



# The Church of Scotland

## Official Response

**Subject:** Ending Conversion Practices in Scotland  
**Requested by:** The Scottish Government  
**Date:** 25 March 2024  
**Prepared on behalf of:** The Public Life and Social Justice Programme Group

### Question 1

Do you support our approach to defining conversion practices which focuses on behaviour motivated by the intention to change or suppress a person's sexual orientation or gender identity?

- Yes  
 No  
 Don't know

### Question 2

Please give the reason for your answer to Question 1.

This response has been prepared and agreed by the Church's Public Life and Social Justice Programme Group, whose remit includes to "contribute to public life by developing and sharing the witness of the Church with government [and] parliament... [and] providing a space in which to explore theologically, reflect, discuss and respond as a Church to important public matters that arise" The Convener and members of the Programme Group are appointed by the General Assembly. This response has been formulated in consultation with the Church of Scotland's Theological Forum, Law Department, Safeguarding Service and our Equality, Diversity and Inclusion Group.

The General Assembly has considered the issues connected to conversion practices on two separate occasions. The first was in May 2022 in response to the Memorandum of Understanding (MOU) on Conversion Therapy where the following was agreed:

*Endorse the definition of Conversion Therapy as outlined in the 'Memorandum of Understanding on Conversion Therapy in the UK'<sup>1</sup>, noting that the Methodist Conference have supported and adopted this definition and the Church of England General Synod have endorsed a similar statement; urge the Scottish Government to ban Conversion Therapy and instruct the Forum to make representations to the Scottish Government and Scottish Parliament.*

In 2023 the Theological Forum, the committee tasked with resourcing and challenging the theology that informs the life and work of the Church, was instructed to *'study the Scottish Government's Independent Report entitled, 'Ending Conversion Practices: Report and Recommendations.'*

The actions and reflections which have taken place as a result of these two deliverances have included conversations with a number of stakeholders across the Church of Scotland alongside ecumenical

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<sup>1</sup> The Memorandum of Understanding on Conversion therapy is a document published in 2015 following discussions between psychologists and psychotherapists to determine and set out an agreed position on conversion therapies. It was revised and updated in 2017 to include gender identity alongside sexual orientation and was amended again in 2019 which saw additional groups sign up to the agreement. It has been signed by twenty-five health, counselling and psychotherapy organisations including the Association of Christian Counsellors.

dialogues, discussion with equalities organisations and the government itself. The Church's position is, in part, reflected by the United Nations Independent Expert<sup>2</sup>: -

“[R]eligion does not have essential inbuilt positions or prejudices, and it would make no sense to characterize it as inherently or predominantly pro- or anti-LGBT.”

The Report continues: -

“And yet religion and the human rights of LGBT persons are often placed in antagonistic positions in social and political discourse, feeding the contention that there is an inherent conflict between FoRB<sup>3</sup> and the human rights of LGBT individuals. The resulting sense of conflict undermines the ideal of peaceful human coexistence.”<sup>4</sup>

There is perhaps merit in reflecting on this before entering into substantive discussion on this topic. It is hoped that our comments are seen as objective, constructive and – most importantly of all – capable of practical implementation.

Serious engagement with the issue by the General Assembly, includes its endorsement of the MoU which highlights that “conversion therapy, whether in relation to sexual orientation of gender identity, is unethical and potentially harmful”. This means we are able to say that we take a broadly supportive position with regard to the proposals outlined in the consultation to tackle coercive practices aimed at changing or suppressing a person's identity.

However, we are not in a position to offer unqualified support and wish to raise several significant points and concerns at this stage. These will be outlined in relation to the specific questions posed in the consultation.

It is important to underline that there is a spectrum and diversity of views within the Church of Scotland on this issue (as on many public issues). Based on consultation and General Assembly positions, the Church of Scotland supports the definition of conversion practices which focuses on targeted intent to change or suppress a person's sexual orientation and gender identity as it correlates with the Memorandum of Understanding on Conversion practices. The MoU definition was endorsed by the General Assembly in 2022.)<sup>5</sup>

The inclusion of *intent* as an important component to determining which behaviours might be deemed criminal is to be welcomed. Focusing on behaviour which evidences intent offers greater reassurance that this law cannot be misused to suppress freedom of expression with particular regard to preaching, prayer and pastoral support. In particular, pastoral conversations provided to explore questions, anxieties and other issues would also come under this protection. It was similarly helpful that conversations which take place which gave the individual questioning their gender or sexual orientation the autonomy to reach their own conclusions would not be considered as coercive as this still leaves room for exploration and discussion in a spiritual setting. The Church of Scotland's safeguarding policies, pastoral training alongside the good practice advocated by the Church's gender-based violence group would all support an emphasis on non-directive advice or guidance where possible.

The Church of Scotland supports the inclusion of references to both sexual orientation and gender identity. There is a diverse array of views in the Church with regard to including gender identity in the Church of Scotland. This diversity of perspectives was reflected on the floor of the Assembly when the Memorandum of Understanding on conversion therapy was presented.<sup>6</sup> Opposition to including gender identity in the definition was based on the possibility that it might be used in a way that inhibits support of

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<sup>2</sup> Sexual Orientation, Gender Identity & Freedom of Religion, the United Nations Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, published 28 June 2023, A/HRC/53/37, from the reader-friendly summary

<sup>3</sup> Freedom of thought, conscience and religion or belief (FoRB)

<sup>4</sup> *ibid*

<sup>5</sup> [Video] May 2023 [Faith Impact Forum \(youtube.com\)](https://www.youtube.com/watch?v=...) (accessed 15:54 18.03.2024)

<sup>6</sup> *ibid*.

people (particularly young people) exploring and developing their identity. Inhibition would occur if professionals, church leaders or those offering pastoral support felt obliged to affirm a person's journey towards questioning their gender rather than explore any other options or causes in the fear that their approach be deemed coercive. The alternative view, that if the practices as defined by the MoU were deemed harmful to those targeted because of their sexual orientation, then the same practices targeted at gender identity were equally harmful. This view was supported by the General Assembly by 230 votes to 132. In the same way that pastoral conversations which give individuals non-directive and non-coercive support in order to explore and discuss sexual orientation would not be considered problematic this consideration should also be applied to similarly respectful conversations on gender identity.

### **Issues and Concerns**

While the Church of Scotland's view is mostly appreciative of the focus on the intention to change or suppress, it was clear that much more detail will be required in the final legislation to outline which kinds of scenarios would be a) indicate the ways in which an individual might be targeted and b) what might constitute harm and c) what intent might look like. On a similar subject, the recommendations contained in the Independent Expert Advisory Group (EAG) report were worryingly one-sided in the kinds of examples given with no explanation of what kinds of speech would be prohibited and what would be allowed. Learning from the example of the EAG report, we would urge the final detail of the Bill to contain a balanced array of examples so as to give a clearer overview of how the law might be applied. Example scenarios would be a helpful way to ensure as much clarity as possible both for faith groups and for the courts to interpret the proposed legislation. Some of the scenarios raised in our internal discussions included instances where individuals requested pastoral care or prayer in order to resist sexual urges that might result in behaviour they themselves deemed incompatible with their beliefs. While consent may not be a complete defence for conversion practices, more detail is required as to how much of a role it might play as some grey areas remain. In our answer to question 17 we address this scenario in more detail with the reflection that reasonableness must defence may play a role when it comes to application and prosecution.

Another instance was raised regarding the nuances of whether an individual had been targeted with a specific intent to change or suppress their identity. Within worship communities wherein only one person is either openly LGBTIQ+ or suspected to be so, and where sermons are delivered that could be interpreted as directly and repeatedly aimed at them with anti-LGBT+ rhetoric, does this qualify as a form of conversion practice? Establishing intention in such scenarios could prove challenging. Nonetheless, for the individual who perceives themselves as targeted, this could result in harm, particularly considering factors such as their age, vulnerability, or the potential power imbalance between themselves and the preacher.

In non-traditional worship settings like home prayer groups, monitoring problematic behaviour may be similarly ambiguous. It is hard to determine if prayers and behaviours are aimed at individuals or evidence of a broader pattern, given the complexity of group dynamics and subtle cues. While a single targeted prayer may not meet the threshold outlined in the consultation paper, identifying the exact point at which isolated incidents fall into a pattern of targeted behaviour poses a challenge. An individual wrestling with or focused on their sexual orientation or gender identity may be prone to see all conduct through this lens, whereas a colleague may be quite unaware of this sensitivity, and be focussing only on matters of impersonal doctrine and belief.

On a related point, in an informal context, traditional worship or pastoral context, is the role (an office bearer, or lay person) of the person offering prayer or something similar relevant to how this law might be applied? In other words, would the relative power differential in a given situation be in consideration when considering the criminal application of the proposed law. Clarity on the parameters of how the law might be applied in non-traditional worship contexts alongside the relevance of power differentials would therefore be helpful.

A final concern for this section relates to the provision of the proposed legislation for the specific needs of vulnerable adults. There was not sufficient detail offered as to how this legislation might protect those with a carer or advocate who might abuse their position to suppress sexual orientation or gender identity

of the person they are caring for. A concern was raised that if these specific circumstances in relation to vulnerable adults are not carefully and clearly covered in the final design of the legislation then there could be loopholes for those who abuse their position in this way. This would be particularly relevant in the application of personal protection orders which have the potential to offer significant protection for disabled and vulnerable adults.

### Question 3

Do you think that legislation should cover acts or courses of behaviour intended to 'suppress' another person's sexual orientation or gender identity?

- should be covered
- It should not be covered
- Don't know

### Question 4

Please give reasons for your answer to Question 3.

Broadly speaking the Church of Scotland supports the inclusion of suppression in the design of the proposed legislation. This position is similarly supported by the General Assembly endorsement of the MOU on conversion therapy which included suppression in its definition. There is understanding that suppression is a major focus for many people attempting to coerce individuals, especially those that know that is impossible to change someone's identity altogether or wish to disguise this as their ultimate objective. The pernicious and damaging role of shame, fear and rejection involved along with a number of other forms of manipulation were also recognised and acknowledged in discussions within the Church of Scotland.

The attempt to suppress through the means of encouraging celibacy poses serious questions with regard to specific beliefs within Christianity. One example of this is circumstances where prayer for the strength and willpower to resist expression of sexual orientation and to practice celibacy might be offered. Whilst a prayer urging celibacy would come under the definition of suppression (page 17 of the consultation paper) there is an additional factor at play within a Christian context whereby celibacy outside of a traditional marriage is a commonly held practice, and for some an important manifestation of their faith. The position of the Church of Scotland maintains a traditional view of marriage whilst giving congregations the option to officially 'depart' from this view and call a minister in a same sex relationship. Similarly, some congregations or Christian organisations require celibacy for anyone (including heterosexual individuals) in a position of leadership if they are not married. For those struggling with this requirement and requesting or being offered prayer as a result, how might the proposed law interact with this aspect of belief? Would it be significant if the prayer to encourage celibacy was requested and thereby consent was given? Would such practices need to be compared with those offered to heterosexual individuals who are struggling with the call to celibacy rather than their sexual orientation? It would be extremely helpful for the Church to have such examples considered in relation to the proposed legislation. This is not only for the sake of clarity but for our safeguarding services to design relevant guidelines to ensure expression of belief and fellowship within that belief does not become coercive.

### Question 5

Do you support or not support an approach which uses a package of both criminal and civil measures to address conversion practices in legislation?

- Support
- Do not support
- Don't know

## Question 6

Please give reasons for your answer to Question 5.

We are largely satisfied in the outline of what would become a criminal offence. In our internal discussions there was particular support for the fact that there needs to be three aspects evidenced for a service or course of behaviour to be deemed criminal; a) directed at an individual, b) intended to change their sexual orientation or gender and c) to cause harm. Requiring all three aspects to be proven beyond reasonable doubt gives a much clearer indication that one-off and/or nuanced pastoral conversations with individuals regarding their gender or sexual orientation would not necessarily be implicated. The high bar of proving a criminal offence thus helps to assuage the fear that this would not curtail freedom of speech or independent thought.

We recognise that the proposed legislation creates a civil as well as a criminal dimension. This could afford greater protection for those at risk rather than waiting for harm to be done with the burden of proof held by the person affected. It would also protect communities from individuals who had carried out conversion practices in the past.

There is concern that the creation of these new offences could give rise to internal disciplinary offences and censure under the Church of Scotland Discipline Act 2019 (Act 1 of 2019), thus indirectly being a risk to ministry and wider office-bearers.

This Church of Scotland 2019 Act provides that a conviction creates a presumption that an accused “shall be taken to have committed that offence, unless the contrary is proved.” This evidential presumption that exists in Church law would, in relevant circumstances, be activated on a conviction following from this proposed legislation. This would, however, be in much the same way as with the creation or development of all criminal offences. This is highlighted merely to draw attention to the interplay between the proposed legislation and Church law.

Whilst this is the case, it is not necessarily the case that a criminal conviction will lead to a disciplinary offence being found to have been committed. One does not follow the other, and so the separate and independent government and jurisdiction of the Church in matters spiritual is maintained.

The defence of reasonableness may also assist here. It is hoped that the jurisprudence surrounding this reasonableness defence might develop, and so not only assist in the criminal prosecutions but also in relation to the civil orders and Church law. The inclusion of the defences is accordingly strongly supported. Ensuring the proper and effective use of it will be important, as discussed in answer to Question 14.

### **Issues and Concerns:**

Some in the Church of Scotland feel that the high bar for a criminal conviction rendered the legislation unenforceable. This is because it would be extremely hard to prove all three dimensions, particularly the intent to suppress or change someone’s sexual orientation or gender identity. There are many potential loopholes for perpetrators to easily evade detection within a faith-based context.

It was noted in our internal discussions that the subtle nature of genuine coercive control and the high bar of evidence needed to convict might then result in a similarly low conviction rate as the coercive control legislation introduced in the Domestic Abuse Act (Scotland) 2018 given how hard it is to prove that a pattern of coercive behaviour has taken place.

It seems inevitable, in light of this, that the civil measures will be the route used in the vast majority of cases. Then, perhaps, the criminal offences used for the most serious examples. This creates the concern

that individuals will be criminalised on the basis of ‘more likely than not’<sup>7</sup> and civil rules of evidence<sup>8</sup>; and without having the protection of the criminal standard of ‘beyond reasonable doubt’.

It is this that gives rise to the concern that freedom of thought and expression will be curtailed. This might be the case if, say, the Civil Protection Orders are used tactically, in an effort to threaten or muzzle voices within faith communities. Alongside this issue is the broader concern that the Civil Orders will have a chilling effect on their freedom of expression even if none of their past, current or future work and ministry would actually be prohibited by this legislation due to the unpopularity of conservative theological views in wider society and in the media. Our democratic society depends on - and legal history celebrates - the right to express controversial opinions; for there to be a diversity of free discussion; and for there not to be a ‘state mandated’ lines of acceptable speech and conduct, other than in the most extreme cases involving threats to life.

The civil measure comes with other protections: lesser punishment; effectively rendering the measure a ‘warning’, if the Order being granted is thought of as a warning; there are protections of who can seek such an Order. The question is: are these sufficient?

It is acknowledged that ending conversion practices is not going to be an easy thing to achieve. In our view, the first priority has to be the *prevention* of harmful conversion practices. In the consultation paper, it is acknowledged that the Scottish Government “are also considering other measures that could be used to provide education, awareness, and support outside of the legislative process.”<sup>9</sup>

This is not something to be left to ‘another day’ – it is of prime importance. Education and other measures points to prevention, and ending conversion practices at their source. Some in the Church have expressed the view that this legislation does not offer anything new that isn’t already covered in existing protections and creating new legislation is therefore unnecessary. Others have said that their perception that this is a marginal issue in Scotland with few people harmed by these practices. This is not a view that is widely shared but perhaps points to the responsibility of the Government to make clear the scale of the harm and how this legislation is needed. A new offence is merited but it should be part of a wider scheme of education and prevention. Ending conversion practices will require a wide array of tools, of which the proposed legislation, and associated new offences, is only one tool.

We would be keen to have made public these “other measures” and the level of investment that is being allocated to these, and prevention generally. The focus should not be on criminalising and pushing people in to the criminal and civil justice systems, without providing them with sufficient extra resources. There should be routes for reflection, improvement and shared understanding; and justice budgets are already stretched.

The consultation document makes only passing reference to this. The Church would like to see this detailed, resourced and implemented first, before any legislation is passed.

Then, when criminalisation is necessary, it should be focussed on those that target the largest number and most vulnerable; those with the worst intentions; and who cause the most harm. It should not be criminalising those that perhaps do not have a mainstream view. Encouragingly, the policy objectives include, amongst others, that the legislation should: -

- Not inhibit nor criminalise non-coercive... spiritual, and pastoral practices that provide support to individuals who seek help to explore their sexual orientation and gender identity.
- Not inhibit nor criminalise the exercise of parental responsibilities and rights including guidance for children and conversations about sexual orientation and gender identity.

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<sup>7</sup> Using the lower standard of civil proof: on the balance of probabilities.

<sup>8</sup> The most pertinent example perhaps relating to the hearsay rule. In civil proceedings, evidence is not excluded solely on the ground that it is hearsay, under the Civil Evidence (Scotland) Act 1988, s2(1).

<sup>9</sup> Consultation paper, para 170

The consultation paper draws the line at “a purpose or intention to change or suppress another individual’s sexual orientation or gender identity”. Looking at draft section 1, the perpetrator and the victim are referred to as “person A” and “person B”, respectively. This is perhaps to avoid the need for ‘labels’ and is one solution that avoids using gender-specific pronouns.

Our preference would be to have the legislation more closely match English language. This would make it more accessible and understandable, without the need for the reader to go through the mental hoop of substituting the actual noun being referred to.<sup>10</sup> This could be achieved by using defined terms.

The theme of our response is the need for clarity and rigour. We consider prevention is the best option; and should be first priority. We accept that thereafter there is the need for an offence for engaging in conversion practice. What precisely this is should be provided clearly and unambiguously. It is important that any legislation is accessible, clear, well-structured – to ‘tell the story’ of what is intended.

It seems inevitable, however, that this legislation will need to be more than just a stand-alone document. It will need to be revised and scrutinised to make it as good as it can be; but no matter how good that is, it will need full explanatory notes and guidance.

### Question 7

What are your views on the proposal that the offence will address the provision of a service?

- Support
- Do not support
- Don’t know

### Question 8

Please give reasons for your answer to Question 7.

In our discussions there was appreciation of the expressed clarity that provision of service did not refer to a religious service. This will address some of the concerns that many within our denomination may have held with regards to how this law might be applied to teaching or preaching in formal and informal worship.

On the other hand, it is worth reiterating the widely held opinion that this legislation would be much easier to navigate if clear directives of permissible and non-permissible behaviours and services are published with the final legislation. This would not be exhaustive but rather would give a clear guide as to what is intended to be caught; and what is not.

The worry is that the balanced position seen in the consultation paper, including the examples therein, will not be reflected in the legislation itself or in the interpretation by the courts of the legislation that follows. We discuss later in this response, our thoughts on the need for accompanying action and guidance.

### Question 9

What are your views on the proposal that the offence will address a coercive course of behaviour?

- Support
- Do not support
- Don’t know

### Question 10

Please give reasons for your answer to Question 9.

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<sup>10</sup> Office of the Parliamentary Counsel – Drafting Guidance, June 2020, para 2.1.10

There is widespread recognition that coercive behaviour and practices are not an acceptable or legitimate expression of faith. Explicit support for the MOU definition of conversion practices makes clear that the Church of Scotland acknowledges the potential harm this behaviour can cause. It is recognised that coercive behaviour can be subtly manipulative and is an offence to a person's autonomy, liberty and their right to flourish.

Those within the Church of Scotland with knowledge of the Domestic Abuse (Scotland) Act 2018 see many of the similarities between the Act and this proposed Bill when it comes to the potential for protection and prevention. While coercive control element of the Domestic Abuse Act has not resulted in a high conviction rate, the accompanying training and information whereby coercive control is explained and analysed is seen as an invaluable tool and is complementary to the legislation. It is hoped that similar resources might become available as a result of this legislation. With greater awareness of how coercive behaviour can manifest creates greater potential for detection, prevention and protection.

### Question 11

What are your views on the requirement that the conduct of the perpetrator must have caused the victim to suffer physical or psychological harm (including fear, alarm or distress)?

- Agree  
 Do not agree  
 Don't know

### Question 12

Please give reasons for your answer to Question 11.

There was broad agreement that proof of harm was an important determinant in assessing whether behaviour was problematic or criminal.

Harm is a highly subjective dimension to evidence and many people do not respond to harm in universally recognisable ways. Expert input into how harm might manifest and be proven would be extremely helpful in additional resources which are produced alongside the proposed legislation.

The draft section 3 currently provides that "psychological harm includes fear, alarm and distress". This mirrors that seen in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. This relates to an aggravation and does not require there to be psychological harm, just the *intention* to cause physical or psychological harm:

"It is immaterial... that the offence does not in fact cause the partner or ex-partner physical or psychological harm."

This is inappropriate for the present draft bill. It sets the bar for harm too low. This is particularly so when the consultation provides for there to be three necessary elements for the offence to have been committed:

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- 1 Relating to a specific individual
- 2 Intent to change or suppress and
- 3 Harm

The definition of psychological harm is so low as to potentially criminalise ordinary, everyday conversation. As currently drafted, it could include anyone who feels disturbed, or upset in any way, having taken offence at, say, a traditional faith belief or gender critical view. It would be preferable, in our submission, that psychological harm includes a recognised psychiatric injury or illness.



Expert mental health practitioners would be able to advise on the particulars of this. It is anticipated that the ICD-10 Classification of Mental and Behavioural Disorders (and successors) could be used to specify the conditions, for which a diagnosis would be required to constitute the necessary psychological harm.

As examples, (i) anxiety and fear-related disorders<sup>11</sup>; and (ii) disorders specifically associated with stress<sup>12</sup> may be included. “Anxiety and fear-related disorders are characterised by excessive fear and anxiety and related behavioural disturbances, with symptoms that are severe enough to result in significant distress or significant impairment in personal, family, social, educational, occupational, or other important areas of functioning.”<sup>13</sup>

“Disorders specifically associated with stress are directly related to exposure to a stressful or traumatic event, or series of such events or adverse experiences... With all disorders in this grouping, it is the nature, pattern, and duration of the symptoms that arise in response to the stressful events – together with associated functional impairment – that distinguishes the disorders.”<sup>14</sup>

The need for a medically recognised definition of psychiatric harm is necessary to draw a distinction between those merely feel offended; and those who suffer a genuine and substantive injury. As the consultation paper itself states: “Courses of behaviour that do not cause harm will not be criminalised.”<sup>15</sup>

The draft Bill’s definition of psychological harm does not currently meet this objective and the copy/paste definition from the 2016 Act is inappropriate. The aggravation in the 2016 Act does not require there to be actual physical or psychological harm; just *intent* to cause it.

Contrast with what is required here: “the proposed offence does not require it to be proven that the perpetrator to intend (sic) to cause harm to the victim or to be reckless as to whether harm would occur. However, for the offence of engaging in a conversion practice to be committed, harm will need to have resulted nonetheless.”<sup>16</sup>

The definition of psychological harm needs to be addressed to ensure that this objective is met and this key protection is realised.

### Question 13

Do you agree with the inclusion of a defence of reasonableness?

- Agree  
 Do not agree  
 Don't know

### Question 14

Please give reasons for your answer to Question 13.

The Church of Scotland is strongly in support of the defence of reasonableness.

The draft section applies “in the particular circumstances” and does not make use of the ‘reasonable person test’. It also puts the onus on the accused to adduce evidence of reasonableness, but it is for the prosecution to “prove beyond reasonable doubt that it is not the case.”

<sup>11</sup> ICD-11, 6B00 to 6B06

<sup>12</sup> ICD-11, 6B40 to 6B4Z

<sup>13</sup> ICD-11, 6B, Description of ‘Anxiety or fear-related disorders’

<sup>14</sup> ICD-11, 6B, Description of ‘Disorders specifically associated with stress’

<sup>15</sup> Paragraph 111. See also para 102 discussing coercive behaviour: “...and the other requirements of intent and harm will also need to be met.”

<sup>16</sup> See also references to the need for ‘harm’, discussed in relation to ‘Intent’ (paras 80 to 84) and ‘Coercive course of behaviour’ (paras 99 to 105)

This seems to put the onus and standards of proof on the right parties. Making it ‘particular’ enhances the prospect that the defence will actually be available. The difficulty appears to be anticipating a situation where it might be necessary, should the intent and harm aspects prove sufficiently robust. This ‘escape route’ is nonetheless merited, for matters that cannot be anticipated – the ‘unknown unknowns’<sup>17</sup>.

As touched on in our answer to Question 6 above, it is hoped that the jurisprudence surrounding this reasonableness defence might develop, and so not only assist in the criminal prosecutions but also in relation to the civil orders and Church law. Indeed, given the criminal sanctions that can follow a breach of a civil protection order, there would seem merit in having a similar ‘reasonableness defence’.

### Question 15

Do you agree or not agree with the proposed penalties for the offence of engaging in conversion practices?

- Agree  
 Do not agree  
 Don't know

### Question 16

Please give reasons for your answer to Question 15.

No particular view is given for the penalties though they were noted in the internal discussions. They appear to be, broadly, proportionate.

### Question 17

Do you agree that there should be no defence of consent for conversion practices?

- Yes  
 No  
 Don't know

### Question 18

Please give reasons for your answer to Question 17.

We understand the reasons that have been given as to why consent would not be considered as a defence. It is appreciated as particularly relevant in relation to the lack of agency and power many young people or vulnerable adults have, who might unwittingly submit to conversion practices or for them to submit to a conversion service which was disguised as something very different.

It would be helpful if more detail could be provided as there are a number of different ways to approach the subject of consent which were not covered in the consultation paper particularly with regards to explicit request for prayer which is more active than saying ‘yes’ to something.

This may arise in particular for those who have elected to be celibate and would seek support and prayer in order to resist unwanted sexual urges. As elected celibacy was specifically referenced as permissible and not an example of being suppressed, how might requested spiritual practices that interact with this decision be affected by the law?

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<sup>17</sup> See United States Secretary of Defence (as he then was), Donald Rumsfelt’s news briefing of 12 February 2002; and the analysis technique referred to as the Johari window.

As an added component, if the individual looked back on a service they themselves had requested, and had received something they had expected, but on reflection determined that this service had caused them harm: would their initial request and ongoing consent be considered a defence?

It is hoped that the combination of intent, harm (if properly addressed) and the reasonableness defence will be such that consent need not be included as a defence.

### Question 19

Do you have any other comments regarding the criminal offence as set out in Parts 8 and 9?

It is suggested that guidance accompanying the legislation, with non-exhaustive examples, might give the courts the assistance they might require to interpret it as Parliament intends, while respecting their independence.

The explanatory notes to the Act should reflect the balance seen in the consultation paper. This is to ensure the interpretation of it is as close as possible to what is seen in the consultation paper.

The detail seen in the consultation paper is, generally, impressive. We have concerns that the draft Bill, without fairly extensive supporting notes and guidance, will not show such balance.

This might have the consequence of the subsequent Act being interpreted not as intended, or leaving the position so uncertain that the courts struggle to give effect to what Parliament intends, should the Bill be passed

The enactment and repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 shows the importance of listening to consultation responses, and experts and stakeholders generally, and taking account of them.

In a similar way, Sir David Edward advocated for a Scottish 'Council of State'. He considered the Council of State of the Netherlands – the *Raad van State* and its Advisory Division<sup>18</sup>: -

"In assessing Bills and other requests for advice the Advisory Division uses an assessment framework made up of three elements: policy analysis, legal issues and technical aspects. These are assessed under the following heads:

#### *Policy analysis:*

- Is the problem being addressed one that can or should be solved by legislation?
- Will the proposed legislation be effective, efficient and balanced as regards costs and benefits?

#### *Legal issues:*

- Is the Bill or Order compatible with superior rules of law (the national Constitution, international treaties such as the ECHR, and EU law)?
- Is it in accordance with principles of democracy and the rule of law?
- Is it in accordance with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection of the individual and proportionality?
- Can it be easily incorporated into the existing legal system?

#### *Technical aspects:*

- Is the Bill or Order well drafted from a technical point of view?
- Does it establish a logical, systematic régime?

The conclusion of the Advisory Opinion may be favourable or unfavourable

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<sup>18</sup> Constitutional Implications of the Scottish Referendum, Working Paper No. 1, 25 September 2014; under the heading 'A Council of State?'

(recommending against the Bill altogether or recommending suspension until substantial amendments have been made). Thereafter, the matter rests with the responsible minister and ultimately with the Parliament. So, the Opinion is not binding, but it will be made public when the Bill is presented to the Lower House or when the final text of an Order is officially published. Some Opinions are hard-hitting and are a formidable check on the introduction of ill-considered, ill-drafted, or tokenistic but unenforceable, legislation.”

He argued that “we must be prepared to show political imagination.” And noted that “the aim [of a Council of State] would be to ensure good, workable legislation by making provision for a system of objective analysis within a transparent, non-partisan framework at a stage in the legislative process where problems and pitfalls can be identified and guarded against. This, surely, is what the people are entitled to require from their Parliament.”

He considered that such a body “might... have forestalled the debacle over the legislation to abolish the general rule requiring corroboration in criminal cases, and have raised questions as to the wisdom and workability of the ‘named person’ provisions of the Children and Young People (Scotland) Act 2014. Sir Edward was aware that this would have cost and pithily observed: -

“As to the structure and cost in manpower and finance, it cannot be pretended that the creation of a Scottish ‘Council of State’ (whatever it might be called) would be cost free, but poor legislation is far from cost free either.”

While such a body does not yet exist, we should approach this consultation with these words at the forefront of our mind.

### Question 20

What are your views on it being a criminal offence to take a person out of Scotland for the purpose of subjecting them to conversion practices?

- Support  
 Do not support  
 Don't know

### Question 21

Please give your reasons for your answer to Question 20.

There was support in our discussions for the fact that the consultation paper acknowledged the potential for conversion practices to be enforced by removing a person from the country. While there is an indication that the warning signs of this will be outlined for relevant statutory bodies, it was felt that these could very easily be evaded as they currently are for forced marriage and FGM. It is hoped that the legislation might learn from the pitfalls in applying this aspect of the legislation from these in order to strengthen the overall approach.

### Question 22

What are your views on the proposed penalties for taking a person outside of Scotland for the purposes of conversion practices?

- Support  
 Do not support  
 Don't know

### Question 23

Please explain your answer to Question 22.

The penalty of removing a person from Scotland was supported as this would help protect others from future harm, though as noted above there was concern that this would be very hard to enact.

#### Question 24

What are your views on the proposal that conversion practices should be an aggravating factor for existing offences?

- Support  
 Do not support  
 Don't know

#### Question 25

Please explain your answer to Question 24.

We are in support of the proposal that conversion practices should be an aggravating factor for existing offences. The benefits are explained in the consultation paper<sup>19</sup> and it seems logical extension of the proposed new offences.

It is noted that harm is not relevant to the aggravation, presumably because this will be assumed to be the case by virtue of the related offence.

The need for the inclusion of an aggravating factor in the legislation would only be increased if our observations in relation to clarifying and strengthening the meaning of harm<sup>20</sup>, particularly psychological harm, are adopted.

#### Question 26

Do you have any views on the steps we have taken to ensure the proposals are compatible with rights protected by the European Convention of Human Rights?

In our internal conversations there was positive recognition that this consultation paper has been informed by the European Convention on Human Rights which identifies and responds to the harm caused by coercive practices. There was also recognition that the consultation paper was influenced by the independent expert on sexual orientation's report to the UN which explicitly highlights the potential conflict between freedom of religion and actions that might inhibit conversion practices. It is indicative from the consultation paper's objectives and in the draft Bill presented that the legislation will seek to address this potential conflict. How thoroughly the final Bill will actually remedy this potential conflict still remains to be seen in the detailed legislation.

Freedom of expression, its importance and restrictions placed thereon have been extensively analysed by the ECtHR. It is well recognised that the proposed restrictions require to be proportionate to the legitimate aim pursued: -

**“Freedom of expression** constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is **applicable not only to ‘information’ or ‘ideas’**

<sup>19</sup> Paras 156 to 158

<sup>20</sup> Discussed in our answer to Question 12

**that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.** Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.” (Handyside v. the United Kingdom judgment of 7 December 1976, § 49).

“... [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle **it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ...**, provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.” (Erbakan v. Turkey judgment of 6 July 2006, § 56).<sup>21</sup>

The consultation paper shows a balance suggesting what is being pursued is proportionate. We have concerns, however, that this proportionality is not adequately represented in the draft Bill included therein. It is acknowledged that the draft Bill is just that – a draft.

It is of no use for the consultation paper to show the required proportionality if this does not result in a piece of legislation that does the same. We submit that some work requires to be done yet, on the draft Bill and we would be keen to work with the Scottish Government to ensure that the equality impact of the legislation is adequately assessed.

Our responses to this consultation have been focussed on improving the draft and ensuring that it is interpreted in a way that is consistent with the consultation document. This, it is hoped, would make the resulting restrictions and penalties proportionate, and compatible with the ECHR. If the draft bill were to be brought in to law tomorrow, we do have concerns that it would be challenged as incompatible with the ECHR. It is essential that faith communities can have confidence that the reasonable expression of a point of view which expresses genuinely held faith convictions is not at risk of being criminalised or categorised as a conversion practice.

### Question 27

What are your views on the purposes of the proposed conversion practices protection order?

- Support  
 Do not support  
 Don't know

### Question 28

Please explain your answer to Question 27.

There was broad support for the creation of a protection order. This would ensure that individuals were protected and harm prevented.

Our reasons given in our response to question five offer an overview for the general support for both a criminal and civil dimension and the protections that the latter will create for individuals and communities.

### Question 29

Do you agree or disagree with the proposals for who should be able to apply for a conversion practices civil order?

- Agree  
 Do not agree

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<sup>21</sup> The European Court of Human Rights, Factsheet – Hate speech of November 2023, with its emphasis

Don't know

**Question 30**

Please explain your answer to Question 29.

The proposals were noted with interest that only the police or local authority would be able to apply for an order for the protection of a community. No particular view was articulated.

**Question 31**

Do you have any other comments regarding the civil order as set out in Parts 13 - 15?

No further comments.

**Question 32**

Do you have any views on the potential impacts of the proposals in this consultation on equality by:

- a) Age
- b) Disability
- c) Gender reassignment
- d) Civil partnership
- e) Pregnancy and maternity
- f) Race
- g) Religion and belief
- h) Sex
- i) Sexual orientation

The Church of Scotland has a significant degree of interest in ensuring that this legislation is able to balance the protections relating to religion and belief and sexual orientation and gender reassignment. We have outlined our specific concerns for where this balance is at risk of falling short, primarily through lack of clear directives. Overall, we are satisfied with the attempt to address the potential impact on freedom of religion and belief, and clarity where it was found as to what would and would not count as a coercive practice within spiritual contexts.

**Question 33**

Do you have any views on the potential impacts of the proposals in this consultation on children and young people, as set out in the UN Convention on the Rights of the Child?

**Question 34**

Do you have any views on the potential impacts of the proposals in this consultation on socio-economic inequality?

**Question 35**

Do you have any views on potential impacts of the proposals in this consultation on communities on the Scottish islands?

**Question 36**

Do you have any views on the potential impacts of the proposals in this consultation on privacy and data protection?

**Question 37**

Do you have any views on the potential impacts of the proposals in this consultation on businesses and the third sector?

**Question 38**

Do you have any views on the potential impacts of the proposals in this consultation on the environment?