

Response submitted to UK Government
consultation

Banning conversion therapy

January 2022

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Introduction

About the Equality and Human Rights Commission

The Equality and Human Rights Commission is the national equality body for Scotland, England and Wales and is accredited by the United Nations as an ‘A status’ national human rights institution. We work to eliminate discrimination and promote equality across the nine protected characteristics set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

How we have approached this response

In our response, we focus on analysing the equality and human rights implications of the proposals in the consultation. If legislation is brought forward for England and Wales following this consultation, we may provide further analysis and advice. We have not responded to questions 5-8, and questions 12-14, as they refer to issues beyond our statutory remit.

Before addressing the specific consultation questions, we have some general comments about the Government’s proposals and the consultation approach. We are supportive of measures to end harmful conversion therapy practices, but the likely significant and wide-ranging implications of the Government’s proposals for a legislative ban for criminal and civil justice, clinicians and therapists, families and religious organisations require careful and detailed consideration. The consultation document contains no clear definition of what will amount to “conversion therapy” caught by its proposals, nor of the meaning of “transgender” – a term which has no clear legal meaning, is potentially wider than the concept of gender reassignment in current UK law, and is understood by different people in different ways.

Nor does the consultation address the possible need to consider a differentiated approach in relation to sexual orientation and being transgender so as to ensure, in particular, that clinicians and therapists are not prohibited from providing appropriate care and support for individuals with gender dysphoria. Given the documented lack of evidence about conversion therapy in relation to being transgender, recent attention and litigation on the implications of medical and surgical transition, and the ongoing NHS-commissioned independent review of gender identity services for children and young people led by Dr Hilary Cass OBE, we consider that these matters require further careful and detailed consideration before legislative proposals are finalised and the implications of them can be fully understood.

In light of the significant potential implications of the proposals for individuals, organisations and a number of pieces of current legislation, and their impact on a range of fundamental rights under the European Convention on Human Rights (ECHR) which cannot be properly considered in the absence of detailed legislative proposals, we were concerned that the original consultation period was limited to six, rather than the usual 12 weeks. We also note that the EasyRead version of the consultation contained errors and was removed from the Government website, creating particular barriers for people with learning disabilities and autism to contribute their views to this important consultation. We therefore welcome the decision to extend the consultation period to a total of 14 weeks and the provision of a revised EasyRead version on 9 December.

Nonetheless, we consider that a more robust consultation would have been achieved had additional information been provided on the definition of the key concepts of “conversion therapy” and “transgender”. This is of particular importance given the lack of evidence about conversion therapy in relation to being transgender and the importance of any ban not preventing appropriate support for individuals with gender dysphoria, who already face barriers to treatment including unacceptably long waiting times. Given this, we recommend that legislation should initially focus on banning conversion therapy attempting to change a person’s sexual orientation, where the evidence and impacts are clearer. Legislation to ban conversion therapy attempting to change a person to or from being transgender should follow, once more detailed and evidence-based proposals are available which can be properly scrutinised.

Should the Government decide to proceed with its proposals for legislation to ban both types of conversion therapy, we consider that a draft Bill should be published for pre-legislative scrutiny by a Committee of both Houses of Parliament. This approach will ensure that legislation to ban harmful conversion therapy practices contains clear definitions and terminology so that its effects can be properly understood, and is evidence-based and proportionate.

Banning conversion therapy

Whichever legislative approach is taken, we recommend that Government should produce a Human Rights Memorandum to accompany the legislation so that the implications for the protection of human rights can be properly considered by Parliament.

Views on banning conversion therapy

Do you agree or disagree that the government should intervene to end conversion therapy in principle?

1. We agree in principle that harmful conversion therapy practices should be ended. We note and welcome the assurances in the consultation document that the Government's proposals for a legislative ban will not impact on personal freedoms or the ability of professional clinicians to provide appropriate care for individuals. However, in the absence of a clear legal definition of what is meant by conversion therapy, we are concerned that the information in this consultation provides insufficient detail to enable us or the public to provide a sufficiently informed response.
2. We note that a key element of the evidence base underpinning the consultation proposals is the UK Government's [2017 National LGBT survey](#), which indicated that conversion therapy was experienced by around 2.9% of respondents in relation to sexual orientation or being transgender. However, the Government research paper *The prevalence of conversion therapy in the UK* points to significant challenges in drawing conclusions from the survey. Among these is the inability to capture a nationally representative sample, leading to sample bias, and the absence of a definition of conversion therapy in the survey question, meaning that the practices classified in this way by respondents are unclear. It notes that the survey asked for evidence of LGBT people 'having been offered or receiving conversion therapy over their lifetime', with answers on the basis of self-selection. It also notes that respondents living in the South East of England were over-represented in the sample, and that transgender people were more likely to have been offered or received conversion therapy than non-transgender people, but it was not possible to infer why this was the case. We are therefore cautious about interpreting this data.

3. As we set out in our response to the [Scottish Parliament call for views on the 'End Conversion Therapy' petition](#)¹, the definition of what is and is not conversion therapy will be critical to the effectiveness of measures to end it. The target should be harmful practices intended to change someone's sexual orientation or to change them to or from being transgender. The legislation must be carefully drafted in order not to catch legitimate and appropriate counselling, therapy or support which enables a person to explore their sexual orientation or gender dysphoria, and to avoid criminalising mainstream religious practice such as preaching, teaching and praying about sexual ethics. Specific consideration will be needed to determine whether a differentiated approach to what constitutes conversion therapy in relation to sexual orientation and being transgender is required to achieve this. Similarly, the legislation must define clearly what is meant by sexual orientation and being transgender. There are existing models in discrimination and hate crime law which may assist.

¹ https://yourviews.parliament.scot/ehrc/petition-end-conversion-therapy-views/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=human+rights&b_index=60&uuld=778871053 [Accessed 11 Nov. 2021].

4. The Government has stated that for consent to be valid in the context of conversion therapy, it must be voluntary and informed, and the person consenting must have the capacity to make the decision. Given the lack of evidence that conversion therapy is effective in changing a person's sexual orientation or gender identity², its statistical association with negative health outcomes, and the evidence of risk of powerful community and belief influences over individuals' choices to seek conversion therapy, the Commission's view is that a provider of what might be considered conversion therapy should supply the individual with information about the likely effectiveness of this treatment, and satisfy themselves that the person fully understands its implications and is consenting of their own free will, before valid informed consent can be deemed to have been given. Further consideration should be given to whether the existing concepts of coercion and control in criminal law, and informed consent in medical law, provide sufficient protection, and whether there is a need to legislate to put in place a clear process for securing and evidencing meaningful and fully informed consent to conversion therapy.
5. We note the proposal that people under 18 should not be able to consent to conversion therapy and recommend that the implications of this for *Gillick* competence³ are given further consideration.
6. Practices should not be banned that enable individuals to explore, reflect on or understand their sexual orientation or being transgender. Nor should LGBT people be prevented from seeking spiritual support from their faith leader in the exploration of their sexual orientation or being transgender, including within their families, schools and communities. Encouraging people to comply with religious doctrine that requires refraining from certain types of sexual activity should not fall within the definition of conversion therapy either. However, faith and community leaders should be made aware of the ban on conversion therapy in order that they understand the importance of compliance.

² GOV.UK. (2021). Conversion therapy: an evidence assessment and qualitative study. [online] Available at: <https://www.gov.uk/government/publications/conversion-therapy-an-evidence-assessment-and-qualitative-study/conversion-therapy-an-evidence-assessment-and-qualitative-study#what-are-the-outcomes-of-conversion-therapy-1> [Accessed 11 Nov. 2021]

³ And the equivalent in Scotland.

7. We are concerned that the consultation does not make sufficiently clear in section 5.2 which forms of communication would be caught by a ban on talking conversion therapy, as this term is used as a 'working term'. The Government should make clear that psychological, medical and healthcare staff can continue to provide support to people experiencing gender dysphoria; this should include support to reduce distress and reconcile a person to their biological sex where clinically indicated, including for children and young people aged under 18 if this is in their best interests.
8. The Government's policy aim to end, rather than just ban, harmful conversion therapy will require measures beyond legislation, and must be sustained over time. We welcome the proposals to raise awareness and provide additional support for victims of conversion therapy, and also urge the Government to take action to reduce the unacceptably long waiting times for NHS gender identity services.

Equality and human rights frameworks and balancing rights

9. The Commission considers that practices of conversion therapy may breach human rights⁴, placing an obligation on the State to provide appropriate protections from them. However, it is important to strike the correct balance between respecting individual freedoms, particularly those under Articles 8, 9 and 10 of the ECHR, and protecting individuals from serious harm. We therefore recommend that Government should produce a Human Rights Memorandum for scrutiny by the Joint Committee on Human Rights setting out how the legislation achieves this balance.

Protection from torture and inhuman treatment

10. Article 3 of the ECHR states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, even during a time of emergency. Some of the more extreme forms of conversion therapy involving violent physical acts, such as 'corrective rape', could amount to torture or ill-treatment and are already unlawful criminal acts in the UK.

⁴ Conversion therapy practices engage many aspects of domestic and international human rights law including the [European Convention on Human Rights \("ECHR"\)](#), incorporated into domestic British law by the [Human Rights Act 1998](#), and binding treaties which have been ratified by the UK, such as the [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#); the [International Covenant on Civil and Political Rights](#); and the [International Covenant on Economic, Social and Cultural Rights](#)

11. The enjoyment of other rights, such as freedom of thought, conscience and religion or freedom of expression, cannot be used to justify breaching Article 3 rights. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the UK in 1988, requires States to take legislative and other measures to prevent torture in their territories and to make such criminal offences punishable by appropriate penalties.

The right to private and family life

12. Article 8 of the ECHR protects the right to respect for private life, family life, home and correspondence.
13. Permitting or banning conversion therapy practices engages a person's right to a private life if it violates their ability to live as they choose without interference. It will therefore be important to ensure that the approach taken is proportionate and that any interference with Article 8 rights can be objectively justified. We note that the Government's proposals are designed to respect how parents or guardians respond emotionally or verbally if their child is LGBT, ensuring that the Article 8 rights of the parent/guardian are protected.

Freedom of thought, conscience and religion

14. The right to freedom of thought, conscience and religion is protected by Article 9 of the ECHR as well as by the International Covenant on Civil Political Rights, which the UK ratified in 1976.
15. This right contains an 'internal' dimension that guarantees the freedom to adopt and maintain a belief or religion, as well as freedom of thought and conscience. This dimension is absolute. The 'external' dimension protects the right to manifest one's beliefs through worship, observance, practices and teaching. This dimension is subject to some restrictions⁵ if in pursuit of a legitimate aim, such as the protection of 'public safety, public order, health or morals, or ... the rights and freedoms of others.'⁶

⁵ Human Rights Committee, General Comment No. 22 on Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 3

⁶ Article 9(2) ECHR.

16. The approach proposed by the Government would not impact the first dimension of this right, as holding religious beliefs relating to sexual orientation or gender identity will not constitute conversion therapy. In terms of the second dimension, conversion therapy will need to be carefully defined in any legislation in order to ensure that harmful practices are caught whilst mainstream religious practices such as preaching, teaching and praying about sexual ethics or gender roles, including in relation to children and young people under 18, are not criminalised.
17. The Commission welcomes the Government's commitment to work with faith communities to develop an approach that is effective in protecting people from harm, while also respecting the right to freedom of religion and belief. Once legislation is brought forward, a full analysis of the safeguards for protecting freedom of thought, conscience and religion should be undertaken to ensure this balance is maintained.

Freedom of expression

18. ECHR Article 10 protects people's right to hold their own views and opinions and to express them, including in speech or in writing, without interference from the state or other bodies carrying out public functions. This is true even when these views or opinions may 'offend, shock or disturb'⁷ others. The right to freedom of expression is also protected by the International Covenant on Civil and Political Rights.
19. The ECHR describes the right to freedom of expression as an 'essential foundation of a democratic society', but that it can be curtailed if such actions are in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
20. Proposals to restrict the promotion of conversion therapy could curtail freedom of expression. However, given the evidence that conversion therapy is statistically associated with negative health outcomes, the Commission considers that banning harmful conversion therapy practices is likely to be a legitimate interference with Article 10 rights. Once legislation is brought forward, a full analysis of the safeguards for protecting freedom of expression should be undertaken to ensure this balance is maintained.

⁷ Handyside v UK; Observer and Guardian v UK

Freedom of assembly and association

21. ECHR Article 11 protects the right to freedom of peaceful assembly and to freedom of association with others. Restrictions can lawfully be placed on this right for the protection of health, or for the protection of the rights and freedoms of others.
22. Proposals to criminalise providing talking conversion therapy, either to someone who is under 18, or to someone who has not consented, could curtail freedom of assembly in a 'group therapy' setting, if that setting intends to provide conversion therapy. Once legislation is brought forward, a full analysis of the safeguards for protecting freedom of assembly should be undertaken to ensure this balance is maintained.

Protection from discrimination

23. Article 14 protects the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention". This right is engaged when enjoyment of any other of the rights set out in the ECHR is affected. A ban on conversion therapy practices is likely to engage Article 14 because it targets specific groups on the basis of sexual orientation or being transgender. Once legislation is brought forward, a full analysis of the protections from discrimination should be undertaken to ensure the correct balance is struck.

Consultation questions

Question 1: To what extent do you support, or not support, the government's proposal for addressing physical acts of conversion therapy? Why do you think this?

24. The Commission supports the Government's proposals that a court should consider the intention to conduct conversion therapy as an aggravating factor upon sentencing for physical acts of harm, and that sentence uplifts should reflect the gravity of the practice in question.
25. We welcome the Government's commitment to ensure those working in the police, prosecutors and statutory services receive appropriate training to be able to recognise the practice of conversion therapy and respond in a manner that is appropriate and makes victims feel supported. The Government should make clear, ahead of the ban being brought into force, who will carry out the training, and how it will be funded and delivered, and this should be assessed through the pre-legislative scrutiny process we recommend above.

Question 2: The government considers that delivering talking conversion therapy with the intention of changing a person's sexual orientation or changing them from being transgender or to being transgender, either to someone who is under 18, or to someone who is 18 or over and who has not consented or lacks the capacity to do so, should be considered a criminal offence. The consultation document describes proposals to introduce new criminal law that will capture this. How far do you agree or disagree with this?

26. The Commission supports the Government's proposals in principle, but is conscious they might have unintended consequences, particularly in relation to those under 18, unless conversion therapy is carefully defined in any legislation.

27. The Commission agrees that banning conversion therapy must not result in interference with professional and regulated clinicians and healthcare staff providing legitimate support for those who seek counselling about their sexual orientation or being transgender. However, the Commission is concerned about the proportionality of the proposed measures and risk of unintended consequences, and is unclear as to how the Government intends to avoid a chilling effect on healthcare professionals who may be deterred from offering legitimate professional services due to a fear of being caught by the proposed ban.
28. This offence should not capture communication such as casual conversations, exchanges of views or private prayer, with the distinction defined clearly in the legislation.

Question 3: How far do you agree or disagree with the penalties being proposed?

29. The Commission agrees that the proposed penalties are proportionate to the seriousness of the potential harm caused by conversion therapies, and that certain factors should increase the seriousness of the offence.

Question 4: Do you think that these proposals miss anything? If yes, can you tell us what you think we have missed?

30. The Commission recommends that the UK Government engage with the Scottish and Welsh Governments to ensure that proposals brought forward reflect shared objectives to end conversion therapy.

31. We have some concerns that services providing healthcare to people who are transgender may be impacted by the public debate that could surround this legislative process, in that they may not be clear on their ability to continue to provide support to people experiencing gender dysphoria. Government should work with the NHS and relevant professional bodies to mitigate this potential impact. In addition, we recommend that Government takes prompt and decisive action to reduce the already unacceptably long waiting times for gender dysphoria services, which we know are a significant barrier to transgender people receiving the professional support they need⁸.

⁸ <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation> [Accessed 11 Nov. 2021]

Consultation questions on protecting people from being taken overseas

Question 9: The consultation document describes proposals to introduce conversion therapy protection orders to tackle a gap in provision for victims of the practice. To what extent do you agree or disagree that there is a gap in the provision for victims of conversion therapy?

32. We agree that there is a gap in the provision for victims of conversion therapy in relation to protection orders – see below.

Question 10: To what extent do you agree or disagree with our proposals for addressing the gap we have identified?

33. We agree with the proposals to introduce Conversion Therapy Protection Orders – see below.
34. The Commission agrees that conversion therapy victims could benefit from a specific protection order to make it harder for individuals to be coerced into going abroad to undergo conversion therapy. We welcome the flexible approach proposed by the Government, as this would enable courts to tailor Orders in a way that respects the human rights of those affected and is proportionate to the likely harm an individual may suffer.

35. Research commissioned by the Government found that some respondents had gone abroad to undergo conversion therapy,⁹ although it is unclear how common this is and what drives individuals to do so.
36. We recommend that the Government review, between three to five years following implementation, how the proposed Conversion Therapy Protection Orders have been used to determine whether changes could make them more effective. This should include whether the process for obtaining Orders is quick enough to prevent an individual from leaving the country, whether the Orders have succeeded in protecting individuals who undergo conversion therapy online by providers outside the UK, and whether there are any wider barriers limiting use of the Orders, such as the associated costs incurred by applicants.
37. We recommend that guidance and training is provided to the relevant public bodies alongside any new legislation, and that this guidance set out a national process for multi-agency engagement, whether through existing channels, for example a Multi-agency Risk Assessment Conference¹⁰ or community safety meeting¹¹, or through a new mechanism.

⁹ <https://www.gov.uk/government/publications/conversion-therapy-an-evidence-assessment-and-qualitative-study/conversion-therapy-an-evidence-assessment-and-qualitative-study> [Accessed 11 Nov. 2010]

¹⁰ 'MARACs' are voluntary meetings where information is shared on high risk domestic violence cases between representatives from local police, health, child protection, housing, Independent Domestic Violence Advocates and other specialists

¹¹ Or other multi-agency meeting where where safeguarding and/or counter-extremism measures are discussed.

Question 11: Charity trustees are the people who are responsible for governing a charity and directing how it is managed and run. The consultation document describes proposals whereby anyone found guilty of carrying out conversion therapy will have the case against them for being disqualified from serving as a trustee at any charity strengthened. To what extent do you agree or disagree with this approach? Why do you think this?

38. There have been no charity disqualification orders made in relation to conversion therapy to date. While we welcome proposals to strengthen measures to prevent charities carrying out conversion therapy, many individuals who provide conversion therapy may not do so through a charity.
39. The Government should consider the need to extend this proposal to apply to other legal entities, such as limited companies, as well as to individuals who are associated with that entity, whether by being employed or volunteers.

Equalities impacts appraisal

Question 16: There is a duty on public authorities to consider or think about how their policies or decisions affect people who are protected under the Equality Act 2010. Do you have any evidence of the equalities impacts of any proposals set out in the consultation?

40. The Equality Act 2010 protects people from direct and indirect discrimination, harassment and victimisation because of protected characteristics. Through the Public Sector Equality Duty, it also requires the government and public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity for people with protected characteristics and foster good relations between people who share a protected characteristic and those who do not. Where adverse impact for people sharing a particular protected characteristic is detected (in this case, mostly likely to be the characteristics of sexual orientation, gender reassignment and religion or belief), public bodies must consider whether there are ways they could reasonably mitigate that impact.
41. The Commission recommends that Equality Impact Assessments (EIAs) should be published to explain how the proposals have been developed and changed in response to evidence of impacts, including consideration of responses to this consultation. Equality impact assessment should continue after measures to end conversion therapy and support victims are implemented to continually monitor whether they are having the intended or expected impact. Updated EIAs should be also published in the event of any significant changes in policy.

Contacts

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