is the offender's intention, not any resultant harm. The Bill can therefore be seen as an endorsement of practices designed to change those who do not believe in, or do not consider themselves to have, a Transgender Identity, but the criminalisation of practices which flow in the opposite direction. This presents an asymmetry of protections under Article 9 and 10, and a very serious obstacle to compatibility with the HRA 1998, and is

addressed in 4.2 and 4.3 of the Summary Advice.

7. In contrast to its predecessor (NC14), NC30 creates a summary only offence. The provision at (4) creates a universal jurisdiction by way of reversing the "active personality" principle (such as is set out in s.72 of the Sexual Offences Act 2003). This is an almost unprecedented reach for a criminal offence, significantly further than the provisions of the Female Genital Mutilation Act 2003. It is also practically inert since those not located in the UK will only fall to be prosecuted if they enter the UK. No person is liable to extradition for prosecution of this offence, as the maximum penalty is lower than the 12 months. Even if the penalty qualified, the "dual criminality" principle would confine extradition to those jurisdictions with analogous prohibitions (and which are therefore less likely to be the locus of offending conduct).

8. The exception for accused persons exercising parental responsibility is not further qualified in NC30 and means that the court will not be required to make an assessment of whether the child's welfare was a paramount consideration to the accused (cf the analogous provision in the PMB). The absence of the 'welfare requirement' will avoid the complication of a further reverse burden on the accused (as seen in (6)(c)(i)) which would have to be subject to the same process of interpretation from the senior courts. It also reduces the scope of any challenge for infringement of Article 8, allowing the exercise of parental responsibility without more to suffice for conduct which would otherwise be an offence.

9. NC30 makes no requirement for any statutory guidance to be provided for investigators or prosecutors. This will leave those charged with enforcing the offence to deal with multiple areas of ambiguity and conflict without any assistance. There will be real problems in the application of any iteration of this offence which I have seen, largely as a result of the failure to achieve the necessary "quality of law". Frontline police officers frequently struggle with the balance of rights in criminal allegations. Without guidance, the problems

of enforcement identified at 4.4, 4.7 and 4.8 of the Summary Advice will be unmitigated. Again, this is a safeguard whose presence in the PMB is welcome, notwithstanding that it will mitigate but not resolve the problems to which it is addressed.

10. A similar observation applies to the safeguard in the PMB, again absent from NC30, requiring the DPP's consent for prosecution. I have set out in my Summary Advice something of the relevant context to this legislation and why it appreciably increases the risk of allegations made, and prosecutions pursued, for improper purposes. The impact of vexatious private prosecutions on the accused and the resources of the criminal justice system will be serious, and the safeguard in the PMB should be regarded as essential to the proper oversight of this proposed offence.

11. I advise accordingly.

20th March 2024

Sarah Vine KC

Doughty Street Chambers