

What the UK can learn from the New Zealand model in the drafting of effective legislation to outlaw conversion practises

On 03 July 2018 the UK government published its policy paper entitled “LGBT Action Plan 2018: Improving the Lives of Lesbian, Gay, Bisexual and Transgender People”.¹ This included a commitment to ending the practice of so-called “conversion therapy”, reported by those surveyed as “still alive in our country”². However, to date, legislation criminalising such conduct has yet to be passed.

Whilst proposals such as the Conversion Therapy Prohibition (Sexual Orientation and Gender Identity) Bill, sponsored by Baroness Burt of Solihull in the House of Lords, have been raised, there has been no formal announcement as to when any such legislation may be passed into law. Even if the proposed legislation as originally drafted were to be passed, a person found guilty of such an offence would face a maximum sentence of a fine³. Concerns that may possibly have led to the delay include debate as to what constitutes conversion therapy and the impact on religious freedoms and freedom of speech.⁴

In considering how any UK prohibition might be framed, it is instructive to examine legislation introduced overseas, particularly in other common-law jurisdictions. One pertinent example is the approach adopted by Aotearoa New Zealand under the Conversion Practices Prohibition Legislation Act 2022 (the 2022 Act).

What constitutes conversion practice?

A significant challenge in drafting effective legislation in the UK lies in defining “conversion practice” with sufficient clarity and precision. Any definition drawn too narrowly risks excluding

¹ <https://www.gov.uk/government/publications/lgbt-action-plan-2018-improving-the-lives-of-lesbian-gay-bisexual-and-transgender-people/lgbt-action-plan-2018-improving-the-lives-of-lesbian-gay-bisexual-and-transgender-people>

² https://data.parliament.uk/DepositedPapers/Files/DEP2018-0667/LGBT_Action_Plan.pdf page 6 paragraph 7

³ <https://bills.parliament.uk/publications/53023/documents/4012>

⁴ <https://hansard.parliament.uk/lords/2024-02-09/debates/DB690A34-D945-4EDA-9178-DD6357498F45/ConversionTherapyProhibition>

harmful conduct. Under section 5 of the 2022 Act, Aotearoa New Zealand defines conversion practice as “any practice, sustained effort, or treatment” that is either directed towards an individual because of their sexual orientation, gender identity, or gender expression and is done with the intention of changing or suppressing that characteristic.

This is followed by a list of items that do **not** constitute conversion practice, including but not limited to: “facilitating an individual’s coping skills, development, or identity exploration, or facilitating social support for the individual”, or “the expression only of a belief or religious principle made to an individual that is not intended to change or suppress the individual’s sexual orientation, gender identity or gender expression”. This list is further followed by examples that **do** constitute conversion practices.

When drafting effective legislation, the model favoured by Aotearoa New Zealand may provide a useful template for consideration. Conversion practices can vary significantly depending upon the context, and a one-size-fits-all approach is unlikely to cover all such cases. Instead, defining conversion practice as “any practice, sustained effort, or treatment” followed by clarification as to what is not included may be a more practical and workable definition from the point of view of the police and relevant prosecutors.

Consent not a defence

Another important element of the 2022 Act is section 10, which sets out that it is not a defence that the person upon whom the practice was performed consented, or that the person charged believed such consent had been given. Conversion practices are not limited to cases where the victim is subjected to physical force. Also included are individuals who have been shamed or manipulated into believing, for example, that their sexual orientation is an illness that can be fixed, to the extent that they seek such practices out.

Non-prosecution of victims

Consent not acting as a defence goes hand in hand with section 11 of the 2022 Act, which states that a person on whom a conversion practice is performed may not be charged as a party to an offence. Not all conversion practices will be imposed directly by the defendant upon the victim. There will also be cases where the defendant provides a form of so-called “treatment” for the victim to self-administer. Any effective UK legislation may wish to look to the approach taken by Aotearoa New Zealand to ensure no prosecution could fail on such a technical point.

Sections 8 and 9 of the 2022 Act

Sections 8 and 9 of the 2022 Act set out two separate criminal offences. Section 8 criminalises the performing of a conversion practice if the defendant either knows, or is reckless as to whether, the victim is under the age of 18 or lacks capacity to understand the consequences of matters relating to their health- either in whole or in part. A person convicted of an offence under section 8 faces a maximum sentence of three years’ imprisonment.

Section 9 meanwhile establishes that it is an offence to perform a conversion practice on any individual that **causes serious harm** to that individual, and the defendant knew or was reckless as to whether that serious harm would be caused. The maximum sentence under section 9 is five years’ imprisonment.

The presence of section 8 may provide additional support to those most vulnerable to conversion practices. However, the wording of section 9 is not without scope for improvement. It could be argued that the need for the presence of “serious harm” could hold back the legislation. What constitutes harm as opposed to serious harm? Is it not more properly the function of the court to determine the level of harm for the purpose of sentencing? Would the need for serious harm risk overly focusing upon examples of visible physical violence and failing to catch practices that result in intense psychological suffering? Is the legislation equipped to handle cases where the harm may not be immediately apparent but instead develops cumulatively or later in life? These are significant questions that the UK legislature will wish to consider.

Conversion practices

Finally, the wording of the 2022 Act is one the UK may wish to consider adopting. The Act specifically uses the phrase “conversion practices” rather than “conversion therapies”. The reason for this is simple. Conversion practices are not therapy. Conversion practices are abuse. Legislation criminalising such behaviour should not risk legitimising it by allowing it to masquerade under the title of therapy.

Conclusion

The stopping of conversion practices in the UK cannot take place without the implementation of effectively drafted legislation. The model favoured by Aotearoa New Zealand is a useful example the UK may wish to consider, particularly in the way conversion practices are defined and the closing of any consent-based loophole. There are also elements is room for improvement such as the serious harm requirement of section 9. Whilst the UK legislature will carefully scrutinise the wording of any proposed legislation, what is clear is that the lack of any current legal prohibition on conversion practices risks giving the message that such practices are acceptable in the UK.