Gay Men's Network

PARLIAMENTARY BRIEFING

Amendment NC42 (Conversion Practices Prohibition) to the Criminal Justice Bill moved by Alicia Kearns MP

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Introduction

1. Conversion legislation globally criminalises practices aimed at modifying a person's sexual orientation or "gender identity". While this legislation is well intended, it leads to far reaching and unintended consequences. These consequences principally flow from enacting the contested and controversial mind/body dualist concept of "gender identity" into criminal law. This is of serious concern to GMN because evidence shows homosexuals are overrepresented at youth gender clinics[1] and conversion practices bans have the effect of limiting clinical inquiry and chilling practice by exposing clinicians to the risk of criminal prosecution.

2. These concerns were recently reflected in evidence placed before the Women and Equalities Select Committee from staff at the Tavistock clinic in the following terms: "Dr Natasha Prescott, a former GIDS clinician reported in her exit interview from the Tavistock that 'there is increasing concern that gender affirmative therapy, if applied unthinkingly, is reparative therapy against gay individuals, i.e. by making them straight' and Dr Matt Bristow, a former GIDS clinician, reported to Hannah Barnes that he came to feel that GIDS was performing 'conversion therapy for gay kids[2]'

3. This briefing follows our work on an earlier version of this amendment entitled NC30[3] and specifically deals with the changes as between that the present amendment entitled NC42. We note that some terminology has changed, a new provision designed to deal with the problem of private prosecutions we identified has been inserted and the offence is now "either way" rather than "summary only". Despite this redraft, this remains a poorly drafted and potentially dangerous piece of legislation.

4. We wish to be clear. We regard "conversion bans" as homophobic pieces of legislation which are completely unnecessary and dangerous. These bans are homophobic because children who are socially different to their peers are encouraged to diagnose themselves as having been born into the wrong body. It is no accident that the figures from GIDS demonstrate that same sex attracted youth are

[1] The most recent reported data from GIDS in England demonstrates that older patients expressing a sexual orientation were overwhelmingly not heterosexual. 67.7% of adolescent female patients were recorded as being attracted to other females only, 21.1% were bisexual, and only 8.5% were listed as heterosexual. Among adolescent male patients, 42.3% were attracted only to other males, 38% were bisexual, and only 19.2% said they were attracted only to females. Holt V, Skagerberg E, Dunsford M. Young people with features of gender dysphoria: Demographics and associated difficulties. Clinical Child Psychology and Psychiatry. 2016;21(1):108-118. doi:10.1177/1359104514558431

[2] https://committees.parliament.uk/publications/43255/documents/215243/default/

[3] See Parliamentary Briefing: Amendment NC30 (Conversion Practices Prohibition) to the Criminal Justice Bill moved by Alicia Kearns MP
Briefing from GMN, https://www.gaymensnetwork.com/letters-and-responses

vastly overrepresented. Conversion bans stop doctors from legitimately exploring a child's presentation and we remark that these children almost always present in states of distress. These bans are unnecessary because no convincing evidence exists to suggest conversion practice are occurring in the modern era[4], and the question of what constitutes a "trans conversion practice" has never been adequately answered beyond exposing clinicians to prosecution.

5. While Amendment NC42[5] has been redrafted, such changes as were made appear to have entirely disregarded the Cass Review. We regard that as extraordinary given what Dr Cass says about the dangers of legislation such as this. Accordingly, we repeat the call we made in our definitive response to the Cass Review that Alicia Kearns MP withdraw this dangerous and homophobic amendment[6]. It is time for heterosexual politicians to stop speaking over and for gay men and we ask again that our evidenced and reasoned objections to this legislation are taken seriously.

The significance of the Cass review

6. The final Cass review is clear on the dangers of conversion practices legislation and says the following (emphasis added):

> "The intent of psychological intervention is not to change the person's perception of who they are but to work with them to explore their concerns and experiences and help alleviate their distress, regardless of whether they pursue a medical pathway or not. It is harmful to equate this approach to conversion therapy as it may prevent young people from getting the emotional support they deserve.[7]"

7. Amendment NC42 specifically envisages the prosecution of doctors and other clinicians, or it would not require the "Health Practitioner" defence it proposes at clause 6(c). There are presently two models of clinical care operating across the country which vary by state and whether provision is public or private. These are the "affirmation only" approach which requires a doctor to unquestioningly accept a child's self-diagnosis and the competing Cass compliant standard exploratory

[4] For a detailed analysis of the available data In this area see Paras 7-12, Gay Men's Network, "Ending Conversion Therapy Practices In Scotland: Consultation, March 2024, https://www.gaymensnetwork.com/letters-and-responses
[5] https://publications.parliament.uk/pa/bills/cbill/58-04/0155/amend/criminal_rm_rep_0429.pdf?fbclid=IwZXh0bgNhZW0CMTAAAR0nxAJtLKES51hjdvX47ufylrtr0gp51KlmD3bQ6GFfaJDEUoMYf70nDml_aem_Af7wSrtt_ds5_WXYBcmH13DfOwtwtEe2HSrYhJnmqH3iSZ9UTJPIE0nzvXZ0afHIklSFy7-tcCD8MoTBAVrxndJn
[6] See Para 51, Gay Men's Network, "Response to the Final Cass Review: Towards a vision of post-gender gay rights", April 2024 https://www.gaymensnetwork.com/letters-and-responses
[7] Final Cass Review, Page 150

therapy approach. This amendment will criminalise one or other of the models contingent on the position of the relevant regulator. This is a recipe for legal chaos and personal misery for clinicians who fall foul of this law.

8. We say that criminal law has no legitimate place in models for paediatric psychiatry outside of the many criminal offences that already exist to deal with malpractice. It is a matter of state overreach to second guess world leading experts such as Dr Cass and we remark that had this amendment been law prior to her report what she recommends would itself be a criminal offence under clause 1(b) of this amendment which criminalises the provision of materials. That is frankly absurd and a vivid illustration of how badly thought through this legislation is.

Summary of continuing legal problems with the amendment

9. Amendment NC42 is a redraft of amendment NC30 which itself was a modified version of a Private Member's Bill moved by Lloyd Russell Moyle MP on 01.03.2024. NC42 contains many of the same problems we identified with NC30 and the original Private Member's Bill[8] and adds to them with defects of a fundamental nature in a criminal statute, namely:

    a. The amendment fails to define key terms such as "transgender identity" (previously simply "gender identity" in NC30).

    b. The permission of the Director of Public Prosecutions is now required to prosecute (which it was not in NC30). This is an attempt to deal with a post-office like scandal by limiting private prosecutions, however, this amendment fails to recognise that such permission can be devolved to Crown Prosecutor level where a statute does not specify the personal permission of the DPP is required. This leaves the door open to a private prosecution with consent.

    c. Many of the statutory defences involve undesirable "reverse burdens" being placed upon defendant doctors and parents such that they must establish difficult to prove facts/concepts in order to secure an acquittal.

[8] https://www.gaymensnetwork.com/letters-and-responses

d. The statutory defences are in some cases entirely circular or otherwise ineffective because they misunderstand legal concepts like parental responsibility.

e. The proposed offence is now "either way" (meaning it can be tried by a Magistrates or Crown Court) whereas NC30 proposed only a summary only offence (meaning it could only be tried by the Magistrates). This has (likely unintended) implications for private prosecution costs being met by the state which we analyse below.

10. We take the view that these defects considered collectively mean the amendment is not compliant with the Human Rights Act 1998 and is therefore vulnerable to a declaration of incompatibility on application. Failing to define key terms in a criminal statute makes for unworkable legislation and simply passes the question of what legislators meant to the High Court at great public expense. Legislating for incoherent or circular defences, particularly where "reverse burdens" are involved simply invites long and costly human rights challenges. This amendment practically guarantees unnecessary and complex caselaw to fill the gaps a responsible legislator would not leave in a criminal statute.

The wide net of criminal liability in this amendment and failure to define core terms

11. This amendment provides via Clause 1 and 2 that

i. any conduct,

ii. that is "carried out",

iii. the "premeditated intent" of which,

iv. is to change, replace or negate,

v. an actual or perceived sexual orientation or "transgender identity" (or lack thereof),

vi. be a criminal offence if not excused by a defence in clause (6)

12. NC30 used the term "gender identity" where NC42 uses the term "transgender identity". It is unclear how these two concepts are different or what either of them means. Neither NC30 or NC42 make any attempt to define these terms, both of which

are contested and widely regarded as impossible to define. That is an extraordinary state of affairs for a criminal statute and it is highly unusual to expose any citizen to prosecution on the basis of an undefined concept.

13. It is also unprecedented and careless to attempt to enact the concept of "transgender identity" into law and not define it. All enacted comparative legislation globally contains a definition, the Scottish proposed legislation in this area attempts a definition, and the Private Member's Bill (PMB) in this area sought to rely on the 2020 Sentencing Act for this purpose. Criminal Courts require clear definitions of terms to direct juries accurately and in accordance with the intent of parliament.

14. Any defendant prosecuted for this offence for the "transgender identity" variant would be bound by criminal law to accept that "transgender identity" exists. This is no different conceptually to the previous amendment requiring a belief in the concept of "gender identity". That requirement cannot be reconciled with the existing civil law position set out in *Forstater v CGD*[9] that a person's view that "gender identity" does not exist is a protected characteristic belief. This amendment thus creates a serious inconsistency in law. In the civil sphere "gender identity ideology" is correctly treated as a contested mind/body dualist theory, but this amendment would compel a defendant in a criminal context to accept it as the basis for their prosecution.

15. With "gender identity" left undefined, the use of the potentially wide term "change" raises areas of serious concern. By way of example, a concerned parent who refuses to privately source puberty blockers for a teenager could be accused of the "premeditated intent" of "changing" a "transgender identity" if "transgender identity" is taken to include manifestations of that concept.

Circular and ineffective statutory defences

16. Clause 6 of the amendment substantially reproduces defences from the previous PMB on this subject. It reproduces the same defects in that bill and the defences are ineffective, circular or misunderstand legal concepts like parental responsibility. The defences raise the following issues:

17. The religion defence is not a statutory defence at all because it cannot apply where a conversion practice has taken place. This means it is not an excusatory defence in criminal law[10]. The religion defence also introduces the new concept of a conversion

[9] https://inews.co.uk/news/long-reads/trans-conversion-therapy-patient-speaks-out-psychiatrist-reported-1641330
[9] https://www.legislation.gov.uk/ukpga/1985/23/section/17
[10] Clause 6 (a) (i)

practices "directed to an individual", it is unclear what this means or if it intended to be a different concept to the main conversion practices concept in clause 2.

18. The "disapproval/acceptance" defence in clause 6 (ii) is vague, and neither term is defined. It is unclear whether this is a defence intended for parents and doctors or general conversation.

19. The "parental responsibility" defence[11] applies only where a person is "exercising" that responsibility, this will be extremely difficult for any parent to prove as against a Gillick competent child. The exercise of parental responsibility was analysed by Lord Denning MR in Gillick who said "the legal right of a parent to the custody of a child…is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and it ends with little more than advice[12]". It is perhaps of serious concern that this statute envisages parental prosecution and sets parents an almost impossible standard to reach in law in order to secure an acquittal.

20. The "health practitioner" defence[13] is a complex three-part defence which places three "reverse burden" on a Defendant thus:

    a. First, a defendant must be a person who is a member of a body overseen or accredited by the Professional Standards Authority for Health and Social Care (PSAHC). This will capture most medical professionals, but it will not cover counsellors or therapists who fall outside the supervision of the PSAHC. This is a significant omission given the prominent role of counselling and therapy in this area.

    b. Second, a defendant must prove they were complying with "their regulatory and professional standards". This phrase is not defined, and the Final Cass Review makes it plain that service specifications in this area are in a state of flux. Legislators should be aware that NHS Service Specifications and General Medical Council (GMC) professional obligations, for example, are two different things. Therefore, the NHS can adopt Cass-compliant standard medical practice, but private providers may adopt a different one. By leaving this key term undefined it is entirely unclear which regulatory or professional standard is envisaged and the circumstances in which this defence would be available. Further, no account is taken of the fact that the many bodies supervised by the PSAHC have different and sometimes conflicting standards, and no account is

[11] Clause 6 (b)
[12] https://www.bailii.org/uk/cases/UKHL/1985/7.html
[13] Clause 6(c) (i) and (ii)

taken of the fact that one of the regulators, Social Work England, was recently heavily criticised by the Employment Tribunal for the influence of gender ideology over it and ordered to put in place remedial training for staff[14].

c. Third, a defendant must prove that they did not commence the treatment with an intention to change, replace or negate a sexual orientation or "gender identity". Placing reverse burdens on Defendants (particularly clinicians or similar) is generally considered to be undesirable and onerous because Defendants are not expected to prove their innocence. Legitimate clinical practice will sometimes have a predetermined outcomes where a confident and clear diagnosis is made.

21. The "assisting" defence[15] is unclear and undefined and introduces the concept of "therapy" into the amendment which is does not feature in the "health practitioner" defence. Read in context the defence appears to be available to those assisting a person undergoing treatment or therapy rather than the therapist or treating clinician. It is entirely unclear why such persons might be criminalised in the first place.

22. The "exploring or questioning" defence[16] suffers from the same flaw as the religion defence, it applies only where a conversion practice is not proved and so is not a statutory defence at all.

23. Read collectively, the statutory defences as drafted suggest a poor understanding of criminal law because the defences are circular, onerous to prove or in some cases not statutory defences at all. In addition, they specifically envisage the prosecution of parents, doctors, religious figures and persons expressing acceptance or disapproval, which might be thought to be highly undesirable.

Ability of Private Prosecutors to misuse this amendment and potential costs issues

24. This amendment provides for an offence which may be privately prosecuted as per s.6 of the Prosecution of Offences Act 1985 where the consent of the DPP is obtained. Amendment NC42 does not specify that the DPP must give personal consent about which the Crown Prosecution Service correctly state "Where the consent of the DPP to institute proceedings is required, this can generally be given by a Crown

[14] See Ms R Meade v Westminster City Council and Social Work England: 2200179/2022 and 2211483/2022, https://www.gov.uk/employment-tribunal-decisions/ms-r-meade-v-westminster-city-council-and-social-work-england-2200179-slash-2022-and-2211483-slash-2022

[15] Clause 6 (d)

[16] Clause 6 (e) (i) and (ii)

Prosecutor by virtue of section 1(7) Prosecution of Offences Act 1985"[17]. While Amendment NC42 is an improvement on NC30 which contained no such provision, a private prosecution is still possible, and legislators should be extremely wary of a post office style scandal with associated costs implications.

25. Private Prosecutions are highly undesirable in a political space where fiercely contested public litigation is a norm. Activists in this area have previously targeted clinicians[18] regarded as political opponents and there is every reason to expect crowdfunded private prosecutions designed to politicise the field of gender paediatrics. This would be a misuse of the criminal law in a fraught area where recent developments around puberty blockers suggest gender activist are motivated by ideology, rather than emerging NHS England clinical best practice.

26. Amendment NC30 created a summary only offence triable only in the Magistrates court. Clause 4 of amendment NC42 creates an "either way" offence which may be tried in the Magistrates or the Crown Court, but it remains punishable only by a fine (which is unusual for an offence in the Crown Court). The significance of this change is that a private prosecutor may claim back costs from the state where an either way offence is prosecuted in the Crown or Magistrates Court. NC42 is therefore potentially far more expensive to the public than NC30 and given the failure to define key legal terms and inadequacy of the defences such costs are likely to be extremely high reflecting the length of trials and legal arguments.

27. It is difficult to reconcile some of the rhetoric in this area which compares conversion practices to torture with an amendment that proposes a fine only offence. This does not suggest such concerns are real or otherwise prison sentences would no doubt be proposed.

Human Rights Concerns

28. We take the view that the amendment as drafted is not compliant with the Human Rights Act 1998 and would likely be declared incompatible with the convention for the following reasons:

[17] See https://www.cps.gov.uk/legal-guidance/consents-prosecute

Right to a Fair Trial (Article 6)

29. This amendment provides for no definition of key terms such as "transgender identity" or "change, replace or negate" at all which is remarkable in this type of legislation and contrary to the Article 6 right that a Defendant understand the case against them in ordinary and clear language. The reverse burdens in clause 6 impose significant and onerous burdens on Defendants and in some cases do not amount to statutory defences at all. Requiring a Defendant to accept the existence of a contested identity concept as the basis for their prosecution is draconian and irreconcilable with the position in civil law where disbelief is protected. Article 6 requires a fair an independent tribunal, but any criminal court adopting the position dictated by this act, (that the contested identity concept exists), would be making an essentially political statement.

30. We remark further that the inadequate statutory defences threaten to embroil criminal courts in unfamiliar areas, principally the nuances of the family law concept of parental responsibility and the regulatory regimes applicable to clinicians. Crown Courts are unlikely to welcome complex legal arguments on these issues given the current backlog in court work.

Right to respect for private and family life (Article 8)

31. The amendment makes significant incursions into family life by potentially criminalising parental guidance or regulation that touches on sexual orientation or "gender identity". Difficult conversations that parents have as a matter of course would potentially be criminalised. Further, a parent can only rely on the relevant defence where they are "exercising" parental responsibility (PR). Courts are unlikely to conclude PR is being exercised over Gillick competent teenagers where prosecutions seem most likely. We respectfully suggest the parental defence as drafted completely misunderstands the concept of parental responsibility and we remark it makes no provision at all for family figures outside the concept of PR.

Right to freedom of conscience (Article 9) and expression (Article 10)

32. This amendment would significantly curtail both religious and political expression. A similar law passed in Victoria, Australia, led to the domestic human rights body regulating public prayer.

Conclusion

33. As with the previous amendment NC30, GMN continues to share the concern of the Secretary of State for Women and Equalities and members across both houses that there is "evidence that children likely to grow up to be gay (same sex attracted) might be subjected to conversion practices on the basis of gender identity rather than their sexual orientation. Both prospective and retrospective studies have found a link between "gender non-conformity" in childhood and someone later coming out as gay. A young person and their family may notice that they are gender nonconforming earlier than they are aware of their developing sexual orientation".

34. The fact that this amendment seeks to introduce "transgender identity" in criminal law but not to define that term is extraordinary. Gender Identity is a contested concept and potentially imposing criminal liability on parents, teachers and clinicians without a clear definition of what will meet the criteria for prosecution is not the hallmark of responsible legislating. This amendment is poorly drafted and likely to create long and expensive cases in the Magistrates, Crown and ultimately High Court, and the court is likely to regard the statute as a less than serious attempt to grapple with the many clearly identified problems in this area.

35. We call upon the movers of this amendment to withdraw it. There is no credible evidence that Conversion practices are actually occurring outside the discredited campaigning material of ideologues. Conversion practice bans are homophobic, and they put parents and doctors under an unwarranted and unjustified threat of prosecution. The Cass Review is perfectly clear on the dangers of such legislation, it is now high time to legislate on the basis of evidence and expert guidance, not ideological lobbying.

THE DIRECTORS

GAY MEN'S NETWORK