Opinion of the Dean of Faculty

For The Christian Institute

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Introduction

1. I refer to Mr Webster's emails of instruction dated 26 April 2024 and 1 May 2024, and the accompanying papers.

2. The Christian Institute are concerned about the threat of a broad conversion therapy ban being legislated for in England & Wales and, separately, also in Scotland. In particular, the Institute is concerned that a broad ban without clear definitions and safeguards could restrict the ordinary, everyday work of churches and the role of parents (particularly in situations where there might be a child struggling with his or her gender identity). Advice has been taken from Aidan O'Neill KC in relation to the Scottish Government's proposals and from Jason Coppel KC in relation to proposals in England & Wales.

3. In the meantime, additional concerns have arisen as to developments on the Isle of Man. A Bill dealing with this has already received legislative approval. This is found in the Sexual Offences and Obscene Publications Act 2021, s.88 of which outlaws "conversion therapy". Section 88 came into force on 25 March 2024. The Institute wishes to explore whether it might be open to challenge.

4. At the outset, and as explained previously, I require to emphasise that I am not qualified in Manx law. I understand, however, that the PII which I hold with Bar Mutual referable to my practice as a Barrister in England and Wales does cover such advice. Moreover, as the ECHR is equally applicable to the Isle of Man as it is to the United Kingdom (as a result of the Manx Human Rights Act 2001, which is in near identical terms to the UK's Human Rights Act 1998) I feel able to offer a view.

5. Nevertheless, there are procedural specialties upon which I cannot comment. I have outlined these already in email discussions. In particular, specialist Manx advice would be required as to (a) time limits for bringing a challenge, and (b) the precise nature of the challenge that might be available. In particular, I have in mind the fact that s.6 of

the 2001 Act excludes the Tynwald from the prohibition against public authorities acting in a way which is incompatible with Convention rights, although it would still be open to the Institute to seek a declarator of incompatibility under s.4 of the same Act.

6. In what follows, I consider whether or not there is a good argument that s.88 of the 2021 Act is incompatible with Convention rights. In doing so, and as again has already been explained, I confirm that I am in large agreement with what has already been said to the Institute by Mr Coppel KC in his advice dated 29 November 2023.

Section 88

7. So far as material for present purposes, s.88 reads as follows:

> "Conversion therapy
>
> (1) It is an offence for any person to practise, or to offer to practise conversion therapy.
>
> (2) In this section, "conversion therapy" —
>
> (a) is any form of therapy which demonstrates an assumption that any sexual orientation or gender identity is inherently preferable to any other and attempts to —
>
> (i) change a person's sexual orientation or gender identity; or
>
> (ii) suppress a person's expression of sexual orientation or gender identity; but
>
> (b) does not include services which are for the purpose of assisting a person to explore, develop or affirm freely the person's sexual orientation or gender identity."

8. The section goes on to explain that Guidance may be issued, but none has been issued thus far. It concludes by providing for sanctions of up to two years' imprisonment.

9. Section 88 is in very similar terms to Article 1 of the Private Member's Bill which was introduced in the House of Lords on 20 November 2023 and which was the subject of consideration in the Advice of Mr Coppel KC. The only differences are as follows:

    a. Whilst the Bill defines "conversion therapy" as "any practice aimed at a person or group of people", s.88 defines it as "any form of therapy".

    b. Whilst the Bill criminalises practices which have "the intended purpose of attempting to" change or suppress, s.88 strikes at therapy which "attempts" to change or suppress.

c. The Bill has no proviso equivalent to that found in s.88(2)(b), which exempts from its reach "services which are for the purpose of assisting a person to explore, develop or affirm freely the person's sexual orientation or gender identity".

10. The combination of these factors means that the scope of s.88 is narrower than that found in the Bill. "Therapy" is not defined in the Act, and would be given its usual meaning of treatment of some sort; and the proviso would be of some assistance to general counselling services which might otherwise be concerned about engaging with those questioning their sexual orientation or gender identity. Moreover, I do not consider that the difference highlighted at §9.b above is material: both the notion of having "the intended purpose of attempting to" change or suppress and the notion of "attempting" to do so seem to me to import a requirement of intent.

11. Nevertheless, clearly there are a number of instances in which s.88 might be engaged, and the question is whether that brings in an incompatibility with Convention rights – in particular, the right to the manifestation and practice of core Christian beliefs within the family and within Christian churches.

12. The Institute is a non-denominational charity established for the advancement of the Christian faith and education, primarily in the UK, by a group of church leaders and Christian professionals. It has over 60,000 supporters throughout the UK, including some 5,434 churches and/or church ministers from almost all Christian denominations. Its religious convictions, and those of its supporters, may broadly be described as those of evangelical Christianity.

13. As has been explained by Mr Coppel KC, the beliefs of the Institute (and of its supporters) which are particularly relevant to this Opinion include that:

    a. Marriage is the lifelong and monogamous union of one man and one woman, and sexual conduct outside of marriage is sinful.

    b. Sexual acts with persons of the same sex are sinful.

    c. Gender (masculine or feminine) is not separate from the biological sex (male or female) of each person's body, but is rather rooted in, flows from, and is discovered in relation to the biological sex of each person's body.

14. The Institute does not support any efforts or practices, whether medical, psychological, or otherwise, that involve violence or coercion of a person to change

their sexual orientation or gender identity. Indeed, it would regard any such practices as abhorrent. However, the Institute is concerned that the effect of the Bill is to prohibit and criminalise the statement, teaching and practice of traditional Christian beliefs both in churches and in domestic settings, and more generally to impinge (a) upon the rights of parents and those in positions of responsibility to discuss and offer guidance upon issues of gender identity and sexual orientation; and (b) upon the ability of those interested in such issues (including those holding 'gender critical' beliefs) to discuss and dispute such matters.

"Therapy".

15. As with the Bill, the definition of conversion therapy appears to derive from the "Memorandum of Understanding on Conversion Therapy in the UK" (v2, November 2022), agreed by a number of healthcare and counselling bodies (the "MoU"). However, and as touched on already above, the Bill differs from the Act in seeking to address any "practice", whereas the latter looks only to "therapy".

16. It seems to me that this is a material distinction. The word "therapy" is not defined in the Act, meaning that one should give it its ordinary meaning – namely, "treatment intended to relieve or heal". That is perhaps underlined by the proviso, which excludes from the prohibited therapy "services which are for the purpose of assisting a person to explore, develop or affirm freely the person's sexual orientation or gender identity". Accordingly, the ambit of the Act is narrower than that proposed by the Bill, as the notion of "practice" is considerably wider than that of "therapy". The activities of the Institute – indeed, of any church – could easily fall within the ambit of "practice", but it is far less clear that it might be said to be "therapy". In particular, it may be noted that whilst the Bill looked at "any practice aimed at a person ***or group of people***", such that it could apply to conduct towards a section of the public in general, the notion of "therapy" is far more likely to require conduct targeted at an individual or at least a small group of people. I doubt that general sermonizing, for example, could be said to fall within the notion of "therapy".

17. Nevertheless, it would not seem to me to be correct to conclude that "therapy" is restricted to the activities of the medical profession. It is well-recognised that "therapy" in general can be provided by psychologists, counsellors or ministers of religion. Most notably, pastoral counselling is widely viewed as a form of therapy.

18. Accordingly, whilst the Act is narrower than the Bill, that does not seem to me to remove the Institute's concerns. Pastoral counselling would be covered by the notion

of “therapy”, and thus be struck at. The question is whether or not that is compatible with the Convention.

“Sexual orientation” and “gender identity”

19. These phrases are also not defined in the Act. I agree with Mr Coppel KC that they are likely to be defined in a similar way to the definitions found in the Equality Act. For the Isle of Man, the relevant legislation is the Isle of Man Equality Act 2017, section 13 of which defines “sexual orientation” as meaning:

> “a person’s inherent romantic or sexual attraction towards —
>
> (a) persons of the same sex,
>
> (b) persons of the opposite sex, or
>
> (c) persons of either sex.
>
> (2) For the sake of clarity, not being romantically or sexually attracted to persons of either sex is also a sexual orientation.
>
> (3) In relation to the protected characteristic of sexual orientation —
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.”

20. As for “gender identity”, this is defined in s.164(4) of the 2017 Act, as meaning:

> “a person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth”.

Attempts to change or suppress

21. As touched on already, the requirement that, before a therapy might be deemed criminal, it should “attempt” to change or suppress either sexual orientation or gender identity seems to me to impose a requirement of intent. That would of course be the default position unless the language of the Act were clearly to impose strict liability, as was made clear in the recent Advice of the Privy Council in *Nurse v Republic of Trinidad and Tobago* [2021] AC 1:

> "2. The correct approach to the interpretation of legislation of any kind when an issue arises as to the mental element for an offence is very well established. The courts presume that Parliament intended that the prosecution should have to show that the defendant knew the ingredients of the offence, and that presumption is not displaced with respect to any such ingredient unless there is clear wording to that effect or it is necessarily implicit in the language of the statute that it is displaced… The Board considers that the five-point summary of the law given by Lord Scarman, giving the advice to Her Majesty, in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, which also addresses regulatory offences, sets out the relevant fundamental principles conveniently and with great clarity:
>
> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) **there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence**; (2) **the presumption is particularly strong where the offence is 'truly criminal' in character**; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act"."

22. There is no such displacement here, and on the contrary it is difficult to see how one could "attempt" to do something without intending to do so. Accordingly, an offence is only committed under the Act if the aim of the "therapy" is to effect the prohibited change or suppression.

23. That said, there is no requirement in s.88 that any harm might result. There is no defence where the therapy is actively sought by the subject thereof. There is no restriction to "therapy" taking place in a medical or psychological context. There is no exemption for "therapy" taking place in the family home or in the context of the practice of religion.

The Convention rights

24. There is no doubt as to the importance of freedom of religious belief under the Convention. As a core part of this freedom, believers are entitled to attempt to convince others of the truth of their beliefs. In *Kokkinakis v Greece* (1994) 17 EHRR 397, a Jehovah's witness was invited into an Orthodox Christian's home and entered into a discussion with her. He was subsequently arrested, convicted and fined for proselytism contrary to Greek law. That was found to contravene Article 9 of the Convention, with the Court saying:

"[31] …freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia* , freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private' ; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching,' failing which, moreover, 'freedom to change [one's] religion or belief,' enshrined in Article 9, would be likely to remain a dead letter."

25. There are limits, of course. In *Larissis and Others v Greece* (1999) 27 E.H.R.R. 329 the same Court said:

"45… Article 9 does not, however, protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a church.

46. The Court's task is to determine whether the measures taken against the applicants were justified in principle and proportionate. In order to do this, it must weigh the requirements of the protection of the rights and liberties of others against the conduct of the applicants."

26. Likewise, in *Ibragimov v Russia* (unreported, 28 August 2018) the Court said:

"90. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected ... The Court has frequently emphasised that 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 ... The Court has also stressed that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed ... Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other..."

27. A similar approach has been seen domestically. In *Billy Graham Evangelistic Association v Scottish Event Campus Ltd* 2022 SLT (ShCt) 219, Sheriff McCormick stressed:

> "Whether others agree with, disagree with or even, as was submitted on behalf of the pursuer, find abhorrent the opinions of the pursuer … is not relevant for the purposes of this decision. This applies even where, as I heard evidence, members within the Christian community may not agree with the pursuer. The court does not adjudicate on the validity of religious or philosophical beliefs."

28. Of course, before a belief is protected it must meet the criteria explained in *Grainger plc v Nicholson* [2010] ICR 360 – in particular, it must be a belief that is worthy of respect in a democratic society. However, here we are on well-trodden ground, since:

    a. It has been held that the "the orthodox Christian belief that the practice of homosexuality is sinful" is a protected belief, in *Application for Judicial Review by The Christian Institute* [2007] NIQB 66; and

    b. A similar conclusion was arrived at regarding belief in the immutability of biological sex in *Forstater v CGD Europe* [2022] ICR 1.

29. Where that takes us is that the protected beliefs of the institute may be exercised freely, such that any state interference therewith is incompatible with the Convention, unless the interference is justified as being proportionate and necessary in a democratic society.

30. I agree with Mr Coppel KC that the importance of the freedom of religious belief is such that an interference, by way of imposition of criminal sanction, is unlikely to be justifiable save in extreme circumstances, such as where there is the application of improper or undue pressure or coercion, or abuse of power; or 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.

31. Section 88, however, goes far beyond this. As touched on above, s.88 would be contravened where an individual, concerned at their feelings on questions of sexual orientation or gender identity, sought out pastoral counselling and was met with the teachings of the bible. That would be the case even where no harm was asserted by that individual; where the individual consented to and welcomed the pastoral counselling; where the counselling avoided intolerance and instead involved expressions of respect for alternative viewpoints; and where the counselling applied

no pressure or coercion and merely recited teachings of scripture. Such a situation would, in my opinion, amount to a clear and unjustifiable contravention of Art 9.

32. The question then is whether s.88 could be "read down" in such a way as to avoid that result. The 2001 Act contains (at s.3) a similar provision to that found at s.3 of the Human Rights Act 1998. The former provides:

> "3(1) So far as it is possible to do so, Acts … must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section —
>
> (a) applies to Acts … whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible Act…"

33. The analogous provision in the 1998 Act was recently considered by the Supreme Court in *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12. Lady Simler, giving the judgment of the Court, said:

> "92. Section 3 requires that, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with rights guaranteed under the Convention. In other words, the courts are required to interpret primary legislation to comply with Convention rights unless the legislation itself makes it impossible to do so.
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> 93. The approach to section 3 is well established and not controversial on this appeal. As it was described by Lord Reed (with whom Lords Hodge, Lloyd-Jones, Sales and Stephens agreed) in *In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 at paras 25 and 26:
>
> > "25. Section 3 of the Human Rights Act was interpreted in *Ghaidan v Godin-Mendoza* as imposing a remarkably powerful interpretative obligation, which goes well beyond the normal canons of statutory construction. The nature of the obligation was explained by Lord Nicholls of Birkenhead at para 30:
> >
> > > 'the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.'

Lord Nicholls added at para 32:

> 'the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.'

> 26. The House of Lords accordingly held that section 3 required, where necessary, that the courts, and other public authorities, should give to provisions in statutes, including statutes enacted subsequent to the Human Rights Act, a meaning and effect that conflicted with the legislative intention of the Parliaments enacting those statutes. ..."

94. Nonetheless, there are limits to its use and not all provisions in primary legislation can be rendered Convention-compliant by the application of section 3(1) of the HRA. While this section gives the court a powerful tool with which to interpret legislation, it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite; or as Lord Nicholls explained at para 33 in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, to "adopt a meaning inconsistent with a fundamental feature of legislation". Further, as Lord Rodger observed at para 115, "difficult questions may also arise where, even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions".

95. In *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264, at para 28, Lord Bingham referred to the cases of *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 and *Bellinger v Bellinger* as illustrating the limit beyond which a Convention-compliant interpretation is not possible and said:

> "In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110–113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: 'So far as it is possible to do so ...'. While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify."

> 102… In my judgment, the Court of Appeal was correct to hold that a Convention compatible interpretation of [the Act] is not possible and would amount to impermissible judicial legislation rather than interpretation. I recognise that section 3 of the HRA can require a court to read in words which change the meaning and the effect of the legislation to achieve a compatible interpretation. However, I do not consider that there is a single, obvious legislative solution that will ensure compliance with article 11 while at the same time maintaining an appropriate balance between the competing rights of employers and their workers in this politically and socially sensitive context. Moreover, to interpret section 146 in the way proposed by the appellant would contradict a fundamental feature of the legislation…
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> 105… seeking to interpret section 146 using section 3 of the HRA in this way, is tantamount to judicial legislation. It fundamentally alters the scope and structure of the rights conferred by TULRCA, re-drawing the balance between workers' and employers' rights. There is no formulation that does not involve making a series of policy choices that may have far-reaching practical ramifications. This goes beyond the permissible boundary of interpretation…
>
> 108… Even when interpreting legislation using section 3 of the HRA, the courts cannot and should not ignore the internal coherence of the legislation concerned. Where the new interpretation involves a significant departure from a fundamental feature of the primary legislation concerned, giving rise to possible ramifications that the court is ill-equipped to evaluate, the limits of section 3 are reached, and a Convention-compliant interpretation is not possible."

34. Adopting that approach, it seems to me that there are difficulties in arguing that a Convention-compatible reading of s.88 is possible. It would require a fundamental re-writing of the statutory language. Whilst that is permissible under s.3, any re-write that would recognize the Convention restrictions as discussed at §30 above would "involve a significant departure from a fundamental feature of the primary legislation concerned, giving rise to possible ramifications that the court is ill-equipped to evaluate". It would go against the grain of the prohibition introduced by s.88.

35. In these circumstances, I consider that there is a good argument that, whilst narrower than the approach advocated in the Bill (or, indeed, in the ongoing consultation referable to the same subject matter in Scotland), the prohibition contained in s.88 is incompatible with Convention rights. In the foregoing, I have concentrated on Art9 of ECHR, but similar considerations would arise under Art10 as well.

36. Whether, and if so to what extent, that might be complained of before the Manx courts at this stage is a different question on which, as previously indicated, specialist advice would be necessary.

37. I hope the foregoing is clear, and should be happy to address any queries that may arise.

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