SUBMISSION ON NSW DEPARTMENT OF JUSTICE AND COMMUNITIES CONSULTATION PAPER – BANNING LGBTQ+ CONVERSION PRACTICES

Thank you for the opportunity to make this submission. Our contact details are at the end of the submission should you require any more information.

1. **The NSW Government's Consultation Paper's (CP) proposed ban on conversion practices closely follows Victoria's ban which is an extreme outlier when benchmarked internationally. The CP is much broader than pre-election commitments made by the Premier and ALP candidates.**

Although the Premier promised the proposed law would not be based on Victoria's law, the Paper's proposal is almost identical to the Victorian law. Of 34 surveyed jurisdictions in the world with laws banning some conversion practices,[1] 31 limit the ban in one or more ways to:

- Practices only in relation to minors (or those under 16 or those with impaired decision-making capacity or those coerced to participate) (29 out of 34 including the ACT). The UK government proposal for a ban will also be limited to minors.
- Practices only by licensed health practitioners (26 out of 34 including Queensland);
- Practices proven to cause actual injury (France and Quebec).

Victoria is one of only 3 jurisdictions in the world of the 34 (with Canada and New Zealand) to ban any practice in relation to all persons without regard to their decision making capacity or consent to participate and without requiring proof of harm.

Premier Minns said before the election on 23 February 2023: We're not just going to transpose the Victorian legislation and implement it into New South Wales.

The ban or the conversion ban has to be directed at an individual's sexuality with the direct purpose of suppression. Taking offence at the teachings of a religious leader will not be banned. Expressing a religious belief through a sermon will not be banned. And an individual, at their own consent, seeking guidance through prayer will not be banned either.

Several ALP candidates at election forums said:

We will oppose any practices that occur in any way, shape or form that harms anybody where these practices are forced upon somebody else.

[1] ACT, Queensland, Victoria, Germany, France, Malta, New Zealand, Canada, 20 US States and District of Columbia and Puerto Rico, and 4 Canadian provinces. The UK government has proposed a ban but is reportedly intending to not proceed partly because of policy concerns over youth gender transition medicine – it proposed to ban talking therapies for those under 18 or who are coerced to participate - https://www.gov.uk/government/consultations/banning-conversion-therapy/banning-conversion-therapy

Any legislation to ban conversion therapy or suppression practices must not outlaw individuals voluntarily seeking out medical health, allied health or other advice and assistance regarding their personal circumstances.

By contrast, the CP proposal would ban *any practice* or collection of practices directed to *any second person* with the purpose of changing or suppressing that second person's sexual orientation or gender identity:

- "Practice" would include advice, counselling, pastoral care, medical and psychological services and in Victoria is treated as including a conversation, even within a family or between friends. The consent of the second person to the "practice" does not remove its illegality. "Suppressing" is not defined.

Proof of harm resulting from the practice is not required for a civil complaint to ADNSW and civil complaints can be conciliated or escalated to NCAT for damages and other remedies without any proof of harm and notwithstanding the consent of the second person to the practice. The CP also asks whether ADNSW should have powers like its Victorian counterpart to investigate systemic practices using compulsory powers and issuing compliance notices.

Proposed Change: Limit the scope of the ban so it is consistent with the commitment of the Premier and ALP candidates before the election.

2. The Consultation Paper's proposal removes the agency of all people to obtain the medical, counselling, religious, family or friendship assistance they consent to in relation to dealing with or resisting unwanted sexual attractions or gender confusion.

This is contrary to the Premier's and ALP candidates' commitments that:

- **the law is directed only to harmful and coercive practices;**
- **the law will not prevent people from obtaining health, allied health or other advice and assistance regarding their personal circumstances including prayer and pastoral care *which they voluntarily seek and consent to*;**
- **the law will not prevent the expression of religious views through teaching or sermons even if some people might take offence at those teachings.**

For example, under the CP proposal, a married adult heterosexual with children who begins to experience unwanted same sex attraction and wants advice or help as to how to resist or change that attraction, could not legally be provided with that advice or help by a family member, friend, counsellor or religious leader. A health service provider could assist only if they could prove it was *necessary* to provide that treatment service in their reasonable professional judgment.

3. Participants in conversion practices report that some conversion practices cause injury and some cause benefit, so a ban on all practices regardless of injury is not a rational response

While some people say the practices the Consultation Paper proposes to ban have caused them significant psychological injury[2] other say the practices it would ban have caused them great benefit including preventing their suicides.[3] Some academic studies

[2] See for example the La Trobe University/HRLC report *Preventing Harm Promoting Justice* (2018) which describes the experiences of 15 LGBT people (14 experiences in Australia) who experienced some of the practices to be banned by the Bill as very harmful and traumatic. The report includes their stories - https://www.hrlc.org.au/reports/preventing-harm

[3] See for example the 2021 Report on the Survey of 78 ex-LGBT People (the majority of whom are

show that some people who are same-sex attracted have benefited from talking therapies that they say have helped them to authentically align their conduct with their religious beliefs.[4] Some of these people experienced a reduction but not change in their same sex orientation and enabling them to live celibate or in a mixed orientation marriage, which they considered a significant benefit. Some (by no means all) of these people reported an effective change in their sexual attractions/orientation to heterosexual. Others allege harm from the practices themselves or from coercion to participate or from the failure of unqualified promises of change which were not achieved. Academic studies differ as to the prevalence of efficacy,[5] harm or benefit and of course criticize and defend methodologies of other studies.

The American Psychological Association accepts the evidence of sexual fluidity [i.e. changes in attraction/orientation] across some people's lifespan[6] but argues that the fact that sexual orientation can evolve and change for some does not mean that it can be altered through intervention or that it is advisable to try.[7] This is an argument about causation. Some studies show a correlation between people's participation in conversion practices and changes in their sexual attraction, but proponents of change practices cannot prove that the practice caused the change nor can opponents prove that conversion practices did not cause the change. This largely leaves us with studies based on participants' self-appraisal of whether they experienced the practices as effective or ineffective or harmful or beneficial.

Australian) who say they benefited greatly from some of the practices that would be made illegal under the Consultation Paper proposals in their transition out of same sex sexual practice of at www.freetochange.org. The report includes some of their stories and the website includes videos of some of the people telling their stories.

[4] See e.g. Jones, S. L., &Yarhouse, M. A. (2011). *A longitudinal study of attempted religiously mediated sexual orientation change*. Journal of Sex and Marital Therapy, 37, 404–427. More recently see Sullins DP, Rosik CH, Santero P: *Efficacy and risk of sexual orientation change efforts: a retrospective Analysis of 125 exposed men* . F1000Res. (2021) 10: 222.
The results of this analysis show the complexity of experience: Exposure to SOCE was associated with significant declines in same-sex attraction (from 5.7 to 4.1 on the Kinsey scale, p <.000), identification (4.8 to 3.6, p < .000), and sexual activity (2.4 to 1.5 on a 4-point scale of frequency, p < .000). From 45% to 69% of SOCE participants achieved at least partial remission of unwanted same-sex sexuality; full remission was achieved by 14% for sexual attraction and identification, and 26% for sexual behaviour. Rates were higher among married men, but 4-10% of participants experienced increased same-sex orientation after SOCE. From 0.8% to 4.8% of participants reported marked or severe negative psychosocial change following SOCE, but 12.1% to 61.3% reported marked or severe positive psychosocial change. Net change was significantly positive for all problem domains.
For analyses disputing that gender identity change efforts always cause harm see Roberto D'Angelo, Ema Syrulnik, Sasha Ayad, Lisa Marchiano, Dianna Theadora Kenny, Patrick Clarke *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria* Archives of Sexual Behavior https://doi.org/10.1007/s10508-020-01844-2. For Detranistioner's testimoinies about the harms of some affirmation approaches to transition see : Entwistle K. 'Debate: Reality check – Detransitioner's Testimonies require us to Rethink Gender Dysphoria'. Child & Adolescent Mental Health, 2020. doi:10.1111/camh.12380.

[5] See e.g. Dehlin, John P., "Sexual Orientation Change Efforts, Identity Conflict, and Psychosocial Health Amongst Same-Sex Attracted Mormons" (2015). All Graduate Theses and Dissertations. 4251. https://digitalcommons.usu.edu/etd/4251 which found that only 3.1% of 916 same sex attracted people said they had experienced some shift in sexual attraction/orientation due to change practices.

[6] See e.g. Diamond, L. M. (2008). *Sexual fluidity: Understanding women's love and desire*. Harvard University Press.

[7] APA Resolution on Sexual Orientation Change Efforts February 2021 p.3 at American Psychological Association. (2021a) https:// www.apa.org/ about/ policy/ resolution- sexual-orientation- change- efforts.

The bottom line is that, based on their own testimonies, some people have experienced conversion practices as harmful and ineffective and some people have experienced them as beneficial and effective.

Given that evidence, the correct public policy response cannot be to ban a broad range of practices regardless of whether injury is caused, by assuming that injury always occurs, as the Consultation Paper does in its proposed definition of practices and proposed civil unlawfulness of practices. Instead, any ban must focus on harmful practices, on whether actual injury was caused by a particular practice. As the ALP candidates promised, the agency of persons to voluntarily seek out advice and assistance regarding their personal circumstances must also be protected.

4. Our Recommended Definitions and Offence and Civil Regime

The purpose of the legislation is "prohibiting harmful and coercive conversion practices".

We support the prohibition of conversion practices that are directed to a person for the primary purpose of changing the person's sexual orientation where the person has not given voluntary and informed consent to the practice and where that practice has caused proven injury to a person.

For reasons set out below, we would not include a prohibition on gender identity change practices and we would not include a ban on suppression as opposed to a change of sexual orientation.

We proposed the following definitions.

Conversion practice means a practice, sustained effort, or treatment[8] directed to another person on the basis of the person's sexual orientation, without the person's informed and voluntary consent, for the primary purpose of changing the person's sexual orientation, and which causes injury to the person.

Injury means serious bodily injury or serious psychological injury.

Serious psychological injury means "serious and protracted psychological injury, going beyond merely transient emotions, feelings and states of mind".[9]

Consent to a practice:

A person who is 16 years or older with capacity to give consent can give voluntary and informed consent to a conversion practice.

A parent or guardian of a person who is under 16 years of age, can give voluntary and informed consent to a conversion practice on behalf of the person, if the parent or guardian has capacity to give consent.

Consent is not voluntary where it is obtained by duress or where the person is deceived into giving consent.

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[8] Practice, sustained effort or treatment is intended to avoid concerns that a one-off conversation or comment could amount to a conversion practice. Many jurisdictions use language requiring some treatment, practice or sustained effort rather than "conduct" as used in Victoria. E.g. Queensland – "practice" of a health service provider, ACT: "a treatment or other practice", New Zealand: "any practice, sustained effort, or treatment", Germany: "guided treatments".

[9] The intent is to avoid claims of injury arising from being temporarily offended or distressed by an opinion, worldview, teaching, sermon or prayer which the person strongly disagrees with.

Informed consent requires the person giving the consent to have received and understood relevant and accurate information about the nature of the conversion practice.

Offence

A person must not engage in a conversion practice in relation to another person intending to cause injury or being reckless as to causing injury to the other person.

The Consultation Paper's proposed mens rea was only the intention to change [or suppress] a person's sexual orientation. This is worse than Victoria which at least requires negligence as to whether injury will be caused. The CP's additional requirement that a reasonable person would consider the practice to be likely to cause injury is not relevant to the defendant's mens rea. Nor did it require any injury to actually occur.

Criminal liability should not turn on the probability a reasonable person would assign to whether conduct is likely to cause injury. It should turn on actual injury and a subjective mental state of intending to cause that injury or being reckless as to injury being caused.

We consider that negligence is too low a bar for criminal liability. If a person engages in conversion practices (be it psychiatry or counselling or a series of sermons) and is negligent in their delivery and that causes damage to a person, then it is likely the person will be civilly liable in negligence. That is the appropriate legal consequence for negligence, not criminal liability.

Civil Regime

The proposed civil response mechanism is that a complaint may be made by a person to Anti-Discrimination NSW, that they were subjected to a conversion practice that caused them injury. *No mental element of intending to cause injury or being reckless as to causing injury is required for a civil response complaint.*

AD NSW will have powers to conciliate the complaint in the same way as a discrimination complaint and the complaint may be handled by NCAT in the same way as a discrimination complaint if it cannot be conciliated.

The complaints regime should also implement recommendations 2, 3, 4 and 6 of Report 55 of the Portfolio Committee No.5 of the Legislative Council addressing unmeritorious or vexatious complaints made under the complaint procedures of the Anti-Discrimination Act (recommendations endorsed by the ALP members of the Committee).

No new powers of investigation or enforcement should be conferred on AD NSW in relation to complaints of conversion practices. The complaints regime should not incorporate an investigatory power that relies upon anonymous complainants who are not identified to the person or body investigated (as is the case in Victoria). The regime should not include a representative body complaint mechanism, which will encourage litigation against religious institutions and schools.

In Victoria the threat of civil response compulsory powers and compliance notices from the Victorian Human Rights Commission has caused great angst for parents and

religious organizations and schools. We refer to examples of illegal practices as published by the VHREOC.[10]

Conversion practices should not create any civil or criminal liability under the Act except to the extent expressly provided by the Act (i.e., there is no separate statutory duty of care arising from the Act, but a conversion practice can also attract ordinary criminal or civil legal consequences under other laws e.g., as an assault).

5. Exemptions

Provided conversion practices and the criminal and civil provisions are defined as recommended above, there should not be any need to include exemptions for religious practices or health practitioners or families, as these will be lawful if they do not cause serious injury. However, if conversion practices are not defined as above there should be exemptions for religious practices and health practitioners as well as family members and their as discussed above.

However, if the elements and definitions we propose above are not adopted then the following types of exemptions will need to be considered to meet the Premier's and ALP candidates' commitments.

5.1 A conversion practice does not include religious practices including, without limitation,

(i) the teaching or communication of religious beliefs to a person; or
(ii) praying with a person or pastoral care or religious counselling of the person.

5.2 A conversion practice does not include discussions about a child's sexual orientation [or gender identity] between a child and their parent or guardian or between a child and a family member who is authorised by a parent or guardian to have the discussion.

5.3 A conversion practice does not include any practice by a registered health service provider[11] that, in the provider's reasonable professional judgement—

(i) is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or
(ii) enables or facilitates the provision of a health service for a person in a manner that is safe and appropriate; or

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10 [10] See https://www.humanrights.vic.gov.au/change-or-suppression-practices/for-families-and-friends/

- a parent denying their child access to any health care services that would affirm their child's gender identity because they do not want their child to have access to information or advice that would affirm their child's gender identity;
- a parent rejecting the recommendations of qualified health professionals and refusing to support their child's request for medical treatment that will prevent physical changes from puberty that do not align with the child's gender identity;
- a religious leader telling a member of their congregation – with the intent to induce that person to change or suppress their sexuality – that they will be excommunicated if they continue their same-sex relationship and prohibited from returning as long as that relationship continues;
- using a youth group session to provide 'support' through group prayer to a young person to help them fight a desire to act on their feelings of same-sex attraction;
- running a peer-to-peer support group designed to coach a person who is exploring or questioning their gender identity to accept the sex they were assigned at birth.

[11] Use the NSW legislative term that covers regulated health service providers including doctors, psychiatrists and psychologists.

(iii) is necessary to comply with the provider's legal or professional obligations.
[Language taken from Chapter 5B of Public Health Act 2005 (Queensland) instead of narrower Victorian law exemption for health services providers.]

We argue below for the removal of gender identity. If that is not accepted, there should not be special exemptions for gender affirmation and traction assistance as the CP proposes.

6. Gender Identity [12]

1. The government should not address gender identity in the ban at this stage. The government should not place a legal thumb on the scales of medical and psychiatric decision making in this controversial area.

2. There has been a dramatic increase in the last 10 years in Western countries in the number of adolescents saying they experience gender incongruence and seeking treatment and being put on puberty blockers and cross-sex hormones (and sometimes sex change surgery). There is a sharp division of opinion in the medical and psychiatric professions about the best approach to gender incongruence and gender dysphoria in children or adolescents, the great majority of whom, in previous research studies, have resolved their gender incongruence before or while going through puberty.[13] Until a few years ago the most widely practiced approach was a biopsychosocial assessment of all possible causes of distress including gender dysphoria, and mental health support to children and adolescents to see whether they resolve their gender dysphoria before or while going through puberty. The more recent approach, advanced despite a weak evidential foundation, is to affirm the child's sense of being in the wrong body and moving them on to puberty blockers and cross-sex hormones.

3. In the last 2 years there has been increasing international health opinion caution about the lack of evidence supporting aspects of the "gender affirmation" approach including lack of follow up and uncertainties about the long term effects and safety of puberty blockers and cross-sex hormones. A number of young people who took these to transition their bodies have sued. Keira Bell (and another person) sued the UK NHS Tavistock Gender Clinic for giving her puberty blockers and hormones at 16 when she could not give informed consent and won at first instance. The litigation led the NHS to commission a review by senior pediatrician Dr Hillary Cass.[14] Following the UK Cass Review in June 2023 the NHS has decided that puberty blockers will not be prescribed to under 18s for gender dysphoria, except in exceptional circumstances, because of a lack of evidence to support their safety

[12] We do not support including gender identity. But in any event there is no reason given why the Paper does not use the existing term "transgender" in the Anti Discrimination Act: a transgender person is a person,
(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

[13] See Jiska Ristori and Thomas Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1*) International Review of Psychiatry* 13; See Jiska Ristori and Thomas Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1) *International Review of Psychiatry* 13.

[14] https://cass.independent-review.uk/publications/interim-report/

or clinical effectiveness.[15] Similar reviews and changes have occurred in Sweden, Norway and Denmark.

4. It is remarkable that the Consultation Paper does not discuss this debate or these developments. It proposes to ban practices which seek to change or suppress a person's gender identity but exempts services supporting gender transition or gender expression and gender affirming care. The proposed law would thus preference the view that the correct treatment for a young person experiencing gender incongruence is to commence puberty blockers and hormones and body transition. But it creates a risk of illegality for any other medical approach (and support for it by parents or family) as being illegal suppression (e.g. holistic assessment of all causes of distress and psychotherapeutic support without using puberty blockers and cross-sex hormones).

5. This legal threat over one medical approach but not the others places a legislative thumb on the scales of medical and psychiatric decision making. But the government cannot know what is the best medical course for any individual person and should not be weighting medical decisions with the threat of criminal and civil consequences. The Consultation Paper also ignores de-transitioners[16] like Keira Bell and Chloe Cole and ignores the risks of litigation by them asserting that they were put on blockers and hormones without informed consent. Jay Langadinos has a claim in NSW Supreme Court against a psychiatrist who put Jay onto gender affirming treatment while Jay was mentally ill. There is a slew of cases in the USA by detransitioners. Senior physicians at the Westmead Clinic have raised concerns over gender affirmation bias. As reported widely only last month, one very large Australian medical insurer has withdrawn cover for gender affirming services for minors.

6. Given the above disputes as to appropriate medical practice and legal liability risks, there are good reasons to leave gender identity out of any legislation at this stage. *But if it is included,* there must be no specific exemptions privileging transition assistance and gender affirming care over holistic care and psychotherapeutic support. Any health service provider exemption should be neutral and providers using either approach will have to bring themselves within that.

7. Suppression

The meaning of the Consultation Paper's proposed ban on "suppression" is unclear. What constitutes suppression of a sexual orientation? What constitutes suppression of a gender identity (given that it is self-defined solely by the individual and can change as they wish)?

In Victoria the Equal Opportunity Commission and the Attorney-General in Parliament have taken a different view on whether counselling sexual abstinence or celibacy is suppressing sexual orientation. Parents in NSW would be stunned to learn that would be illegal under the proposed ban.

Traditional cultural groups and religious bodies and schools often require their leaders, employees, volunteers and members to conform to cultural or religious beliefs on sexual orientation and gender identity. Such requirements should not become illegal "suppression". Likewise sex-based access to groups (e.g. a women's group and shared bathrooms) should not become "suppression" of gender identity. Such matters are

[15] As reported in the BMJ https://www.bmj.com/content/381/bmj.p1344.full
[16] See e.g. https://segm.org/first_large_study_of_detransitioners

already dealt with by antidiscrimination law including its exceptions. There is no reason to create a second and different regime of prohibitions on discrimination on the grounds of sexual orientation or gender identity.

We recommend not including a ban on suppression. But if such a ban is included, explicitly exclude advocacy or teaching of sexual abstinence or celibacy and exclude qualifications for membership, volunteer or employment roles or leadership roles or sex-based groups and facilities in traditional cultural and religious organizations and schools from the proposed ban.

Please contact us if you require further information.

Mark Sneddon, Executive Director, Institute for Civil Society
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marks@i4cs.com.au www.i4cs.com.au

PO Box 2107 | Camberwell West | VIC 3124

INSTITUTE FOR CIVIL SOCIETY

ABN:46 611 668 243
Australian Registered Charity