Highlighting added by The Christian Institute

THE CHRISTIAN INSTITUTE

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proposals for the Scottish Parliament to legislate with a view to bringing to an end in Scotland "Conversion Practices" related to individuals' sexual orientation and separately to their "gender"

ADVICE

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1. INTRODUCTION

1.1 I refer to the E-mails from my instructing solicitor, Sam Webster of The Christian Institute, of 11 and 12 October 2022. My Advice is sought by The Christian Institute in order to assist it in formulating and articulating its policy and responding to any concrete proposals which might emanate from the Scottish Government to introduce legislation before the Scottish Parliament to ban/criminalise "Conversion Practices" - which is to say any activity (including speech) the intent of which is to seek to effect change in, or suppression of, a person's sexual orientation or their "gender expression" or their "gender identity".

2. RELEVANT HISTORY OF THESE PROPOSALS

The setting up of the "Expert Group"

2.1 The Scottish Ministers *Programme for Government 2021-22* published in September 2021 [1] contained an *undertaking* that the Scottish Government would seek to

> "protect LGBT people from harm by banning promotion and practice of conversion therapy, bringing forward legislation that is as comprehensive as possible *within devolved powers* by the end of 2023, *if UK Government proposals do not go far enough"*.[2]

[1] https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/

[2] The most recent UK Government proposals appear to be as set out in a letter to Catherine McKinnell MP and Elliot Colburn MP (respectively Chair and Member of the Petitions Committee) dated 10 June 2022 from the then UK Minister for Equalities Mike Freer MP https://committees.parliament.uk/publications/22588/documents/166235/default/ as follows:

> "[W]e are progressing legislation that seeks to protect everyone, including transgender people, from being subjected to practices that seek to change their sexual orientation.

2.2 On 17 November 2021 the Scottish Cabinet Secretary for Social Justice, Housing, and Local Government announced the establishment (on a non-statutory basis, which was therefore said to "by-pass" the requirements of the Code of Practice for Ministerial Appointments to Public Bodies in Scotland) of an "Expert Advisory Group on Ending Conversion Practices" to be chaired by a civil servant holding the position of Deputy Director for Equality and Inclusion at the Scottish Government.

2.3 Members of the "Expert Group" were selected and appointed by the Scottish Ministers without their going through any formal public appointments process. The Christian Institute was in correspondence with the Scottish Government, seeking to join the group. However, this was not taken forward by the Scottish Government. The Scottish Government's Minister for Equalities simply responded that they had appointed 15 members of the group, four of whom (she said) represent faith and belief organisations and communities and that she was

> "confident members will carefully consider any legal implications and the structures which will underpin effective implementation of the measures to end conversion practices".

2.4 In announcing the names of the individuals they had appointed to constitute the Expert Group the Scottish Government stated that:

> "Membership of the Expert Advisory Group includes individuals who are experts in their field from LGBTI organisations, faith and belief organisations and communities, mental health, the law, human rights, academia, and people with personal lived experience of conversion practices.
> - Blair Anderson, lived experience
> - Dr Paul Behrens, University of Edinburgh
> - Pritpal Bhullar, Sarbat LGBT+ Sikhs
> - Very Reverend Dr Susan Brown, Church of Scotland
> - Dr Mhairi Crawford, LGBT Youth Scotland
> - Dr Rebecca Crowther, Equality Network
> - Richy Edwards, lived experience
> - Dr Amber Keenan, NHS Grampian
> - Reverend Jide Macaulay, House of Rainbow
> - Colin Macfarlane, Stonewall Scotland
> - Reverend Elder Maxwell Reay, Metropolitan Community Church
> - Dr Igi Moon, MoU Coalition Against Conversion Therapy
> - Florence Oulds, Scottish Trans
> - Hannah Winter, lived experience

> Our approach recognises the complexity of the issues and the need for further careful thought, we will carry out separate work to consider the issue of conversion therapy concerning transgender status.
>
> It is key that measures complement the existing clinical regulatory framework in this space, and that clinicians feel able to deliver legitimate therapies in supporting those experiencing gender dysphoria, especially those under 18. There is no equivalent service as regards sexual orientation."

- Luis Felipe Yanes, Scottish Human Rights Commission

The Group is chaired by Nick Bland, Deputy Director of the Equality and Inclusion Division at the Scottish Government. Secretariat is provided by the Equality and Inclusion Division, Scottish Government.

2.5 Those four members of the "Expert Group" appointed by the Scottish Government to be "representative" of a religious viewpoint and perspective were identified by it as being:

- Pritpal Bhullar of Sarbat LGBT+ Sikhs;
- the Very Reverend Dr Susan Brown of the Church of Scotland;
- Rev Jide Macaulay of House of Rainbow;
- Reverend Elder Maxwell Reay of Metropolitan Community Church.

2.6 The Scottish Catholic Bishops Conference and the Free Church of Scotland subsequently made a jointly authored public complaint about the "religious" representation on this group, noting:

> "All of those religious representatives had previously pledged their support for a broad ban on conversion practices, whereas religious organisations that had expressed reservations about a broad ban were not included on the group.
>
> The Free Church of Scotland and the Catholic Bishop Conference of Scotland are opposed to abusive and coercive conversion practices; however we have expressed concerns about the impact a broad ban would have on religious freedom and the normal activities of churches (especially prayer)." [3]

2.7 Having selected its members, the Scottish Government then directed its "Expert Group" to consider the Scottish Parliament's Equalities, Human Rights and Civil Justice (EHRCJ) Committee *Report on the Petition to End Conversion Therapy*. [4] Using this Report as a

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[3] Letter to The Times (7 October 2022) Times letters: Boosting benefits 'could avoid real hardship' | Comment | The Times

[4] Scottish Parliament Equalities, Human Rights and Civil Justice Committee *Report on Petition PE1817 - End Conversion Therapy* (SP Paper 88, 25 January 2022) Report on Petition PE1817: End Conversion Therapy (azureedge.net), the Executive Summary of which contains the following observations and recommendations (among others):

> "1. The Committee agrees that conversion practices are abhorrent and are not acceptable in Scotland. They should be banned. *The Committee has heard that current protective legislation is insufficient to prevent these harms taking place*.
>
> 2. The Committee agrees, based on the evidence taken, that the term 'conversion therapy' or 'practices' requires more clarity and should be explicitly defined in any proposed legislation. For that reason, it recommends that the definition used in the Report on Conversion Therapy by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, should be adopted for use in the legislation, namely
>
> > 'an umbrella term to describe interventions of a wide-ranging nature, all of which have in common the belief that a person's sexual orientation or gender identity (SOGI) can and should be changed. Such practices aim (or claim to aim) at changing people from gay, lesbian, or bisexual to heterosexual and from trans or gender diverse to cisgender'.

starting point, the Group was asked to provide an "evidence based" report to the Scottish Government setting the Group's recommendation for the changes it deemed to be required to law, policy and/or practice in order to "end conversion practices in Scotland".

Recommendations of the Expert Group

2.8 In an Annex to its report the Expert Group submits a number of specific recommendations to the Scottish Government which are said to be based on the guiding principles in the report and the Expert Group's "work with stakeholders".

2.9 These recommendations contain a number of assertions, as well as recommendation for specific actions and changes in the law, among them the following:

> **"1.1** Conversion practices infringe the human rights of individuals, in particular the victims' freedom from discrimination and freedom from non-consensual medical

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3. The Committee notes from evidence that *the majority of religious organisations we heard from* are in favour of a ban on conversion practices. It agrees that legislation should not pose any restrictions on ordinary religious teaching or the right of people to take part in prayer or pastoral care to discuss, explore or come to terms with their identity in a non-judgmental and non-directive way.

However, it heard evidence that most conversion practices take place within a religious setting including in the form of 'talking therapy' which is used with the intention to 'correct' sexuality or gender. The Committee believes and recommends that such practices should fall within a ban.

4. The Committee heard persuasive evidence that, for many survivors of conversion practices, their faith is part of their identity and they have felt forced to choose between faith and their sexual orientation or gender identity which can have a devastating impact. The Committee believes it is vital to involve religious and community leaders as a Bill progresses, and that education and awareness is crucial to promote acceptance of diversity. It recommends that the Scottish Government, when considering legislation, engages with a wide range of faith and belief organisations in order both to protect LGBT people and protect religious freedom. The *Committee agrees that there is no conflict in protecting religious freedom and preventing harm by putting a ban in place.*

5. The Committee is anxious to ensure that, in a similar way to legislation that exists to protect victims of domestic abuse or female genital mutilation, the definition makes it clear that consent to *such practices can never be informed and should not be available as a defence to those undertaking conversion practices*.

…

7. The Committee agrees that any proposals should not pose restrictions on parents or schools to provide a safe space for discussion and exploration *but should prohibit harmful practices which attempt to change a person's sexual orientation or gender identity, including trans identity*.

The Committee agrees that "affirmative therapies" should be protected under any ban.

…

10. Having considered all the evidence presented to it, the Committee agrees that a ban on conversion practices should be *fully comprehensive and cover sexual orientation and gender identity, including trans identities, for both adults and children in all settings without exception and include 'consensual' conversion practices*. The Committee recommends that any ban should also include a ban on advertising and promotion of conversion practices."

treatment. Conversion practices can also violate the prohibition of torture, cruel, inhuman and degrading treatment.

1.2 Where children are concerned, conversion practices are capable of violating every child's right to be free from all forms of physical or mental violence, injury, or abuse.

1.3 A ban on conversion practices does not lead to an unlawful restriction of freedom of religion. Numerous religious groups have declared their support for the prohibition of conversion practices. Freedom of religion is not an absolute right; it meets its restrictions where it unduly infringes the human rights of others.

1.4 Similar considerations apply to freedom of expression. Freedom of expression meets its limits where it unduly infringes the reputation or rights of others, and the State is entitled to adopt legislation to protect such competing rights.

2. Definitions

The Group recommends that the Scottish Government adopt these definitions:

2.1 'Conversion practices' refers to any treatment, practice or effort that aims to change, suppress and/or eliminate a person's sexual orientation, gender identity and/or gender expression.

2.2 A person *cannot* consent to conversion practices being carried out against them.

2.3 'Gender expression' and 'expression of sexual orientation' refers to each person's manifestations of their gender identity and/or expression of sexual orientation *and/or the one that is perceived by others*.

2.4 'Gender identity' refers to each person's internal and individual experience of gender, which may or may not correspond with their sex assigned at birth, including their personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms.

2.5 'Sexual orientation' refers to a person's emotional, affectional and sexual attraction to persons of a different gender, the same gender or more than one gender *and includes the lack of such attraction or relations*.

3. Criminalisation

The Criminalised Acts

3.1 The Expert Advisory Group recommends that the following acts be criminalised when they are carried out with intent:

3.1.1 performing conversion practices
3.1.2 offering the performance of conversion practices
3.1.3 *promoting* or advertising conversion practices
3.1.4 referring a person to any other person for the purpose of performing conversion practices
3.1.5 removing a person from Scotland for the purpose of performing conversion practices

3.2 The Group also recommends that it be a crime for a superior:
3.2.1 to order the carrying out of any of the acts under 3.1 by a subordinate
3.2.2 to allow the carrying out of any of the acts under 3.1 by a subordinate, if the superior knew or should have known that such acts were being committed or were about to be committed

3.3 The Group recommends that allegations of the commission of any of the Criminalised Acts be investigated by the Crown Office and Procurator Fiscal Service (COPFS) at the request of a victim, or, in cases of public interest, at the request of the [Commission] or by the COPFS *ex proprio motu*.

3.4 The Group recommends that there be *no exceptions* to the prohibition of the Criminalised Acts.

3.5 The Group recommends that *consent is not to be considered a defence* to any of the Criminalised Acts.

4. Sentencing and Other Legal Consequences

4.1 The Group recommends that appropriate sentences be imposed for each of the Criminalised Acts.

4.2 The Group recommends that a higher sentence be imposed:
4.2.1 where any of the Criminalised Acts leads to the causation of serious bodily or mental harm and the perpetrator **(i)** intended such harm **(ii)** was aware of its likely occurrence **(iii)** should have been aware of its likely occurrence
4.2.2 where the victim of any of the Criminalised Acts is a child, and the perpetrator is aware of the age of the victim.
4.2.3 where the victim of any of the Criminalised Acts is a person in a situation of vulnerability and the perpetrator is aware of such vulnerability. This is understood to include persons with mental disorders as well as persons in situations of dependence.

4.3 The Group recommends that, where the perpetrator of any of the Criminalised Acts has parental or guardianship rights in relation to the victim, the legal consequences may include the modification or withdrawal of such rights.

4.4 The Group recommends that, where the perpetrator of any of the Criminalised Acts is a healthcare professional, the legal consequences may include the withdrawal of the perpetrator's professional licence.

5. State Responsibility

5.1 The Group recommends that public authorities in Scotland do not provide support, be it direct or indirect, to persons and organisations engaging in any of the Criminalised Acts. The Group recommends in particular that authorities make sure that no public facilities are provided for any of the Criminalised Acts and that organisations engaging in any of the Criminalised Acts do not enjoy preferential tax status or benefit from public subsidies.

...

10. Civil Law Provisions

The Group recommends that Scotland adopt such measures as may be necessary to:

10.1 establish civil liability for natural and legal persons who are engaging or have engaged in conversion practices

10.2 ensure that persons who have been subjected to conversion practices have the right to initiate legal proceedings against those responsible for such practices in order to obtain redress and compensation

3. THE EXISTING LAW

3.1 The Expert Group' report does *not* - before making its recommendations for changes in the law - give any account of what the existing (criminal and or civil) law might be in this area. This is unfortunate. Whether any change in the law is needed - and what the likely effect of any proposed legal change might be - can only be determined against a background of an understanding of an account of the current state of the relevant law.

3.2 For example, the recommendations for legal changes emanating from this Expert Group appear to be based on its claims and beliefs that:

> "conversion practices infringe *upon* the human rights of individuals, in particular the victims' freedom from discrimination and freedom from non-consensual medical treatment.
>
> Conversion practices *can* also violate the prohibition of torture, cruel, inhuman and degrading treatment and are *capable of* violating children's rights to be free from all forms of physical or mental violence, injury, or abuse.
> ...
> Freedom from discrimination and from non-consensual medical treatment are rights which are recognised in the European Convention on Human Rights and the case law of the European Court of Human Rights respectively.
>
> Freedom from torture, cruel, inhuman and degrading treatment is an absolute right under Article 3 of the European Convention on Human Rights. The Group therefore considers that legislation criminalising conversion practices must be guided by the international legal prohibition of discrimination and torture.
>
> The Group also considers that conversion practices create a pattern of structural discrimination that can have an effect on the rights of all LGBT+ people."

3.3 It may therefore be useful to consider a number of the recommendations made by the Expert Group against the background of the existing law.

Existing criminal prohibition at common law against torture/ physical or mental violence

3.4 Recommendation 1.1 and 1.2 of the Expert Group provide, among other things, as follows:

> "Conversion practices can also violate the prohibition of torture, cruel, inhuman and degrading treatment.

Where children are concerned, conversion practices are capable of violating every child's right to be free from all forms of physical or mental violence, injury, or abuse."

3.5 But, as might be expected, subjecting a child to "physical or mental violence, injury, or abuse" – and subjecting another to "torture or to inhuman or degrading treatment or punishment" – both ***already*** constitute criminal conduct in Scotland at common law.

3.6 And the courts both in Scotland (as in the rest of the UK) ***already*** have regard to, in particular, the Article 3 ECHR case law of the European Court of Human Rights. For example in *R (AB) v Justice Secretary* [2021] UKSC 28 [2022] AC 487 Lord Reed observed as follows:

"40 In order for treatment to constitute a violation of Article 3 ECHR, the European court has consistently held that it must attain a minimum level of severity, which normally has to be assessed in the light of all the circumstances of the case. The position was explained by the plenary court in the early case of *Ireland v United Kingdom* (1978) 2 EHRR 25, para 162:

> 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'

That formulation, emphasising the need to consider 'all the circumstances of the case', has been repeated in the subsequent case law.

41 The range of relevant circumstances was discussed in *Ramirez Sanchez* (2006) 45 EHRR 49, where the Grand Chamber stated at para 118:

> 'The court has considered treatment to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering.
>
> It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment is 'degrading' within the meaning of article 3 ECHR, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3 ECHR. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of article 3 ECHR.'

42 A somewhat fuller catalogue of relevant factors was provided in *Ahmad v United Kingdom* 56 EHRR 1, para 178:

> 'in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the court's conclusion that there has been a violation of article 3:
> - the presence of premeditation;
> - that the measure may have been calculated to break the applicant's resistance or will;
> - an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;

- the absence of any specific justification for the measure imposed;
- the arbitrary punitive nature of the measure;
- the length of time for which the measure was imposed; and
- the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

The court would observe that all of these elements depend closely upon the facts of the case.'

...

50 The judgments which I have cited demonstrate a consistent approach to the application of article 3 ECHR.

In cases concerned with allegations of ill-treatment, the court asks itself whether the ill-treatment has attained the minimum level of severity which is necessary for article 3 ECHR to apply. That minimum level is not fixed, but depends on the circumstances of the case (para 40 above). A range of matters are relevant. They include the age of the applicant and the duration of the treatment, but they are by no means confined to those factors. Judgments concerned with solitary confinement, such as *Ramirez Sanchez* and *Ahmad*, have provided lists of factors which the court has found to be relevant. As the court has noted, all of the elements in question depend closely upon the facts of the particular case (paras 41—42 above).

...

57. [T]he intended aim of the Human Rights Act 'to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts' is particularly at risk of being undermined *if domestic courts take the protection of Convention rights further than they can be fully confident that the European court would go*.

If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them.

But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected."

3.7 The case law of the European Court of Human Rights is clear that Article 3 ECHR cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, treatment can be qualified as "degrading" (and thus fall within the scope of the prohibition set out in Article 3 ECHR): if it causes in its victim feelings of fear, anguish and inferiority; if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes (whether or not that was the aim); if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience; or if it shows a lack of respect for, or diminishes, human dignity. [5] More particularly the Strasbourg Court has held that:

[5] Cf *Aghdgomelashvili and Japaridze v. Georgia* [2020] ECtHR 7224/11 (Fifth Section, 8 October 2020) at paragraph 42

"discriminatory treatment can in principle amount to degrading treatment within the meaning of Article 3 ECHR where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3 ECHR." [6]

3.8 Under the law as it currently stands, where an individual makes a credible assertion to the relevant authorities in Scotland that they have suffered treatment infringing the standards set out in Article 3 ECHR [7] any unjustified failure or refusal by the police to carry out, or the Lord Advocate to order, an effective investigation [8] – including examining the role, if any, played by homophobic and/or transphobic motives in the alleged abuse [9] and

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[6] *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022) at para 81

[7] See e.g. *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022)
"90. The Court has already found in several other cases concerning allegations of ill-treatment motivated by homophobia where the applicants had not suffered actual physical injuries that the threshold of Article 3 of the Convention had been attained (see, for example, *Aghdgomelashvili and Japaridze*, cited above, §§ 47-49, concerning abusive police conduct, including, *inter alia*, threats to use physical force, hate speech and insults, during the search of the premises of an LGBT NGO, including unjustified strip-searches of the applicants, motivated by homophobic hatred, and *Women's Initiatives Supporting Group and Others*, cited above, §§ 60-61, concerning rallies to promote LGBT rights in which the individual applicants had become the target of vicious hate speech and aggressive behaviour during clashes with counter-demonstrators)."

[8] See, for example, *Kennedy and Black v. Lord Advocate* [2008] CSOH 21, 2008 SLT 195

[9] *Sabalić v. Croatia* [2021] ECtHR 50231/13 (First Section, 12 January 2021)
"[W]hen investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives, which the Court concedes is a difficult task. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use best endeavours, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, violence motivated by gender-based discrimination or sexual orientation. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see *Identoba and Others*, cited above, § 67, and *M.C. and A.C.*, cited above, § 113, with further references).

95. Accordingly, where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of such acts and to maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory motivated violence. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce criminal law against the perpetrators of such violent acts (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII; *Koky and Others v. Slovakia*, no. 13624/03, § 239, 12 June 2012; and *Amadayev v. Russia*, no. 18114/06, § 81, 3 July 2014). Without a strict

separately any refusal by the criminal prosecution authorities in Scotland (the Crown Office/Procurator Fiscal Service) to prosecute [10] could, in principle, be challenged by way of judicial review before the courts in Scotland. [11] The basis for this challenge would be that of a failure by the relevant State authorities to comply with their positive obligations under

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approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes (see *Identoba and Others*, cited above, § 77, with further references)."

[10] *Oganezova v. Armenia* [2022] ECtHR 71367/12 & 72961/12 (Fourth Section, 17 May 2022):

"119. While being careful not to hold that each and every utterance of hate speech must, as such, attract criminal prosecution and criminal sanctions, the Court reiterates its finding that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on their face, may in principle require the States to take certain positive measures. It has likewise held that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Association ACCEPT and Others*, cited above, § 119).

120. The Court has already pointed out that criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure.

That being so, it has also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor. The Court has likewise accepted that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (see *Beizaras and Levickas*, cited above, §§ 110-11, with further references).

Furthermore, the Court considered that this applied equally to hate speech against persons' sexual orientation and sexual life. It found in that case that the "undisguised calls [for attacks] on the applicants' physical and mental integrity ... require[d] protection by the criminal law" (ibid., § 128). In the Court's view, the hateful comments in the present case contained similarly undisguised calls for violence against the applicant which required protection by criminal law."

See e.g. *Women's Initiatives Supporting Group and Others v. Georgia* [2021] ECtHR 73204/13 & 74959/13 (Fifth Section, 16 December 2021) at para 68:

"Article 3 ECHR may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of ill-treatment. This positive obligation is to be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment can entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. Therefore, for a positive obligation to arise it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"

[11] See for example *Ross v. Lord Advocate* [2016] CSIH 12, 2016 SC 502

Article 3 ECHR.[12] Indeed, such failure or refusal to act may itself form the basis for a damages action against the police[13] or prosecution authorities - if and insofar as their refusal or failure to act could be shown to be motivated by discriminatory reasons, such that a finding of "malice" might reasonably be inferred.[14]

Existing civil law liability in relation to findings of abuse

3.9 Recommendation 10 of the Expert Group is in the following terms:

> **"10. Civil Law Provisions**
> The Group recommends that Scotland adopt such measures as may be necessary to:
> "**10.1** *establish civil liability* for natural and legal persons who are engaging or have engaged in conversion practices
> **10.2** ensure that persons who have been subjected to conversion practices have the right to initiate legal proceedings against those responsible for such practices in order to obtain redress and compensation."

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[12] In *Szula v. United Kingdom* (2007) 44 EHRR SE19 237 at pp 239-240 the Strasbourg Court noted as follows:

> "[T]he obligation of the High Contracting Parties under Article 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3 ECHR, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *A v United Kingdom* (1999) 27 EHRR 611 at [22]; *Z and Others v United Kingdom* [GC] (2002) 34 EHRR 3 at [73]–[75] and *E and Others v United Kingdom* (2003) 36 EHRR 31).
>
> Positive obligations on the State are also inherent in the right to effective respect for private life under Article 8 ECHR; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 ECHR in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.
>
> Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v Netherlands* (1986) 8 EHRR 235 at [23]–[24] and [27] and *August v United Kingdom* (2003) 36 EHRR CD115 (dec.) N 0.36505/02, January 21, 2003).
>
> In a number of cases, Article 3 ECHR has also been held to give rise to a positive obligation to conduct an official investigation (see *Assenov and Others v Bulgaria* (1999) 28 EHRR 653 at [102]). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by state agents (see, *mutatis mutandis*, *Calvelli and Ciglio v Italy*).
> ...
> [T]he Court found in *MC v Bulgaria* No.39272/98, (2005) 40 EHRR 20 at [153] that states had a positive obligation inherent in Article 3 ECHR and Article 8 ECHR to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. These considerations apply equally to serious sexual offences inflicted on children. That said, however, there is no absolute right to obtain the prosecution or conviction of any particular person."

[13] See e.g. *Grier v. Police Scotland* [2022] CSOH 2, 2022 SLT 199

[14] See *Whitehouse v Lord Advocate* [2019] CSIH 52, 2020 SC 133

3.10 At common law it is already possible to seek from the courts an award of monetary damages to reflect the loss, injury and damage sustained by an individual consequent upon harm intentionally and wrongfully inflicted on that person by another. Among the wrongful acts or omission which the law recognises as giving rise to a claim for personal injury damages in respect of the loss, injury and damage attributable thereto and to which the injuries were attributable are: the infliction on another of inhuman and degrading treatment in contravention of the standards set out in Article 3 ECHR; [15] and separately sexual abuse, physical abuse, emotional abuse and (at least in the case of a child or vulnerable dependent adult) abuse which takes the form of neglect.[16]

3.11 In such a personal injury action the defender is liable to make reparation for all losses suffered by the pursuer which directly arise from the wrongdoing - whether or not these losses are reasonably foreseeable. [17] For example damages in respect of post-traumatic

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[15] See for example *Napier v. Scottish Ministers*, 2005 SC 229, OH (upheld on appeal *Napier v. Scottish Ministers* [2005] CSIH 16, 2005 1 SC 307) per the Lord Ordinary, Lord Bonomy at paras 78, 95:

> "78. Having regard to the factual evidence, the experts medical, psychological, scientific and technical evidence, the informed opinion evidence of those with special experience of prison conditions, I am entirely satisfied that the petitioner was exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation. He was, in my opinion, subjected to degrading treatment which infringed Art 3 of the Convention.
> ...
> 95. I shall, therefore, in my interlocutor find and declare that the respondents acted unlawfully in terms of sec 6 of the Human Rights Act 1998 and *ultra vires* in terms of sec 57 of the Scotland Act 1998 by acting in a manner incompatible with Art 3 of the Convention and detaining the petitioner in conditions in which he was subjected to degrading treatment; I shall find that the petitioner suffered loss, injury and damage by reason of the fault of the respondents; I shall find the respondents liable to pay damages to the petitioner of £2,450 with interest at eight per cent from the date of decree until paid ..."

[16] See e.g. Section 17A 17 of the Prescription and Limitation (Scotland) Act 1973 insert—

> **"17A Actions in respect of personal injuries resulting from childhood abuse**
> (1) The time limit in section 17 does not apply to an action of damages if—
> (a) the damages claimed consist of damages in respect of personal injuries,
> (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,
> (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
> (d) the action is brought by the person who sustained the injuries.
>
> (2) In this section—
> *abuse' <u>includes</u> sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,*
> 'child' means an individual under the age of 18."

[17] See Professor Thomson, *Delictual Liability*, 5th Edition, at paragraph 16.4

stress disorder sustained in consequence of the unlawful abuse is often a head of claim in personal injuries actions. [18]

3.12 The pursuer must still prove to the satisfaction of the court that those intentional wrongs which the law recognises as constituting legally actionable abuse was the cause of the harm sustained by the pursuer. In particular, the pursuer must normally prove, on the balance of probabilities, that "but for" the defender's breach of duty or intentional wrongdoing, the harm to the pursuer would not have occurred. However, where there are two sources of harm to the pursuer, which operate concurrently, the source for which the defender is responsible will be regarded as the factual cause of the pursuer's injury if it materially contributed to the injury. [19]

Freedom from non-consensual medical treatment

3.13 The Expert Group also states in its Recommendation 1.1 that:

> "Conversion practices infringe the human rights of individuals, in particular the victims' … freedom from non-consensual medical treatment."

3.14 The Oviedo Convention on Human Rights and Biomedicine has, as its longer title, the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. It contains the following provisions among others:

> **<u>Chapter I – General provisions</u>**
>
> **Article 1 – Purpose and object**
> Parties to this Convention shall protect the dignity and identity of all human beings and
> guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.
>
> Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.
>
> **Article 2 – Primacy of the human being**
> The interests and welfare of the human being shall prevail over the sole interest of society or science.
>
> **Article 3 – Equitable access to health care**

[18] See *Connelly v. New Hampshire Insurance Co.*, 1997 SLT 1341, OH holding that the phrase "accidental bodily injury" used in in an insurance policy encompassed a diagnosis of post-traumatic stress disorder.

[19] See generally for a survey of the current law on liability and quantification of personal injuries damages consequent upon intentional harm constituting abuse B v English Province of the Congregation of Christian Brothers [2022] SC EDIN 7

Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.

Article 4 – Professional standards
Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.

Chapter II – Consent

Article 5 – General rule
An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.

Article 6 – Protection of persons not able to consent
1 Subject to Articles 17 and 20 below, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.

2 Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.

3. Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The individual concerned shall as far as possible take part in the authorisation procedure.

4. The representative, the authority, the person or the body mentioned in paragraphs 2 and 3 above shall be given, under the same conditions, the information referred to in Article 5.

5. The authorisation referred to in paragraphs 2 and 3 above may be withdrawn at any time in the best interests of the person concerned.

...
Chapter VIII – Infringements of the provisions of the Convention

Article 23 – Infringement of the rights or principles
The Parties shall provide appropriate judicial protection to prevent or to put a stop to an unlawful infringement of the rights and principles set forth in this Convention at short notice.

Article 24 – Compensation for undue damage

The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law.

Article 25 – Sanctions
Parties shall provide for appropriate sanctions to be applied in the event of infringement of the provisions contained in this Convention.
…

Chapter X – Public debate

Article 28 – Public debate
Parties to this Convention shall see to it that the fundamental questions raised by the developments of biology and medicine are the subject of appropriate public discussion in the light, in particular, of relevant medical, social, economic, ethical and legal implications, and that their possible application is made the subject of appropriate consultation.

Chapter XI – Interpretation and follow-up of the Convention

Article 29 – Interpretation of the Convention
The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:
– the Government of a Party, after having informed the other Parties;
– the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.

3.15 These provisions of the Oviedo Convention may be understood as representing a useful codification (at least as from 1997 when it was first drafted) of the then general mainstream European consensus on such issues as consent and medical treatment. Thus in its judgment in *Glass v United Kingdom* (2004) 39 EHRR 15 the European Court of Human Rights had regard to the standards enshrined in the Oviedo Convention, even though that instrument had not been ratified by all the States parties to the ECHR, and had at the time not even been agreed to by the United Kingdom (although it had been agreed to by the European Union as a distinct international legal person).

3.16 Notwithstanding that the Oviedo Convention has not been signed up to or ratified by the UK (and certainly not brought into force in domestic law), in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, 2015 SC (UKSC) 63 a unanimous 7 judge Supreme Court bench referred to and relied upon the Oviedo Convention as support for a newly discovered common law right of involvement and self-determination for patients in decisions relating to their medical treatment. In a jointly authored judgment of Lord Kerr and Lord Reed (with whom Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony, Lord Wilson of Culworth, and Lord Hodge all agreed):

"80. .. Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values.

As Lord Scarman pointed out in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, these include the value of self-determination. [20]

As well as underlying aspects of the common law, that value also underlies the right to respect for private life protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

The resulting duty to involve the patient in decisions relating to her treatment has been recognised in judgments of the European Court of Human Rights, such as *Glass v UK* (2004) 39 EHRR 15 and *Tysiac v Poland* (2007) 45 EHRR 947, as well as in a number of decisions of courts in the United Kingdom.

The same value is also reflected more specifically in other international instruments: see, in particular, Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, concluded by the Member States of the Council of Europe, other states and the European Community at Oviedo on 4 April 1997 ("the Oviedo Convention").

81. The social and legal developments which we have mentioned *point away from a model of the relationship between the doctor and the patient based upon medical paternalism. They also point away from a model based upon a view of the patient as being entirely dependent on information provided by the doctor*. What they point towards is an approach to the law which, instead of treating patients as placing themselves in the hands of their doctors (and then being prone to sue their doctors in the event of a disappointing outcome), *treats them so far as possible as adults who are capable of understanding that medical treatment is uncertain of success and may involve risks, accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices.*

...

87. ... An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

88. The doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision. It is unnecessary for the purposes of this case to consider in detail the scope of those exceptions."

[20] See, e.g. *S (An Infant) v S* [1972] AC 24 per Lord Reid at p 43; *McColl v Strathclyde Regional Council*, 1983 SC 225 at p 241; *Airedale NHS Trust v Bland* [1993] AC 789, per Lord Goff of Chieveley, p 864.

3.17 Quite how, from an orthodox constitutional dualist perspective (strictly distinguishing between enforceable domestic law and unenforceable international law) [21] the terms of a Council of Europe Treaty which the UK has neither signed nor ratified can spill over and alter the common law is simply not explained by the judges in *Montgomery*. [22] Certainly it appears from more recent judgments of the UK Supreme Court (under the duumvirate of Lords Reed and Hodge as respectively President and Deputy President) that the UKSC is much less willing to refer to or rely upon provisions of international law such as the Oviedo Convention.[23] Nonetheless the unanimous judgment of the UKSC in *Montgomery*

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[21] See e.g. *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (commonly known as "the International Tin Council case")

[22] In the 7 judge decision (of a bench made up of Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Reed, and Lord Hodge) in *Moohan v. Lord Advocate* [2014] UKSC 67 [2015] 1 AC 901 Lord Hodge (in a majority judgment with which Lord Neuberger, Baroness Hale , Lord Clarke and, Lord Reed expressly agreed) stated at §§ 33, 35:

> "33 I have no difficulty in recognising the right to vote as a basic or constitutional right. The House of Lords did so in *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395. See for example Lord Bingham of Cornhill (§ 25) and Lord Rodger of Earlsferry: § 61. It is also not in doubt that the judiciary have the constitutional function of adapting and developing the common law through the reasoned application of established common law principles in order to keep it abreast of current social conditions. *Nor is it controversial to suggest that judges can take into account rules of international law which are binding on the United Kingdom when interpreting statutes and in developing the common law*: *R v Lyons* [2003] 1 AC 976, Lord Bingham at § 13, Lord Hoffmann at §§ 27—28; *R (Osborn) v Parole Board* [2014] AC 1115, Lord Reed JSC at § 62.
>
> ...
>
> 35. ... I do not exclude the possibility that in the very unlikely event that a *parliamentary majority abusively sought to entrench its power* by a curtailment of the franchise or similar device, *the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful*."

[23] See notably *R (SC) v Work and Pensions Secretary* [2021] UKSC 26 [2021] 3 WLR 428 a seven judge bench (Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Stephens, Lady Black) in a unanimous judgment authored by Lord Reed rejected a challenge to the limit set by the Welfare Reform and Work Act 2016 on the number of children for whom child tax credit (and afterwards universal credit) would be paid. The litigation which had been brought in the name of SC (a single parent with her three youngest children) and CB (a single parent to five children) has been brought by the Child Poverty Action Group (CPAG), which is a well-established NGO which has frequently brought or participated in cases concerning the impact of changes in welfare benefits on children. CPAG argued that restricting the benefit to two children amounted to a breach of human rights law and was incompatible with the requirements of the UNCRC. Lord Reed's judgment too issue with this claim, noting:

> "84 There is ... no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties.
>
> ...
>
> 91. ... [F]or a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law."

v Lanarkshire Health Board [2015] UKSC 11, 2015 SC (UKSC) 63 now sets out the current common law position.

3.18 But that common law position is one which, if anything, runs contrary to the tenor of the recommendations of the Expert Group that no person can validly give consent to any form of treatment (medical or otherwise) which might be aimed at changing or suppressing (the expression of) their sexual orientation or "gender identity". The common law position as set out in *Montgomery* is, instead, to the effect that an individual is entitled to take into account their own values and beliefs, and make their own assessment as to the merits or demerits of any treatment or therapy in relation to sexual orientation and/or "gender identity" or "gender expression" that may be available, and make their own informed judgment (consonant with those values) on whether or not to access such treatment.

3.19 By contrast, the Expert Group recommend that the State make a blanket rule or absolute legal presumption deeming no-one to have the legal capacity to consent to any treatment or therapy as regards their sexual orientation or gender expression or gender identity, unless that treatment or therapy is deemed by the State to be "affirmatory".

3.20 This approach certainly smacks of a strong degree of State paternalism which appears to be incompatible with the "informed consent" stance which the common law since *Montgomery* now adopts to issues of medical treatment or therapy.

Medical consent and children

3.21 In the English case of *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 the Appellate Committee of the House of Lords considered whether GPs could give contraceptive advice and treatment to girls under 16 without their parents being informed. The disputed Department of Health advice was to the following effect: it would be most unusual to provide contraceptive advice to children without parental consent or knowledge; however, to breach the principle of confidentiality between doctor and patient in respect of children under 16 by advising their parents of the request might cause some children not to seek professional advice at all; children who would otherwise anyway be sexually active would then be exposed to risks such as pregnancy and sexually-transmitted diseases; accordingly, in exceptional cases, it was for a doctor exercising his clinical judgment to decide whether to prescribe contraception to children even without their parents' consent or knowledge. In a divided 3:2 decision, the House of Lords concluded that this departmental guidance to GPs was lawful, with the majority holding that in

exceptional cases a doctor will be entitled to give contraceptive advice and treatment to a girl under 16 without her parents' knowledge and consent if the GP is satisfied that (i) the girl will understand the advice; (ii) she cannot be persuaded to inform her parents or to allow the GP to inform her parents that she is seeking contraceptive advice; (iii) she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment; (iv) unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer; and (v) her best interests require the GP to give her contraceptive advice, treatment or both without the parental consent. [24]

3.22 In *Bell v The Tavistock and Portman NHS Foundation Trust & Ors R (Bell) v. Tavistock* [2022] EWCA Civ 1363 [2022] PTSR 544 the Court of Appeal (Lord Burnett of Maldon CJ, Sir Geoffrey Vos MR, King LJ) in overturning the decision of the Divisional Court (Dame Victoria Sharp P, Lewis LJ, Lieven J below ([2020] EWHC 3274 (Admin) [2021] PTSR 593) made the following observations (in a case which concerned the long-term implications on physical health and fertility in children prescribed taking puberty blocking drugs on grounds of their reported experience of gender dysphoria) at para 76-:

> "76 The *ratio decidendi* of *Gillick* was that it was for doctors and <u>not</u> judges to decide on the capacity of a person under 16 to consent to medical treatment. Nothing about the nature or implications of the treatment with puberty blockers allows for a real distinction to be made between the consideration of contraception in *Gillick* and of puberty blockers in this case bearing in mind that, when *Gillick* was decided 35 years ago, the issues it raised in respect of contraception for the under-16s were highly controversial in a way that is now hard to imagine. A similar conclusion was reached by Silber J in connection with abortion in *R (Axon) v Secretary of State for Health* [2006] QB 539, para 86.
>
> ...

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[24] Compare however *Re R (A Minor) (Wardship Consent to Treatment)* [1992] Fam 1 per Lord Donaldson MR at 23, 26:

> "I do not understand Lord Scarman to be saying [in *Gillick v West Norfolk and Wisbech Health Authority*] that, if a child was 'Gillick competent', to adopt the convenient phrase used in argument, the parents ceased to have an independent right of consent as contrasted with ceasing to have a right of determination, that is, a veto.
>
> In a case in which the 'Gillick competent' child refuses treatment, but the parents' consent, that consent enables treatment to be undertaken lawfully, but in no way determines that the child shall be so treated. In a case in which the positions are reversed, it is the child's consent which is the enabling factor and again the parents' refusal of consent is <u>not</u> determinative.
>
> If Lord Scarman intended to go further than this and to say that in the case of a '*Gillick* competent' child, a parent has <u>no</u> right either to consent or to refuse consent, his remarks were <u>obiter</u>, because *the only question in issue was Mrs. Gillick's alleged right of veto*. Furthermore I consider that they would have been wrong.
>
> ...
>
> There can be concurrent powers to consent. If more than one body or person has a power to consent, only a failure to, or refusal of, consent by all having that power will create a veto. ... A 'Gillick competent' child or one over the age of 16 will have a power to consent, *but this will be concurrent with that of a parent or guardian*."

80. … It would have been inconsistent with the ratio of the case that clinicians must be trusted to make the decisions for the court effectively to give them a manual about how to do so. It is instructive to consider the language of Lord Scarman on the main issue in *Gillick* at pp 188H–189A:

> 'I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give consent valid in law.'

81 His conclusion on the law is found in the first sentence but the second recognises that the question whether valid consent is given in any case is a question of fact. That depends upon the individual circumstances of any child and the surrounding circumstances of the clinical issues. Both he and Lord Fraser identified at a high level what they could expect a clinician to take into account in making a clinical decision. Turning their observations into formal declarations (all the more so if they included immutable facts) would have been inappropriate. It is a matter of clinical judgement, tailored to the patient in question, how to explain matters to ensure that the giving or refusal of consent is properly informed. As Lord Fraser observed at p 174F, medical professionals who do not discharge their responsibilities properly would be liable to disciplinary sanction.

The law of informed consent culminating in *Montgomery* also exposes the vulnerability of clinicians to civil action from someone they have treated who shows that they did so without first obtaining informed consent.

…

83 The policy and practice under consideration in this case requires the informed consent of both child and parents before Tavistock refers to the Trusts, again before either Trust prescribes puberty blockers and once more before prescription of cross-sex hormones. This case is not concerned with a child who lacks capacity to make the decision for the purposes of the Mental Capacity Act 2005. Such a child would not be treated through GIDS [the Tavistock Gender Identity Development Service] because informed consent is always required from the child before any treatment is given.

…

Was the Divisional Court right to have given the guidance?

85 We recognise that the guidance stemmed from the understandable concern of the Divisional Court for the welfare of children suffering from gender dysphoria who, it is common ground, are deeply distressed and highly vulnerable.

In our judgment, however, the court was not in a position to generalise about the capability of persons of different ages to understand what is necessary for them to be competent to consent to the administration of puberty blockers. The court was not deciding any specific case …

…

87 As we have already said, the principle enunciated in *Gillick* [1986] AC 112 was that it was for clinicians rather than the court to decide on competence.

…

89 We conclude that it was inappropriate for the Divisional Court to give the guidance concerning when a court application will be appropriate and to reach general age-related conclusions about the likelihood or probability of different cohorts of children being capable of giving consent. That is not to say that such an application will never be appropriate. There may be circumstances where there are disputes between one or more of clinicians, patients and parents where an application will be necessary …

…

92 We should not finish this judgment without recognising the difficulties and complexities associated with the question of whether children are competent to consent to the prescription of puberty blockers and cross-sex hormones. They raise all the deep issues identified in *Gillick* [1986] AC 112, and more.

Clinicians will inevitably take great care before recommending treatment to a child and be astute to ensure that the consent obtained from both child and parents is properly informed by the advantages and disadvantages of the proposed course of treatment and in the light of evolving research and understanding of the implications and long-term consequences of such treatment.

Great care is needed to ensure that the necessary consents are properly obtained. As *Gillick* itself made clear, clinicians will be alive to the possibility of regulatory or civil action where, in individual cases, the issue can be tested.

93 … Those clinicians *must* satisfy themselves that the child and parents appreciate the short- and long-term implications of the treatment upon which the child is embarking. So much is uncontroversial. But it is for the clinicians to exercise their judgement knowing how important it is that consent is properly obtained according to the particular individual circumstances, as envisaged by *Gillick* itself, *and by reference to developing understanding in this difficult and controversial area*."

3.23 As a decision of the House of Lords in an English case, the decision in *Gillick* is of persuasive, but not binding force, in Scots law. But there does not appear to be any case in Scotland in which the *Gillick* approach, to the effect that children who were of sufficient maturity and understanding could consent to medical treatment, has been expressly adopted or received into Scots law. It may be that this is because the courts in Scotland simply refer to and apply the provisions of Section 2(4) Age of Legal Capacity (Scotland) Act 1991 [25] which by way of specific exception to that general rule set out in Section 1 allows that

"(4) A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment."

3.24 But picking up on the concluding quoted reference from the Court of Appeal decision in *Bell* (at para 93) to "developing understanding in this difficult and controversial area" it should be noted in a public consultation on *Interim service specification for specialist gender dysphoria services for children and young people* which was published by NHS England on 20 October 2022 the following observations, among others, were made:

"5. Social transition – clarification

…

[T]he clinical approach in regard to pre-pubertal children will reflect *evidence that in most cases gender incongruence does not persist into adolescence*; and that for adolescents the provision of approaches for social transition should only be considered

[25] See for example *John Houston, Applicant* [1996] SCLR 943 (Sh. Ct.)

where the approach is necessary for the alleviation of, or prevention of, *clinically significant distress* or *significant impairment in social functioning* and the young person is able to *fully comprehend the implications of affirming a social transition*.
…

Building the research protocol
The interim service specification reads:

> "*Consistent with advice from the Cass Review highlighting the uncertainties surrounding the use of hormone treatments, NHS England is in the process of forming proposals for prospectively enrolling children and young people being considered for hormone treatment into a formal research programme with adequate follow up into adulthood, with a more immediate focus on the questions regarding GnRHa [puberty blockers].*
>
> *On this basis NHS England will only commission GnRHa [puberty blockers] in the context of a formal research protocol. The research protocol will set out eligibility criteria for participation.*"

…
Unregulated drugs
….
The proposed interim specification reads:

> *"Children, young people and their families are strongly discouraged from sourcing GnRHa [puberty blockers] and masculinising/feminising hormone drugs from unregulated sources or from on-line providers that are not regulated by UK regulatory bodies. In such cases The Service will make the child or young person and their family aware of the risks, contraindications and any irreversible or partly reversible effects of the drugs and will advise the GP to initiate local safeguarding protocols.*
>
> *Should a child or young person access GnRHa [puberty blockers] from unregulated sources or unregulated providers The Service will not assume responsibility for prescribing recommendations nor will it enter into shared cared arrangements in these circumstances.*
>
> *Where a child or young person has obtained masculinising / feminising hormones from an unregulated source (such as the internet) The Service will not accept clinical responsibility for management of the endocrine intervention."*
>
> *"Where a child or young person has been prescribed masculinising/feminising hormones by an unregulated provider outside of the eligibility and readiness criteria described in the current NHS clinical commissioning policy The Service will not accept clinical responsibility for management of the endocrine intervention."*

Freedom from discrimination/harassment and the Equality Act 2010

3.25 The Expert Group also states in its Recommendation 1.1 that:

> "Conversion practices infringe the human rights of individuals, in particular the victims' freedom from discrimination …."

3.26 In terms of the Expert Group's reliance upon the principle of "freedom from discrimination" the Equality Act 2010 ("EA 2010") already contains a comprehensive code

drawing together the law which applies across England, Scotland and Wales in this area.

In particular Section 26 EA 2010 so far as relevant provides as follows:

> **"26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in *unwanted conduct* related to a relevant protected characteristic, and
> (b) the conduct has the *purpose or effect* of—
> (i) violating B's dignity, *or*
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ....
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature *or that is related to gender reassignment* or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's *rejection of or submission to* the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following *must* be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
> age;
> disability;
> *gender reassignment*;
> race;
> religion or belief;
> sex;
> *sexual orientation*."

Service providers and the prohibition against harassment

3.27 Section 28 EA 2010 delimits the extent to which the provisions of Part 3 EA 2010 (section 28 to 31 EA 2010) which concern "Services and Public Functions" apply as follows:

> **"28 Application of this Part**
> (1) This Part does not apply to the protected characteristic of—
> (a) age, *so far as relating to persons who have not attained the age of 18*;
> (b) marriage and civil partnership.
>
> (2) This Part does not apply to discrimination, harassment or victimisation—
> (a) that is prohibited by Part 4 (premises), 5 (work) or 6 (education), or
> (b) that would be so prohibited but for an express exception."

3.28 The prohibition in Part 3 EA 2010 against "harassment" (as defined in Section 26 EA 2010) applies to those "service-providers" concerned, whether for payment, or not with

the provision of a service to the public (or a section of the public). Section 29(3) EA 2010 provides as follows:

"(3) A service-provider must not, in relation to the provision of the service, harass—
(a) a person requiring the service, or
(b) a person to whom the service-provider provides the service."

The exercise of public functions and the prohibition against harassment

3.29 Similarly Section 29(6) EA 2010 extends the prohibition against "harassment" (as defined in Section 26 EA 2010) to the exercise of any "public function" as follows:

"(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation".

Exclusion of religion/belief and/or sexual orientation from harassment prohibition

3.30 Importantly, however, by virtue of Section 29(8) EA 2010 the Westminster legislature has determined that the prohibition against harassment (whether in the exercise of a public function, or in the provision of a service to the public or to a section of the public) does *not* extend to either of the protected characteristic of "religion or belief" or of "sexual orientation". By necessary implication the Part 3 EA 2010 Services/Public Functions prohibition against harassment *does* apply to, among other things, the protected characteristics of "gender reassignment" and separately of "sex". Section 29(8) EA 2010 is thus in the following terms:

"(8) In the application of section 26 for the purposes of subsection (3), and subsection (6) as it relates to harassment, neither of the following is a relevant protected characteristic—
(a) religion or belief;
(b) sexual orientation."

3.31 The post-enactment Explanatory Notes to the EA 2010 published by the UK Government provide the following gloss on these provisions:

"*Background*
112. Previous legislation provided *some* protection from discrimination, harassment and victimisation in the provision of services and the exercise of public functions.

However, the protection was not uniform for the different protected characteristics. For example, there was no protection from discrimination in the exercise of public functions because of pregnancy and maternity, or because a person is intending to undergo, is undergoing or has undergone gender reassignment.

Also there was no protection for discrimination because of age, either in the provision of services or in the exercise of public functions.
113. This section replaces the provisions in previous legislation and extends protection so that it is *generally* uniform across all the protected characteristics covered by this Part.

However, as under previous law, there is *no* express protection for harassment related to religion or belief or sexual orientation in either the provision of services or the exercise of public functions.

Conduct that would otherwise have fallen within the definition of harassment *may* still amount to direct discrimination, as section 212(5) EA 2010 makes clear."

Harassment and discriminatory detriment

3.32 Section 218 EA 2010 provides so far as relevant as follows:

"212 General interpretation
(1) In this Act— … "detriment" does *not*, *subject to subsection (5)*, include conduct which amounts to harassment;
…
(5) Where this Act *disapplies* a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."

3.33 The intent of Section 212(5) EA 2010 appears to be to leave it open to the courts, if so advised on the facts of any particular case, to interpret and apply, in cases concerning the protected characteristics of "religion or belief" or "sexual orientation", the existing general prohibitions in Section 29(2)(c) EA 2010 (against a service provider discriminating against a person by subjecting that person "to any other detriment" than discriminating against them as to the terms on which the service provider provides the service to that person or by terminating the provision of the service to that person) and in Section 29(6) EA 2010 (against a person doing anything in the exercise of a public function "that constitutes discrimination") to situations which, in relation to other protected characteristics, would constitute "harassment".

3.34 There is some precedent for such an approach in the decision of the First Division of the Inner House of Court of Session in *Porcelli v Strathclyde RC*, 1986 SC 137 in which the court held that sexual harassment at work constituted sexually discriminatory conduct contrary to the Sex Discrimination Act 1975, notwithstanding the fact that at the time of the decision there was *no* specific prohibition against harassment (such as now appears in Section 26 EA 2010). Lord Brand put the matter thus in his concurring opinion (at page 152):

"The primary question in terms of section 1 (1)(a) of the Sex Discrimination Act 1975 [which is in the following terms:

> '1.—(1) A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Act if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man. …']

is not 'Was there sexual harassment?' but 'Was the applicant less favourably treated on the ground of her sex than a man would have been treated?'.

If that question is answered in the affirmative, there was discrimination within the meaning of the Act and it was conceded by counsel for the appellants that, in the present case, if there was discrimination, it was to the detriment of the applicant.
...
The purpose of the Act is to regulate treatment. Senior counsel for Mrs Porcelli submitted that the test of whether section 1(1)(a) of the Sex Discrimination Act 1975 had been complied with depended on what was done and not on motive. I agree with that submission.

It follows that, if a form of unfavourable treatment is meted out to a woman to which a man would *not* be vulnerable, she has been discriminated against within the meaning of section 1(1)(a). That is this case." [26]

3.35 Applying the same logic and analysis as was deployed in *Porcelli* it might be said that the primary question in terms of section 13(1) EA 2010 is *not*: "was there harassment "because of" either 'religion or belief' and/or because of or 'sexual orientation'". Instead the relevant question in claims by an individual to have been harassed by a service provider and/or in the exercise of a public function because of 'religion or belief' and/or because of 'sexual orientation' is, and is only:

"was that individual (B) treated *less favourably* than A treats or would treat others because of 'religion or belief' and/or because of 'sexual orientation'".

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[26] The Lord President (Emslie) noted in similar terms in *Porcelli v Strathclyde Regional Council*, 1986 SC 137 (at pages 145-146):

"Section 1 (1)(a) of the Sex Discrimination Act 1975 is concerned with 'treatment' and *not* with the motive or objective of the person responsible for it. Although in some cases it will be obvious that there is a sex related purpose in the mind of a person who indulges in unwanted and objectionable sexual overtures to a woman or exposes her to offensive sexual jokes or observations that is not this case.

But it does not follow that because the campaign pursued against Mrs Porcelli as a whole had no sex related motive or objective, the treatment of Mrs Porcelli by Coles, which was of the nature of 'sexual harassment' is not to be regarded as having been 'on the ground of her sex' within the meaning of section 1(1)(a).

In my opinion this particular part of the campaign was plainly adopted against Mrs Porcelli because she was a woman. It was a particular kind of weapon, based upon the sex of the victim, which, as the industrial tribunal recognised would not have been used against an equally disliked man
...
[A] material part of the campaign against Mrs Porcelli consisted of 'sexual harassment', a particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain. From their 'Reasons' it is to be understood that the Industrial Tribunal members were satisfied that this form of treatment—sexual harassment in any form—would *not* have figured in a campaign by Coles and Reid directed against a man. In this situation the treatment of Mrs Porcelli fell to be seen as very different in a material respect from that which would have been inflicted on a male colleague, regardless of equality of overall unpleasantness, and that being so it appears to me that upon a proper application of section 1(1)(a) of the Sex Discrimination Act 1975 the industrial tribunal ought to have asked themselves whether in that respect Mrs Porcelli had been treated by Coles (on the ground of her sex) 'less favourably' than he would have treated a man with whom her position fell to be compared. Had they asked themselves that question it is impossible to believe that they would not have answered it in the affirmative.

3.36 On the face of the plain wording of that Section 13 EA 2010 derived test, a comparator (whether hypothetical or actual) is required to show detrimental discriminatory conduct in cases in which there is alleged to have been harassment "because of" either 'religion or belief' and/or because of 'sexual orientation'. By contrast, in cases involving claims of harassment because of "gender reassignment" or because of "sex" there is no requirement for a comparator. Instead all that is required under the Section 26 EA 210 test is that it be shown that there has been:

- unwanted conduct which is
- related to "gender reassignment" and/or
- related to "sex"
- the *purpose* of which unwanted conduct
- is to violate B's dignity, or
- to create an intimidating, hostile, degrading, humiliating or offensive environment for B.
- *or*
- the *effect* of which unwanted conduct is
- in all the circumstances of the case
- reasonably perceived by B
- to violate B's dignity, or
- to create an intimidating, hostile, degrading, humiliating or offensive environment for B.

Schools and the prohibition against harassment

3.37 Continuing with the examination of the precise extent of the parameters of the existing law (as set out in the EA 2010) on harassment, it should be noted that although the EA 2010 prohibition against harassment undoubtedly creates a positive obligation on schools in Scotland not to follow (or to desist from) any course of conduct related to all and any of the sex, age, disability or race of their (prospective) pupils which can reasonably be perceived or experienced by those pupils as having the effect either of violating their dignity *or* of creating an intimidating, hostile, degrading, humiliating or offensive environment for those pupils (qv Section 85(3) EA 2010) the non-harassment obligation set out in Section 26 EA 2010 has been specifically *disapplied* for schools in relation to the three protected characteristics of gender reassignment, religion or belief and/or sexual orientation: Section 85(10) EA 2010.

Associations and the prohibition against harassment

3.38 The Section 26 EA 2010 non-harassment duty also applies to "associations" (which are more fully defined in Section 197 EA 2010 [27]). Associations are prohibited from harassing a member, a person seeking to become a member, an associate (by Section 101(4) EA 2010) and/or from harassing a guest or a person seeking to be a guest of the association (Section 102(4) EA 2010). Again, however, the non-harassment duty is disapplied for associations in respect of either of the protected characteristic of "religion or belief" and/or "sexual orientation".

Past relationships and the prohibition against harassment

3.39 The Section 26 EA 2010 non-harassment duty applies in relation to conduct arising from or connected to past relationships after they have ended. Section 108(2) EA 2010 provides that:

> "A person (A) must not harass another (B) if—
> (a) the harassment arises out of and is closely connected to a relationship which *used to exist* between them, and
> (b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act."

This post-relationship non-harassment duty appears to have a degree of retrospectivity in the sense that Section 108(3) EA 2010 specifies that "it does not matter whether the relationship ends before or after the commencement of this section".

Vicarious liability and the prohibition against harassment

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[27] Section 107 EA 2010 provides as follows:

> **"107 Interpretation and exceptions**
> (1) This section applies for the purposes of this Part.
>
> (2) An "association" is an association of persons—
> (a) which has at least 25 members, and
> (b) admission to membership of which is regulated by the association's rules and involves a process of selection.
>
> (3) A Minister of the Crown may by order amend subsection (2)(a) so as to substitute a different number for that for the time being specified there.
>
> (4) It does not matter—
> (a) whether an association is incorporated;
> (b) whether its activities are carried on for profit.
>
> (5) Membership is membership of any description; and a reference to a member is to be construed accordingly.
>
> (6) A person is an "associate", in relation to an association, if the person—
> (a) is not a member of the association, but
> (b) in accordance with the association's rules, has some or all of the rights as a member as a result of being a member of another association."

3.40 Sections 109 EA 2010 makes detailed provision for the statutory vicarious liability (both as a matter of civil law but also to a limited extent of criminal law) of employers (for the unlawful discriminatory/harassment acts of their employees) and principals (for the unlawful discriminatory/harassment acts of their agents) whether or not done with the employer's or principal's knowledge or approval.

3.41 And Section 110 EA 2010 make provision for the independent continuing individual liability of employees and agent, irrespective of whether their employer or agent has been found to be vicariously liable for the unlawful discriminatory/harassment act or acts complained of.

3.42 The judgment of Elias LJ in *Ministry of Defence v Kemeh* [2014] EWCA Civ 91 [2014] ICR 625 underlines that a broad purposive approach is to be taken to these provisions, even in cases where the common law would not impose vicarious liability for the alleged unlawful discriminatory decisions or acts of alleged unlawful harassment by their employees and/or agents. He notes:

> "*The agency issue*
> 9 Section 32 of the Race Relations Act 1976 in certain circumstances fixes liability on persons other than, and in addition to, the actual discriminator. It is as follows:
>
> > '*Liability of employers and principals*
> > (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act … as done by his employer as well as by him, whether or not it was done with the employer' s knowledge or approval.
> >
> > (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act … as done by that other person as well as by him.
> >
> > (3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.'
>
> 10 Subsection (1) applies a principle whose effect is similar to the common law concept of vicarious liability; in each case the employer is held liable for the acts of a person in his employment. But the method of imposing liability is different, as Peter Gibson LJ pointed out in *Chief Constable of Bedfordshire Police v Liversidge* [2002] ICR 1135, 1143. True vicarious liability makes the employer liable for the acts of his employees committed in the course of their employment. By contrast, section 32(1) imposes a form of constructive liability by deeming the employer himself to have committed the act of discrimination as well as the employed person. (Indeed the actual discriminator is treated as aiding the wrong of the employer or principal, as the case may be, and is personally liable accordingly: see section 33(1) and (2).)

11. Read literally, subsection (2) might suggest that the principal must authorise the act of discrimination itself before liability arises. But I agree with the Employment Appeal Tribunal in *Lana v Positive Action Training in Housing (London) Ltd* [2001] IRLR 501, para 32 (Mr Recorder Langstaff QC presiding) that this would virtually render the provision a dead letter. In my judgment, Parliament must have intended that the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do. It is a moot point whether the common law would in any event impose liability in these circumstances.

The scope of the principal's liability for an agent at common law is not entirely clear, although it seems likely that he will be liable for certain tortious acts of the agent, such as misrepresentations, provided they are sufficiently closely related to the agent's actual or apparent authority: see *Bowstead & Reynolds on Agency* 19th ed (2010), para 8-182. Whether racial abuse would fall within that principle is problematic, but section 32(2) [of the Race Relations Act 1976] removes the uncertainty which might otherwise exist.

12 If that analysis is right and the principal can be liable even though he has not authorised the act of discrimination itself, it follows that the act itself may be - and no doubt usually will be - without the principal's knowledge or approval.

It is perhaps surprising that the draftsman did not make this plain in subsection (2) as he did in subsection (1). It might be argued that the omission indicates a conscious decision by Parliament that in the case of a principal he should only be liable if he knows or approves of the discriminatory act itself, but I am not persuaded that this is a legitimate inference to draw from the difference in wording of the two subsections. Indeed, in the Equality Act 2010 section 109(3) *expressly* states that the principal will be liable irrespective of whether he knew or approved of the act of discrimination.

13 It is to be noted that, whilst there is a defence in subsection (3) for liability arising by virtue of the acts of those in employment, it does not apply to the liability of a principal for his agent.

...

35 We are concerned with the construction of a statute. The aim must be to give effect to Parliament's intentions as evidenced by the language of the provision having regard to the statutory and social context. I do not find it helpful to talk in the abstract about the need to adopt a purposive construction. It is not permissible to expand the meaning of a statutory concept beyond its legitimate reach because it is thought that the broad objective of the statute would be better effected thereby. The point was put with characteristic clarity by Peter Gibson LJ in another case involving the potential liability of a chief constable for the acts of his officers, *Chief Constable of Bedfordshire Police v Liversidge* [2002] ICR 1135.

One of the arguments in that case was that a purposive construction of, *inter alia*, section 32 should be adopted to achieve that objective; and *Jones v Tower Boot Co Ltd* [1997] ICR 254 was cited to support that proposition. His Lordship said, at para 39:

> 'I have no difficulty in accepting that a statute like the 1976 Act should be construed purposively, provided that it is understood what that properly means. The function of the court in construing a statute is to give effect to the intention of Parliament. Normally that involves ascertaining the intention from the words used in the Act. It is often easy to say what the general thrust of legislation is. Discrimination Acts are intended to deter and combat discrimination. But it is important not to lose sight of the fact that such Acts

> are not intended to be completely comprehensive, in the sense of making all discrimination unlawful. Thus, the 1975 Act Preamble states that it is an Act to render unlawful certain kinds of sex discrimination. Provisions within discrimination Acts often contain limitations and conditions, and it is impermissible to rely on the general purpose of the Act to construe the Act in a way that eliminates those qualifications, even though so to eliminate the qualifications would leave the Acts with a wider reach. What a purposive construction does allow the court to do is to construe a provision which permits of two possible meanings in a way which gives effect to the identified purpose.
>
> The *Jones v Tower Boot Co Ltd* case is a good example of that. Often it will be difficult to find a clear indication of the purpose of a specific provision.'
>
> 36 Like Peter Gibson LJ, I readily accept that a broader rather than a narrower meaning should be adopted where two constructions are equally plausible and the broader meaning better achieves the statutory purpose."

Ancillary liability and the prohibition against harassment

3.43 It does not immediately appear from its report that the Export Group has made any recommendation concerning vicarious liability whether of employers for their employees or of principals for their agents, but the Expert Group's report does contain recommendations concerning what might be termed the ancillary liability of "superiors" in recommending that

> "it be a crime for a superior: to <u>*order*</u> a subordinate to carry out of any of the conversion practices which the Group says should be criminalised; and/or to allow the carrying out by a subordinate of any of the criminalised conversion practice acts, if the superior knew or should have known that such acts were being committed or were about to be committed".

3.44 The issue of another instructing an act which constitutes discrimination or harassment rendered unlawful by the EA 2010 is dealt with specifically in Section 111 EA 2010 which is headed "Instructing, causing or inducing contraventions". And Section 112 EA 2010 – which is headed "aiding contravention" - makes it unlawful for one person knowingly to help another to do anything which contravenes the relevant substantive provisions of the EA 2010. As with the statutory vicarious and primary liability provisions of the EA 2010 these provisions concerning ancillary liability are interpreted and applied in broad purposive manner: *Anyanwu and another v South Bank Student Union* [2001] UKHL 14 [2001] 1 WLR 638. In *NHS Development Authority v Saiger* [2018] ICR 297 the ET had found that the NHS Development Authority (which oversaw the employer's recruitment process) caused or induced the employer to victimise the claimant. In relation to s111(7) the EAT said this:

> "I reject Mr Reade's argument that section 111(7) EA 2010 means that the section cannot apply as between corporations. I see no reason why one company cannot

commit 'a basic contravention' against another. In particular, I can see no reason why one corporation cannot knowingly help another to commit 'a basic contravention'"

Structural discrimination

3.45 On the issue of the Expert Group's assertion (at page 13 of its Report) that "conversion practices create a pattern of structural discrimination that can have an effect on the rights of all LGBT+ people", Section 149 EA 2010 on the "public sector equality duty" is the provision which the UK legislature has made in relation to issues around the need of the public authorities specified and listed in Schedule 19 EA 2010 and those who exercise public functions to

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic (whether age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and/or sexual orientation) and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

3.46 Section 149(3) EA 2010 specifies that

"Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

3.47 And Section 149(5) EA 2010 stipulates that

"Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding."

3.48 Section 149 EA 2010 thus sets out a series of mandatory relevant considerations (the "statutory equality needs") to which a public authority must have regard when taking

decisions in exercise of its public functions. [28] The public sector general equality duty may be said to be about properly and conscientiously following a process. [29] This may involve undertaking a sufficiently thorough information gathering exercise. [30] It may also involve properly analysing that information. [31] Section 149 EA 2010 does not compel a particular substantive outcome. It mandates a public authority to consider particular matters; but it is then for it to decide what weight to accord to equality considerations and how to balance them against countervailing factors. [32] It is the clear purpose of section 149 EA 2010 to require public bodies to give advance consideration [33] to issues around eliminating discrimination and advance equality of opportunity in relation to all the "protected characteristics" listed in Section 149(7) EA 2010; which is to say age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and/or sexual orientation. Issues around structural discrimination are not and cannot be confined simply to say those sharing a protected characteristic of a particular sexual orientation or who have the protected characteristic of gender reassignment.

3.49 And in relation to the State's responsibilities under the Human Rights Act 1998 in relation to the EA 2010 protected characteristic of "religion or belief", the Grand Chamber of the European Court of Human Rights notes in its decision of *Lautsi v. Italy* (2012) 54 EHRR 3 (18 March 2011) as follows (at paras 60-61):

> "Article 9 of the Convention … guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on contracting states a "duty of neutrality and impartiality".
>
> In that connection, it should be pointed out states have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, *particularly between opposing groups*.
> *That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.*
> …

[28] *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506, QBD per Aikens LJ at para 89

[29] *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809, EWCA per Dyson LJ at para 31

[30] *R. (on the application of Luton BC) v Secretary of State for Education and others* [2011] EWHC 217 (Admin); [2011] Eq. L.R. 481

[31] *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 703; [2011] PTSR 931

[32] *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 [2014] PTSR 785 per Lord Dyson MR at para 74

[33] *R(Elias) v Secretary of State for Defence* [2006] 1WLR 3213, CA per Arden LJ

The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the states must not exceed."

State Responsibility

3.50 The Expert Group states in its Recommendation 5.1 as follows:

> **5.1** The Group recommends that public authorities in Scotland do not provide support, be it direct or indirect, to persons and organisations engaging in any of the Criminalised Acts.
>
> The Group recommends in particular
> - that authorities make sure that no public facilities are provided for any of the Criminalised Acts and
> - that organisations engaging in any of the Criminalised Acts do <u>not</u> enjoy preferential tax status or benefit from public subsidies."

3.51 From the wording of this recommendation it is unclear whether the Expert Group is recommending the banning from public facilities and the removal of among other things charitable status or any eligibility to public funding from persons and organisations: (1) *when or for the purpose of engaging in* any of conversion practices which the Expert Group wishes to see criminalised; <u>*or*</u> (2) *because they have engaged* (or have not undertaken not to engage) in any of conversion practices which the Expert Group wishes to see criminalised.

3.52 In any event, should any such new policies be introduced by public authorities (including the Scottish Ministers) in Scotland the provisions of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 apply, Regulation 5 of which provides, so far as relevant, as follows (emphases added):

> **"5.— Duty to assess and review policies and practices**
>
> (1) A listed authority must, where and to the extent necessary to fulfil the equality duty, *assess the impact* of *applying* a proposed new or revised policy *or practice* against the needs mentioned in section 149(1) of the Act.
>
> (2) In making the assessment, a listed authority <u>*must*</u> *consider relevant evidence relating to persons who share a relevant protected characteristic* (including any received from those persons)."

3.53 In their consultation on this regulation the Scottish Ministers observed as follows (emphasis added):

> "….[T]he public sector equality duty at section 149(1) of the Equality Act 2010 (the general duty) *covers all functions of public authorities, and consideration of impact on people is an inherent part of paying due regard to the general duty*.

We therefore plan to retain our impact assessment duty in relation to new policies and practices, including changes or revision of existing policies and practices. This will assist an authority to take a proportionate response to the specific duties. However, in order to make clear that existing policies and practices cannot be ignored, we propose adding a duty to make arrangements to review existing policies and practices and where necessary *change or revise policies or practices to ensure that they do not have a detrimental impact on an authority's ability to deliver the general duty*."

3.54 The Equality and Human Rights Commission has produced guidance to public authorities in Scotland in relation to their duties under Regulation 5. In this Guidance the EHRC notes as follows (emphasis added):

"This guidance uses the term 'policy' as shorthand for any activity of your organisation. Therefore *'policy' should be understood broadly to embrace the full range of your policies, provisions, criteria, functions, practices and activities including the delivery of services – essentially everything you do*.

This guidance uses the term 'equality groups' to mean 'persons who share a relevant protected characteristic' and where reference is made to 'equality groups and communities', this includes 'any person who appears to the authority to represent the interests of those persons'.

...

[T]he starting point for assessing impact will be the three needs of the duty:

- ensuring that the policy does not discriminate unlawfully;
- considering how the policy might better advance equality of opportunity; and
- considering whether the policy will affect good relations between different groups.

The impact of the policy on equality groups should be assessed under each need of the duty. .... Assessing impact does not end with the introduction of the new or revised policy; it is important to monitor the actual impact of the policy as it is implemented, and revisit the assessment as part of any review. Therefore, assessment of impact should be considered as an on-going, end-to-end process, from early discussions right through to the final decision about whether to go ahead with a policy or service change and beyond, to monitor the actual impact of the implementation."

3.55 This all usefully may be said to underline the importance of the duty on the part of all public authorities in Scotland in the exercise of their public functions not to discriminate against persons or organisation because of religious beliefs and practice. As was noted in *Billy Graham Evangelistic Association v Scottish Event Campus Ltd.* [2022] SC GLW 33 (at para 2):

"[T]he Equality Act 2010 applies to all, equally. It is an Act designed to protect cornerstone rights and freedoms within a pluralist society. It applies to the LGBTQ+ community as it does to those of religion (including Christianity) and none. It follows that in relation to a protected characteristic (here: religion or philosophical belief) no section of society can discriminate against those with whom he, she or they disagree."

Parental rights

3.56 The Expert Group states in its Recommendation 4.3 as follows:

> "**4.3** The Group recommends that, where the perpetrator of any of the Criminalised Acts has parental or guardianship rights in relation to the victim, the legal consequences *may include the modification or withdrawal of such rights*."

3.57 The governing principle behind the formulation and the adoption of the European Convention of Human Rights (and other post-Nuremberg international human rights law instruments) is the *rejection* of the totalitarian State. The development of the concept of subsidiarity was a response to a conscious rejection of the ideology of the *totalitarian* State. This is perhaps most clearly articulated by the Italian dictator Mussolini (in a speech in La Scala Milan in 1925): *tutto nello Stato, niente al di fuori dello Stato, nulla contra lo Stato – everything within the State, nothing outside the State, naught against the State*.

3.58 In the mid-20th century, Catholic social teaching sought to curb the idea of the totalitarian State which the new ideology of Fascism proclaimed, by emphasizing the idea of society as being made up of a commonwealth of associations in which individuals participated and to which their loyalties could be given and, accordingly, in which there might be a multiplicity of identities. [34] With its adoption of this concept of subsidiarity, the Strasbourg court proclaims that the State should not presume to arrogate all power to itself, but should respect the nature of society as a commonwealth by permitting power to cascade down to the lowest level at which it could most effectively be exercised. As was

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[34] See Pope Pius XI *Quadragesimo Anno* (1931)

> "79. .... Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.
>
> 80. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function', the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.
>
> 81. First and foremost, the State and every good citizen ought to look to and strive toward this end: that the conflict between the hostile classes be abolished and harmonious cooperation of the Industries and Professions be encouraged and promoted.
>
> 82. The social policy of the State, therefore, must devote itself to the re-establishment of the Industries and Professions."

observed in *O'Keefe v. Ireland* (2014) 59 EHRR 15 (in a joint and partly dissenting Opinion):

> "According to the Preamble to the Convention, fundamental freedoms are best maintained in an effective political democracy. The notion of a democratic society encompasses the idea of subsidiarity. *A democratic society may flourish only in a state that respects the principle of subsidiarity and allows the different social actors to self-regulate their activities."* [35]

3.59 The post-Nuremberg/anti-totalitarian State is one which is obliged, at the level of fundamental constitutional principle, to recognise and respect *the family* as a basic society in its own right. This is the principle of subsidiarity which may be understood *in the positive sense* as entailing constitutional obligations on the post-Nuremberg State to offer economic, institutional or legal support to those basic social associations which form the essential cells of society, chief among which is the family.

3.60 The requirements of subsidiarity as properly understood within a modern European democracy governed by the rule of law and respectful of fundamental rights means that the State has to recognise that *parents* have the primary social, moral and legal responsibility to safeguard the welfare and promote the health, development and flourishing of their children and to provide, in a manner appropriate to the stage of development of the individual child, direction and guidance: see, for example, Section 1(1) of the Children (Scotland) Act 1995.

3.61 The principle of subsidiarity also therefore entails a corresponding series *of negative* implications that requires the State to *refrain* from using its coercive powers in a manner which subverts or undermines those smaller essential associations that go to make up society, notably the family. [36] Thus in *R. (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 [2005] 2 AC 246 Baroness Hale observed (at § 72):

> "Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and the primary right to do this. The state steps in to regulate the exercise of that responsibility in the interests of children and society as a whole.
>
> But '*the child is not the child of the state*' and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities.

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[35] *O'Keefe v. Ireland* (2014) 59 EHRR 15 (Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at O-11-7)

[36] See generally Maria Cahill "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2016) *International Journal of Constitutional Law* (forthcoming).

A free society is premised on the fact that people are different from one another. A free society respects individual differences. 'Only the worst dictatorships try to eradicate those differences': see *El Al Israeli Airlines Ltd v Danielowitz* [1992]4] Isrl LR 478, § 14, Justice Barak. Often they try to do this by intervening between parent and child.

That is one reason why the European Convention on Human Rights restricts the power of the state to interfere in family life (article 8) or to limit the manifestation of religious or other beliefs (article 9) and requires it to respect the religious or philosophical convictions of parents in the education of their children (First Protocol, article 2)."

3.62 And *In re B (Children)* [2008] UKHL 35 [2009] 1 AC 11 Baroness Hale noted at § 20:

"In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families *in all their subversive variety are the breeding ground of diversity and individuality*. In a free and democratic society we value diversity and individuality. .... As McReynolds J famously said in *Pierce v Society of Sisters* (1925) 268 US 510, 535: 'The child is not the mere creature of the state.'"

3.63 Similarly in *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 when striking down Scottish legislation which had been passed without any dissenting votes by the democratically elected and accountable Scottish Parliament and which required the universal appointment of State guardians to children in Scotland the Court noted (at § 73) that:

"The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."

3.64 The primary duty placed on State actors (notably, in this case, the Scottish Parliament and the Scottish Government) under the Convention principle of subsidiarity has to be the protection and conservation of the family as a primary unit. Thus as Lord Hope's noted in *Fornah v Home Secretary* [2007] AC 412 at § 45:

"45 It is universally accepted that the family is a socially cognisable group in society.... Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State'. The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society."

3.65 Similarly in *R (Bibi) v Home Secretary* [2015] UKSC 68 [2015] 1 WLR 5055 at Baroness Hale noted at § 31:

"31 All of this reflects the importance attached to family relationships in modern international human rights law. The Universal Declaration of Human Rights of 1948 proclaimed that

> 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the state': article 16.3.

The International Covenant on Civil and Political Rights of 1966 translated this into a binding obligation in exactly the same words: article 23.

Both of these documents proclaimed that the rights they provided must be respected without discrimination on grounds such as race and sex: article 2 in each case.

The Human Rights Committee, in General Comment No 19 (1990), explained that different states might have different concepts of the family, but whatever their concept, it must be afforded the protection required.

The International Covenant on Economic and Social Rights goes even further, in providing that

> 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society': article 10.1."

3.66 Accordingly, except in a situation where the family is wholly dysfunctional - and is therefore no longer a space in which a child is being protected from harm - the State should not use its *coercive* powers to intervene in the family. As Lord Templeman noted in *Re: KD (a minor ward) (Termination of access)* [1988] 1 AC 806 at page 812:

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.
>
> Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation. In terms of the English rule the court decides whether and to what extent the welfare of the child requires that the child shall be protected against harm caused by the parent."

3.67 Otherwise the law is required to protect the family from unwarranted intrusion while, at the same time, protecting children from *harm*: *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9 [2013] 1 AC 680 per Baroness Hale at § 1. This is, in essence, the principle of subsidiarity. And in relation to an aim of the protection of children from harm, any State interference in family life has still to be proportionate. As the CJEU noted in Case C-244/06 *Dynamic Medien* [2008] ECR I-505 at § 42:

> "Although the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty…. the fact remains that such restrictions may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it."

3.68 Parents – who are "in the overwhelming majority of cases the best judges of a child's welfare": *Gillick v. v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 per Lord Fraser at 173 – may legitimately have quite different views on these issues and might

properly object to any attempt by the State either to impose contrary views, or to allow those entrusted by the State to undermine or exclude or ignore parents when it comes to making decisions on what is best for their child.

3.69 The State's role in promoting the wellbeing of children is, then, necessarily a subsidiary and supportive role for the myriad of positive choices made by parents of any individual child as to what these parents consider to be necessary for their child to be, in the "well-being" terminology used in Section 96(1) of the Children and Young People (Scotland) Act 2014, "safe, healthy, achieving, nurtured, active, respected, responsible and included". It is therefore the duty of the State to *defer* to families as regards the care, upbringing, welfare and wellbeing, education and training of their children. As we have seen it is only in exceptional circumstances – for example of family breakdown or child endangerment - that the State is justified in using its powers to intervene in family life with a view to protecting a child from *harm*. Parents have a fundamental right - which the State must respect and protect - to raise their children in accordance with their own views and beliefs about what is best for their child's wellbeing and flourishing.

3.70 The fundamental importance of parents' views and involvement specifically in issues concerning the gender identity of their children has been underlined most recently by Lieven J in her judgment in *AB v CD* [2021] EWHC 741 (Fam) (2021) 179 BMLR 139 when granting a declaration that the parents of a child who was reported as suffering from gender dysphoria had the right to consent to their child being prescribed puberty blockers. As the judge notes:

> "44. The caselaw is replete with judicial statements about not merely the centrality of parents in decisions about their children, but also as to why the Courts should in the vast majority of situations respect and uphold the parents' views and decision making about their children.
>
> 45. Just one of these numerous statements was made by Baker J (as he then was) in *Re Ashya King* [2014] EWHC 2964 (Fam) which sets out the parental role in the context of serious medical treatment of a child:
>
> > *"31. Thirdly, it is a fundamental principle of family law in this jurisdiction that responsibility for making decisions about a child rest with his parents. In most cases, the parents are the best people to make decisions about a child and the State – whether it be the court, or any other public authority – has no business interfering with the exercise of parental responsibility unless the child is suffering or is likely to suffer significant harm as a result of the care given to the child not being what it would be reasonable to expect a parent to give."*
>
> 46. The then President of the Family Division, Sir James Munby said in *In the matter of E (A Child) (Medical Treatment)* [2016] EWHC 2267 at §35:
>
> > *"Judges do not necessarily know best. Usually a child's long-term carers, whether parents, adoptive parents or long-term foster carers are much better placed than a judge to decide what should happen to their child. In the realm*

of private law – and this issue, despite the public law context in which it happens to arise, is in truth one in the private law realm – the court, the State, usually becomes involved only because the child's parents or carers have been unable to resolve the difficulty themselves, either because they cannot agree or, as sometimes happens in medical treatment cases, because they prefer to leave a particularly agonising decision to a judge: see, on the latter point, In re Jake (A Child) [2015] EWHC 2442 (Fam) , § 46."

47. The importance of protecting parents' rights and duties is set out in article 5 of the United Nations Convention on the Rights of the Child ("UNCRC"):

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capabilities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

48. Further, parents' rights are part of family life to which protection is given by article 8 European Convention on Human Rights ("ECHR") under the Human Rights Act 1998 ("HRA"). I do not need to set out further detail and caselaw on either the UNCRC or article 8 because in my view these protections are fully reflected in the caselaw which is referred to above, and article 8 does not alter the analysis in that caselaw.

…

118. I rely heavily on the dicta set out above from many senior and highly eminent judges about the central role that parents must and should play in their children's lives and the fact that parents will, in the vast majority of cases, be the people who know their children best and who are best placed to make decisions about them. I agree with the view expressed that judges do not necessarily know best, and that judges should be slow to displace the decision making role of committed and loving parents.

…

120. … Parents are, in general, in a position to understand and weigh up these matters and consider what is in the long and short term best interests of their child. They are adults with full capacity and as the people who know their child best, and care for them the most, will be in a position to reach a fully informed decision.

…

125. My second particular concern is that of the pressure that may be placed by the children in issue upon their parents. Where a child has Gender Dysphoria and is convinced that s/he should be prescribed Puberty Blockers, it is likely to be very hard for parents to refuse to consent.

One does not have to be a child psychologist to appreciate the tensions that may arise within a family in this situation. I would describe this as "reverse pressure" and, although I have no evidence about it, it seems obvious that the problem could arise and the Second and Third Respondents are plainly alive to the issue.

126. However, the evidence in this case does not support any such finding in respect of XY's family. The Applicant (mother) and First Respondent (father) have plainly thought long and hard about what is best for [their child] XY. There is no evidence that they feel forced to give consent, somewhat reluctantly, because XY has placed undue pressure upon them.

127. *The pressure on parents to give consent is something that all the clinicians concerned are likely to be fully alive to. Ms Morris submitted that GIDS was very much aware of the issue, and that considerable efforts were made to ensure that there was a family-based range of consultations and that parents saw clinicians in private*

as well as with their children. If the clinicians, or indeed any one of them, is concerned that the parents are being pressured to give consent, then I have no doubt such a case should be brought to Court.

128. Equally, if the clinicians consider the case to be finely balanced, or there is disagreement between the clinicians, then the case should be brought to Court. However, I do not consider that these issues justify a general rule that PBs should be placed in a special category by which parents are unable in law to give consent."

UN Convention on the Rights of the Child (UNCRC)

3.71 At page 13 of its Report the Expert Group observes as follows

> **"3. The rights of the child must be considered**
> The Group is concerned that victims of conversion practices are often children and young people. The rights of children to be free from all forms of physical or mental violence, injury or abuse are guaranteed under the United Nations Convention on the Rights of the Child (UNCRC) and the Group considers that conversion practices are capable of violating these rights."

3.72 The Strasbourg Court has repeatedly referred to and relied upon provisions of the UNCRC in coming to its judgments on the correct interpretation and application of the provisions of the ECHR. [37]

3.73 Specific reference to the duty of State to respect for the "family" is reiterated in other international catalogues of fundamental rights thus:

(1) *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State":* Article 16(3) of the Universal Declaration of Human Rights 1948 (UDHR) and Article 23(1) of the International Convention on Civil and Political Rights 1966 (ICCPR)

(2) *"Everyone has the right to respect for his private and family life, his home and his correspondence"*: Article 8(1) ECHR 1950

(3) *"The greatest possible protection should be accorded to the family, which is the natural and fundamental group unit of society … particularly for its establishment and while it is responsible for the care and education of dependent children":* Article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESR)

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[37] See for example *T and V v. United Kingdom* (2000) 30 EHRR 121 on the fair trial requirements of treatment of child offenders and *Neulinger v Switzerland* [2010] ECHR 41615/07 (Grand Chamber, 6 July 2010); [2011] 1 FLR 122:

> "132. In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (see *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 51, ECHR 2003-V, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 95, ECHR 2000-I) and the Convention on the Rights of the Child of 20 November 1989 (see *Maire v. Portugal*, no. 48206/99, § 68, ECHR 2003-VII § 72)."

(4) *"Convinced that the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community …. (5) State parties shall respect the responsibilities, rights and duties of parents … to provide in a manner consistent with the evolving capacity of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention … and (18) Parents … have the primary responsibility for the upbringing and development of their child: the best interests of the child will be their basic concern.":* Preamble and Articles 5 and 18(1) of the UN Convention on the Rights of the Child (CRC)

(5) *"The family shall enjoy legal, economic and social protection":* Article 33(1) of the EU Charter of Fundamental Rights (CFR).

3.74 On 16 March 2021 the Scottish Parliament passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. The avowed purpose of this Bill is to incorporate in Scots law rights and obligations set out in the United Nations Convention on the Rights of the Child. In *Re UNCRC (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2022 SC (UKSC) 1 the UK Government referred the Bill as passed by the Scottish Parliament to the UKSC (before Royal Assent was given). In its decision on this pre-enactment reference the UKSC effectively struck down not only the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill but also the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (which had also been referred to the UKSC by the UK Government). Both of these Bills sought to incorporate into domestic Scots law treaties to which the UK had signed up and which bound the UK at the level of international law, namely UNCRC and the European Charter of Local Self-Government. In the sole and unanimous judgment of the court authored by Lord Reed it was said that these Bills passed by the Scottish Parliament could not be given Royal Assent because they purported to "affect the power of the Parliament of the United Kingdom to make laws for Scotland" and this constituted a contravention of the limits on the Scottish Parliament's legislative powers laid down by the UK Parliament in the Scotland Act 1998, notably section 28(7) of the Scotland Act 1998 which in providing that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland" is said by the court (at § 21) to "preserve the unqualified power of [the UK] Parliament to make laws for Scotland [38] Lord Reed also stated that the proposed Scottish legislation was unlawful because if it were allowed to become law it would allow the courts in Scotland to make a formal declaration that particular provisions of a Westminster statute were incompatible with the UNCRC (or the Local Self-Government

[38] See in particular section 29(2)(c) SA 1998 and paragraph 4(1) of Schedule 4 SA 1998 which provides that "(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this [the Scotland] Act [1998]"

Charter). Notwithstanding that any such declaration of incompatibility would not in itself affect the validity of (any provisions of) an Act of the UK Parliament, it would, said Lord Reed (at § 52):

> "subject legislation enacted by [the Westminster] Parliament to judicial condemnation if it fails to meet a legal standard embodying international obligations to which [the Westminster] Parliament has not chosen to give domestic legal effect.
>
> A declarator of incompatibility under section 21 would be a judicial finding that an Act of [the Westminster] Parliament is incompatible with those obligations.
>
> The possibility and, *a fortiori*, the actuality of such a finding would plainly affect [the Westminster] Parliament's power to make laws for Scotland, since it would impose pressure on [the Westminster] Parliament to avoid the opprobrium which such a finding would entail."

3.75 At the time of writing the Scottish Parliament was yet to finalise the terms of any new enactment which might give some domestic effect in Scotland to the UNCRC without offending the limits on its legislative competence as set out by the UKSC in the above judgment.

3.76 But in any event, the UNCRC is itself founded on the principle that while the family and society at large have complementary functions in defending and fostering the good of each and every human being, the constitutional principle of subsidiarity means the State cannot and must not take away from families the functions that they can just as well perform on their own or in free association with others. This is certainly the approach set out in the preamble to the UN Convention on the Rights of the Child (UNCRC) which emphasises "*the family as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children*" and states that the obligations of State Parties under the UNCRC is to afford *the family* with "*the necessary protection and assistance so that it can fully assume its responsibilities within the community*", a provision which is reflected in Article 3(2) CRC which underlines that the State has a subsidiary role to parents in matters concerning the wellbeing of children, noting (emphasis added) that:

> "State Parties undertake to ensure the child such protection and care as is *necessary* for his or her wellbeing, *taking into account the rights and duties of his or her parents,* legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all *appropriate* legislative and administrative measures."

4. THE LIMITS ON THE LEGISLATIVE POWERS OF THE SCOTTISH PARLIAMENT

4.1 In the *Reference by the UK Attorney General and the Advocate General for Scotland re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018]

UKSC 64 [2019] AC 1022, 2019 SC (UKSC) 13 the UK Supreme Court summarised the approach to be taken to understanding the extent of the legislative competences of the Scottish Parliament as follows (at § 12):

> "The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland.
>
> It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect.
>
> And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act.
>
> The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used."

4.2 The powers of the Scottish Ministers defined as being within "devolved competence" march with the same statutory limitations as are imposed on the Scottish Parliament's legislative competence. [39]

4.3 And even in those areas in which the UK authorities expressly transfer powers to the devolved Scottish administrations in areas which are not within the legislative competence of the Scottish Parliament (for example, extradition) the Scottish Ministers' powers remain - by virtue of the terms of Section 57(2) SA 1998 [40] - subject to the *vires* limitation of

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[39] See Section 54 SA 1998 which provides as follows:

> **"54.— Devolved competence**
> (1) References in this Act to the exercise of a function being within or outside devolved competence are to be read in accordance with this section.
>
> (2) It is outside devolved competence—
> (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or
> (b) to confirm or approve any subordinate legislation containing such provision.
> (3) In the case of any function other than a function of making, confirming or approving subordinate legislation, it is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be, conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament."

[40] Section 57(2) SA 1998 provides as follows:

> **"57.— Convention rights**

Convention compatibility, such that any Convention incompatible actions on the part of the Scottish Ministers is treated in law as a nullity, void and of no effect. [41]

Statutory limits on the Scottish Parliament's legislative competence

4.4 Section 28(1) of the Scotland Act 1998 ("SA 1998") stipulates that, subject to Section 29 SA 1998, the Scottish Parliament may make laws to be known as Acts of the Scottish Parliament, albeit that Section 28(7) SA 1998 stipulates that:

> "(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

4.5 Section 29 SA sets out a number of statutory limits on the legislative competence of the Scottish Parliament by providing, so far as relevant, as follows:

> "**29.— Legislative competence**
> (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply—
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
> (b) it relates to reserved matters,
> (c) it is in breach of the restrictions in Schedule 4,
> (d) it is incompatible with any of the Convention rights,
> (e) ....
>
> (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.
>
> (4) A provision which—
> (a) would otherwise not relate to reserved matters, but

> (2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights."

[41] See e.g. *Craig v. HM Advocate* [2022] UKSC 6, 2022 SC (UKSC) 27 per Lord Reed at §§ 37, 53:

> "The question is whether the Lord Advocate and the Scottish Ministers were acting *ultra vires* in performing their functions in relation to the appellant's extradition. It is a matter of agreement that they had no power to do so, by reason of sec 57(2) of the Scotland Act (see para 25), if in doing so they were acting incompatibly with the appellant's Convention rights.
> ...
> [T]he acts of the Lord Advocate in conducting the extradition proceedings, and the act of the Scottish Ministers in making the extradition order, were incompatible with the appellant's Convention rights, and were therefore *ultra vires* by virtue of sec 57(2) of the Scotland Act. In the language of para 1(d) of sch 6 to the Scotland Act (see para 24), they were merely 'purported' acts, and were therefore invalid."

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. ...."

"Relates to reserved matters": subsection 29(2)(b) SA 1998

4.6 Among the matters which are reserved to the UK Parliament and executive is "Equal opportunities", which is defined (in paragraph L2 of Schedule 5 SA 1998) as

> "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions".

4.7 Accordingly it is beyond the powers of the Scottish Parliament to purport to pass any legislation which has "more than a loose or consequential connection" [42] with "equal opportunities" as defined in paragraph L2 SA 1998.

4.8 In *For Women Scotland Ltd. v. Lord Advocate* [2022] CSIH 4, 2022 SC 150 the Second Division (the Lord Justice Clerk Lady Dorrian, Lord Malcolm and Lord Pentland) noted as follows (at § 28):

> "[T]he Lord Ordinary [Lady Wise] stated [in *For Women Scotland v. Lord Advocate* [2021] CSOH 31, 2021 SLT 639 at para 49] ... that:
>
> > 'The regulation of discrimination between groups is a matter in which the United Kingdom as a whole has an interest and so the Equality Act 2010, which is part of that subject-matter is reserved, other than for any topic or area specifically carved out as devolved.'
>
> All the Lord Ordinary is meaning here is that equal opportunities is a reserved matter, save within the limited scope of the exception; that *the 2010 Act is the manifestation of how equal opportunities law is applied in Great Britain* ...

4.9 This observation from the Inner House confirms that the Equality Act 2010 ("EA 2010") provides a base line for the regulation of "equal opportunities" such that the Scottish Parliament cannot pass legislation which relates to or purports to modify the Equality Act

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[42] *Keatings v Advocate General* [2021] CSIH 25, 2021 SC 329 at § 66:

> "The Act would relate to these reserved matters if it had 'more than a loose or consequential connection' with them: *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, 2019 SC (UKSC) 13 at §27, quoting *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40 per Lord Walker at § 49."

2010, as well as being prohibited from enacting or approving any Scottish statutory provisions which relates to

> "the prevention, elimination or regulation of discrimination between persons on grounds of … sexual orientation …. or of other personal attributes, *including beliefs or opinions, such as religious beliefs or political opinions*".

"In breach of the restrictions in Schedule 4 SA 1998": subsection 29(2)(c) SA 1998

4.10 Subparagraph 1(2)(f) of Schedule 4 SA 1998 specifies that **"**an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify …. the Human Rights Act 1998" and subparagraph 2(1) of Schedule 4 SA 1998 stipulates that

> "An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters."

4.11 Accordingly no Act of the Scottish Parliament (and no Scottish subordinate legislation") can validly modify, among other things, the Human Rights Act 1998 ("HRA 1998") and/or the existing law on "equal opportunities". This would include Section 13 HRA 1998) which provides that:

> "If a court's determination of any question arising under this Act might affect the exercise *by a religious organisation*… of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

"Is incompatible with any of the Convention rights": subsection 29(2)(d) SA 1998

4.12 Among the Convention rights most relevant to the circumstances of the present case is Article 9 ECHR, which guarantees freedom of religion and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance.[43]

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[43] Article 9 ECHR sets out five distinct rights as follows:

> "**Article 9 - Freedom of thought, conscience and religion**
>
> 1. Everyone has the right to:
> [i] freedom of thought,
> [ii] [freedom of] conscience and
> [iii] [freedom of] religion
> this right includes
> [iv] freedom to change his religion or belief
> and
> [v] freedom, either alone or in community with others and in public or private, to *manifest* his religion or belief, in
> [a] worship,
> [b] teaching,
> [c] practice and
> [d] observance.

4.13 Also relevant is Article 10 ECHR, which guarantees the freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference.[44] The rights in article 10(1) ECHR have been held to apply equally to legal persons as to natural persons.[45] In *ES v. Austria* (2019) 69 EHRR 4 the Court noted (at paras 42-43):

> "42 ....Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to para.2 of art.10, *it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb*.
>
> The Court further notes that there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate on questions of public interest. Those who choose to exercise the freedom to manifest their religion under article 9 of the Convention, irrespective of whether they do so as members of a religious majority or a minority, *therefore cannot expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*.
>
> 43 As para.2 of art.10 recognises, however, *the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under art.9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane*.
>
> Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a state may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by art.10 of the Convention."

Article 9(2) ECHR allows for limitations to be placed *only* on the last of these rights, that of *manifestation* of religion or beliefs by providing as follows:

> "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitation as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[44] The importance which the ECtHR attaches to free expression principles appears from its decision in *Annen v Germany* [2015] ECHR 3690/10 (Fifth Section, 26 November 2015). The pursuer was an anti-abortion campaigner who handed out leaflets next to an abortion clinic naming and giving the addresses of doctors who performed abortions at the clinic. The leaflets appeared to draw an analogy with the Holocaust and identified a website named "www.babycaust.de". Despite the personal and what many would consider to be the somewhat extreme nature of Mr Annen's expression, the ECtHR found that an injunction preventing him from disseminating the leaflets violated his article 10 ECHR rights.

[45] See e.g. *Markt Intern* v *Germany* (1989) 12 EHRR 161.

4.14 The third immediately relevant Convention right is Article 11 ECHR which guarantees to everyone the right to freedom of peaceful assembly and to freedom of association with others.[46] The Strasbourg Court has emphasised the importance of the freedom of association protected under Article 11 ECHR in its case law concerning associations for religious purposes, noting that "associations formed for … proclaiming or teaching religion, are also *important to the proper functioning of democracy*".[47] In *Centre of Societies for Krishna Consciousness v. Russia* [2021] ECtHR 37477/11 (Third Section, 23 November 2021) the Strasbourg Court noted as follows in relation to an attempt to ban a religious gathering:

> "50. The Court reiterates that the right to freedom of assembly covers *both private meetings and meetings in public places*, and can be exercised by individual participants and by the persons organising the event. Interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities.
>
> The Court has previously found that the refusal of authorisation to hold a religious service in the public space constituted interference with the applicant's rights under Article 11 of the Convention, interpreted in the light of Article 9.
> …
> 52. The Court notes that the domestic authorities did not have any objections to the planned events being held at a specific location or time, the factual matters in respect of which the Contracting State must be allowed a wider margin of appreciation. Rather, their objections related to the *religious nature* of planned events and accordingly amounted to *content-based restrictions on freedom of assembly* which should be *subjected to the most serious scrutiny by the Court*.
>
> The situations where a gathering may be legitimately banned in relation to the substance of the message which its participants wish to convey are *rare*, and *the domestic authorities are not at liberty to prohibit a public event from being held simply because they consider that its "message" is wrong.*"

4.15 It is clear that a church *body* - or an *association* with religious and/or philosophical objects - is capable of possessing and exercising the Convention rights contained in Articles 9, 10 and 11 ECHR in its own right [48] (as well in a representative capacity of individuals

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[46] In *Bayev v Russia* (2018) 66 EHRR 10, the ECtHR found that the convictions of three gay activists for demonstrating outside schools in favour of gay rights violated their article 10 ECHR rights. In finding that the interference was not justified, the ECtHR emphasised that the pursuers' messages had not been inaccurate, sexually explicit or aggressive and that nothing the pursuers did diminished the rights of parents to enlighten and advise their children in line with their own religious or philosophical convictions (§ 82).

[47] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at § 61.

[48] Cf *Beizaras and Levickas v. Lithuania* (2020) 71 EHRR 28 in which the Strasbourg court affirmed that a civil-society organisation (in that case a national gay rights group) might legitimately have and

who are its members or adherents to the beliefs which it espouses and seeks to proclaim and protect). [49] In *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12 the Strasbourg Court observed at § 93:

> "religious associations are not merely instruments for pursuing individual religious ends. In profound ways, *they provide a context for the development of individual self-determination and serve pluralism in society*. The protection granted to freedom of association for believers enables individuals *to follow collective decisions to carry out common projects dictated by shared beliefs*."

4.16 Interferences with the Convention rights protected under articles 9, 10 and 11 ECHR can only be justified if they are prescribed by law and are "*necessary in a democratic society*" in order to pursue one of the aims identified at sub-paragraph (2) of each article. The justification analysis is essentially a proportionality analysis and should proceed in four stages: (a) is the objective or aim of the measure or act sufficiently important to justify limiting a fundamental right; (b) are the means used rationally connected to that objective; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community: *Re the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 [2018] HRLR 14 at § 265. [50]

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exercise a constitutional role in performing a "public watchdog" function in a pluralist, democratic society, noting (at § 81):

> "[I]t should have been open to the Lithuanian National Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Association, whose members the pursuers were ..., and which is a nongovernmental organisation set up for the purpose of assisting people who have suffered discrimination to realise their right to a defence, including in court, to act as a representative of the pursuers' "interests" within the domestic criminal proceedings.... To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level. Indeed, *the Court has held that in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively*. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 37-39, ECHR 2004-III, see also, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 101, 103 and 112, ECHR 2014, and the case-law cited therein). Any other, excessively formalistic, conclusion would make protection of the rights guaranteed by the Convention ineffectual and illusory."

[49] In Case C-426/16 *Liga van Moskeeen v Vlaams Gewest* EU:C:2018:335 at § 49 the Court of Justice of the European Union also confirmed (consistently with the Strasbourg case law) that the freedom of religion guarantee in the EU Charter on Fundamental Rights applies to religious organisations.

[50] See to similar effect, in the context specifically of EU influenced discrimination law, *R (Z and another) v Hackney London Borough Council* [2020] UKSC 40 [2020] 1 WLR 4327 per Lord Sales at § 40:

> "In *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] AC 1399 ... Baroness Hale DPSC explained that the concept of proportionality as used in domestic anti-discrimination law is derived from EU law. It requires application of a structured approach in relation to the measure in question, involving four stages:

No Scottish legislation possible which purports to "affect the power of the Parliament of the United Kingdom to make laws for Scotland": subsection 28(7) SA 1998

4.17 In *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, 2019 SC (UKSC) 13 the UK Supreme Court confirmed (at § 62) that it was, in principle, open to the Scottish Parliament to legislate in order to give effect in Scotland to a policy which has been rejected by the UK Parliament. Neither the purpose nor the effect of such legislation would be said to impinge upon the constitutional functions, powers or privileges of the Westminster Parliament. However this essentially political observation was made after the UKSC had determined that the provisions of subsection 28(7) SA 1998 - which stipulates that "this section [28 SA 1998] does not affect the power of the Parliament of the United Kingdom to make laws for Scotland" - impose a further and distinct statutory legal limitation on the legislative competence of the Scottish Parliament (on top of the limits imposed by Section 29(2) SA 1998 which have outlined above). The UK Supreme Court observed (at §§ 52-53) that:

> "52. … [T]he power of the UK Parliament to make laws for Scotland includes the power to make laws authorising the making of subordinate legislation by Ministers and other persons.
>
> An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers.
>
> It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to 'make laws' if the laws which it makes are of no effect. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by sec 28(7) of the Act, of its unqualified legislative power.
>
> Thus, in order for sec 17 of the Bill and sec 28(7) of the Act to operate concurrently, the former would have to be treated as impliedly amending the latter, so that it read:

> 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?
>
> And, fourth:
>
> 'As the Court of Justice of the European Communities put it in Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* [1990] ECR 1-4023, § 13, "the disadvantages caused must not be disproportionate to the aims pursued": or as Lord Reed JSC … put it in [*Bank Mellat v HM Treasury (No 2)*] [2014] AC 700, 791, § 74,
>
> "In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."'"

> 'Subject to section 17 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018, this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'

53. That conclusion is *not* altered by the other arguments advanced by the Lord Advocate.

In relation to the first argument (see para 47), a provision which made the effect of laws made by the UK Parliament for Scotland conditional on the consent of the Scottish Ministers, unless it disapplied or repealed the provision in question, would for that very reason be inconsistent with the continued recognition of its unqualified sovereignty, and therefore tantamount to an amendment of sec 28(7) of the Scotland Act.

In relation to the second argument (see para 48), the question before the court is whether, if the Scottish Bill were to receive royal assent, sec 17 would be law. If not, there would be no question of its having to be disapplied or repealed by the UK Parliament: it would be of no legal effect whatsoever ('not law', in terms of sec 29(1) of the Act). It is therefore no answer to an argument that sec 17 of the Bill would be outside legislative competence, to say that it could be disapplied or repealed.

In relation to the third argument (see para 49), this submission resembles the Lord Advocate's first argument, and for similar reasons we are unable to accept it. A provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of sec 28(7) of the Act.

The suggested analogy reinforces the point. If a provision of a Bill passed by the Scottish Parliament were to prevent legislation enacted by the UK Parliament from coming into force without the Scottish Ministers' consent, that provision would undoubtedly limit the UK Parliament's power to make laws for Scotland."

Common law as limiting the Scottish Parliament's legislative competence

4.18 In *Axa General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 the UK Supreme Court held that Acts of the Scottish Parliament were also subject to a form of common law review, for breach of the rule of law and/or fundamental common law rights, in addition to review for compatibility with the express statutory limitations set out in the Scotland Act 1998. Lord Hope observed (at §§ 46-7):

> "The UK Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision-making powers have been delegated. And it does *not* enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in *R (Jackson) v Attorney-General* [2005] UKHL 56 [2006] 1 AC 262 (para 9), is the bedrock of the British constitution. Sovereignty remains with the UK Parliament.
>
> The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes. Section 29(1) declares that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

Then there is the role which has been conferred upon this court by the statute, if called upon to do so, to judge whether or not Acts of the Parliament are within its legislative competence (see section 33(1) and paras 32 and 33 of schedule 6, as amended by sec 40 of and paras 96 and 106 of sch 9 to the Constitutional Reform Act 2005 (cap 4)).

The question whether an Act of the Scottish Parliament is within the competence of the Scottish Parliament is also a devolution issue within the meaning of para 1(a) of schedule 6 to the Scotland Act in respect of which proceedings such as this may be brought in the Scottish courts.

47. Against this background, as there is no provision in the Scotland Act which excludes this possibility, we think that it must follow that in principle Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law."

4.19 And Lord Reed stated in the same case (at §§ 152-153):

"152 The principle of legality means not only that [the Westminster] Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so. As Lord Browne-Wilkinson stated in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575:

> 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect ... the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'

Lord Steyn said in the same case, at p 591:

> 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.'

153 The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *HM Advocate v R* [2004] 1 AC 462, para 121, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, para 11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted

> 'bearing in mind the values which the constitutional provisions are intended to embody'.

That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. *That being so, [the Westminster] Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law*."

5. ASSESSMENT OF THE *IMPACT* OF THE SCOTTISH GOVERNMENT OR PARLIAMENT LEGISLATING IN ACCORDANCE WITH THE EXPERT GROUP'S RECOMMENDATIONS

5.1 The Expert Group's recommendations undoubtedly involve proposals for radical changes in the current law and a marked expansion in the powers of the State; indeed they are fundamentally *illiberal* in intent.

5.2 This is because in order to stigmatise and change what the Expert Group's members clearly regard to be *morally* objectionable behaviours and attitudes ("conversion practices") the Expert Group recommends a new use of, in particular, the criminal law.

5.3 The Scottish authorities are called upon by the Expert Group to use the full weight of the State's coercive powers of expropriation, incarceration and humiliation (what Max Weber termed the State's claim to a "monopoly" on the "legitimate use of violence" to vindicate its rule) against individuals and associations in Scotland deemed guilty - even at an individual's request, or with their consent – of performing, offering, promoting, authorising, prescribing or arranging for *any* treatment, practice or effort that is deemed to be *aimed* at changing, suppressing and/or eliminating that person's sexual orientation, gender identity and/or gender expression.

5.4 Further, this new criminal offence is recommended by the Expert Group to be one of strict liability – which is to say that there is no need for any criminal intent in order for persons to be found guilty of it. [51]

5.5 And – apparently drawing an analogy with the criminalisation of female genital mutilation and separately, of domestic violence – the Expert Group recommends that there be no defence of "consent" on the part of the deemed "victim" to any criminal charge of others' involvement in performing, offering, promoting, authorising, prescribing or arranging for any "conversion practice". Instead, the State - seemingly exercising a paternalistic guardianship role even over, and in respect of, non-vulnerable adults otherwise of full capacity – is requested to deem it to be *impossible* for *any* person to be able to give their

[51] In *Pwr v. Director of Public Prosecutions* [2022] UKSC 2 [2022] 1 WLR 789 per Lady Arden, Lord Hamblen, and Lord Burrows (with whom Lord Lloyd-Jones and Lady Rose agreed) at § 57

> "[S]trict liability offences almost inevitably have unfortunate consequences for what have been termed 'luckless victims' (see the discussion in *Nurse v Republic of Trinidad and Tobago* [2019] UKPC 43 [2021] AC 1, §§ 41-44). And if there are harsh but unlikely consequences, that are not resolvable in practice by prosecutorial discretion, we regard that as an insufficiently strong reason to override the reasons we have set out above for why section 13(1) should be interpreted as imposing strict liability."

consent to *any* treatment, practice or effort that is deemed to be *aimed* at changing, suppressing and/or eliminating that person's sexual orientation, gender identity and/or gender expression.

5.6 The Expert Group seems to brush aside issues around the fact that questions as to the proper place for the expression of sex and sexuality, and questions around gender identity and gender expression are matters of ongoing controversy and contention within Scotland.

5.7 It is clear, for example, that certain women's groups which might be loosely described as Gender Critical Feminists have expressed serious concerns around the issue of "gender recognition". [52] And, separately, many mainstream traditional religious groups – whether

[52] See for example *Forstater v. CGD Europe* [2022] ICR 1, EAT and *Fair Play for Women v. Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199

in Islam,[53] Judaism[54] or Christianity[55] or other faiths – hold to and affirm positions on the expression of sexuality and/or gender identity/gender expression and/or marriage[56]

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[53] See e.g. *Birmingham City Council v. Asfar* [2019] EWHC 3217 (QB) [2020] 4 WLR 168 per Warby J at para 38:

> "38 It was in support of this part of their case that the defendants called from Imam Masroor. The Imam expressed a number of opinions about aspects of the School's conduct, all of which were based on hearsay and which, in my judgment, are issues for me to determine. His principal remit was to provide expert evidence as to Islamic doctrine and teaching. His report did however correctly identify the nature of the issue at the centre of the debate as "whether schools should be teaching young children of primary school age about the different types of relationship that exist in the UK today, including homosexuality as a valid form of family relationship". He said, "there is no simple answer to this question". He set out to identify the Islamic approach to sex and sexuality, and its inter-relationship with teaching. The following aspects of the Imam's evidence on those issues were not disputed. "A Muslim can have homosexual, bisexual or transsexual thoughts or tendencies" but they commit grave sins if they translate their thoughts into sexual acts. There is "no room for … kinds of sexual relationship" other than the heterosexual, which is "the moral absolute in Islam." In Islam, "standing up against wrong is a religious obligation". His evidence was that "equality should not be confused with sexuality" and "certainly should not be taught as only a sexual act and the promotion of casual sexual behaviour". The principle that, in his opinion, "should form the bedrock for teaching human relationship" is one that he identifies as clearly stated in the Quran: "everyone is born with inalienable right to dignity, honour and respect regardless of their background."

[54] See e.g. *In re A (Children) (Contact)* [2017] EWCA Civ 2164 [2018] 4 WLR 60 pe Sir James Munby P at para 16:

> "16 Also of importance, as we shall see, in influencing the judge's thinking, was the evidence of Rabbi Andrew Oppenheimer (paras 90–102). This part of the judgment requires to be read in full. Here we merely quote the salient passages. First at paras 91–92:
>
> > "91. Rabbi Oppenheimer describes Charedi communities as 'warm, close-knit and supportive communities for which the teachings of Torah Judaism guide all aspects of their lives … The teachings of the Torah also highlight integrity, respect for others, peace and justice (including respect for the law of the country) and place the family and its welfare at the heart of life … Allegiance to the lifestyle … means of necessity that members have traditional values and seek to guard their children and themselves against what they regard as the dangers and excesses of modern open society.'
> >
> > "92. Rabbi Oppenheimer was clear that transgender and procedures to achieve sex change violate a number of basic principles in Torah Law, including the prohibition against castration (Leviticus 22.24) and the prohibition against wearing garments of the opposite sex (Deuteronomy 22.5)."

[55] See e.g. *R (Cornerstone) v. OFSTED* [2021] EWCA Civ 1390 [2022] PTSR 595 as noted per Peter Jackson LJ (at paras 20-22):

> "20 Cornerstone's foundational purpose is to recruit evangelical Christian foster carers. Its charitable objects are 'to provide a high quality adoption and fostering child care service according to Christian principles'. It believes that by encouraging members of that community to be foster carers and by supporting them (practically, emotionally and spiritually) in caring for a child, Cornerstone and its recruits manifest their love of God and their Christian faith. The basis for its recruitment policy is set out in its Memorandum and Articles of Association at clause 5:
>
> > "The policy of the Charity shall be to restrict employment by the Charity and acceptance of any application to foster or adopt children through the charity to evangelical Christians being those:
> >
> > > (a) who shall have first signed the Statement of Beliefs set out in the Schedule hereto and
> > >
> > > (b) whose personal lifestyle conduct and practice is consistent with the practice of the Statement of Beliefs set out in the Schedule hereto and traditional Biblical Christian standards of behaviour as set out by the trustees in their Code

which would be at odds with the liberal consensus position expressed by the Expert Group's Report which, in their Recommendations, they wish to see enforced by the criminal and civil law. [57]

> of Practice issued from time to time and who shall have first signed the said Code of Practice at the commencement of their employment or in the case of foster carers or adoptive applicants at the time of their initial application."
>
> This is the present form of clause 5, the provision having been amended in April 2007 to bring the requirements for foster carers into line with those for Cornerstone's staff. That alteration was approved by the Charity Commission and registered with Companies House.
>
> 21 The Code of Practice mandated by clause 5 is in these terms:
>
> > "As Cornerstone is a Christian organisation it is expected that all carers conduct themselves in a manner that will give proper expression to faith in Jesus Christ as Lord. This Code of Practice presents a brief summary of biblical teaching regarding Christian lifestyle and morality.
> >
> > The Bible, as the revealed Word of God, shall be the final authority in such matters.
> >
> > The Trustees will seek to give proper regard to the place of grace and forgiveness within a Christian organisation but they will also give proper regard to their duty to ensure that Cornerstone presents a consistent Christian witness. There is an expectation on all Cornerstone carers to:
> > ...
> > 10. Set a high standard in personal morality which recognises that God's gift of sexual intercourse is to be enjoyed exclusively within Christian marriage; abstain from all sexual sins including immodesty, the viewing of pornography, fornication, adultery, cohabitation, homosexual behaviour and wilful violation of your birth sex. (1 Cor 12:23; 1 Cor 6:12–20; Eph 4:17–24; 1 Thes 4:1–8; Rom 1:26–27; 1 Tim 1:9–11; Gen 1:27; Deut 22:5)
> >
> > 11. Give proper regard to the laws of the land. (Rom 13:1–7)"
>
> The prospective carer then signs this declaration:
>
> > "As long as I am a carer for Cornerstone (North East) Adoption and Fostering Service I agree to maintain the Christian ethos of the organisation by accepting the above code of practice."
>
> 22 The issue in this case concerns the lawfulness of the requirements in clause 10 that sexual intercourse is to be enjoyed exclusively within Christian marriage and that carers should abstain from homosexual behaviour."

[56] See, for example, the position of the Church of England as recorded in *Pemberton v. Inwood* [2018] EWCA Civ 564 [2018] ICR 1291 per Asplin LJ at §§ 63, 64:

> "63. .... [T]he Church of England considers marriage to be between one man and one woman. By its very terms it delimits the concept of marriage in accordance with the teachings and doctrine of the Church in a way which excludes same sex marriage....64. .... [T]he Church of England does not accept same sex marriage as 'marriage' for its purposes at all. ... [M]arrying someone of the same sex would be at variance with the teachings of the Church of England."

[57] Cf Sales J as he then was, in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No 2)* [2012] UKUT 395 (TCC) [2013] 1 WLR 2105 at para 45

> "45. ... [W]here third party donors are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Roman Catholic Church (and particularly where, as here, their activities do not dominate the public sphere in relation to the activity in question - provision of adoption services - which are otherwise widely available to homosexuals and same sex couples), the position is rather different. In my opinion, donors motivated by respect for Roman Catholic doctrine to have a

5.8 One effect (and the apparent intent) of the Expert Group's recommendations would be to criminalise, among other things, the open expression of such orthodox traditional religious beliefs that sexual activity is only properly permissible within the bounds of an opposite sex marriage if said with a view to encouraging another to *refrain* from same-sex sexual behaviour. To fall foul of the law, it would need to be proved that the person intended the treatment, practice or effort that took place, but there would not be any requirement to show that harm was intended (or indeed that any actual harm resulted).

5.9 The aim of the Expert Group's proposals is to outlaw all and any religious pastoral care, or parental guidance, or advice or medical or other professional intervention relating to sexual orientation, expression of sexual orientation, gender identity and/or gender expression *except* that which is deemed by the State to constitute "affirmative care" in:

> "providing a safe space for someone to explore their sexual orientation, expression of sexual orientation, gender identity and/or gender expression in a safe and non-judgmental way; providing support and understanding in helping with self-acceptance; facilitating coping skills and social support or assisting someone who was undergoing or considering undergoing gender reassignment". [58]

5.10 Were the Scottish Government to adopt the Expert Group's recommendations and legislation were introduced and passed to give effect to them by the Scottish Parliament, this would have the undoubted effect of criminalising much mainstream pastoral work of churches, mosques and synagogues and temples. Prayers and sermons would be criminalised if their content did not conform to the new State requirements only to affirm, validate and support the identity and lived experience expressed and stated by an individual (but never to question or raise concerns about an individual's expression of their sexuality, or their assertion of a "gender identity" or "gender expression" different from that associated with their birth sex).

5.11 The recommendations if acted upon would also criminalise medical practitioners who express a professional opinion that it may not be in a patient's best medical interest to undergo or undertake gender reassignment.

5.12 Indeed these proposals would also criminalise parents who lovingly and in good faith and in accordance with their own best judgment and conscience seek to caution their

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> preference to support adoption within a traditional family structure cannot be equated with racist bigots, as Ms Dixon sought to suggest. Such views have a legitimate place in a pluralist, tolerant and broadminded society, as judgments of the European Court of Human Rights indicate."

[58] See Expert Group Report at page 20 "Background Note: Considerations regarding healthcare provision and other care and support"

children in relation to any stated intention to embark on "gender affirmatory"/"gender transition" treatment in respect of their currently experienced discomfort or dysphoria in relation to their sex and/or sexuality. The giving of such parental advice might result, were the Expert Group's recommendation to be followed into law, in these parents being deprived of their parental rights and/or their children removed from their care.

6. ASSESSMENT OF THE *LEGALITY* OF THE SCOTTISH GOVERNMENT OR PARLIAMENT LEGISLATING IN ACCORDANCE WITH THE EXPERT GROUP'S RECOMMENDATIONS

6.1 It may perhaps be said in defence of the Expert Group recommendations that all they are doing is recommending legislative changes in Scotland which will bring the law in this country into line with current international trends. As a Briefing Note on *Conversion Therapy* prepared for the UK Parliament by the Parliamentary Office of Science and Technology in December 2021 (Post note 658) notes:

> **"Box 3: International examples of legislation**
> A growing number of countries and legal jurisdictions have passed legislation to restrict or end Conversion Therapy (CT) for sexual orientation and gender identity. The breadth and scope of legislation and penalties varies. For example, some:
> - apply only to health professionals (including Germany, [59] Ontario, [60] Nova Scotia and Murcia [61]);
> - apply only to CT practiced with minors and vulnerable people (including Germany,117 Malta, [62] Queensland, [63] most Canadian Provinces and some US States [64]);
> - apply to any form of CT in any setting and is criminal regardless of consent (including Madrid [65] and Victoria [66]).

[59] Conversion Treatment Protection Act 2020. Germany.

[60] Affirming Sexual Orientation and Gender Identity Act, 2015. Ontario, Canada.

[61] Law 8/2016 Lesbian, gay, bisexual, transgender, and intersex social equality, and policy equality actions against discrimination on sexual orientation and gender identity in the Autonomous Community of Murcia. Community of Murcia (Spain).

[62] The Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016. Malta.

[63] Health Legislation Amendment Act 2020. Queensland (Australia).

[64] See Jowett et al. (Coventry University), A. (2021). *Conversion therapy: an evidence assessment and qualitative study* Appendix 3: Measures taken by country https://www.gov.uk/government/publications/conversion-therapy-an-evidence-assessment-and-qualitative-study/appendix-3-measures-taken-by-country

[65] Law 3/2016 Comprehensive Protection against LGTBIphobia and Discrimination for Reason of Orientation and Sexual Identity in the community of Madrid. Community of Madrid (Spain).

[66] Change or Suppression (Conversion) Practices Prohibition Act 2021. Victoria (Australia).

6.2 A European Parliament Briefing Note *Bans on conversion therapies: the situation in selected EU Member States* (June 2022) sets out the variety of approaches which have been adopted to date to these issues across the EU, noting, among other things, as follows:

"**Ban in EU Member States**

Some Member States have officially banned conversion 'therapies' on the national level, while others on the regional level. The first Member State to introduce a nation-wide ban on conversion therapy was **Malta** (2016), followed by **Germany** (2020), **France** (January 2022) and **Greece** (May 2022). While **Spain** does not have national-level legislation on the topic, a proposal was made in 2021 and there are regional-level bans in non-discrimination legislation.

...

[T]he **Spanish** regions of Navarra and Murcia have only enacted legislation for the protection of transgender and intersex persons; consequently, it does not cover sexual orientation.

...

In principle, some laws only protect minors and adults who lack legal capacity. This is the case in **Germany** and **Greece**. The situation is similar in **Malta**, where the law protects minors up to the age of 16 who have been categorised as vulnerable, as well as vulnerable adults.

The latest proposal in Ireland is also specifically aimed at protecting minors, by giving them the possibility to withdraw the consent given on their behalf. In other Member States, such as **France**, the use of conversion 'therapy' on a minor constitutes an aggravated offence.

[...]

Comparing laws as regards the possibility to give consent

The clearest distinction between the different laws is the question of whether adults can freely consent to be subject to conversion 'therapies'. **Malta, Germany** and **Greece** offer this possibility and so do the **Belgian** proposals.

Nevertheless, the majority of these laws also specify that where consent is lacking or has been given under duress, no treatment may be applied.

Comparing the entities involved in the provision of conversion therapies

With regard to the entities involved in the provision of conversion therapies, the laws use general terminology to cover non-qualified counsellors or religious groups. In addition, some laws and proposals state that the ban covers both remunerated and unremunerated services.

In some of the **Spanish** regional laws, the ban specifically addresses public health services and/or includes an article prohibiting the registration of companies providing conversion therapies.

In some countries, such as **Malta**, which allow consenting adults to undergo conversion 'therapies', professionals are prohibited from performing such practices and are subject to specific fines and other punishments (see 'Comparing sanctions' below for more detail).

One issue of special note is the involvement of person(s) holding parental authority. While most of the laws do not specifically refer to them, there are some notable exceptions. In this respect, the **German** law is quite remarkable in that it mentions

that the penalties do *not* apply to the person(s) holding parental authority unless they grossly violated their duty of care or upbringing.

Conversely, in **France**, the involvement of a direct ascendant or person holding parental authority constitutes an aggravated offence. Additionally, the French law states that 'where the offence is committed by a person holding parental authority over the minor, the trial court shall rule on the total or partial withdrawal of parental authority or on the withdrawal of the exercise of that authority'.

6.3 But the issue which I am asked to address in this Advice is not the general desirability of whether the Scottish Parliament *should* legislate to criminalise conversion practices relating to the attempt to change or suppress the outward expression or inward experience of sexual orientation and/or gender identity, but whether it would be within the legislative competence of the Scottish Parliament to do so.

6.4 The recommendations of the Expert Group go far beyond a simple restatement or codification of the relevant law which might currently be prayed in this area. Instead, the recommendations seek to innovate upon and make substantial changes to the current law. Because of this, in my view, it would be beyond the powers of the Scottish Parliament to legislate along the terms recommended by the Expert Group.

6.5 In the first instance this is because the proposed legislation outlawing conversion practices concerned with sexual orientation and/or gender identity would relevantly "relate to"

> "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions".[67]

6.6 As we have seen, Subsection 29(3) SA 1998 provides that the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection 29(4) SA 1998, by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. In *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40 Lord Hope observed at § 18:

> "The question whether a provision 'relates to' a reserved matter in terms of section 29(2)(b) SA 1998 is to be determined by reference to the purpose of the provision, applying the rule set out in section 29(3) SA 1998. This rule lays down the primary test of what is meant by 'purpose'."

[67] This is defined in paragraph L2 of Schedule 5 to the Scotland Act 1998 as being a matter reserved to Westminster.

6.7 And in *Imperial Tobacco v Lord Advocate*, 2013 SC (UKSC) 153 Lord Hope observed at § 43

> "43. .. if the provision in question has two or more purposes, one of which relates to a reserved matter. In such a situation the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence, unless the purpose can be regarded as consequential and thus of no real significance when regard is had to what the provision overall seeks to achieve …"

6.8 Subsection 29(4) SA 1998 provides that a provision which would otherwise *not* relate to reserved matters but makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters is to be *treated* as relating to reserved matters, *unless* the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. It is does not appear that Section 29(4) SA 1998 has any relevance or application in the circumstances of this case given that the aim of all these recommended legislative changes is avowedly and expressly to give *greater* protection in Scotland and under Scots law against the "conduct" which the Expert Group defines as "conversion practices" (namely "any act, treatment, or effort, whether immediate or cumulative, with a specific intent to change, suppress or inhibit someone's sexual orientation, expression of sexual orientation, gender identity, and/or gender expression") - that is to say conduct which, in principle, may qualify as discriminatory or detrimental treatment being afforded to an individual because of their EA 2010 protected characteristics of sexual orientation and/or of "gender reassignment".

6.9 Separately, as we have noted, paragraph 2 in Schedule 4 SA 1998 so far as relevant, provides (as noted by Lord Hope at § 20 in *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40) as follows:

> "2.–(1) An Act of the Scottish Parliament cannot modify [which includes amending or repealing per section 126(1) SA 1998], or confer power by subordinate legislation to modify, the law on reserved matters.
>
> (2) In this paragraph, "the law on reserved matters" means–
> (a) *any* enactment *the subject matter of which is a reserved matter and which is comprised in an Act of Parliament* or subordinate legislation under an Act of Parliament, and
> (b) any rule of law which is not contained in an enactment and the subject matter of which is a reserved matter,
>
> and in this sub-paragraph "Act of Parliament" does not include this Act."

6.10 As Lord Walker noted in *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40 at § 53:

> "[S]ection 29(2) SA 1998 is dealing comprehensively with the scope of *any new legislation* enacted by the Scottish Parliament, whereas schedule 4 SA 1998 is (as its heading indicates) concerned with *the protection of some existing legislation* (or some non-statutory rule of law) which has a reserved matter as its subject-matter."

And Lord Rodger in the same case observed at § 122 as follows:

> "Section 29(3) and 29 (4) SA 1998 focus on the provision which is being enacted and on its purpose. By contrast, paragraph 2 of Part I of schedule 4 SA 1998 focuses on the rule of law that is being modified by the enactment *and makes no mention whatever of the purpose of the modification*."

6.11 In *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, 2019 SC (UKSC) 13 the court observed at § 51:

> "51. … When the UK Parliament decides to reserve *an entire area of the law to itself*, it does so by listing the relevant subject matter in Schedule 5.
>
> When it has *not* taken that step, but has protected a particular enactment from modification by including it in Schedule 4, it is *not* to be treated as if it had listed the subject matter of the enactment in Schedule 5.
>
> Where the *only* relevant restriction on the legislative power of the Scottish Parliament is the protection of an enactment from modification under Schedule 4, *the Parliament has the power to enact legislation relating to the same subject matter as the protected enactment, provided it does not modify it*.
>
> Without attempting an exhaustive definition, a protected enactment will be *modified* by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one."

6.12 The present case *is* dealing with a situation in which the UK Parliament has reserved "an entire area of the law to itself …. by listing the relevant subject matter in [paragraph L2 of] Schedule 5 SA 1998". Following the above analysis of the UKSC in *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* this means that any provision of legislation of the Scottish Parliament which even purports simply to make additional provision in the same field of law as "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions" will be not law as outside the Parliament's legislative competence.

6.13 Had the Equality Act 2010 simply been listed among the protected enactments listed in Schedule 4 SA 1998, then such "additionality" of provision (which was otherwise

consistent with the scheme of the EA 2010) *might* have been within the Scottish Parliament's legislative competence, provided that it did not attempt any express or implied amendment or repeal of any of its provisions. But the Schedule 4 SA 1998 restrictions on legislating in and for reserved matters are *not* the relevant provisions at issue in the present case which is focussed, instead, on the reservation contained in paragraph L2 of Schedule 5 SA 1998.

6.14 The very purpose of the Expert Group's recommended legislative changes, on its own analysis, are to outlaw practices which may be experienced as detrimental and certainly perceived as discriminatory against individuals who identify as lesbian, gay, bisexual, and/or as trans/gender non-conforming. As such, any such legislation would be in breach of the restriction on the Scottish Parliament's legislative competence set out in Section 29(2)(d) SA 1998 when read with paragraph L2 of Schedule 5 SA 1998.

6.15 Further and in any event the effect of this legislation, if passed, would among other things change and extend the existing EA 2010 prohibition against harassment (which is to say "*unwanted* conduct related to a relevant protected characteristic"). And while the provisions of the EA 2010 are not themselves reserved matters, as the Second Division noted in *For Women Scotland Ltd. v. Lord Advocate* [2022] CSIH 4, 2022 SC 150 at § 28: "the 2010 Act is the *manifestation* of how equal opportunities law is applied in Great Britain". Accordingly legislating in Scotland to make provision the effect of which is to change the scope of the current equal opportunities law's prohibition against harassment – for example so as to cover not just *unwanted* conduct related to gender reassignment (which conduct has the *purpose or effect* of violating another's dignity, *or of* creating an intimidating, hostile, degrading, humiliating or offensive environment for that person) but also such conduct which has been consented to - would be beyond the legislative powers of the Scottish Parliament. Further, legislating for these proposals would also have the effect of purporting to remove or modify current exclusion or carve out in the EA 2010 from anti-harassment duties because of "sexual orientation" and/or because of "gender reassignment" being imposed in the sphere of education on schools in relation to pupils and/or students.

6.16 In addition, it is clear as we have noted above that many of the Expert Group's proposed changes in the law generally would impact upon the Convention rights of individuals and organisation – from the rights to respect for individual personal autonomy and respect for family life protected by Article 8 ECHR, to the religious freedom rights protected by Article 9 ECHR, the free expression rights covered by Article 10 ECHR, the

freedom of association and assembly guaranteed under Article 11 ECHR, and the right of parents under Article 2 of Protocol No. 1 ECHR to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions.

6.17 I do not expand on the Convention rights issues in the present advice but simply refer to and endorse what was said in this regard in the April 2021 written Advice to The Christian Institute by Jason Coppel KC and Rupert Paines both of 11kbw who note as follows (at para 35):

> "(1) The relevant beliefs of the Institute regarding sexual relations, sexual orientation and gender identity are protected by Article 9(1) ECHR. These beliefs must be treated by the State with neutrality and impartiality. Adherents to those beliefs are entitled to practise them and to maintain discipline within their church organisations according to those beliefs. Legislation which prevented them from doing so would be likely to be incompatible with Convention rights.
>
> (2) Christians who hold these beliefs are, in principle, entitled to seek to persuade others to adhere to them. Legislation may only prevent such activities in two circumstances. First, where they amount to "improper proselytism", that is, the application of improper or undue pressure or coercion, or abuse of power, including where the mental state of the individual requires special protection. Second, where the "persuasion" falls outside the bounds of freedom of expression because it consists of the spreading, incitement, promotion or justification of hatred based on intolerance.
>
> (3) There are, accordingly, only limited circumstances in which the expression of Christian beliefs to a consenting adult, with a view to suppressing or changing their behaviour, could be prohibited compatibly with Convention rights. There is greater scope for prohibiting such conduct when directed at minors, even where it appears consensual, simply because minors (as a category) are more vulnerable to improper pressure or abuse of power than adults (as a category). However, the position is likely to differ depending upon the age and maturity of particular individuals. The law presumes that 16 and 17 year olds are competent to give consent to medical treatment, which is a significant indicator of respect for their autonomy and capacity; many younger teenagers will also be "Gillick competent" for the purposes of consent to medical treatment. Further, the general consideration that children "demonstrate increased maturity and independence as they grow older" is relevant to the level of protection that is required of children at different ages: *R (Just for Kids Law) v SSHD* [2019] 4 WLR 97, §71.
>
> (4) There are additional barriers to the legality of prohibiting the expression of Christian beliefs within the family, by parents to their children. The general position of the law, given the right to respect for private and family life, is that "[w]ithin limits, families must be left to bring up their children in their own way" (*Christian Institute v Lord Advocate*, §73). The intervention of the state in the actions taken by parents in relation to their children could only be justified where parental action harms or would harm the health and development of a child (§74, citing *Neulinger v Switzerland* (2012) 54 EHRR 31). Against that background, a legal prohibition on parents expressing their religious beliefs to their children, with a view to fostering beliefs and behaviours in their children, seems to us to be highly problematic and unlikely to be compatible with Article 8, 9 and 10 rights. (We recall that this Advice is not concerned with extremes of parental behaviour, amounting to physical or psychological abuse of children, which is prohibited by the existing law).

(5) The imposition of criminal sanctions for the expression of religious beliefs to others is particularly difficult to justify in Convention terms. We would not say that criminal sanctions can only be justified where such expression amounted to incitement to hatred. That principle has been expressed in the context of public expression (see §33 above) and there are other cases where the ECtHR has upheld convictions for (e.g.) improper proselytism conducted in private. Undoubtedly, however, a regime which imposes criminal penalties will be more difficult to justify, and the more serious the penalty the more onerous will be the burden of justification."

6.18 I have nothing more to add at this stage. I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor and client. Those instructing me should not hesitate to revert to me if there is anything arising from the above on which I might usefully further advise, whether in writing or at a consultation.

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