THE CHRISTIAN INSTITUTE
SCOTLAND

Banning ‘conversion therapy’ in Scotland

Summary and extracts of the written legal opinion of Aidan O’Neill KC

DECEMBER 2022



Foreword

The Christian Institute commissioned written legal advice from Aidan O'Neill KC in December 2022. This booklet offers a summary and extracts of the legal opinion received.

His opinion outlines serious flaws in the recommendations of the Scottish Government's Expert Advisory Group.

The Expert Group's Report does not consider the current law in this area. As such its recommendations for changes to the law are dangerously divorced from relevant legal considerations.

The Opinion is clear that the Expert Group's recommendations would, if carried forward by the Scottish Government, go beyond the legislative powers of the Scottish Parliament. Such legislation would also be incompatible with human rights legislation.

The Scottish Government cannot legislate in this way.

Direct quotations from Aidan O'Neill's legal opinion are in *blue italics*. Paragraph numbers are references to the full opinion available at *the.ci/CTopinion*



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1. Background

The Scottish Ministers' Programme for Government 2021-22 was published in September 2021. In it, the Government said it would bring forward legislation to ban conversion therapy "that is as comprehensive as possible within devolved powers by the end of 2023, if UK Government proposals do not go far enough".[1]

In November 2021, the Scottish Government announced it would establish an 'Expert Advisory Group on Ending Conversion Practices' to make recommendations of necessary changes to law and policy. Members were appointed to that group without any formal process, and it appears only those in support of a broad ban were included.

The 'Expert Group' published a Report with recommendations for the Scottish Government in October 2022.[2]

1. *A Fairer, Greener Scotland: Programme for Government 2021-22*, Scottish Government, September 2021, page 50
2. *Expert Advisory Group on Ending Conversion Practices Report and Recommendations*, Scottish Government, October 2022



2. Expert Group's Report

The Expert Group defines 'conversion practices' as:

> "any treatment, practice or effort that aims to change, suppress and/or eliminate a person's sexual orientation, gender identity and/or gender expression".[3]

The Expert Group recommends that intentionally performing, offering, promoting, or referring a person for such practices be criminalised. It says no exceptions, including a person's consent, should be made.

3. *Ibid*, page 17



Ignores existing law

Aidan O'Neill says: *The Expert Group's 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.* (Para 3.1)

So, for example, the Expert Group says: "Conversion practices can also violate the prohibition of torture, cruel, inhuman and degrading treatment."[4]

But subjecting someone to "torture or to inhuman or degrading treatment or punishment" *already constitute[s] criminal conduct in Scotland.* (Para 3.5)

Likewise, the Expert Group recommends ensuring "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".[5]

But *[a]t 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.* (Para 3.10)

4. *Ibid*, page 3
5. *Ibid*, page 53



3. The Impact

"illiberal in intent"

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. (Para 5.1)

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. (Para 5.2)

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. (Para 5.3)



"matters of ongoing controversy"

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. (Para 5.6)

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". And, separately, many mainstream traditional religious groups – whether in Islam, Judaism or Christianity or other faiths – hold to and affirm positions on the expression of sexuality and/or gender identity/ gender expression and/or marriage 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. (Para 5.7)



"criminalise… traditional religious beliefs"

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. (Para 5.8)

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). (Para 5.8)

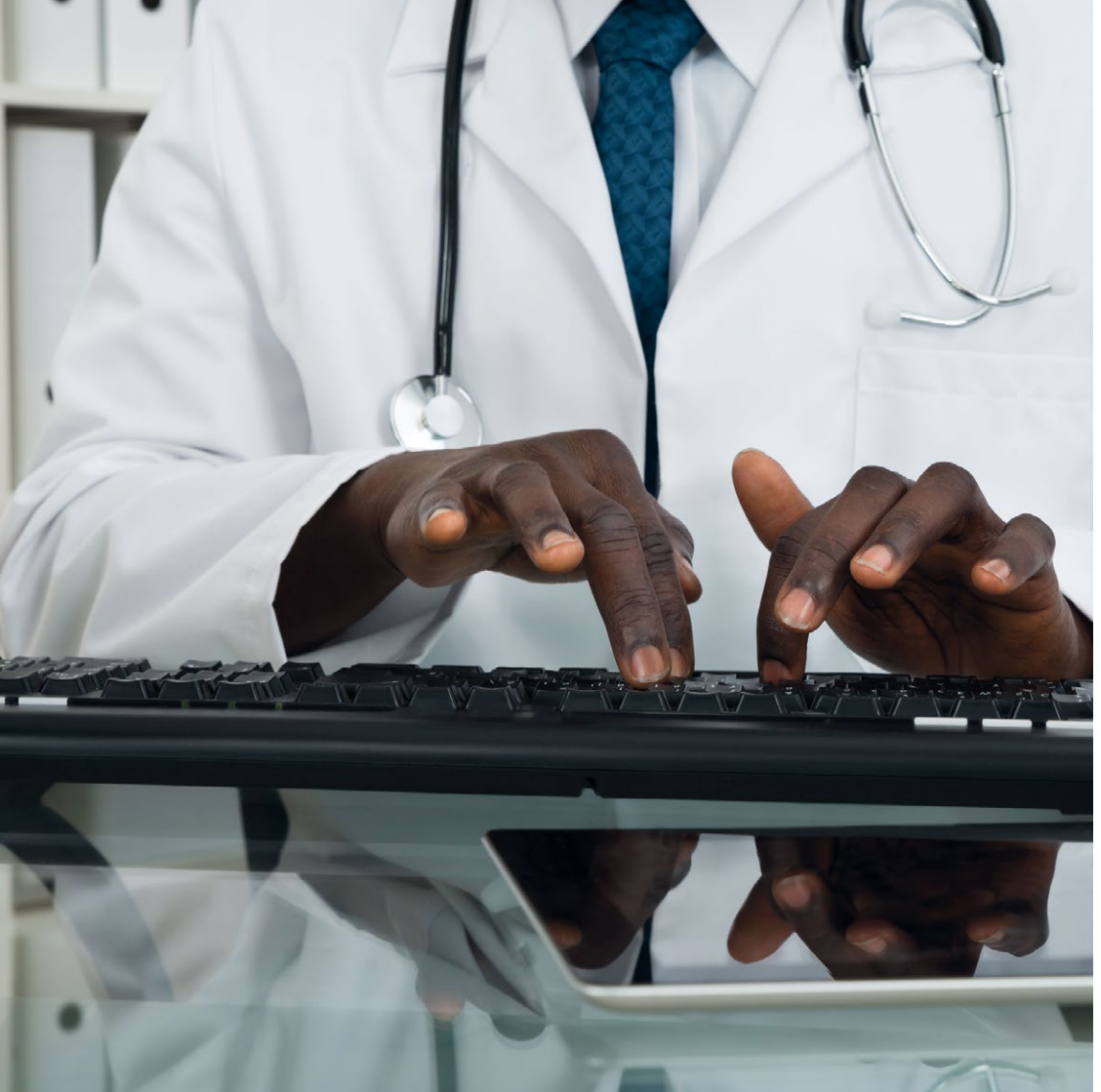
The aim of the Expert Group's proposals is to outlaw all and any religious pastoral care, or parental guidance, or advice or medical or other professional intervention relating to sexual orientation, expression of sexual orientation, gender identity and/or gender expression except that which is deemed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



"Prayers and sermons would be criminalised"

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. (Para 5.10)

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). (Para 5.10)



“criminalise medical practitioners”

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. (Para 5.11)



“criminalise parents”

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 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. (Para 5.12)

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. (Para 5.12)



4. The Legality

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. (Para 6.4)

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. (Para 6.4)

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 opinion".* (Para 6.5)



"outside the Parliament's legislative competence"

The present case is dealing with a situation in which the UK Parliament has reserved 'an entire area of the law to itself'. (Para 6.12)

...any provision of legislation of the Scottish Parliament which even purports simply to make additional provision in the same field of law as the "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. (Para 6.12)

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 [The Scotland Act 1998]. (Para 6.14)



"beyond the legislative powers of the Scottish Parliament"

Further and in any event the effect of this legislation, if passed, would among other things change and extend the existing [Equality Act] 2010 prohibition against harassment (which is to say "unwanted conduct related to a relevant protected characteristic"). (Para 6.15)

And while the provisions of the [Equality Act] 2010 are not themselves reserved matters, as the Second Division noted in For Women Scotland Ltd. v. Lord Advocate [2022] … "the 2010 Act is the manifestation of how equal opportunities law is applied in Great Britain". (Para 6.15)

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. (Para 6.15)



Impact on Convention rights

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 organisations – 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. (Para 6.16)

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… (Para 6.17)



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