CHANGE OR SUPPRESSION (CONVERSION) PRACTICES PROHIBITION BILL 2020 (VIC)

A. Summary of Issues with the Bill

The Bill's bans are far too broad and make beneficial conduct and practices illegal

This Bill has been introduced in response to reports by people of practices they experienced as harmful and traumatic (at the time or later) which were intended to change their sexual orientation or sexual behaviour from same-sex attracted to opposite sex attracted or suppress the expression of same-sex orientation or behaviour.

Historical practices included invasive and non-consensual medical and psychiatric aversion therapies which were abusive and are no longer practised. According to Attorney-General Jill Hennessy, contemporary change or suppression practices include: counselling or psychology; formal behaviour-change programs; residential camps; support groups; and religious-based approaches like prayer and deliverance.[1] These contemporary practices are usually sought and consented to by a person who, at the time, wishes to change or manage their sexual desires.

But the Bill is not limited to these historical or contemporary practices. The Bill proposes to ban *any* conduct (including a conversation) by *any* person directed towards *any* second person on the basis of the second person's sexual orientation (or gender identity) where the conduct is intended to "suppress or change" the second person's sexual orientation (or gender identity) or induce the second person to suppress or change their sexual orientation (or gender identity).[2] Instead of trying to define and ban "harmful" conduct and practices,

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[1] Attorney-General Jill Hennessy, *Statement of Compatibility of the Bill with the Charter of Human Rights and Responsibilities* Assembly Hansard 26 November 2020 page 3718.

[2] Clause 5(1) provides that a ***change or suppression practice*** means a practice or conduct directed towards a person, whether with or without the person's consent—

(a) on the basis of the person's sexual orientation or gender identity; and

(b) for the purpose of—

(i) changing or suppressing the sexual orientation or gender identity of the person; or

the Bill makes illegal all practices and conduct (including a conversation or family discussion, counselling, pastoral care, prayer) engaged in for the purpose of "suppressing or changing" a person's sexual orientation or gender identity, *even if the conduct was requested and consented to by the person and even if that person experienced the conduct as beneficial rather than harmful.*

The **first major problem** with the Bill then is that it bans far too broad a range of conduct by any person – ranging from non- consensual aversion therapy (which should be banned) to consensual counselling which people are free to join and leave, and even a simple conversation within a family or between friends.

The **second major problem** with the Bill is that it assumes that no person can ever benefit from the contemporary practices and conduct it bans and no person (including an adult) can be trusted to make the decision for themselves whether to start or stop engaging in such practices.

Yet there is significant evidence (such as a recent Australian study of 78 ex-LGB people) that *some* same sex oriented people who were unhappy in that orientation freely chose to engage in some practices the Bill would ban (such as secular and religious counselling) and experienced them as highly beneficial (even preventing suicidal ideation) and as helping them move to what they describe as a contented heterosexual orientation and relationship (a change practice under the Bill) or a celibate life (a suppression practice under the Bill).[3] (This is not a claim that every same-sex oriented person is unhappy in that orientation or can change or ought to change.) There is also significant self-reported evidence that *some* same-sex attracted people who engaged in practices the Bill would ban have experienced them as very harmful, including causing them significant trauma and depression.[4]

Both sets of accounts (including the pain of people in each group) can be taken at face

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(ii) inducing the person to change or suppress their sexual orientation or genderidentity.

[3] See for example the testimonies of 78 ex-LGB people (the majority of whom are Australian) who say they benefited greatly from some of the practices made illegal by the Bill) at www.freetochange.org – explanatory video at https://media.freetochange.org/Video/CAUSE_data_video_updated_results_REV001.mp4 and the report on the 2020 survey of 70 of these people at https://www.freetochange.org/wp-content/uploads/Free-To- Change-2020-Conversion-Therapy-Report-V4F.pdf Updated interim data for 78 people is also available.

[4] 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 - https://www.hrlc.org.au/reports/preventing-harm

value. Different people can react very differently to the same psychotherapy or counselling approaches on any issue – some might find it traumatic and others find it healing. Rather than ban a vast range of conduct, some of which some people have found beneficial and some of which some people have found harmful, the Bill should confine the banned conduct much more narrowly to that which the evidence shows *always* causes harm to *everyone*. For all other practices, the Bill should let adults freely choose whether or not to engage in them and make up their own minds about what is beneficial or harmful for them. The only possible case for regulating those other practices is for minors and those who cannot judge benefit or harm for themselves.

The Victorian Bill is vastly broader and harsher than all other conversion ban laws

There has been a campaign over the last 10 years by LGBT groups across Western countries to ban Sexual Orientation Change Efforts (SOCE) or more broadly Sexual Orientation and Gender Identity Change Efforts (SOGICE).

This has mainly succeeded in parts of North America and in 2020 draft legislation was introduced to Australia.

As at December 2020, there are legislative bans on "conversion therapy" (variously defined) in 5 countries covering 27 jurisdictions: Queensland, the ACT, Germany, Malta, 20 of the 50 USA States, 3 of the 9 Canadian provinces[5] (the "ban jurisdictions"). There is a proposed federal ban in Bill C-6 in Canada. Similar legislation has failed to pass in Ireland[6] and several US States, including Colorado, New Hampshire, Maryland and Virginia. In the USA, one Federal Circuit Court of Appeal has declared some State conversion therapy bans to be unconstitutional restrictions on free speech[7], but challenges in two other Circuit Courts of Appeal have failed.[8]

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[5] Quebec does not criminalise simple conversion therapy but makes the provider liable for any injury caused.

[6] https://www.oireachtas.ie/en/bills/bill/2018/39/?tab=debates

[7] Otto et al v City of Boca Raton, Florida et al, 11th U.S. Circuit Court of Appeals, No. 19-10604; https://www.usnews.com/news/top-news/articles/2020-11-20/us-appeals-court-voids-south-florida-bans-on-conversion-therapy-for-children

[8] Sometimes other jurisdictions are erroneously reported as having legislation banning conversion practices. For example, Ecuador makes torture a crime under its Criminal Code and adds an extra penalty if the torture was to change sexual orientation but the crime is torture, not conversion therapy. In Brazil, the federal psychology council has instructed psychologists not to engage in conversion therapy and in Albania the order of psychologists has done the same but these are a professional body rules or guidelines, not laws passed by a parliament attracting state-sanctioned criminal and civil penalties.

Compared with all other ban jurisdictions, the Victorian Bill would create the broadest and harshest ban in the world.

Every other ban jurisdiction in the world has limited the ban in one or both of the following two ways:

(a) In every ban jurisdiction except Queensland,[9] the person who is subject to the conversion practice must be under 18 (in some Canadian provinces 16) or have diminished mental capacity or be made to participate in the practice without their consent (in other words, adults of sound mind are not banned from receiving any advice, counselling, therapy or prayer they freely consent to). But under the Bill in Victoria, adults of sound mind will not be able to consent to such advice, counselling, therapy or prayer, which will be illegal.

(b) In 23 of the 27 ban jurisdictions in the world (including Queensland) the only people who are banned from engaging in conversion practices (e.g. advice, counselling, therapy) are health professionals, so in most ban jurisdictions there is no restriction on parents, relatives, friends, religious and community leaders providing advice, counselling, therapy or prayer to people in relation to sexual orientation or gender identity.[10]

But under the Victorian Bill parents, relatives, friends, religious and community leaders providing advice, counselling, therapy or prayer to people in relation to sexual orientation or gender identity can find themselves committing an illegal act and be subject to a range of civil enforcement by the Human Rights Commission and a criminal prosecution.

The Victorian Bill has the harshest criminal penalties of any legislation in the world – for "change or suppression" conduct causing psychological harm 5 years' imprisonment or a $100,000 fine or for serious psychological harm 10 years imprisonment or a $200,000 fine. Most other laws provide for at most 1 years' imprisonment.

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[9] The Queensland ban only applies to conduct by health practitioners. However, these practitioners can still engage in clinically appropriate treatment, so its application to conduct affecting adult patients has limited practical effect.

[10] In Germany the ban applies to all persons but they must engage in "guided treatments" so it is unlikely to catch unconnected conversations or advice. The ACT and Malta bans apply to conduct by all persons but only in relation to minors. The Nova Scotia ban applies to health professionals and any person in a position of trust or authority towards a young person.

The Victorian Bill also gives enormous investigation and enforcement powers to the Victorian Equal Opportunity and Human Rights Commission ("Commission") to act on anonymous complaints from third parties not affected by the practice, investigate on its own motion and compel production of evidence and issue its own enforcement notices, enforceable as VCAT orders. The Commission is both investigator and judge of breaches. The Commission does not have these powers in relation to sex, age, disability or any other discrimination, which are much bigger issues in terms of the number of Victorians affected by them.

The gender identity provisions in the Bill are incoherent and will cause harm by pushing an unqualified affirmation approach to body transitioning

The Bill also prohibits any conduct intended to "suppress or change" a second person's *gender identity,* but excludes from the ban any assistance to a person considering or undergoing a *gender transition*. The term *gender transition* is unhelpfully not defined, but presumably means changing a person's physical body so it looks more like, and has the anatomical features of, the person's self-determined gender identity. For example, a biological female with a self-determined gender identity as male may seek to gender transition by changing their body through hormones and surgery to develop facial hair, breast binding or removal of breasts and uterus.

There is no evidence about practices intended to "suppress or change" a second person's *gender identity* in the reports on which the government relies. The La Trobe/HLRC report described 14 stories of gay conversion practices in Australia (and one hearsay account of a foreign country practice concerning a trans person). The Health Complaints Commissioner Report (of which only a 2 page summary was ever made public) looked only at gay conversion practices.[11]The Department of Justice and Community Safety conducted a consultation on the best way/s to implement a ban of conversion practices but in its outcomes summary[12] only described 4 stories – all of gay conversion practices.

[11] https://www2.health.vic.gov.au/about/publications/researchandreports/report-on-inquiry-into-conversion-therapy-executive-summary

[12] https://engage.vic.gov.au/changeorsuppression

There is no evidence base put forward by the government for banning practices relating to change or suppression of gender identity. Remarkably, the government's documents are silent on the controversies about gender (body) transition therapies.

Despite the serious concerns about young people being pushed too quickly into *gender transition of their bodies*, the government has provided no evidence for its ban on cautious approaches to body transition (which would be "suppression" practices).

The Attorney-General asserted in her second reading speech that there is no evidence that gender identity can change. But that must be wrong. For many people, gender dysphoria does not begin as a young child but develops closer to puberty. At some point, those persons who had identified as their birth gender may begin to feel they are more like the opposite gender and identify as the opposite (or in theory another) gender. That is a change in gender identity. In addition, more and more people who underwent a change of gender identity from their birth gender and transitioned their body to match have later regretted doing that and have de-transitioned by changing their gender identity (and, to the extent they can, their bodies) back to their birth gender. That is a change in gender identity.

In gender theory, gender identity is self-determined by the individual and fluid (the individual can change their self-determination). How then can anyone who is counselling or assisting a person with gender confusion tell whether, under the Bill, they were illegally inducing the person to change their gender identity (clause 5(1)) or legally assisting the person to express their gender identity (clause 5(2)(a)(ii))? The answer won't be known until the person arrives at (or changes) their self-determined gender identity. But that is no help to the clinician or counsellor who faces imprisonment and civil sanctions if it turns out (retrospectively) that they were inducing a change in gender identity. With respect, these provisions are hopelessly confused yet criminal liability turns on them.

The Bill also exposes a bizarre contradiction in government policy. In 2019, the current Victorian government legislated to allow people to change their birth certificate gender *once each year* to reflect their gender identity – clearly this implies that people can change their gender identity at least annually.[13] So how can the same government now propose a law to

[13] Births, Deaths and Marriages Registration Amendment Act 2019

ban people from helping others to change their gender identity, when annual change is expressly contemplated by the birth certificate legislation?

These provisions about changing or suppressing gender identity are so incoherent that they should be dropped altogether or withdrawn and redrafted.

But there is a real practical harm in these provisions as well. The Bill prohibits everyone from inducing a person to "suppress" their gender identity. Take an adolescent with gender dysphoria who believes they are in the wrong body and wants to take puberty blockers, sex hormones and eventually undergo surgery to transition their body to fit their self-determined gender identity. It will be an illegal gender identity "suppression" practice for a parent or doctor advising the adolescent to induce them to defer taking the drugs until after puberty or until after other co-existing conditions like depression or conditions relating to autism spectrum disorder have been treated. A cautious approach in considering whether to proceed to body transition is the prudent medical course for people presenting with gender dysphoria – especially in childhood or adolescence.[14] Many gender dysphoria cases present with other conditions like depression or factors arising from being on the autism spectrum and those issues need to be worked through to discover the real cause of the person's sense of being in the wrong body and whether body transition is appropriate.

At least half a dozen medical studies cited by Dr Philip Morris and Professor Patrick Parkinson in an open letter to the Victorian Attorney-General of 7 January 2021 show that a large percentage of children presenting with gender-related distress were reconciled to their natal sex before adulthood without body transition:

> *The overwhelming evidence is that the great majority of children who attend gender clinics because they experience serious discordance between natal sex and gender identity tend to resolve these issues when they go through puberty as long as a cautious therapeutic approach is adopted.[15]These consistent clinical findings have*

[14] See the principles on this formulated by the National Association of Practising Psychiatrists on the Management of Gender Dysphoria at https://napp.org.au/2020/11/management-of-gender-dysphoria/

[15] M. Wallien, & P. Cohen-Kettenis, 'Psychosexual Outcome of Gender-dysphoric Children' (2008) 47 *Journal*

been contested on theoretical grounds.[16] However, no clinical studies have been conducted that contradict these findings.

There is a recent trend in some gender clinics to always affirm the "wrong body" feelings of an adolescent and quickly move them to body transition. This approach has been criticised by the High Court of England as "experimental" in the Keira Bell case.[17] In that case a 16 year old girl consented to a course of body transition treatments including hormone therapy, which potentially rendered her infertile. She later had a double mastectomy. In her early 20s she greatly regretted her decision and sought to de- transition her body to match her female birth gender. Bell and another person made a claim for judicial review of the policy and practice of the Tavistock and Portman NHS Foundation Trust of prescribing puberty-suppressing drugs to persons under the age of 18 who experience gender dysphoria. The claimants' case was that children and young persons under 18 are not competent to give informed consent to the administration of these drugs.

The Court gave the following guidance in respect of children under 16:

> A child under 16 may only consent to the use of medication intended to suppress puberty where he or she is competent to understand the nature of the treatment. That includes an understanding of the immediate and long-term consequences of the treatment, the limited evidence available as to its efficacy or purpose, the fact that the vast majority of patients proceed to the use of cross-sex hormones, and its potential life changing consequences for a child.
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> There will be enormous difficulties in a child under 16 understanding and weighing up

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of the American Academy of Child and Adolescent Psychiatry 1413; J. Ristori and T. Steensma, 'Gender Dysphoria in Childhood' (2016) 28 *International Review of Psychiatry* 17; Entwistle K. 'Debate: Reality check – Detransitioner's Testimonies require us to Rethink Gender Dysphoria'. *Child & Adolescent Mental Health*, 2020. doi:10.1111/camh.12380.

[16] Julia Temple Newhook and others, 'A Critical Commentary on Follow-Up Studies and "Desistance" Theories About Transgender and Gender-Nonconforming Children' (2018) 19 *International Journal of Transgenderism* 212; see also the responses from Kenneth Zucker, Thomas Steensma & Peggy Cohen-Kettenis in the issue.

[17] *R (on the application of) Quincy Bell and A v Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin).

> this information and deciding whether to consent to the use of puberty blocking medication. It is highly unlikely that a child aged 13 or under would be competent to give consent to the administration of puberty blockers. It is doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty blockers.

Different guidance was given for young persons aged 16 and over. The legal position in respect of such persons:

> …. is that there is a presumption that they have the ability to consent to medical treatment. Given the long-term consequences of the clinical interventions at issue in this case, and given that the treatment is as yet innovative and experimental, we recognise that clinicians may well regard these as cases
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> where the authorisation of the court should be sought prior to commencing the clinical treatment.

Expert evidence in that case showed that body transition drugs are themselves harmful, for example by producing infertility and reduction in bone density. Natal sex girls transitioning to boys were encouraged to have their eggs harvested and choose a sperm donor (because a frozen embryo fares better than a frozen egg). The Economist[18] has described a Western world trend among some clinics of hastening people into body transition, with increasing numbers of such people desisting from the treatment or later regretting and attempting to de-transition their bodies back to their birth sex. **None of this is addressed in the government case for this Bill.**

The number of referrals of cases of childhood gender dysphoria to the Melbourne Royal Children's Hospital Gender Clinic per year has increased forty-fold from 8 in 2011 to 336 in 2019, after being stable for the prior 8 years.[19] Referrals to the London Tavistock NHS Gender Clinic have increased 30 fold from 2011 to 2019 (there were 2700 in 2019). Both

[18] After the Keira Bell verdict - An English ruling on transgender teens could have global repercussions *The Economist* 12 December 2020

[19] https://www.smh.com.au/lifestyle/health-and-wellness/staying-on-her-feet-how-michelle-telfer-won-gender-clinic-battle-20200416-p54kjf.html

clinics use the affirmation approach.

The Bill will effectively force clinicians to affirm a person's desire for body transition and prescribe the drugs for body transition because to do otherwise will leave them open to the accusation of engaging in a "suppression" of gender identity inviting criminal investigation, VEOHRC investigation and compliance notices and presumably professional sanctions. (Clinicians have a defence under the Bill, but only if they can show that their advice and treatment was "necessary" to provide a health service. "Necessary" is too high a standard. The Queensland Bill was amended following representations by the Queensland AMA and the Queensland Law Society to use a better standard of whether the treatment was "clinically appropriate", which recognises that there is often a range of appropriate treatment choices.)

The treatment of gender dysphoria involves complex and delicate judgments specific to the person. They are not judgments that the Parliament should be determining by threatening criminal prosecution or civil sanctions for parents or doctors simply because they are not uncritically affirming and facilitating a child's desire to transition their body to a different gender. Appropriate medical decisions for a particular child are a matter for the child, the parents and the health practitioner, not for blanket rules set by the Parliament. This part of the Bill risks rushing young people with gender dysphoria into body transition, leading to more regret and de-transitioners and more litigation over the next 10 years.

Overall, this Bill is motivated by a good intention of protecting people from some demonstrably abusive practices. But its incredible overbreadth in definition and scope causes more harm than it remedies. The Bill needs significant amendments or a rewrite to avoid creating that harm. **The proposals in the Bill have never had a transparent public inquiry (rather, government consultations have occurred behind closed doors with very limited reports). A fully transparent parliamentary inquiry would be very welcome.**

Mark Sneddon, Executive Director, Institute for Civil Society (ICS)
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