



Comments on the 'Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2015.'

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Introduction

Background

On 15 December 2015 the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties (MSDC) presented a Bill in Parliament, entitled 'Affirmation of Sexual Orientation, Gender Identity and Gender Expression ACT, 2015'. Following the Bill's presentation, MSDC launched a [public consultation](#) on the Bill.

The Bill and public consultation are part of a broader process in which aditus foundation has been participating as member of the LGBTIQ Consultative Council within MSDC. In this process, we have submitted several technical comments on the Bill's earlier versions and also published (July 2015) a '[Policy Paper I: Prohibition of Sexual Orientation, Gender Identity/Expression Conversion Therapy](#)'. These present submissions are based on this Policy Paper, with the addition of specific comments on the Bill as publicly presented in December 2015.

The Bill

In its 'Objects and Reasons', the Bill states that:

The main object of this bill is to provide for a ban on professional conversion therapy against variations of sexual orientation, gender identity and, or gender expression; and an outright ban on conversion therapy on vulnerable persons, as well as to affirm and protect these characteristics of a person.

Our Policy Paper

In our July Policy Paper we highlighted a rights-based approach to legislation seeking to prohibit or somehow regulate conversion therapies. The full text of the Paper (9 pages) is available on the above-provided link, yet our Main Observations (pages 3-4) are reproduced here in order to reiterate our core concerns towards such legislation.

We reiterate the spirit and recommendations made in our Policy Paper, with this present document adapting them to the Bill presented for public consultation

Conversion or reparative therapy is generally understood to be an "umbrella term for a type of talking therapy or activity which attempts to change sexual orientation or reduce attraction to other of the same sex".¹ Any such treatment is based on the premise that being gay, lesbian, bisexual, trans or queer is a mental disorder or deformity that can be cured.

We consider these forms of treatment as having potentially damaging effects on the individuals subjected to them.² Furthermore, the belief that sexual orientation or gender identity may be treated as curable illnesses or conditions is based on a non-scientific and largely religious understanding of the LGBTIQ community as opposed to one based on researched and informed scientific facts. Yet we also feel that the State should not give itself the authority to

¹ UK Council for Psychotherapy, 'Conversion therapy: Consensus statement' (2014) - http://www.psychotherapy.org.uk/UKCP_Documents/policy/Conversion%20therapy.pdf

² Human Rights Campaign, 'Policy and Position Statements on Conversion Therapy', <http://www.hrc.org/resources/entry/policy-and-position-statements-on-conversion-therapy>

interfere in free and informed decisions taken by adults, including on issues that the State might be uncomfortable with.

Clearly, when such decisions are not free and informed but forced and/or involuntary, the State is not only justified but also required to intervene in order to safeguard the rights and interests of affected persons. Particular attention should therefore be paid to vulnerable persons, including children. Finally, in view of these considerations, we propose that the ban on conversion therapy be limited to mental health practitioners and to those instances when this is forced and/or involuntary.

Our comments and position are based on a more subtle approach towards conversion therapy, in an attempt to reconcile the various fundamental human rights at play in such contexts, namely: religious freedom, freedom of expression, freedom from inhuman and degrading treatment, right to privacy and family life (in no particular order).

We are keen to reiterate that banning conversion therapy should not be seen as an end in itself, as this could be described as blind and invasive. The idea of banning conversion therapy should however be entrenched in the State's interest to (1) prevent practices that claim to be based on medical evidence, when they are not and (2) to protect vulnerable members of society from harmful practices.

Comments on the Bill

Article 1 - Title

Although a formality, we feel it is nonetheless necessary to note that the Bill is not a legal tool to reaffirm LGBTIQ identity, but to create a series of specific crimes. As such, we feel that the title is misleading and fails to reflect the Bill's substance.

Rename the Bill in order to ensure a title that truly reflects the Bill's substance.

Article 2 - Definitions

As highlighted in our Policy Paper, the fact that the Bill is adopting a criminalisation approach strengthens the need for Article 2 to be as clear and exhaustive as possible.

“conversion therapy”

Whereas the subjective element of the crime is clearly captured in this definition, being the aim *“to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression,”* the objective element lacks clarity. Read in conjunction with the crimes' *ratione personae* definition of 'professional' and with Article 3, where the crimes of performing, advertising, offering and referring are created (to different degrees of criminalisation), the present definition of what constitutes prohibited behaviour is not too clear. The word 'treatment' resonates with only a number of persons included in the 'professional' definition, whilst it is not clear which activities performed by warranted or qualified educators, social workers or youth workers fall within the scope of 'treatment'. This point is linked to our observation below regarding the definition of 'professional'.

Also, the present definition's second component removing counselling from the Bill's scope is unclear. In relation to 'treatment' for the Bill's purposes, the definition provides the objective element (the treatment itself) and a subjective element (the aim to change, repress, etc.), but fails to provide a subjective element for 'counselling', merely providing that permitted counselling is that *“related to the exploration of...”*. This latter term is, in our opinion, an objective term that in no way considers the professional's intention in providing the counselling service.

Clarify the behaviour that is prohibited and that which is permitted.

“professional”

Together with the comment made above regarding the conjoined reading of this definition with the definition of 'conversation therapy', we remain concerned that the Bill is here exceeding its scope in the way it includes an extremely broad group of persons into its application. The obvious question here is: what criteria has been adopted in order to select the listed professionals? The Bills drafting history reveals that this list was originally largely composed of medical practitioners, with subsequent additions of other non-medical professionals based on the idea that specific groups of persons (particularly children and vulnerable individuals) require further protection. Yet the result, and consequently the Bill in its entirety is not a direct consequence of this logic.

If the Bill wishes to offer further protection to children and vulnerable individuals, this list of professionals should be far broader to include, potentially, legal guardians, curators, lawyers (particularly Child Advocates), all members of the judiciary, members of particular sections in the Malta Police Force, etc. It is clear that this approach, based on a general harm-assessment, runs the risk of either being too broad for its own sake.

For legal clarity and efficiency, and also in order to remain within and therefore achieve a clear legal and policy goal, we reiterate our recommendations that the list be strictly limited to medical professionals, and that the activities of all other persons be targeted not on the basis of the person performing but on the basis of the person subjected them (as highlighted below). As stated in our Policy Paper, the rationale for banning or regulating conversion therapies should be based on two pillars:

1. their potentially damaging effects; and
2. the agreement that sexual orientation, gender identity and gender expressions issues are not curable illnesses, and that beliefs to the contrary are not based on research and informed scientific facts.

Accordingly, in order to fulfil the second goal, only medical professionals should be included in a limited-style blanket approach. This limitation will also render futile the need to provide in-depth clarification of the term ‘treatment’, as mentioned above, since it would be more readily comprehensible in a medical context, including for a presiding judge/magistrate.

Our Policy Paper is also clear on how to achieve the first goal, where this is actually in the State’s legitimate interests to legislate to achieve. Summarily, we refer to existing legislation and administrative structures protecting children from all forms of abuse and also to Criminal Code norms/sections that can be used as templates onto which to model provisions prohibiting only those conversion therapy instances that are violent and non-consensual³.

Limit the Bill’s main scope to medical professionals.

“vulnerable person”

In relation to children and vulnerable adults, we reiterate the above-made observations regarding their places in the Bill.

With specific reference to the present definition, we suggest a formulation that is in-line with jurisprudential understandings of vulnerability, and of torture and cruel or inhuman degrading treatment or punishment, that both incorporate objective and subjective elements in assessing whether an individual is actually vulnerable in a specific context (physical or otherwise).

Rely on other Criminal Law provisions and measures to protect children and vulnerable adults.

The Affirmation

Whilst we appreciate Government’s wish to stress the Bill’s policy basis, we feel that this is sufficiently catered for in the Bill’s ‘Objects and Reasons’. The inclusion of the Affirmation, having no legal value, is a superfluous one.

³ We also stress that vulnerable adults would be covered by such provisions since Criminal Law already presumes violence or lack of consent when they are victims of specific crimes.

Delete the Affirmation.

Article 3 - Unlawful Conversion Therapy

We highlight our observations in the Policy Paper, as also referred to above. In particular, we further stress the observations relating to the criminalisation as the method chosen by Government to regulate and ban prohibited conversion therapy.

In this regard, coupled with our recommendation of limiting the ban to medical professionals, we stress our recommendation to formulate the ban in terms of a professional restriction to be regulated, implemented and enforced by professional bodies. *"We feel that this approach strengthens the notion of self-regulation, also creating an atmosphere of responsibility. It should also encourage practices that are based on provision of information on content and impact of suggested therapies."*⁴

With specific reference to the Article as formulated:

1. the crime of advertising conversion therapy is unclear, since it fails to specify who is criminally liable: editor, sales representative, service-provider paying an advert, etc. Furthermore, since the Bill does not prohibit all forms of conversion therapy, we feel that an absolute ban on its advertising is incongruous and inconsistent. Advertising bans should only be introduced for specific circumstances, such as in the proximity of schools;
2. professionals are banned from 'offering' conversion therapy. We feel this is probably a linguistic error, since it is clear that what should be prohibited in the actual provision of services and not their mere offer;
3. the last phrase in Article 3(b)(i) referring to monetary compensation is unnecessary and could create a situation whereby non-monetary compensation could become a relevant consideration, simply since it is not referred to in the final law;
4. in order to clarify the meaning of the crime of 'referring', we suggest the inclusion of 'instigation' in this sub-paragraph.

Criminal Procedure

The Bill is silent on the procedural element of the crimes created. Maltese Criminal Law contains several crimes where, due to the fact that the activities could include children, vulnerable persons, family members and a high level of intrusion in private and family life, special procedural rules are laid down. These generally relate to the triggering of Police interventions (upon the complain of injured parties or *ex officio*), withdrawal of reports by injured parties, prescription, victim and witness protection, etc.

We strongly recommend the Bills clarifies procedural elements, primarily to ensure effective access to justice, punishment of perpetrators and prevention of future - include repeat - incidents.

⁴ Policy Paper, page 7.