Tasmania Law Reform Institute

Sexual Orientation and Gender Identity Conversion Practices

Issues Paper No. 31

November 2020

Submission on behalf of Women Speak Tasmania

27 January 2021

[This is a public submission]

Question 1
After considering the background and working definition, in your opinion, what are and are not 'sexual orientation and gender identity conversion practices'?

The immediate problem with the Institute's working definition of 'sexual orientation and gender identity conversion practices' – so-called SOGI conversion practices – is that 'sexual orientation' and 'gender identity' are entirely disparate aspects of human behaviour, attitudes and social presentation. They should not be conflated at law, nor should their unique attributes be publicly concealed behind a meaningless and misleading acronym, however convenient it might be.

Sexual orientation refers, as the name plainly suggests, to the attraction an individual experiences to either a person of the opposite sex, or the same sex, or people of both sexes. It is arguably very well accepted, even by those who have a religious or cultural objection to anything other than opposite sex attraction, that same sex attraction and bisexuality are part and parcel of the human experience.

As we know, the legalisation of same-sex unions in marriage is now possible in the majority of Western jurisdictions – a clear acknowledgment that sexual orientation is not evidence of disease or dysfunction in an individual.

Item 3 of the Terms of Reference for this Issues Paper says –

'3. Consider any other verifiable and authoritative data about the nature and prevalence of SOGI conversion practices in Tasmania;'

This should be a primary goal of any investigation into 'conversion practices', simply because thorough investigation will likely reveal that such practices are not evident to the extent that dedicated legislation is required to address them, particularly practices intended to change or suppress an individual's sexual orientation. As a society, we have well and truly moved past the homophobia of previous generations, and there seems little point in revisiting long abandoned prejudices and affording any remnant shadows of same a public forum.

Gender identity is a relatively new social concept, and one that is undergoing rapid and under-scrutinised evolution and acceptance. From a time in the not too distant past when 'gender identities' were considered either stereotypically male or female, we now have an

ever-expanding cohort of identities. Unable to cope without becoming ridiculous the LGBTQA initialism now carries a simple '+', and it's anyone's guess what that means exactly. In fact, it doesn't mean anything, exactly.

As noted above, it is incumbent on any investigation into conversion practices to determine the nature and extent of those practices, insofar as they currently exist in relation to gender identity. When both criminal penalties and civil compensation are proposed, the law needs to be very clear about what behaviours and actions it intends to punish, and provide standards that are readily understood.

If 'gender identity' is innately personal, then practices that allegedly attempt to change or suppress gender identity will be perceived in an equally personal way. Attempting prosecution on the basis of individual perceptions, which will necessarily be the case for gender identity conversion practices, is bound to be problematic. The adoption of a 'principles-based approach to regulation' will not address this issue satisfactorily, reliant as it is on 'broader norms'. There are no broader norms in the constantly mutating gender identity universe.

The TLRI appears to understand the notion of ideology and its incompatibility with effective law-making when speaking of the perceptions and beliefs of those practising conversion techniques, but doesn't extend the same insight to the infinitely varied perceptions of those who are allegedly the subject of gender identity conversion practices.

In summary, sexual orientation and gender identity do not belong in the same legislation. One is well understood, the other is ideological ephemera. Conversion practices that purport to address anything other than a heterosexual orientation are a thing of the past, and legislation to regulate them is unnecessary. Conversion practices relating to gender identity defy workable definition, and, by extension, workable legislation.

Combining conversion practices in law under the SOGI label is like having one law to regulate the care and feeding of horses, and unicorns.

Question 2
Should people be allowed to consent to SOGI conversion practices? If so, at what age and under what conditions?

It seems anomalous to suggest, in relation to the right of persons to live authentically with the sexual orientation or gender identity that best suits them, that a person could be prevented from consenting to a conversion practice. The Bill (Change or Suppression (Conversion) Practices Prohibition Bill 2020) currently before the Victorian parliament purports to do this – the definition of 'change or suppression (conversion) practice', specifically precludes any person, even a competent adult, from consenting to such a practice.

A provision in these terms clearly disregards the basic human right to self-determination. No matter how odious the parliament considers conversion practices to be, banning competent adults from making a choice to partake of them demonstrates an unequivocal attempt to regulate civil liberties beyond the bounds of what should be considered acceptable.

If harmful conversion practices can be shown to exist, in relation to either sexual orientation or gender identity, clearly some oversight is required for minor children, and incapacitated adults.

Perversely, those who promote the rights of gender non-conforming children and young people, and adults with compromised understanding, advocate for their access to all means necessary to achieve their desired identity. Even when this means children as young as 10 are set on a path to lifelong drug dependence, and subjected to medical and surgical interventions that will likely a have long term negative impact on their health and well-being. They can destroy their bodies with medications and surgeries that have no solid evidence base, and the government will support them, and punish those who offer an alternative, evidence-based approach. Under the proposed Victorian law, they cannot freely choose such an alternative.

Tasmania should not follow this example.

Question 3
Have you been involved in or offered, or are you aware of, any forms of SOGI conversion practices in Tasmania? If so, what were the effects on you, or the person exposed to them?

The Institute suggests the following could be a consideration, among other things, for those seeking to answer this question –

'Have you been involved in, heard of, or are aware of, any groups in Tasmania that describe LGBTQA+ identities as somehow disordered or offered to suppress or alter LGBTQA+ feelings or identifying status?'

In the context of the Issues Paper, as written, the overall intent of this question should be the unmasking of health care organisations and religious/cultural groups who allegedly carry out conversion practices, or have done so in the past.

But how will 'describe LGBTQA+ identities as somehow disordered' be interpreted in the proposed legislation? Will any group that opposes unquestioning gender affirmation for gender non-conforming individuals be considered to be describing those persons and their identities as 'somehow disordered'? At what point will rational, evidence based discourse be abandoned in favour of an ideology that cannot be challenged under any circumstances?

Question 4
Do you think that Tasmanian law should be changed to address SOGI conversion practices? If so, should this be through comprehensive reform, amendment or both (a hybrid)?

How can existing laws be changed in any rational way when the behaviours/actions/attitudes that are to be addressed – SOGI conversion practices – defy coherent definition? The TLRI's 'working definition' of SOGI practices is, as noted in the answer to Question 1, an unworkable hybrid of alleged behaviours relating to two entirely different aspects of human behaviour in society.

The Issues Paper notes (at p.29) that '(T)he Institute is not aware of any complaints being raised under existing laws. Nor is the Institute aware of any complaints about SOGI conversion practices being considered by a court or tribunal in Australia'. However, despite a total lack of formal evidence that such practices exist and are causing harm, the TLRI is happy to assert that the current law in Tasmania is deficient because, among other things, it 'is inappropriate and inefficient to deal with a common class of practices and harms'. How did a 'common class of practices and harms' manage to slip entirely under the legal radar in Australia, particularly given the comprehensive suite of laws and causes of action available to those who have been harmed by the activities of others in this country and its various jurisdictions?

Comprehensive reform is both unnecessary and inherently problematic, from a regulatory perspective. If it is, in fact, necessary to legislate in respect of SOGI practices, it would make for far clearer, more efficient, law if 'sexual orientation' and 'gender identity' were considered as separate phenomenon for the purposes of conversion practices, and any provisions for compensation or prosecution in respect of same were incorporated into existing legislation.

Question 5
Should some or all forms of SOGI conversion practices be criminalised in Tasmania? If so, which, if any, should be dealt with as serious (indictable) crimes and which, if any, should be dealt with as less serious (summary) offences?

Again, it is imperative that 'SOGI practices' be unambiguously defined, which is impossible given the dichotomous association implied by the SOGI acronym. Sexual orientation is one thing, gender identity is a phenomenon of an entirely different character. If practices that allegedly seek to convert either sexual orientation or gender identity are to be criminalised, they should be done so separately. If they can be shown to exist at a rate, and level of severity that requires any specific legislative intervention at all – which is doubtful.

Question 6
Should some or all forms of SOGI conversion practices be made civil wrongs in Tasmania? If so, what sort of practices should people be liable for and how should those subject to such practices be compensated?

See answer to Question 5, above. If sexual orientation and/or gender identity conversion practices can be shown to exist in Tasmania, to the extent that civil legislative intervention is required, minor amendment to existing laws would be sufficient to address them.

Question 7
Should any existing Tasmanian laws (besides criminal laws or the Civil Liability Act 2002 (Tas)) be amended to cover SOGI conversion practices? If so, which ones and in what way?

See answers to Questions 5 and 6, above.

Question 8
Are there any other models or approaches that are preferable to, or should complement, changing the law?

Sexual orientation is a clearly protected attribute at law in Tasmania, as it is in all Australian jurisdictions. Further, the meaning of 'sexual orientation' is clearly understood by the general public – it means the *sex-based* romantic or sexual interests of an individual.

In recent years, gender identity has also been afforded extensive protections at law in Australian jurisdictions, but interpretation of the term is based solely on the feelings and personal perceptions of individuals at any given time.

Sex, and by extension, sexual orientation, relate to dimorphic material realities in humans and readily lend themselves to regulation at law. Gender, and gender identity, are fluid concepts – the list of recognised gender identities is long, and appears to grow daily. Any law that attempts to regulate behaviour in relation to gender identity must, in its drafting, interpretation and enforcement, be referable only to a constantly changing ideological concept, as it is expressed by the individual claiming harm.

Clearly, it is not ideal to ground legislation in an amorphous, and now legally contested, ideology – it is akin to building on shifting sand and expecting a solid, durable structure that fulfils it expected purpose without the need for constant repair.

There may be an argument for legislating specifically to prohibit conversion practices in relation to sexual orientation, if it can be shown that existing laws are inadequate, or the alleged practices are so pervasive that they warrant a dedicated law. This seems unlikely in Tasmania today.

Gender identity is an imprecise trait. The Issues Paper outlines three approaches to law reform for SOGI practices – 'a comprehensive principal act, an amendment act, or a hybrid approach' – and proposes two forms any such laws could take – 'broadly criminal or civil'. All permutation of these proposals have, in the case of alleged gender identity conversion practices, the potential to be unnecessarily punitive and indiscriminate in their application. It is impossible to fairly regulate an ideological enigma.

Question 9
Are there any other matters that you consider relevant to this Inquiry and would like to raise?

The Issues Paper refers to extant legislation in Queensland (*Health Legislation Amendment Act 2020*) and the ACT (*Sexuality and Gender Identity Conversion Practices Act 2020*), and a bill currently before the Parliament of Victoria (*Change or Suppression (Conversion) Practices Prohibition Bill 2020*), all of which purport to prohibit SOGI conversion practices.

Along with uniformly vague definitions of these practices, all three legislative instruments provide relatively detailed guidance as to what does NOT constitute a SOGI conversion practice insofar as they relate to gender identity.

Briefly, any practice that affirms an individual's gender identity, and assists them to transition, is unreservedly acceptable at law in these jurisdictions (the Victorian Bill is expected to pass the Upper House next month).

In December 2020, the UK High Court handed down a judgment in the case of *Bell v Tavistock [2020] EWHC 3274 (Admin)*. The matter was a judicial review of the practices of the Tavistock and Portman NHS Foundation Trust and its Gender Identity Development Service (GIDS), sought by the mother of a potential client of the service and a former client who gave evidence that the medical interventions she received at GIDS had caused her significant, ongoing harm.

To summarise, the claimant, Keira Bell, asserted that GIDS had 'fast-tracked' her through puberty blocker and cross sex hormone interventions without paying sufficient attention to other, comorbid psychological issues. The focus of the service was limited to affirming a male gender identity with the administration of puberty blocking hormones, and shortly thereafter, testosterone. Ms Bell subsequently underwent a double mastectomy. She is 23, with no breasts and likely compromised fertility.

The High Court found as follows –

151. 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. There will be enormous difficulties in a child under 16 understanding and weighing up 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.

152. In respect of young persons aged 16 and over, the legal position 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 where the authorisation of the court should be sought prior to commencing the clinical treatment.

The Tavistock and Portman NHS Trust Gender Identity Development Service immediately suspended new referrals for puberty blockers or cross-sex hormones for clients under the age of 16. The Trust has been granted leave to appeal the High Court decision to the Court of Appeal after leave to appeal to the High Court was refused. The appeal will be heard some time in 2022.

It is pertinent to the proposed legislation, however, that the High Court was unequivocal in its opinion that children and young people under the age of 16 cannot be competent to consent to gender affirming hormone interventions, and that such interventions have no reliable evidence base. Given the 'innovative and experimental' nature of puberty blockade and cross-sex hormone administration, the Court was further of the opinion that such

interventions should not be available to young people between the ages of 16 and 18 without court authorisation.

Consent is a key component of any medical or surgical intervention for any individual, regardless of age (except, of course, in the case of life-saving emergency treatment). The High Court quite correctly decided that minors cannot have the cognitive or emotional maturity to consent to interventions that will have lifelong consequences, including increased risk of certain diseases, possible cognitive impairment, impaired sexual function and infertility/sterility.

Health care practitioners who recognise the limits on a minor's capacity to consent to gender affirming hormone interventions, and instead offer counselling/psychotherapeutic treatments, are at risk, under the law proposed for Tasmania and the laws already in place in other jurisdictions, of prosecution or civil liability for engaging in gender identity conversion practices. The consequences of this risk are several – a decline in research and scholarship in the area of gender dysphoria if only one course of care and management is permitted at law, and a concomitant dearth of treatment options for gender non-conforming children and young people and their families. Additionally, health practitioners will be reluctant to work in the area of 'gender medicine'.

Such a situation is clearly not ideal – for children, young people and adults dealing with gender dysphoria, or for practising health care providers.

Further, the indiscriminate use of hormone interventions for vulnerable minors could, in the not too distant future, be recognised as a failure of duty of care causing identifiable harm, with possible criminal and civil liability attributed to those responsible.