Grant Illingworth QC

26 August 2021

Richard McLeod
McLeod & Associates
By Email

Dear Richard,

Conversion Practices Prohibition Legislation Bill

You have instructed me to provide an opinion for your client, Family First New Zealand, concerning aspects of the Conversion Practices Prohibition Legislation Bill. The essential issue is whether the proposed legislation interferes unduly with human rights.

The purpose of the Bill is set out in the explanatory note as follows:

> Conversion practices encompass a broad range of practices that seek to change or suppress a person's sexual orientation, gender identity, or gender expression. Research emphasises that conversion practices do not work and can contribute to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts.
>
> The Government's objectives in prohibiting conversion practices are to—
> - affirm the dignity of all people and that no sexual orientation or gender identity is broken and in need of fixing:
> - prevent the harm conversion practices cause in New Zealand and provide an avenue for redress:
> - uphold the human rights of all New Zealanders, including of rainbow New Zealanders, to live free from discrimination and harm.

This explanation makes it clear that the intended purpose of the proposed legislation is to prohibit "a broad range of practices" that necessarily involve the communication of ideas between individuals in the community. This immediately indicates that the proposed legislation is likely to interfere with various rights and freedoms that are currently protected under our existing law. I return to this issue below.

Clause 3 of the Bill says that its purpose is to prevent harm caused by conversion practices and to promote respectful and open discussions regarding sexuality and gender. As is evident from the explanatory note, and from clause 3, the definition of "conversion practice" is the key to meaning and purpose of the legislation as a whole.

The definition of "conversion practice" is found in clause 5(1). It means "any practice" that:

(a) is directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression; and

(b) is performed with the intention of changing or suppressing the individual's sexual orientation, gender identity, or gender expression.

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At least when read literally, this is a very broad definition. It is narrowed down to some extent, however, by clause 5(2) which provides that "conversion practice" does not include:

(a) a health service provided by a health practitioner in accordance with the practitioner's scope of practice; or

(b) assisting an individual who is undergoing, or considering undergoing, a gender transition; or

(c) assisting an individual to express their gender identity; or

(d) providing acceptance, support, or understanding of an individual; or

(e) facilitating an individual's coping skills, development, or identity exploration, or facilitating social support for the individual; or

(f) the expression only of a religious principle or belief made to an individual that is not intended to change or suppress the individual's sexual orientation, gender identity, or gender expression.

It follows that to understand the meaning of "conversion practice" it is first necessary to understand the meaning of clause 5(1) and then to exclude the types of conduct that are exempted under clause 5(2). I will refer to what is left, after the exemptions have been excluded, as the "residual definition."

Despite the exemptions contained in clause 5(2), the residual definition still potentially encompasses a wide range of human behaviour. The scope of the residual definition is primarily governed by the words "any practice" in section 5(1). Those words could be interpreted broadly so as to include important aspects of private behaviour. It is therefore crucial to understand what is meant by them. When applying the residual definition, "any practice" could include persuasion, whether in words or in writing. "Any practice" could also include conduct other than persuasion, such as prayer for the person to be set free from thoughts considered to be morally inappropriate. Parental or pastoral counselling could potentially fall within the residual definition as well, if expressed in words or conduct.

For the reasons explained below, it is possible that the words "any practice" could be interpreted quite restrictively by the courts. But irrespective of what meaning is attributed to those words, to fulfil the definition of "conversion practice" it would have to be established that the "practice" in question was directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression, and was intended to bring about a change in, or the suppression of the individual's behaviour, in respect of at least one of those personal attributes. It would also need to be established that the exemptions in clause 5(2) did not apply.

Under clause 8, the proposed legislation would make it an offence, punishable by up to 3 years imprisonment, for a person to perform a conversion practice on an individual where the person performing the conversion practice knew or was reckless as to whether the individual was under the age of 18 years, or where the individual lacked, wholly or partly, the capacity to understand the nature, and foresee the consequences, of decisions in respect of matters relating to their health or welfare.

Under clause 9, the proposed legislation would make it an offence, punishable by up to 5 years imprisonment, for a person to perform a conversion practice on an individual

where that practice caused serious harm to the individual and where the person performing the conversion practice:

(a) knew that doing so would cause serious harm to the individual; or

(b) was reckless as to the whether the performance of the conversion practice would cause serious harm to the individual.

Under clause 10, consent would be no defence to a charge under section 8 or 9. But, under section 11, a person on whom a conversion practice was performed could not be charged as a party to an offence under section 8 or 9. And, under section 12, no prosecution could be brought without the Attorney General's consent. Apart from the criminal offence provisions outlined above, a person who performed a conversion practice could incur civil liability: substantial damages could be sought by way of a complaint under the provisions of the Human Rights Act 1993.

Many activities that could potentially fall within the residual definition of "conversion practices" are presently lawful. Thus, for example, it is presently lawful for a parent to express strong moral views to a child with the intention of persuading the child to refrain from engaging in sexual behaviour which is considered immoral. Similarly, it is presently lawful for a minister of religion to pray for a person who wants to be released from sexual thoughts about persons of the same gender. If enacted into law, and if taken at face value, the proposed legislation would seemingly prohibit such behaviour, and could make it criminal in certain circumstances.

Under the law as it stands at present, activities of that kind would be protected by human rights legislation, including as follows:

- The right to freedom of thought, conscience and religion, including the freedom to seek, receive, and impart information and opinions of any kind in any form;
- The right to manifest a person's religion or belief in worship, observance, practice or teaching either individually or in community with others, and either in public or in private;
- The right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form;
- The principle that a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians.

The first three of the provisions listed above are affirmed in sections 13 to 15 the New Zealand Bill of Rights Act 1990. The fourth provision is included in section 5 of the Care of Children Act 2004. They are each regarded as basic rights in our society. If the Bill is enacted into law, and at least if it is read as broadly as seems to be intended, its requirements would interfere substantially with those basic rights.

It is an elementary aspect of New Zealand constitutional law, that Parliament has the authority to enact legislation which limits fundamental rights. Some rights can also be attenuated by other legal decisions (eg court rulings), but only where the limitations are prescribed by law and are demonstrably justified in a free and democratic society.[1] The courts generally accept that fundamental rights can be overridden by Parliament, so long

[1] See section 5 of the New Zealand Bill of Rights Act 1990. The case law suggests that some rights are absolute and cannot be attenuated in this way (eg freedom of conscience).

as the legislative intention is made sufficiently clear.[2] In cases where the meaning is uncertain, or where something seems to have gone wrong in the drafting process, the courts may "read down" statutory words that appear to be inconsistent with fundamental rights, so as to effect harmonisation within the rules of the legal system. The courts are expressly required to adopt this approach by section 6 of the New Zealand Bill of Rights Act which provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

In fulfilling this requirement, the courts may apply a concept of "minimal impairment" under which consideration is given to whether an enactment is excessively broad in its apparent reach and goes beyond what is genuinely necessary to achieve the intended purpose of the legislation.[3]

Laws that appear excessively broad can therefore be narrowed by judicial interpretation. This kind of interpretational narrowing could well be applied in relation to the words "any practice" in the definition of "conversion practice." For example, the word "practice" could be read as applying only to conduct of a formal, semi-formal, systematic or repetitive nature.[4] This would in turn narrow the meaning of the term "conversion practice" and would consequentially limit the scope of the criminal and civil sanctions outlined above.

Whether a narrow interpretation of that kind would be adopted by the courts in relation to the proposed provisions is difficult to predict with certainty, however. And, even if a restricted interpretation were to be adopted, the definition of "conversion practice" would still cover a broad range of human conduct. An important question, therefore, is whether there is sufficient justification for the rights and freedoms of people in New Zealand to be restricted in the way that is proposed in the Bill. This is a vital issue: democratic rights and freedoms should not be whittled away, even by Parliament, unless the proposed limitations can be "demonstrably justified in a free and democratic society."[5]

At this point it is worth recalling that one of the stated purposes of the proposed legislation is "to promote respectful and open discussions regarding sexuality and gender." If enacted into law, and even if a narrow interpretation of "conversion practices" were to be accepted by the courts, the proposed legislation would almost certainly have a profound "chilling effect" on freedom of expression concerning gender issues. Some people would be afraid to talk about the subject, or to advance strong opinions, for fear of being prosecuted or being subjected to a claim for damages under the Human Rights Act 1993. The idea that the proposed legislation would promote respectful and open discussions regarding sexuality is therefore difficult to accept, despite the limited exemptions in clause 5(2).

As earlier mentioned, the explanatory note relies on "research" which is said to emphasise that "conversion practices do not work and can contribute to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts." It is not clear what research is being referred to in this part of the explanatory note. Parliament will presumably be provided with that information and may subject it to appropriate

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[2] See *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 (SC); *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [44].
[3] For example, see *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 (SC) at [126] per Tipping J.
[4] Numerous dictionary definitions could be cited in support of this interpretation.
[5] As confirmed in section 5 of the New Zealand Bill of Rights Act 1990.

scrutiny. It is beyond the scope of my own knowledge and expertise to make any comment on this aspect of the matter, except to observe that, before serious sanctions are imposed for conduct that is currently protected by fundamental rights, it would normally be expected that an empirical investigation would be carried out to assess the extent and seriousness of the perceived problem in the community.[6]

I am not presently aware of any such investigation having been carried out in New Zealand, nor am I aware of any official report on the subject which might justify both criminal sanctions and civil liability in the way that is currently proposed. I understand that the Bill has been referred to a select committee. The question whether an adequate investigation has been carried out, and whether there is sufficient justification for the proposed measures, should obviously be the subject of rigorous scrutiny at this important stage of the legislative process.

In addition to the general outline of the Bill provided above, I have been asked to respond to the specific questions set out below.

1. **Q:** Is the definition of "conversion practice" and "any practice" clearly defined and understandable so that parents, religious groups, counsellors and health professionals will know exactly when they are breaking the law? Does it give certainty to parents and counsellors and health professionals?

   A: As explained above, the definition of "conversion practice" means "any practice" that meets the specified criteria. The term "practice" potentially covers a very wide range of possible conduct. Almost anything a human being does could be called a "practice." It could readily include teaching, counselling and praying for someone. Any attempt to change or suppress a person's sexual orientation, gender identity, or gender expression would potentially be covered by the definition of "conversion practice" unless one of the exemptions in clause 5(2) applied. As earlier noted, whether the term "practice" should be read broadly or narrowly is a question that cannot easily be answered at present. There is, therefore, a significant element of uncertainty in the definition which seems undesirable. This could potentially create difficulty for parents, teachers, religious groups and counsellors. As regards health professions, though, it is important to recall that clause 5(2) excludes "a health service provided by a health practitioner in accordance with the practitioner's scope of practice." This provides a measure of protection not enjoyed by other professionals and parents.

2. **Q:** Is the definition of "serious harm" clearly defined and understandable?

   A: In relation to an individual, section 4 defines serious harm to mean "any physical, psychological, or emotional harm that seriously and detrimentally affects the health, safety, or welfare of the individual." In relation to an allegation that a conversion practice had caused serious harm, a court could approach the issue by first asking whether it had been proved that the conduct in question had caused any harm at all. If no physical, psychological, or emotional harm had been caused, the allegation would be unproven. If some harm had been caused, the court could go on to consider whether it was proved that the harm done had seriously and detrimentally affected the health, safety, or welfare of the individual. This would involve a factual inquiry based on an assessment of the evidence. An inquiry of this kind would not be unusual in legal proceedings. It

[6] The Law Commission regularly provides detailed reports on law reform issues, for example.

would be similar, for example, to the kind of inquiry that the courts used to undertake in personal injury cases and which may still be undertaken in cases where damages are in issue.

3. **Q:** Does the bill adequately deal with causation – that is, identifying whether the "conversion therapy" actually caused the "serious harm"?

   A: As noted above, in relation to the offence proposed under clause 9, it would be essential for the prosecution to prove that the conversion practice had caused "serious harm" within the prescribed meaning of that term. Causation is a concept which has been traversed in numerous legal cases and which is often regarded as a question of fact in each case in which it arises. It is, however, a complex issue and, as the UK Supreme Court has recently pointed out,[7] its requirements in any given situation will be influenced by the particular legal context in which it arises. For present purposes, though, the short point is that Parliament usually leaves questions of causation to the courts, because there is no easy way to be specific about what is needed to establish causation when, as here, the proposed legislation would cover factual circumstances of many different kinds. In my opinion, there is therefore no basis for suggesting that the Bill is defective by reason of a failure to define precisely what is required in relation to causation.

4. **Q:** Will a parent be committing a crime if they tell their child that they cannot go on puberty blockers or wear chest binders (female to male transitioning) or tell their child that they cannot identify as the opposite sex or that the parent/s will not refer to their child as the opposite sex pronoun or "they / their" (i.e. who encourages their child to maintain their biological gender or who discourages them from changing their biological gender?)

   A: For the reasons outlined above, whether providing parental guidance is a "practice" which would fall within the definition of "conversion practice" is a debateable issue. But if providing parental guidance is a "practice" then the conduct outlined above would fall within the proposed restrictions and would amount to a criminal offence in relation to a person under 18 years of age, if the Bill is enacted into law.

5. **Q:** Will a faith-based school or a church be committing a crime if they teach / preach that Allah/God made us male and female and that we cannot "choose our own gender", and/or that the Quran or the Bible teaches an understanding of sexuality, and that homosexuality (and other acts such as adultery & pornography & sex before marriage) is sin?

   A: Conduct of this kind would not fall within the definition of "conversion practice" so long as it was not "directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression" and was not "performed with the intention of changing or suppressing the individual's sexual orientation, gender identity, or gender expression." Such conduct would also fall within the exemption under section 5(2)(f) if it was "the expression only of a religious principle or belief made to an individual that is not intended to change or suppress the individual's sexual orientation, gender identity, or gender expression." Either way, it would not constitute criminal conduct. The problem, however, is that it would be very easy for a preacher or teacher to overstep the

[7] *FCA v Arch and others* [2021] UKSC 1 at para 190.

mark, inadvertently, in relation to subject-matter of this kind.[8] It would also be very easy for a person hearing such preaching or teaching to take the issue personally and to complain that the message was targeted at them. The risk of serious disruption within religious communities is therefore significant and substantial. In my opinion, a stronger and clearer measure is needed to protect the right to impart information and opinions and the right to manifest a person's religion or beliefs.

6. **Q:** If a person asks a religious leader or counsellor for prayer to deal with unwanted sexual thoughts towards the same sex, or for healing for gender confusion and acceptance of their biological sex, will it be a crime for the religious leader to pray or counsel in that manner?

   A: If prayer and counselling were to be classified as a "practice" then the conduct of the religious leader or counsellor could fall within the scope of sections 8 or 9. But this would depend on whether the other requirements of those sections were met. Those other requirements are outlined above.

7. **Q:** If a person wanted to align their sexuality or gender with the teachings and values of their faith, and sought help to do so from a health professional, would they effectively criminalise the health professional who tried to help them, and would they be able to access the support that they wanted?

   A: The health professional would be protected by the exemption in clause 5(2)(a) so long as the health service was being "provided by a health practitioner in accordance with the practitioner's scope of practice." The question suggests that the requested assistance might not be within the normal scope of practice of a general practitioner; but it might possibly be within the normal scope of practice of a psychiatrist or a psychologist. Expert advice is needed on this point.

8. **Q:** Would the Bill, as written, criminalise a doctor who tells the parents to adopt a "wait and see" approach on gender dysphoria (as recommended by the UK High Court recently) rather than adhering to the explicit request of either the parents and/or the child to be prescribe puberty blockers? Would this be deemed a form of "suppressing"?

   A: The health professional would again be protected by the exemption in clause 5(2)(a) so long as the health service was being "provided by a health practitioner in accordance with the practitioner's scope of practice." For the reasons outlined above, it is also questionable whether giving advice to "wait and see" would fall within the definition of "conversion practice." I doubt that it would, and I do not think advice to wait and see would be deemed to be a form of suppression.

9. **Q:** If a person wanted to align their sexuality or gender with the teachings and values of their faith, and sought help to do so from a teacher, counsellor or church pastor, would they effectively criminalise anyone who tried to help them, and would they be able to access that support that they wanted?

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[8] Exhorting others to "repent of their sins" or to "turn from their wicked ways" could become a hazardous activity under the proposed legislation, as currently drafted. This could represent a significant interference with "the right to to manifest a person's religion or belief in worship, observance, practice or teaching either individually or in community with others, and either in public or in private" affirmed by section 15 of the New Zealand Bill of Rights Act 1990.

A: In effect, the person would be inviting the teacher, counsellor or church pastor to engage in a conversion practice which would be unlawful and could be criminal in some circumstances.

10. **Q:** Is it correct that a proposed ban "could be inconsistent" with the New Zealand Bill of Rights Act 1990, as was expressed by the Ministry of Health to the Associate Minister of Health in 2018.

    A: Yes, for the reasons outlined above.

11. **Q:** Was the Justice Select Committee correct in 2019 when it said "The Bill of Rights Act affirms, protects, and promotes human rights and fundamental freedoms in New Zealand. It allows all New Zealanders to live free from discrimination, including in relation to their sexual orientation. New Zealanders also have the right to freedom of religion. This protects those who offer and seek out conversion therapy because of their religious views."

    A: Under the current law, those points are all correct. But if Parliament changes the law, and if the new provisions are sufficiently clear, the rights and freedoms affirmed by the New Zealand Bill of Rights Act could be overridden, or limited, as explained above.

In respect of two of the above questions, I was also asked whether the provisions proposed in the Bill would impair "the right to self-determination." The New Zealand Bill of Rights Act does not refer to a right to self-determination. This phrase is normally used in relation to the ability of a country or an ethnic group to control its own destiny. But the Bill of Rights Act obviously does protect the freedom of the individual to make personal decisions and does so in a variety of ways. At the root of many of the rights and freedoms affirmed by the Bill of Rights Act is the ability of individuals to decide their own destiny without interference from the state, except as provided by law. This equates to a concept of personal autonomy. At common law, this is often referred to as "the liberty of the subject." If enacted, the Bill would undoubtedly restrict personal autonomy, and the liberty of the subject, in at least some of the ways explained above. The key issue for the select committee, and Parliament, is whether restricting personal autonomy and the liberty of the subject, in the way that is proposed in the Bill, is demonstrably justified in a free and democratic society.

Yours faithfully,

G M Illingworth QC