

Grant Illingworth QC

16 October 2019

Richard McLeod
McLeod & Associates
By Email

Dear Richard,

Family First Opinion

You have instructed me to provide an opinion for Family First concerning the Prohibition of Conversion Therapy Bill (“PCT Bill”), a private member’s Bill which is currently awaiting consideration by Parliament. I advise as follows.

The PCT Bill commences with an explanatory note described as a “general policy statement” which reads as follows:

Conversion therapy is a flawed and abhorrent practice that continues to happen in New Zealand. This practice tells people that, due to their sexuality or gender, there is something fundamentally wrong with who they are and they should be changed. It has no basis in modern science or psychology, goes against every ethical requirement for practitioners, is demonstrably harmful, and has no place in New Zealand.

Conversion therapy is a practice or treatment that seeks to change, suppress, and/or eliminate a person’s sexual orientation, gender identity and, or gender expression. It is a practice that has been outlawed in a number of countries. It is opposed by numerous organisations, including the United Nations Committee against Torture, the Royal College of Psychiatrists London, the Canadian Psychological Association, and the Australian Medical Association.

Conversion therapy is a practice that should be relegated to history. Unfortunately, there is no shortage of stories about the impact conversion therapy has had on our Rainbow community in New Zealand. Continuing to allow people, particularly young people, to be subjected to this unproven and widely condemned practice does not reflect the values of modern New Zealand.

This Bill creates an offence for any person who advertises, offers, or performs conversion therapy on another person. Under this Bill, any person is guilty of an offence if they remove another person from New Zealand for the purposes of conversion therapy. No one should, or even can, have their sexual orientation, gender identity, or gender expression changed through the pseudo-psychology of conversion therapy.

New Zealand is an inclusive, compassionate, tolerant, and forward-looking country and our laws should reflect that. Conversion therapy is another form of legal discrimination the Rainbow community faces and Parliament cannot not let it continue. This Bill will put an end to a practice that has no place in contemporary New Zealand.

There are obviously some controversial statements made in this explanatory note but, for present purposes, the important point is that the essential purpose of the proposed legislation is to eliminate the practice known as “conversion therapy” by making it unlawful to advertise or offer that service, or to perform it on others. This includes removing a

person from New Zealand for the purpose of conducting conversion therapy. To carry out any of these practices is intended to become a criminal offence.

As with any criminal offence provision, and for obvious reasons, it is vital to define the proscribed conduct with clarity and specificity. In this case, that turns largely on the definition of “conversion therapy” which, under clause 5:

- “(a) means any therapeutic practice or treatment administered to a person that seeks to change the person’s sexual orientation or gender identity, including, but not limited to, any effort to—
 - (i) change gender expression:
 - (ii) eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender; but
- (b) does not include counselling intending to—
 - (i) assist a person undergoing gender transition:
 - (ii) provide acceptance, support, and understanding to the person in respect of sexual orientation or gender identity issues:
 - (iii) facilitate the person’s coping, social support, or identity exploration and development, including, but not limited to, any therapeutic intervention that is neutral with regard to sexual orientation and seeks to prevent or address unsafe sexual practices providing such counselling does not seek to change the person’s sexual orientation or gender identity.”

It follows that, to fall within the meaning of “conversion therapy,” the conduct in question must involve a “therapeutic practice or treatment administered to a person”. The use of the term “therapeutic” is mildly incongruous in this context given its dictionary meanings which usually include an intention to heal or make happy. If, as the explanatory note asserts, conversion therapy is “a flawed and abhorrent practice” based on “pseudo-psychology”, it could hardly be described as a therapeutic practice. Presumably the drafter intended to refer to a purportedly therapeutic practice or treatment.

In any event, the “practice or treatment” must be intended “to change the person’s sexual orientation or gender identity”. Under clause 5 the term “sexual orientation” is deemed to have the same meaning as in section 21(1)(m) of the Human Rights Act 1993 which refers to “a heterosexual, homosexual, lesbian, or bisexual orientation”. The 1993 definition seems somewhat limited, more than two decades on, because a broader approach to sexual orientation appears to have been recognised over time. Thus, for example, individuals who regard themselves as asexual might fall outside the 1993 definition, and it is questionable whether “bisexual” includes or means the same thing as “pansexual”.

Having said that, “sexual orientation” must be read together with “gender identity,” an undefined term which accompanies sexual orientation in clause 5 of the PCT Bill. Taken together, those two terms probably cover all, or at least most, individuals who would describe themselves as “LGBTQ+”. A prominent Rainbow community website www.ok2bme.ca advises that the term LGBTQ+ may include those who are: lesbian, gay, bisexual, transgender, transsexual, 2/two-spirit, queer, questioning, intersex, asexual, pansexual, agender, gender queer, bigender, gender variant and pangender. For present purposes, I will assume that all such variants are included in the omnibus phrase “sexual orientation or gender identity.”

It should also be noted that the meaning of “conversion therapy” is deemed to include any effort to change “gender expression” or to “eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender”. The term “gender expression” is defined to mean “a person’s manifestation of their gender identity that is perceived by others”. This would include any expression of gender through choice of clothing, length of hair, use of make-up and all other ways in which individuals give expression to their sense of gender. In short, therefore, the concept of “conversion therapy” appears to encompass all purportedly therapeutic practices or treatments that seek to change the way recipients see or classify themselves, or behave, in relation to matters of sexuality or gender or both.

This general definition is limited, however, by the exclusion of some forms of counselling, in particular counselling that is intended:

- To assist a person undergoing “gender transition”; or
- To provide acceptance, support, and understanding to the person in respect of sexual orientation or gender identity issues; or
- To facilitate the person’s coping, social support, or identity exploration and development.

The first of these exceptions requires an understanding of what is meant by “gender transition”. The website www.plannedparenthood.org says:

Transitioning is the process of changing the way you look and how people see and treat you so that you become the gender you feel on the inside. Transitioning can mean lots of different things. It can involve medical treatment and hormones. It can involve changing your name and preferred pronouns. It can involve changing your appearance and dress. It can involve coming out to your friends and family. It can be a long and ongoing process. Or it can be something that happens over a short period of time.

The exceptions seem intended to allow counselling that supports a person’s choice to adopt a non-traditional approach (for want of a better phrase) to sexual orientation and gender identity issues. The “mischief” being aimed at is therefore the attempt to counsel so-called “normal” attitudes and behaviour in relation to sexuality and gender. Conversion therapy is thus described in the explanatory note as “a practice or treatment that seeks to change, suppress, and/or eliminate a person’s sexual orientation, gender identity and, or gender expression.” This approach seems to be based either on:

- the view that variations in sexual orientation and gender identification are “built in” - naturally occurring phenomena which cannot be (or perhaps should not be) stifled by counselling or treatment based on out-dated views and theories that are now known to be “flawed and abhorrent”; or possibly
- the view that variations in sexual orientation and gender identification are matters of individual and personal choice, with which no-one else has any business interfering.

It is also possible that the unstated assumption is that these views are both correct and that there is no inconsistency between them.

The first of these alternatives is suggested by the explanatory note where it asserts that “no one should, or even can, have their sexual orientation, gender identity, or gender expression changed through the pseudo-psychology of conversion therapy.” This statement is probably intended to mean, however, that sexual orientation, gender identity, and gender

expression cannot be changed by conversion therapy because it is a form of “pseudo-psychology” rather than that sexual orientation, gender identity, and gender expression cannot be changed because they are immutable. In any event, once the definition of “conversion therapy” is understood, it becomes possible to appreciate the scope of the criminal offence provisions that are proposed under the PCT Bill, to which I now turn.

Clause 6 of the PCT Bill provides:

6 Offence of performing, offering, or advertising conversion therapy

- (1) Every person commits an offence who knowingly—
 - (a) performs or offers to perform conversion therapy; or
 - (b) advertises the performance of conversion therapy.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 6 months, a fine not exceeding \$5,000, or both.

The effect of this provision is that any form of purported therapy or practice (which might include, for example: counselling, psychological treatment, psychiatric treatment or prayer) would be punishable by imprisonment if carried out for the purpose of changing the recipient’s sexual orientation or gender identity, unless one or more of the narrow exceptions were to apply. It would also be criminally unlawful to advertise such services or to take a person out of New Zealand to undergo conversion therapy overseas, even though therapy of that kind might be lawful in the country of destination.

Clause 7 of the PCT Bill provides:

7 Offence of removing a person from New Zealand for conversion therapy

- (1) Every person commits an offence who knowingly removes a person from New Zealand for the purposes of having conversion therapy performed upon that person.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 1 year, a fine not exceeding \$10,000, or both.

This provision contains a significant element of ambiguity because it is not clear whether removing a person from New Zealand means taking them out of the country against their will, or whether it includes doing so even with the informed consent of the person concerned. Accompanying an adult person on a voluntary overseas trip, when that person has full knowledge about what is to take place in the country of destination, would probably not amount to removing a person from New Zealand (although that is not entirely clear). But if a parent were to arrange for a child to travel overseas for the purpose of receiving conversion therapy, it seems highly likely that the conduct of the parent would be construed as amounting to an unlawful removal from New Zealand. Similarly, an overseas trip for teenagers, organised for purposes including counselling for behaviour perceived to be behaviourally wayward, could fall within the scope of this section if the counselling was intended to modify sexual orientation or gender identity, including gender expression.

If a person offering or performing services, classed as conversion therapy, happens to be a “professional”, as defined in the Bill (a health practitioner, a teacher or a social worker), the potential penalties are higher than under clause 6.

Clause 8 provides:

8 Offence of professional performing, offering, or referring a person for conversion therapy

- (1) Every professional commits an offence who knowingly—
 - (a) performs or offers to perform conversion therapy on a person, irrespective of whether monetary compensation is received in exchange; or
 - (b) refers a person to another professional, or any other person, for the performance of conversion therapy.
- (2) A professional who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 1 year, a fine not exceeding \$10,000, or both.

Under clause 10, everyone who promotes or encourages the commission of an offence under clauses 6, 7 or 8 is subject to the same penalties as the person who commits the primary offence. Clause 10 provides:

10 Parties to offences

- (1) Every person is a party to and commits an offence who aids, abets, counsels, procures, or incites—
 - (a) a person to commit an offence under section 6 or section 7; or
 - (b) a professional to commit an offence under section 8.
- (2) A person who commits an offence under subsection (1) is liable on conviction to a penalty not exceeding that prescribed for the offence to which the person was a party to (*sic*).

Significantly, it would not be a defence to a charge under any of the provisions just mentioned to prove that the person concerned sincerely wanted to modify their sexual orientation or gender identity and had asked for help to achieve that objective. In fact, a person who asked for help of that kind, and received it, could potentially be charged with procuring the commission of an offence.

Against that background, I now address six specific questions that I have been asked to consider. (I have modified the questions somewhat in order to enhance their clarity):

Question 1: Is the definition of “conversion therapy” defined adequately enough to avoid confusion and misinterpretation. Does it give certainty to parents and professionals?

- Most of the definition is reasonably clear but there is one area of significant ambiguity. As noted above, the definition applies to “any therapeutic practice or treatment”. It seems obvious that counselling is a form of therapeutic practice or treatment; but counselling is an amorphous concept. Formal professional counselling would fall within the definition, but it is unclear whether it covers informal counselling such as, for example, parental advice to a child or a pastoral chat between a church youth group leader and a confused teenager.
- It also seems possible that prayer, in the setting of a church meeting for example, could fall within the concept of “any therapeutic practice”. Thus, if a church pastor were to pray for a teenager to be freed from unwanted sexual thoughts about other persons of the same gender, this could be seen as a “therapeutic practice” intended to “eliminate or reduce sexual or romantic attraction or feelings toward persons of

the same gender.” This, in turn, could be interpreted to constitute a criminal offence.

- There is therefore a significant element of uncertainty as to what would constitute a “therapeutic practice or treatment” if the Bill were to be enacted into law in its present form. This would create an undesirable grey area at the periphery of the definition with a potential to expose well-intentioned people, possibly parents and professional advisers, to accusations of criminal conduct and possible criminal prosecutions.

Question 2: Will this Bill, as written, criminalise a parent who encourages their child to maintain their biological gender or who discourages them from changing their biological gender?

- As explained in relation to question 1, the boundaries of the phrase “any therapeutic practice or treatment” are not entirely clear. If counselling is regarded as a “therapeutic practice” then parental counselling could be deemed to be included in that category. While significant arguments that could be marshalled to refute that interpretation, it could equally be argued that there is no reason in principle to distinguish between parental counselling and counselling by other parties.
- If parental counselling were to be classified as a “therapeutic practice”, encouragement for a child to maintain his or her biological gender, or discouragement from changing his or her biological gender could then be interpreted as an attempt to change the child’s sexual orientation, gender identity or gender expression. The result could possibly be the criminalisation of the parental conduct, although most judges would probably be reluctant to reach that conclusion.

Question 3: Will this Bill, as written, remove a requirement for parental notification and/or consent relating to the parents’ own children?

- There are numerous different professional situations in which obligations to notify a parent or obtain parental consent can arise. Ordinary medical treatment is a good example (depending on the circumstances). Whether a professional person will owe an obligation to notify a parent about a proposed therapeutic treatment for a child, or to obtain parental consent, is a diffuse and complex issue, the exploration of which is beyond the scope of this opinion.
- Having said that, there does not appear to be anything in the Bill that would derogate from, or modify, the obligation of a professional person providing therapeutic treatment to a child to notify a parent about the treatment or to obtain a parent’s consent to the treatment in question (assuming the existence of such an obligation in any particular case).

Question 4: Will this Bill, as written, criminalise a teacher, counsellor or church pastor who discourages, in any way, a young person from starting the process of changing their biological gender, whether through medication or surgery or both?

- As noted above, the definition of conversion therapy has an essential component which comprises “any therapeutic treatment or practice”. As already explained, this phrase is likely to include counselling.

- If a teacher, counsellor or church pastor provides counselling, the purpose of which to change the person's sexual orientation or gender identity, or to change the person's gender expression, or to "eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender", that conduct could well fall within the proposed definition of conversion therapy. For the reasons explained above in relation to clauses 6 to 10, counselling of that kind would probably fall within the scope of a criminal offence provision if the PCT Bill is enacted into law in its present form.

Question 5: Would the Bill, as written, prevent individuals from voluntarily seeking guidance regarding their sexual orientation or gender identity (ie would it interfere with the right to self-determination)?

- The PCT Bill would not prevent individuals from voluntarily seeking guidance regarding their sexual orientation or gender identity. It is clear that the Bill would permit counselling and guidance of the kind recognised in the exception under clause 5 namely: to assist a person undergoing gender transition; or to provide acceptance, support, and understanding to the person in respect of sexual orientation or gender identity issues; or to facilitate the person's coping, social support, or identity exploration and development.
- But the person providing such benevolent counselling or guidance would not be permitted to offer or perform "conversion therapy" as defined and as explained above. A person seeking guidance regarding their sexual orientation or gender identity would not be permitted to ask for conversion therapy to be performed (because that would constitute an attempt to procure the commission of a criminal offence) and it would be unlawful for a requested person to offer or perform conversion therapy in response to such a request, even if the request was entirely voluntary and unsolicited.
- To that extent, the Bill as written would interfere with the freedom of the individual by effectively eliminating (or at least seriously restricting) any genuine possibility of obtaining counselling or assistance to change the person's current sexual orientation or gender identity (other than within the narrow scope of the exceptions in clause 5).

Question 6: Could the New Zealand Bill of Rights Act 1990 ("BORA"), or any other human rights legislation, provide a basis (eg through freedom of religion or freedom of expression) for parents, professionals and their clients (including young people) to be excluded from the restrictions that would apply if the Bill were to be enacted into law? For example, if a young person wanted to align their sexuality or gender with the teachings and values of their faith, and sought help to do so, would they effectively criminalise anyone who tried to help them, and would they be able to access that support that they wanted?

- Section 13 of BORA provides that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference. Section 14 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Section 15 provides that every person has the right to manifest that 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.

- It is strongly arguable that to restrict the ability to give or receive counselling and guidance on important personal issues like sexual orientation, gender identity and gender expression would constitute a serious interference with the rights and freedoms affirmed in sections 13 to 15 of BORA. Indeed, it seems obvious that the Bill would impair those rights and freedoms in a significant way. It is important to appreciate, however, that BORA does not override laws that have been enacted by Parliament. If the PCT Bill were to be enacted, it would operate as the law of the land despite sections 13 to 15 of BORA.
- This does not mean that those sections would be completely irrelevant: section 6 of BORA requires the courts to interpret other statutes so as to give maximum effect to the fundamental rights which BORA affirms. The courts could therefore use sections 13 to 15, and any other relevant provisions of BORA, to assist in the interpretation of the new law, if enacted. This could mean, for example, that any doubts created by the areas of uncertainty mentioned above would be resolved by interpreting those ambiguous provisions in a way that was most consistent with any relevant BORA provisions. Under our constitutional arrangements, fundamental rights have an important role to play in the interpretation of statutes, but they do not override Acts of Parliament.
- It follows that, if the Bill were to be enacted into law, it would not be possible to claim an exclusion based on freedom of religion or freedom of expression. Nor would it be possible to defend criminal charges brought under the new statute on grounds of that kind. The most that could be done would be to rely upon the principle that the courts should interpret laws, especially criminal laws, in accordance with rights that are recognised as fundamental under our constitutional arrangements.
- Thus if a young person wanted to align their sexuality or gender with the teachings and values of their particular faith (be it Muslim or Christian, Jewish or Sikh etc), and sought help to do so from a minister of their particular religion, the proposed statute would make it virtually impossible to access the support they wanted. And, if they were able to find someone prepared to provide counselling of that kind, they could well cause that person to become implicated in a criminal offence, for the reasons outlined above.

As we all know, and as the legal, social and political history of New Zealand confirms, matters of human sexuality and gender identification are hotly disputed topics which are capable of polarizing the community and creating rifts in the fabric of our society. The purpose of this opinion is obviously to consider the PCT Bill from a purely legal point of view. I have therefore endeavoured to provide a neutral and objective analysis of the proposed legislation, without interpolating any personal opinions of my own. A detailed consideration of the PCT Bill has, however, led me to reach the following overall conclusions in relation to the value of the proposed legislation as a possible contribution to the human rights law of New Zealand:

- It is certainly appropriate to recognise that people of all different kinds should be respected and protected. It is also clearly right that all New Zealanders should be protected from proponents of potentially harmful psychological or spiritual theories and practices. But when carrying out the task of enacting protective laws, one of the most important responsibilities of our Parliament is to ensure that

criminal offence provisions do not overreach their legitimate targets in a way that trespasses on rights that have been affirmed as fundamental in a free and democratic society. In the constitutional law terminology of the United States, laws which overreach their legitimate targets are often appropriately described as having a “chilling effect” on fundamental rights such as freedom of expression and freedom of religion.

- In my respectful opinion, the PCT Bill goes too far in restricting the basic rights affirmed in sections 13 to 15 of BORA. It arguably represents a paternalistic attempt to extend the criminal law too egregiously into areas of behaviour that can usually be left to the personal choice and judgment of the individual. Participation in psychological assessments, counselling sessions, prayer meetings, and other purportedly therapeutic practices, is almost always an expression of voluntary behaviour and personal freedom. If there is a genuine need to protect some vulnerable people from the perils of wrongful influence in relation to matters of sexual orientation and gender identity, it seems legitimate to question why the PCT Bill is cast in terms that are so broad and so all-encompassing that even a fully informed, and entirely sane, consenting adult would be precluded from seeking assistance of the kind that the Bill seeks to outlaw.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'G M Illingworth', with a large, sweeping flourish extending to the right.

G M Illingworth QC