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## Nailing Down a Conversion Therapy Offence

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This comment supplements Trispiotis and Goosey's framework for legislating for a conversion therapy offence by addressing outstanding definitional challenges, its criminal theorisation and practical consequences.

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Trispiotis and Goosey's *Criminalising 'Conversion Therapy'* makes an important contribution to operationalising a conversion therapy offence. Prior to their article, many authors argued for prohibition in the abstract, grounding their arguments in the wrongfulness and harm underlying conversion therapy. Trispiotis and Goosey's recent article takes steps to justify a criminal law response and to translate theoretical justifications for criminalisation into a guide for drafting effective legislation. The contribution I make in this comment is to: (1) clarify the elements of a conversion therapy offence, (2) address how it would interact with existing offences, (3) more robustly defend its compatibility with human rights law, and (4) consider the practical side-effects of criminalisation.

### I. Defining the Offence

The authors make important progress in narrowing down the meaning of conversion therapy, a practice they acknowledge takes various forms. The authors cite the UN definition to suggest that there is an 'internationally accepted definition' of conversion therapy yet they later note the many discrepancies among national laws. This first section highlights and responds to three main controversies which were somewhat overlooked: (i) defining the *actus reus* conduct element, (ii) the *actus reus* consequence element (the 'harm threshold') and (iii) *mens rea*.

### i) Conduct

Definitions of the *actus reus* conduct element in conversion therapy bans in different jurisdictions are reasonably convergent. Virtually all require an act which aims to suppress, change or cure a person's sexual orientation or gender identity. In addition, many jurisdictions make conversion therapy a 'course of conduct' offence by requiring the offender to make 'sustained efforts' or equivalent in their attempt to change the victim. This recognises how the criminal law ought not punish isolated comments and risk encroaching on freedom of speech. It is where the offender systematically weaponises comments through a targeted programme that their nature as 'speech' assumes less importance. In conversion therapy, the offender's speech is merely a means through which their course of conduct operates.[1] A requirement for sustained conduct also recognises the unique relational harm occasioned by the abuse of trust over a period of time.

Having highlighted the conduct requirements largely shared across jurisdictions, I suggest the conduct must require an additional normative element. As the authors note, discrimination is what delineates practices relating to the exploration or development of one's sexual orientation or gender identity from conversion therapy. Any offence should therefore interrogate whether discrimination, intentional or not, lies below the offender's conduct. For instance, the conversion therapy offence in the Isle of Man requires that the conduct 'demonstrate an assumption that any sexual orientation or gender identity is inherently preferable to any other'.[2] The word 'inherently' helpfully delimits the scope of conversion therapy. Open-minded, exploratory therapies are legitimate because they are not premised on a belief that queerness is inherently undesirable. Equally, the word 'inherently' means that the offence is indifferent to *why* the offender holds that belief. Conversion therapy has often been underpinned by the pathologisation of queerness, endowing queerness with the stigma of disease or disorder by interrogating the circumstances which may have 'caused' it, but this is not universally so. A strong definition of conversion therapy recognises that a desire to change someone's queerness may be based on irrational feelings, such as disgust, or because queerness is deemed sinful, rather than disordered. The offence's focus must be on marking out a person as inferior and 'other', regardless of the rationale guiding that belief (or absence of it). The question of what assumption the conduct demonstrates should be answered objectively, rather than subjectively. This avoids arguments common in religious contexts that it was only through 'love' or for the victim's 'wellbeing' that the offender tried to change the victim. This would be irrelevant because, objectively, attempting to dismantle and erase someone's identity demonstrates a belief that their identity is undesirable or inferior.

Even with discrimination embedded in the conduct definition, certain practices test the boundaries of the offence. One issue to be resolved is the inclusion of 'suppression' as a prohibited act. Practices designed to suppress feelings or the expression of one's identity through shaming are wrongful and harmful. But what about therapists who confirm that queerness is perfectly normal yet seek to help devoted religious persons reduce feelings of stigma and implement healthy mechanisms to avoid acting on their feelings? The aim is not to change their sexual orientation but to alleviate the discomfort of certain individuals who, no matter what alternative interpretations of religious doctrine exist, find their queerness and religion irreconcilable. While a life of celibacy is a legitimate choice, assistance in pursuing that goal could constitute 'suppression' of their sexual orientation and would demonstrate an assumption that asexuality is preferable to, say, homosexuality. One study indicates that queer people who resort to celibacy suffer mental anguish and often cave into risky same-sex sexual

encounters. However, some participants found that celibacy enabled the reconciliation of their religious and sexual identities. While the verb ‘suppress’ usefully includes conversion therapies aiming to repress one’s queerness where ‘change’ is not forthcoming, it is overinclusive. Perhaps a distinction can be drawn between celibacy as a general lifestyle choice and therapies actively proposing celibacy *as a solution* to homosexual feelings. However, this line-drawing exercise is immensely difficult.

In addition, ‘sexual orientation’ requires greater consideration. Under the Equality Act 2010, sexual orientation is viewed through a binary, biological lens of sex which sees individuals as homosexual, heterosexual or bisexual.[3] Yet, the authors note how some jurisdictions take a more ‘universal’ approach which would include a broader spectrum of sexualities. This may pose issues. If asexuality is included, the requirement for ‘suppression’ becomes more redundant. This is because any suppression-based practice would, substantively, seek to ‘change’ an individual from homosexual to asexual. Alternatively, the inclusion of pansexuality (sexual attraction which is indifferent to gender) may lead to overinclusion. For instance, somebody who repeatedly attempts to persuade a bisexual person to view sex in a less binary or biological way so as to include, respectively, non-binary or trans persons in their attraction could be attempting to convert them to pansexuality. They may well demonstrate an assumption that pansexuality is inherently preferable on the basis that it is more inclusive. But is this really the sort of conduct the offence is seeking to target?

The authors note how definitional uncertainties can be partly cured by carve-outs clarifying what does not constitute conversion therapy. These can be broadly categorised into four groups: non-judgmental exploration of one’s identity; the provision of legitimate mental health support by registered healthcare providers; assistance in helping someone come to terms with their identity; and the mere expression of religious beliefs which does not spill over into a form of sustained treatment. While these carve-outs usefully compare conversion therapy against acceptable practices, their very inclusion points to ambiguities in the central definition. Indeed, the authors note that the carve-outs are ‘illustrative rather than exhaustive’. However, the key concern in the UK Parliament’s debates on a conversion therapy offence was overinclusion and this list may not suffice to allay their concerns. While the authors argue that human rights law requires the criminalisation of conversion therapy as a form of inhuman or degrading treatment, this overlooks the importance of legal certainty. From a criminal theory perspective, legal certainty is a fundamental requirement for criminalisation to be justifiable. Further reflection on what might incidentally be criminalised would therefore be welcome to safeguard against fears of overcriminalisation.

### ii) Harm Threshold

I have addressed the *actus reus* conduct requirement, but there remains the question of whether liability should depend on proof of a certain level of harm or whether the wrongful nature of the conduct suffices. The authors note that there is disparity among different jurisdictions regarding whether harm needs to be caused, to what level and over what period of time. They argue that a conversion therapy offence should mirror the offence of coercive or controlling behaviour by not requiring proof of any injury. Whilst I agree that the offence should not require proof that the offender caused any injury, I make two small additions. First, I explain why this would accord with the ‘harm principle’, a concept still considered a cornerstone of criminalisation. Second, I explain

why the offence of coercive or controlling behaviour, while a useful case study, should not be seen as a perfect model for legislators.

First, while a conversion therapy offence must *target* a specific harm to satisfy the harm principle, it should not require the *causation* of that harm. The authors note how the harms of conversion therapy involve discrimination and violations of dignity. Discrimination harms the collective interests of queer people through their deemed undesirability and erasure. Meanwhile, the violation of dignity is concerned about how conversion therapy erases one's legitimate claim to their authenticity and sexual or gender identity. Because both harms are always inherently embodied in the conduct of conversion therapy (even in the mildest instances), requiring proof of causation of these harms via a specific harm threshold would be redundant.

Some might argue that discrimination and violations of dignity are not harms germane to the criminal law. Surely, they might say, the language of criminal liability is that of 'injury' or even 'death'. However, English criminal law has already recognised that repeated psychological and social harms occasioned through an abusive relationship ought not to be trivialised just because they are less visible than, say, a scar. The authors draw parallels with the offence of coercive or controlling behaviour. This requires the offender's conduct to have a 'serious effect' on the victim. In the context of conversion therapy, this could include consequences such as mental health deterioration, social reclusion and distress. However, importing the coercive-control model uncritically generates two key difficulties. First, where the victim is strong-willed and not provably impacted, no offence would be committed. One judge reportedly held that because one victim was a 'strong and capable woman… it [was] to her credit' that the defendant's behaviour did not seriously affect her and so did not constitute coercive or controlling behaviour.[4] Second, even where there is in fact a serious effect on the victim, producing evidence of this may be problematic in conversion therapy contexts where the extent of the harm caused often manifests itself years after the cessation of the practice.

A more coherent approach is to conceptualise the offence as one of unjustifiable risk-creation, endangering the victim's important interests. In each and every case of conversion therapy, the offender risks causing a 'serious effect' and serious psychological or physical harm to the victim. This rationale parallels that of drink-driving offences. One can never simultaneously drink-drive and not risk various bodily and property harms. Similarly, one cannot both administer conversion therapy and not risk serious effects and/or psychiatric harm. Making conversion therapy a 'consequence crime' and requiring actual causation of these harms would attach the offender's liability to factors outside his control (i.e. moral luck). That a particular victim is strong-willed is irrelevant to the wrongfulness of trying to erase the identity of an individual person and a wider socio-cultural group. While some criminal theorists are wary of crimes of risk-prevention, where the risk is present in each instance of conversion therapy and the targeted harm may ensue without further intervention by other actors, the harm principle can still be satisfied.

So, while harm is targeted at the criminalisation stage and indeed should be considered at sentencing when determining the likelihood of the risked harms eventuating in the precise circumstances, harm should not feature in the definition of any conversion therapy offence.

### iii) *Mens Rea*

Another element which is fundamental to any criminal offence but which is somewhat overlooked by the authors is that of *mens rea.* Of course, as most international bans recognise, the offender must intend the course of conduct of attempting to convert the victim. However, there is more disagreement regarding *mens rea* as to the harm targeted by the offence: the New South Wales ban has no specific *mens rea* requirement;[5] the Victoria ban requires negligence,[6] while the New-Zealand ban requires knowledge or recklessness in relation to the harm.[7] Liam Fox MP in the UK House of Commons debate on a proposed conversion therapy bill even suggested the offender must intend harm.[8] While I have partly rationalised a conversion therapy offence as one of risk-creation, I argue in this section that the offender objectively *ought* to know about the risks and need not have actual knowledge. Because of the offender's position and his process of belief formation, negligence as to the harm is most appropriate. As negligence is inherent to all instances of conversion therapy, it need not feature in the definition of the offence.

First, negligence-based crimes are justifiable where the offender's role is tied up with duties and risks.[9] Because the offender virtually always places himself in a position of trust or authority, it is justifiable to deem that he is aware of the potential harms of conversion therapy. This trust or authority might derive from the offender's position as a qualified medical practitioner, from a self-professed title such as 'therapist', 'counsellor' or 'coach', from their status within a religious community or, more universally, from any conduct presented as capable of altering another person's identity. Negligence-based liability is sometimes criticised for overburdening individuals by demanding non-stop risk assessment. However, in conversion therapy, the offender willingly places himself in a position of authority, thereby accepting the increased expectations concomitant with his role. There may be cases where the offender genuinely, but mistakenly, believes that conversion therapy does not risk the harms I have described. It is true that the law occasionally excuses mistaken beliefs, for instance where one mistakenly believes that force is required in self-defence. However, this rationale does not apply to conversion therapy. The offender is neither required to make a split-second decision nor is he under attack (as in the case of self-defence). This paradigm parallels sexual consent cases where mistaken but unreasonable beliefs are not excused. Since the offender in conversion therapy places himself in a position where care is required, the offender must suspend his actions pending further research about the risks.

Second, as Findlay Stark has argued, individuals can be 'culpably careless' where they demonstrate an 'intellectually irresponsible attitude' in belief formation. This can manifest itself in two main ways. First, the offender may have formed *no* belief regarding the risk of harm to the victim. Here, the offender is epistemically negligent for failing to consider the victim's interests and investigate the risks associated with his background belief in the righteousness of conversion therapy. Alternatively, the offender might have an incorrect belief that conversion therapy is risk-free (having undertaken research or not). The offender is not culpable for his incorrect belief *per se,* but for manifesting and *acting* on that belief to the victim's detriment. Because the offender's incorrect belief about the propriety of conversion therapy is one which he must have consciously accepted as part of his motivational framework, rather than arising from his innate disposition, negligence-based liability is justifiable.

In all cases of conversion therapy, because the offender is responsible for being aware of the risks and acting in consideration of those risks, it will always be negligent to offer

conversion therapy. Therefore, requiring proof of negligence is superfluous. Again, the conduct element does the heavy lifting in this offence.

## II. Overlap of Offences

Once a watertight definition of all elements of a conversion therapy offence is settled on, an important question is that of overlap. The authors convincingly justify a distinct conversion therapy offence on the grounds that existing offences do not suffice and that the expressivist function of the criminal law ought to be utilised. However, a corollary of a specific conversion therapy offence that is somewhat overlooked is that there may be overlap where the conduct fulfils the requirements for multiple offences. I suggest this is most probable where conversion therapy involves physical or sexual violence against the victim. To this end, I propose the following solution. Where the overlapping offence involves lower-level physical harm (such as assault and battery), it should be charged under the conversion therapy offence. The single-incident model of assault-based offences would neither capture the persistent nature of the victim's suffering, nor recognise how the offender's physical and non-physical behaviour are allied in the desired end of 'conversion'. However, where there are specific incidents of sexual violence or really serious harm (physical or psychiatric), I suggest that the conversion therapy context becomes eclipsed and a sexual offence or an offence against the person would better communicate the nature of the offender's wrongs. In such cases, the conversion therapy context should be an aggravating factor. The authors dismissed having a conversion therapy aggravating factor on both the basis that there may be no underlying offence and that conversion therapy encompasses a distinct wrong. However, where the conduct fulfils the definition of a distinct, more serious underlying offence, this rationale becomes less compelling.

## III. Articles 9 and 10 ECHR

An effective conversion therapy offence must be secure from legal challenge. The authors argue that because all forms of conversion therapy amount to inhuman and/or degrading treatment and therefore violate Article 3 ECHR (an absolute right), there is no need to consider the impact of an offence on freedom of religion and speech under Articles 9 and 10 ECHR. They state that 'the question of balancing . . . simply does not arise'. While this may often be true, it is prudent not to assume that every form of conversion therapy would meet the minimum level of severity – especially in light of its manifold forms. As such, I provide a more thorough defence of a conversion therapy offence by addressing Article 9 and 10 concerns which have been raised by religious and free-speech organisations.

I argue that it is possible to make a conversion therapy offence compliant with freedom of speech and religion as set out in the ECHR. First, the belief that queerness could or should be erased by conversion therapy should not be 'worthy of respect in a democratic society' under Article 17 ECHR because its manifestation 'necessarily' entails the destruction of the rights of queer people.[10] It is fundamentally premised on erasing queer identities. Failing this, a conversion therapy offence (appropriately delimited) is a proportionate restriction on free speech under Article 10(2) ECHR for the protection of the victim's health. I need not repeat the harms caused by conversion therapy and I have noted above how its nature as 'speech' is really a misnomer. Even if conversion therapy were deemed 'speech', the ECtHR has accepted that convictions can be a proportionate response to queerphobic hate speech.[11] How an offence is

delimited will be crucial. The carve-outs evaluated above may help demonstrate proportionality.

Regarding freedom to manifest religious beliefs under Article 9(2) ECHR, I suggest that there is not a sufficiently 'close connection' between the repugnant *act* of trying to convert someone and any underlying religious *belief* in queerness being sinful, such that it is not a relevant 'manifestation' of any protected belief.[12] Conversion therapy is better conceptualised as a distinct practice which may or may not be justified under the guise of religion. The belief that queer identities should be erased is distinct from the belief that queerness is sinful, the former being the relevant belief that any offender would be manifesting.

Conversion therapy and its interaction with human rights law is not unfamiliar to English courts. In *R (Core Issues Trust) v Transport for London*, the Court of Appeal considered whether preventing conversion therapy advertisements on a London bus was lawful.[13] The advertisement in question contained the slogan 'Not Gay! Ex-Gay, Post-Gay and Proud' and was submitted by an organisation supporting those seeking to 'change from a gay lifestyle'. While Article 10 was engaged, the protection of queer people's right to 'respect for their dignity' was a legitimate aim. The court was particularly concerned that the advert would encourage homophobia and place queer people at risk. Thus, the advertising ban was deemed a proportionate restriction since there were other avenues for the conversion therapy organisation to express its views. Regarding Article 9, it affirmed that the expression of a perspective on a 'moral/sexual issue' was not a 'manifestation' of a religious belief but rather conduct 'motivated' by religion, which is not protected. While I emphasise that the context of a prominent and offensive advert was important in *Core Issues Trust*, I suggest that it supports the view that a proportionately drafted ban would be ECHR-compliant.

## IV. The Impact of Criminalisation

One final question remains. Even if criminalisation can be defended in theory and against legal challenge, what difference would it actually make? The authors argue that a conversion therapy offence would usefully harness the criminal law's expressivist function, allowing the State to adopt an unequivocal stance on the wrongfulness of conversion therapy. They then note how individuals may thereby be empowered to recognise conversion therapy and that this may prevent further harm. However, I question the strength of any link between expressing this message and preventing conversion therapy – especially in its principal, religious arena. While most religious organisations welcome conversion therapy bans, the real target is the more underground, extreme sects. Responding to the conversion therapy ban in Victoria, the Head of the Presbyterian Church proclaimed that he followed instructions from scripture, not Parliament. If these sects see their God as occupying a place above the law, individuals may seek to become 'martyrs' fighting for their interpretation of God's word. In addition, reports show that conversion therapy in France has continued underground despite criminalisation. Criminalisation without the effective investigatory mechanisms suggested by the authors may therefore be undesirable.

Given the relative novelty of conversion therapy offences in other jurisdictions and the clandestine nature of the practice, there is virtually no data on the impact of criminalisation. However, a specific female genital mutilation (FGM) offence was created for reasons similar to those advanced by Trispiotis and Goosey and so provides for a useful point of comparison. Supporters argued that criminalisation would send a clear message and prevent FGM occurring. Sadly, research shows that

criminalisation has done little to reduce the practice. Offenders take victims abroad and perform less serious forms of FGM outside the purview of the offence. Equally, victims are not always aware that FGM is illegal and, regardless, are reluctant to give evidence against perpetrators within their community. All such issues are likely to translate to the conversion therapy context. An offence with a considered definition and with extra-territorial effect, combined with investigatory and victim-support mechanisms, may go some way in addressing these problems. However, as the authors note, a criminal ban cannot alone deliver the cultural and social changes required to eliminate conversion therapy. Parliament must therefore scrutinise the potential side-effects of criminalisation to determine whether the expressive value of criminalisation is ultimately beneficial to potential victims. This must also be weighed against the merits and drawbacks of alternative or complementary measures such as civil offences, regulation of self-professed 'therapists', corporate criminal responsibility and anti-discrimination law, some of which the authors address in detail.[14]

## V. Conclusion

Criminalising conversion therapy is far from straightforward and the delays in passing appropriate legislation are therefore unsurprising. This comment sought to provide answers to some, but not all, of the challenges that Parliament may face when considering a conversion therapy offence. Sadly, none of the Bills considered by Parliament have advanced past their second reading and the Labour Party is running behind on their manifesto commitment to put forward a new one. Trispiotis and Goosey's piece in the MLR will no doubt be of central concern to legislators, should they proceed with criminalisation.

### *References*


**[1]** This is recognised in US case law. See: *Tingley v Ferguson*, 47 F4th 1055 (9th Cir 2022).

**[2]** Sexual Offences and Obscene Publications Act (Isle of Man) 2021, s 88(2)(a).

**[3]** EqA 2010, s 12(1). This biological view of sex was confirmed in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16.

**[4]** Cassandra Wiener, *Coercive Control and the Criminal Law* (Routledge 2022) 143.

**[5]** *Conversion Practices Ban Act 2024* (NSW) s 5.

**[6]** *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), ss 10(1)(c) and 11(1)(c).

**[7]** *Conversion Practices Prohibition Legislation Act 2022* (New Zealand), s 9(1).

**[8]** HC Deb 1 March 2024, vol 746, col 605.

**[9]** See: A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 201-202.

**[10]** *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ, [2022] ICR 1 [15], [99], [103].

**[11]** *Lilliendhal v Iceland* App No 29297/18 (ECtHR, 12 May 2020).

**[12]** *Eweida v UK* (2013) 57 EHRR 8, para 82.

**[13]** *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34.

**[14]** See further, eg, Martin Clark and Brendan Gogarty, 'Searching the Reins and Hearts: Conversion Practices Reforms in Australia' (2024) 47(1) *UNSW Law Journal* 5.


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