

POLICY PAPER I:

PROHIBITION OF SEXUAL ORIENTATION, GENDER IDENTITY/EXPRESSION CONVERSION THERAPY



JULY, 2015

T A B L E O F C O N T E N T S

TABLE OF CONTENTS	2
INTRODUCTION & BACKGROUND	3
MAIN OBSERVATIONS	3
COMPARATIVE OVERVIEW	4
INTERNATIONAL INSTRUMENTS AND LEGISLATION	4
NATIONAL LEGISLATION	5
POLICY PAPER DETAILS	5
DEFINITION AND SCOPE	5
CRIMINALISATION	6
CHILDREN	7
FORCED AND INVOLUNTARY	7
SUPPORTING ACTIONS	8

I N T R O D U C T I O N & B A C K G R O U N D

This first Policy Paper is being published following a 14 July 2015 Sunday Times report of a three-day service with Mr. T. Brown (US Evangelist) invited by a Maltese Evangelist community, River of Love, in order to carry out or promote conversion therapy. Central to Mr. Brown's teaching is a belief that homosexuality is an illness that can be cured through repentance.¹

Following this news, the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties announced its intention to enact legislation in order to criminalise harmful conversion therapies². This intention was also included as one of the main legislative measures to be carried out under the Ministry's LGBTIQ Action Plan 2015 - 2017.³

As a human rights NGO with a mandate to monitor, act and report on access to human rights in Malta, **aditus foundation** feels it is necessary to publish our policy on the banning of conversion therapies. This Paper is the first in what we hope will become a series of Policy Papers on human rights issues of national importance. Our aim is that these Papers will inform policy- and law-making as well as contribute to a public discussion that is safe, inclusive and based on key human rights principles.

aditus foundation welcomes Malta's efforts to address conversion or reparative therapies, and this document is modelled on our experiences working with fundamental rights with a specific focus on LGBTIQ issues, and on a comparative overview on the regulation of conversion therapy in those countries where such is regulated.

M A I N O B S E R V A T I O N S

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*".⁴ 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.⁵ 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.

¹ 'Preacher: I know how to cure the 'mentally ill' gays, Ivan Martin, Sunday Times of Malta, 14 June 2015.

² 'Gay conversion therapy could become a criminal offence', Tim Diacono, Malta Today, 16 June 2015, available at http://www.maltatoday.com.mt/news/national/54144/gay_conversion_therapy_might_become_a_criminal_offence#.VbopBTCqgko.

³ LGBTIQ Action Plan 2015 - 2017, Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, July, 2015 <https://socialdialogue.gov.mt/en/Documents/LGBTIQ%20Action%20Plan/LGBTI%20Action%20Plan%20lo%20res.pdf>

⁴ UK Council for Psychotherapy, 'Conversion therapy: Consensus statement' (2014) - http://www.psychotherapy.org.uk/UKCP_Documents/policy/Conversion%20therapy.pdf

⁵ Human Rights Campaign, 'Policy and Position Statements on Conversion Therapy', <http://www.hrc.org/resources/entry/policy-and-position-statements-on-conversion-therapy>

Yet we also feel that the State should not give itself the authority to 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.

It will therefore be noted that our approach does not endorse a blanket criminalisation approach, as originally suggested by the Ministry, but is 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 also keen to stress 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.

C O M P A R A T I V E O V E R V I E W

International instruments and legislation

The United Nations High Commissioner for Human Rights' Report 'Discrimination and violence against individuals based on their sexual orientation and gender identity'⁶ considers that medical procedures, when forced or otherwise involuntary, can breach the prohibition on torture and ill-treatment and include, amongst others, 'conversion' therapy. The report outlines that such therapies have been found to be unethical, unscientific and ineffective and in some instances, tantamount to torture. As a conclusion, the High Commissioner therefore recommended that States address the violence by banning conversion therapy.⁷

Furthermore, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in a 2013 Report called upon States to repeal any law allowing intrusive and irreversible treatments, including reparative or conversion therapies when enforced or administered without the free and informed consent of the persons concerned.⁸ The latter proviso is key to our own position.

The UN Committee Against Torture (CAT) has also raised concerns on the practice of conversion therapies carried out in the United States on LGBTI youth.⁹ In November 2014, three CAT

⁶ Human Rights Council, 29th Session, Agenda Items 2 and 8: Discrimination and violence against individuals based on their sexual orientation and gender identity (2015) Report of the Office of the United Nations High Commissioner for Human Rights, United Nations (A/HRC/19/41), May 2015.

⁷ Ibid.

⁸ Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 2013 Report, para. 88, U.N. Doc. A/HRC/22/53, February, 2013

⁹ U.N. panel raises concern about "ex-gay" therapy in U.S. <http://sdgln.com/news/2014/11/12/un-panel-raises-concern-about-ex-gay-therapy-us#sthash.yxM2ZlZT.QMPLTe4y.dpbs>

Members asked the U.S. State Department why conversion therapies are still being practised on LGBTI youth despite it being condemned by leading medical organisations.

National legislation

United States

The use of conversion or reparative therapy is banned in four states, these being California¹⁰, New Jersey¹¹, Oregon¹² and Washington DC.¹³ Generally, the four states ban conversion therapy conducted by professional mental health providers on persons under 18 years of age.

Canada

Ontario bans the provision of health care services that seek to change the sexual orientation or gender identity of any person under the age of 18 years. It also prohibits any other person (a substitute decision-maker) from giving consent to such treatment on another person's behalf.¹⁴

P O L I C Y P A P E R D E T A I L S

Definition and Scope

We believe that any attempt at prohibiting 'conversion therapy' should clearly define the parameters of what is actually being prohibited. These parameters should include the specific activities – including omissions – and also the individuals/institutions prohibited from conducting these banned activities. As state above, we disagree with a blanket ban on conversion therapy and have serious concerns when such a blanket ban is raised to the level of a criminal offence.

Since our discomfort with conversion therapy is essentially based on its non-scientific views of sexual orientation and gender identity/expression issues, we feel the definition should only refer to mental health professionals, which term ought to be further defined. In addition, **aditus** also recommends that such therapies involving children and vulnerable adults should constitute an aggravation in relation to the calculation of the penalty.

It is crucial that the law strike a balance between the protection of the individual from harmful therapies offered by professionals, and the freedom of religious or other beliefs.

Any legal measure should also include a reference to those therapies or mental health services that are not prohibited. For the sake of legal clarity, it is important that there is no confusion between mental health services that actually assist and support LGBTIQ individuals, and banned conversion therapy.

¹⁰ Sexual Orientation Change Efforts [865 - 865.2]
http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=865.1.&lawCode=BPC

¹¹ An Act concerning the protection of minors from attempts to change sexual orientation
http://www.njleg.state.nj.us/2012/Bills/PL13/150_.HTM

¹² Relating to efforts to change an individual's orientation
<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2307/Enrolled>

¹³ Amendments to the Mental Health Service Delivery Reform Act to prohibit the use of practices designed to change the sexual orientation of a minor by a licensed mental health provider. D.C. ACT 20-530

¹⁴ An Act to amend the Health Insurance Act and the Regulated Health Professions Act, 1991 regarding efforts to change sexual orientation or gender identity http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3197

1. The definition of “*conversion therapy*” should be specific in relation to prohibited activities and to its addressees.
2. The ban should be limited to mental health professionals, appropriately defined to include, as a minimum – physicians, psychiatrists, psychologists, marriage therapists, social workers, and licenced counsellors. This list could refer to existing national legislation regulating such professions.
3. There should be an inclusion of those methodologies and interventions that are not banned, including therapies that provide support, self-awareness and understanding, coping skills, identity exploration and development and general coming out assistance.
4. Therapies involving youth under the age of 18 and vulnerable persons would constitute an aggravation in relation to the calculation of the penalty imposed on professionals carrying out conversion therapy.

Criminalisation

In the drafting of legislation that seeks to prohibit specific acts it is important to determine whether such acts ought to be criminalised or whether other forms of prevention and sanctioning are more efficient. Whilst we appreciate the sentiments generated by stories of conversion therapy, it is imperative that the State does not act merely in response to such emotions, but more in the interests of preventing harmful activities and securing justice when necessary.

For many, criminalisation should be a matter of last resort due to the stigmatization that it creates and due to it entailing the most intrusive form of State intervention.¹⁵ Furthermore, it has been observed that criminal laws are not automatically necessary to accomplish a purpose if other means could do so more easily.¹⁶

A number of factors can be used as guidance as to whether or not an act ought to be criminalised: criminal law should not be used to prohibit trivial harm or evil; the criminal offence must target a wrongful act conducted by the defendant; the punishment is justified only when and to the extent it is deserved; the burden on justifying the creation of a crime is on those who seek to introduce it; the crime must identify a substantial and legitimate State interest to be protected; and criminalisation will ensure that criminal law should not be more extensive in scope than is necessary in order to achieve its purpose.¹⁷

In this regard, Malta needs to assess whether there are easier, more effective and efficient ways in which to accomplish the purpose of banning conversion therapy. **aditus** therefore recommends that any legal measure adopted with a view to prohibiting conversion therapy by mental health professionals be accompanied, in situations of violation, by consequential disciplinary action decided and imposed by the professional body regulating the warranting or licencing of such profession. In addition, prohibited therapies involving children and vulnerable persons would constitute an aggravation in relation to the calculation of the penalty imposed on the professionals. We feel that this approach strengthens the notion of self-regulation, also creating an atmosphere of

¹⁵ Ormerod D., Laird K., Smith and Hogan's Criminal Law, Oxford University Press, 2015

¹⁶ Husak D., The Criminal Law as Last Resort, Oxford J Legal Studies (SUMMER) 24 (2): 207-235 doi:10.1093/ojls/24.2.207

¹⁷ Husak D., Overcriminalization: The Limits of the Criminal Law, Oxford University Press, 2009

responsibility. It should also encourage practices that are based on provision of information on content and impact of suggested therapies.

aditus encourages the Ministry to conduct in-depth consultations with the various regulating professional bodies, with civil society organisations working in the field and with mental health professionals themselves in order to discuss the scope of the proposed legislation, the regulation of professionals and penalties that could be imposed. Procedural issues could either be based on existing disciplinary mechanisms or be created for these specific situations.

5. The penalty should involve disciplinary action from regulating professional bodies.

Children

Whilst adults are generally able to receive and process information, with a view to taking decisions that could affect their life-style and overall well-being, children and vulnerable adults might not be in a position to fully engage in such processes.

In the situation of children, it is not uncommon for parents to wish to alter their child's sexual orientation or gender identity/expression for various reasons, including for this to be in conformity with the perceived norm, to avoid bullying and other social problems, or religious belief. Yet despite the gravity of situations that could involve teenagers being exposed to potentially harmful experiences, we feel that they do not warrant legislation specifically criminalising actions of parents taken with a view to conversion.

We reiterate the principle protected under Maltese Law whereby parents enjoy parental authority over their children, which authority can and should be limited or withdrawn in situations where the best interests of the child so warrant. These situations are covered in various legal instruments, and a number of institutions are in place geared towards the protection of children, including from their parents. Reference can be made to laws such as the Criminal Code, the Domestic Violence Act, the Children and Young Persons (Care Orders) Act.

On the basis of these considerations, we do not feel that special provisions are required to cater for the situation of children. We feel that existing norms and procedures can and should be relied upon in situations where the interests of children are at stake. To this end, it would be important to sensitise services such as APPOĠĠ and school counsellors in order for them to be alert and aware of conversion therapy so as to refer for support when necessary.

Furthermore, we also suggest that advertisement of such therapies be regulated in the same manner as advertisement relating to alcohol and cigarettes in terms of the required distance from schools and other spaces frequented by children.

6. Conversion therapy conducted on children should be able to be considered as a sign of abuse, thereby triggering protective mechanisms, procedures and entities already in place.

7. As a corollary, advertisement of conversion therapy be regulated in the same manner as that of cigarettes and alcohol.

Forced and Involuntary

The presumption that adults are able to take decisions affecting their lives is clearly a rebuttable one, and in this regard we reiterate our position that conversion therapy should only be allowed where carried out by non-mental health practitioners¹⁸ and only when it is free and voluntary.

Conversion therapy that is forced and involuntary could amount to inhuman and degrading treatment, and as such should be prohibited in all scenarios. This prohibition would not only include within its protective sphere activities that, *per se*, deprive individuals of their dignity but would also protect vulnerable individuals on whom the impact of 'regular' activities is aggravated due to their very vulnerability.

To regulate these activities, we suggest reference is made to Criminal Code 'Subtitle IX Of Threats, Private Violence and Harassment' wherein the Ministry will find all the elements necessary to design a provision catering for these envisaged situations, including additional protection for vulnerable individuals. A specific legal instrument could easily contain a provision introducing the single crime of conducting forced and involuntary conversion therapy activities (in accordance with a clear definition). Judicial discretion would be relied upon to define specific parameters of what constitutes 'forced' and 'involuntary' on a case-by-case basis.

8. Conversion therapy that is forced and involuntary should be criminalised.

S U P P O R T I N G A C T I O N S

Together with banning conversion therapy under the above-mentioned circumstances, **aditus** encourages the Ministry to carry out a number of supporting actions in order to raise awareness in the public in relation to the psychological harm that conversion or reparation therapy may have on individuals, in particular on young people. Furthermore, seeking assistance through specialised mental health professionals and/or civil society organisations in order to deal with complex issues should be encouraged, in order to dissuade persons from pursuing help in non-professional circles.

The Government should encourage the self-regulation of professional boards through support of on-going training of their members and awareness raising on the law once enacted.

Training is also of outmost importance when it comes to the identification of and assistance to persons who are either at risk of or have been subjected to conversion therapy, specifically in schools and youth centres.

Parents and entities in contact with children should also be sensitised to the negative impact of such therapies, and child protection services be alerted as to the need to classify them as raising child protection issues.

9. Awareness raising on the potentially harmful effects of conversion therapy, on the law banning these therapies (once adopted).

10. Strengthening of self-regulation for professional bodies.

¹⁸ Since we are advocating for a ban on its practice by mental health practitioners.

11. Training on the identification of and assistance to persons who are at risk of or have been subjected to conversion therapy.