

Hon Kris Faafoi
Minister of Justice

Proactive release – Prohibiting conversion practices

Date of issue: 28 September 2021

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	Options for prohibiting conversion practices <i>Briefing Paper</i> Ministry of Justice 18 March 2021	Some information has been withheld in accordance with section 9(2)(a) to protect privacy of natural persons.
2	Prohibiting conversion practices <i>Cabinet Paper</i> Office of the Minister of Justice Meeting date: 19 April 2021	Released in full.
3	Appendix 1: Definition scenario <i>Cabinet Paper Appendix</i> Office of the Minister of Justice Meeting date: 19 April 2021	Released in full.
4	Appendix 2: Regulatory Impact Statement <i>Cabinet Paper Appendix</i> Ministry of Justice Meeting date: 19 April 2021	This document is available at: www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments and www.justice.govt.nz/justice-sector-policy/publications
5	Prohibiting Conversion Practices <i>Cabinet Committee Minute [CBC-21-MIN-0047]</i> Cabinet Office Meeting date: 19 April 2021	Released in full.
6	Appendix 3: Prohibiting conversion practices <i>Cabinet Paper Appendix</i> Office of the Minister of Justice Meeting date: 3 May 2021	Released in full.
7	Prohibiting Conversion Practices <i>Cabinet Minute [CAB-21-MIN-0142]</i> Cabinet Office Meeting date: 3 May 2021	Released in full.

No.	Document	Comments
8	Additional policy decisions for prohibiting conversion practices <i>Briefing Paper</i> Ministry of Justice 21 May 2021	Some information has been withheld in accordance with section 9(2)(a) to protect privacy of natural persons and section 9(2)(h) to maintain legal professional privilege.
9	Conversion Practices Prohibition Legislation Bill: Approval for Introduction <i>Cabinet Paper</i> Office of the Minister of Justice Meeting date: 30 June 2021	Some information has been withheld in accordance with section 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials. No public interest has been identified that would outweigh the reasons for withholding it.
10	Departmental Disclosure Statement <i>Cabinet Paper Appendix</i> Office of the Minister of Justice Meeting date: 30 June 2021	The departmental disclosure statement attached to the paper is publicly available at http://disclosure.legislation.govt.nz/
11	Conversion Practices Prohibition Legislation Bill <i>Cabinet Paper Attachment</i> Office of the Minister of Justice Meeting date: 30 June 2021	Note that the Bill provided to Ministers with this paper have been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege. The legislative instrument is publicly available from www.legislation.govt.nz .
12	Conversion Practices Prohibition Legislation Bill: Approval for Introduction <i>Cabinet Committee Minute [SWC-21-MIN-0102]</i> Cabinet Office Meeting date: 30 June 2021	Some information has been withheld in accordance with section 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials. No public interest has been identified that would outweigh the reasons for withholding it.



Hon Kris Faafoi, Minister of Justice

Options for prohibiting conversion practices

Date	18 March 2021	File reference	HUM-18-01
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Action sought	Timeframe
Indicate your preferred policy options	22 March 2021

Contacts for telephone discussion (if required)

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Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to:		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office's comments		

IN CONFIDENCE

Purpose

1. This briefing seeks direction on your preferred options for prohibiting the use of conversion practices in New Zealand. These options will be included in a Cabinet paper seeking policy decisions in April so that legislation to prohibit conversion practices can be introduced by July.

Key messages

2. In its 2020 election manifesto, the Labour Party committed to banning conversion practices in New Zealand. Conversion practices are harmful and ineffective, and can contribute to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts. They are not expressly illegal in New Zealand and continue to occur in unregulated settings.
3. This paper provides advice and options on three main issues for prohibiting conversion practices: how to define conversion practices, who should be protected by a prohibition and how, and how behaviours associated with the provision of conversion practices should be regulated.
4. A statutory definition of conversion practices needs to be broad enough to capture the practices that a prohibition is intended to target. However, it also needs to protect legitimate support by health practitioners or expressions of faith that are not harmful.
5. We have developed an indicative definition of conversion practices. This definition focuses generally on practices intended to change or suppress someone's sexual orientation, gender identity, or gender expression, rather particular practices or settings. We recommend that the definition should specifically exclude practices with a legitimate therapeutic or supportive intent.
6. We have developed three options for who should be protected by a prohibition on conversion practices and whether criminal or civil penalties should apply. Our recommended option would protect all people from the harms of conversion practices regardless of their age through either the criminal or civil law and provide a broad range of remedies.
7. We also recommend the creation of a new criminal offence for removing someone from New Zealand for the purposes of conversion practices being performed. This would ensure that it would be illegal to procure practices in an overseas jurisdiction that it would be illegal to procure or perform in New Zealand.
8. Due to the expedited timeframes for this work, we have had limited opportunity to engage with stakeholders. We have had targeted discussions on key policy issues with a range of people and groups. However, we have not conducted broader engagement, including any specific engagement on our options.

Background

Conversion practices are harmful and ineffective

9. Conversion practices are commonly referred to as “gay conversion therapy” or “conversion therapy”. They encompass a broad range of practices that seek to change or suppress a person’s sexual orientation, gender identity, or gender expression. They are motivated by a belief that any form of sexual or gender diversity is deviant and abnormal behaviour that needs to be cured, treated or reversed so that a person is ‘normal’ again.
10. Common forms of conversion practices include talk-therapy and faith-based practices such as prayer, fasting, and exorcism. At the more extreme end of the spectrum, conversion practices have included electroconvulsive therapy and hormone injections to suppress sexual desire.
11. There is no evidence that it is possible to change a person’s sexuality or gender identity. Research emphasises that conversion practices are harmful to people’s mental wellbeing and can contribute to issues such as low self esteem, depression, anxiety, and suicidal thoughts and attempts.¹ Many international and New Zealand health professional bodies have condemned the use of conversion practices in their ethics standards.

Conversion practices are not expressly illegal and continue to occur in New Zealand

12. It is not clear how widespread or frequently used conversion practices are in New Zealand today. We understand that, while they have occurred in the past, the more extreme practices described above do not happen in New Zealand today. Media reporting and survivor accounts indicate that conversion practices now largely occur in unregulated settings such as faith communities and primarily involve talk-therapy and faith-based practices.²
13. There are no explicit laws prohibiting conversion practices in New Zealand. Some forms of conversion practices fall under existing criminal offences, such as common assault. There are also protections that reduce the likelihood of conversion practices occurring in health settings, such as the Code of Health and Disability Services Consumers’ Rights. However, it is unlikely that existing laws would protect against the types of conversion practices that media reporting indicates mainly occur in New Zealand today.

¹ *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009).

² TVNZ Sunday “‘Pray the gay away’ - Homosexual conversion therapy in NZ” (18 June 2018) TVNZ <<https://www.tvnz.co.nz/one-news/new-zealand/tvzn-sunday-exclusive-pray-gay-away-homosexual-conversion-therapy-in-nz>>; Sherry Zhang “Soul-destroying: What conversion therapy in NZ looks like” (11 October 2020) The Spinoff <<https://thespinoff.co.nz/society/11-10-2020/it-was-pretty-soul-destroying-what-conversion-therapy-in-nz-looks-like/>>; Dave De Loreau “I thought I was a freak: One man’s experience with gay conversion therapy” (13 July 2018) Stuff <<https://www.stuff.co.nz/national/health/105368961/i-thought-i-was-a-freak-one-mans-experience-with-gay-conversion-therapy>>; Trinity Thompson Browne “Surviving conversion therapy as a young, Māori, takatāpui, autistic person” (17 February 2021) Re: News <<https://www.renews.co.nz/surviving-conversion-therapy-as-a-young-maori-takatapui-autistic-person/>>.

Manifesto commitment and previous advice

14. In its 2020 election manifesto, the Labour Party committed to banning conversion practices in New Zealand.
15. In December 2020, we briefed you on the historic and current use of conversion practices in New Zealand and internationally. We also briefed you on the current legal protections against conversion practices in New Zealand, recent moves to ban them in several international jurisdictions, and key considerations for ending their use in New Zealand.
16. In February 2021, you directed us to expedite the timeframe for this work so that policy decisions could be sought from Cabinet in April 2021 and legislation introduced in July 2021.

Objectives for a prohibition

17. We propose that the objectives of prohibiting conversion practices are to:
 - affirm the dignity of all people and that no sexual orientation or gender identity is broken and in need of fixing
 - prevent the harm caused by conversion practices in New Zealand and provide an avenue for redress, and
 - uphold the human rights of all New Zealanders, including of rainbow New Zealanders to live free from discrimination and harm.

Our key considerations in developing options to prohibit conversion practices

International prohibitions

18. In developing our options, we have reviewed international examples of prohibitions of conversion practices, particularly the recent legislation passed by the Australian Capital Territory and Victoria. We note that there are some limits to drawing on these examples in New Zealand. Along with their differing legal and policy contexts, there are also some key demographic differences between New Zealand and Australia, particularly in terms of ethnic makeup and religiosity.

Human rights

19. As we noted in our December 2020 briefing, the types of conversion practices occurring in New Zealand are likely to directly engage rights and freedoms in NZBORA. Depending on the specific practices, these rights may include freedom of expression, manifestation of religion and belief, and freedom from discrimination.
20. These rights and freedoms are not absolute and may be subject to justified limitations where there is a sufficiently important purpose. We also note that the status quo, which allows conversion practices to occur and cause harm largely without sanction, likely does not appropriately balance the rights and interests involved.
21. Any prohibition of conversion practices is likely to both promote and limit rights and freedoms for different groups. The right to freedom of expression, for example, could

protect both some forms of conversion practices (such as talk therapy) and the freedom to express one's identity in the form of sexuality or gender in order to fully participate in society.

22. We have carefully designed our options to account for the rights involved and to be proportionate. We have considered the behaviours to be captured by a prohibition, the kind and scale of penalties to apply for particular behaviours or persons, and the conduct and mental element required for any criminal offences. However, there remains a risk that these options may still be considered inconsistent with NZBORA once a Bill is drafted and vetted.

Criminal and civil law

23. In developing our options, we have also considered whether criminal or civil liability would be more appropriate and effective in achieving the policy objectives and particularly in achieving a more rights-consistent prohibition.
24. Criminal offences are a serious sanction to punish, deter, and denounce particularly harmful behaviour. Because conviction can result in a loss of liberty or property (imprisonment or fines), criminal offences generally set a high threshold for prohibited conduct and require the prosecution to prove the elements of the offence beyond reasonable doubt. Criminal offences are investigated by police and guilt is determined by the courts.
25. Civil actions are intended to remedy harm and prevent it from happening again. Remedies can include damages or orders that restrict the conduct of a party to the proceedings. Civil actions do not always require matters to be determined by courts or tribunals and can instead be resolved between the parties using alternative dispute resolution mechanisms. For that reason, civil actions can be more appropriate in cases that involve family or other close relationships.

Our advice focuses on three main issues

26. The structure of the remainder of this paper follows the three main questions that we consider need to be answered in determining the shape of a prohibition on conversion practices:
 - How should conversion practices be defined for the purpose of a prohibition?
 - Who should be protected by a prohibition and how?
 - How should behaviours associated with the provision of conversion practices be regulated?

Defining conversion practices

27. As we advised in December 2020, the statutory definition of conversion practices needs to be broad enough to capture the practices that a prohibition is intended to target. However, if the definition is too broad, it could capture legitimate work by health practitioners and others to support people (such as gender transition or therapy to discuss identity) or expressions of faith that are not harmful. The definition also needs to be clear as to what behaviour is illegal.

28. Consistent with most international examples, we do not recommend including a list of specific behaviours or practices within a statutory definition of conversion practices. Such a definition would not be flexible enough to respond to any changes in the nature of the practices and so would not be adequately future proof. We also note that the distinguishing characteristic of a conversion practice is not its form but its intent.
29. We have developed an indicative definition of conversion practices (**Appendix 1**) and a table mapping a range of scenarios against this definition to indicate what would and would not be captured (**Appendix 2**). We expect the exact form of the definition and any exclusions will likely be further refined during the drafting process.

We recommend a practice should meet three criteria to be a conversion practice

30. Under our definition, a conversion practice is a practice that:
- is directed towards another person
 - based on that person's sexual orientation, gender identity, or gender expression, and
 - is performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression.
31. Practices that do not meet all three criteria would not be conversion practices for the purpose of this definition.
32. This definition encompasses practices that seek both to change or suppress someone's sexual orientation, gender identity, or gender expression. We consider that if the definition only covered change efforts there might be a shift to practices that focus on suppression. Practices to suppress sexual orientation or gender identity can be just as harmful, as they can reinforce the message that someone's sexual orientation or gender identity is abnormal and in need of treatment or repair. The inclusion of suppression is not intended to prevent individuals from freely choosing to live celibate lives and refraining from sexual behaviours. However, it is intended to capture practices performed by others that seek to suppress a person's innate sexual *orientation* or gender *identity*.
33. The definition would not distinguish between practices occurring in health and more informal settings, including practices that occur in faith settings. We consider there would be no justification for such a distinction. As we briefed you in December 2020, most conversion practices in New Zealand occur in unregulated settings and can cause harm regardless of the setting.
34. The requirement for a practice to be "directed towards another person" is intended to exclude general expressions of religious beliefs or tenets about sexual orientation and gender issues, such as sermons. These general expressions may still be harmful and have the intention of changing or suppressing sexual orientation or gender identity. However, they are likely to cause less harm than practices that are specifically targeted toward a person.
35. We considered whether the definition should include a statement that a practice is a conversion practice whether or not the recipient consented. Victoria's definition

includes such a statement, following strong representations from survivors there that it is impossible to offer informed consent to conversion practices due to the pressure and false claims that underly their provision. We consider that this issue can be adequately addressed by excluding consent as a defence for any criminal offences. For civil redress, the question of whether a person had been able to consent to conversion practices, and its relevance, would be considered when determining culpability and remedies.

A general exclusion should apply for health practitioners' professional judgement

36. It is important to ensure that health practitioners are not discouraged from offering legitimate, evidence-based support or therapy for fear of incurring liability under a prohibition on conversion practices.
37. We consider it is unlikely that such support or therapy would satisfy all three criteria of the definition of a conversion practice. However, for the avoidance of doubt we recommend that the statutory definition of conversion practices should exclude a practice of a health practitioner that, in the practitioner's professional judgement, is necessary to provide a health service or comply with the legal, professional, and ethical standards to which they are subject.
38. "Health practitioner" would have the same meaning as in the Health Practitioners Competence Assurance Act 2003 (HPCA Act). We note this would mean that counsellors would not be covered by this general exclusion, as counsellors are not regulated health practitioners under the HPCA Act.

Other legitimate practices should be expressly excluded from the definition

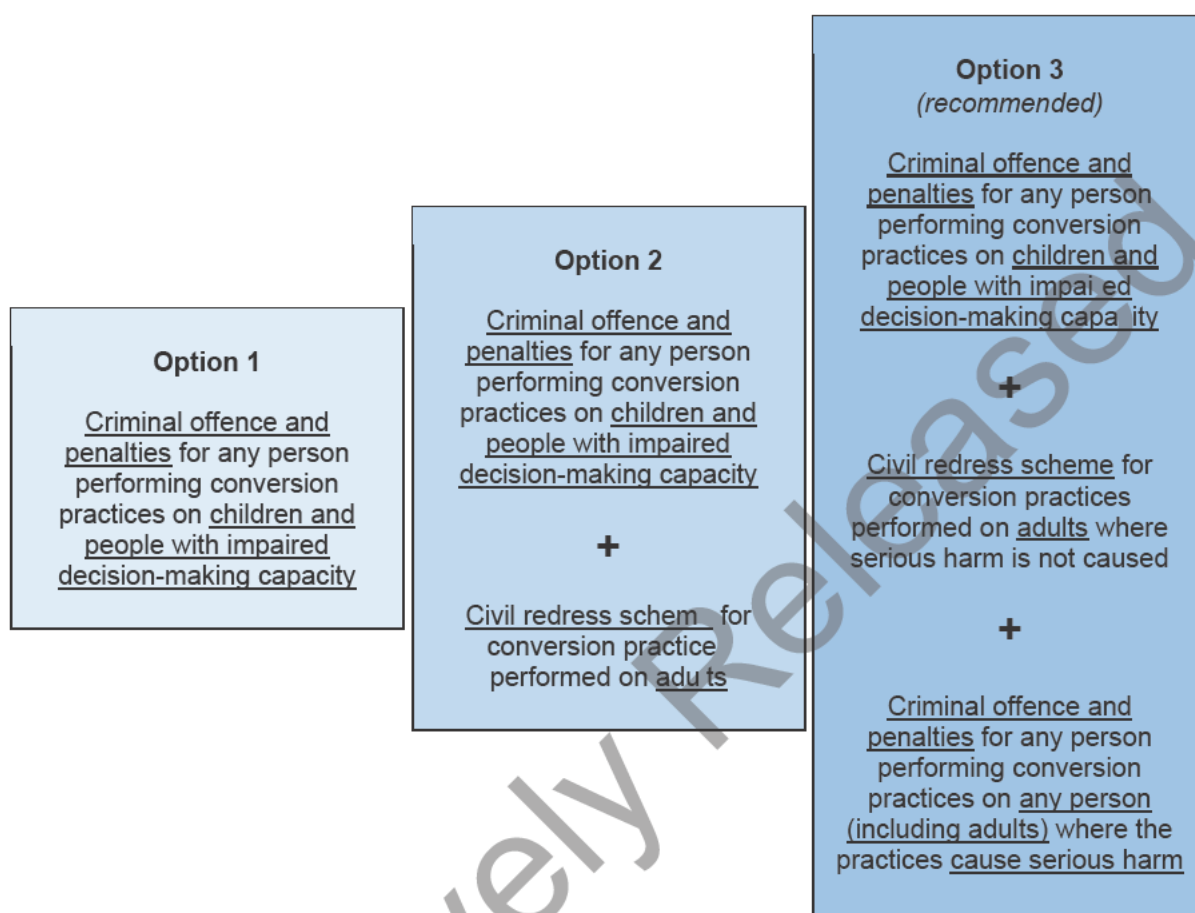
39. We also recommend that practices with a legitimate therapeutic or supportive intent should be expressly excluded from the statutory definition of conversion practices. Examples of these practices include those intended to:
 - assist a person undergoing, or considering undergoing, gender transition
 - provide acceptance, support, and understanding to a person in respect of sexual orientation, gender identity, or gender expression issues
 - facilitate a person's coping, social support, or identity exploration or development.
40. Practices performed by counsellors could fall within the scope of these exclusions, depending on the nature of the counselling provided.

The definition could clarify that expressions of religious beliefs or tenets are not captured unless they otherwise meet the definition of a conversion practice

41. As noted in paragraph 31, our proposed definition of conversion practices is not intended to capture general expressions of religious beliefs or tenets, provided they do not otherwise meet the definition of a conversion practice.
42. To make this intention clear, we consider it could be worthwhile clarifying as part of the statutory definition or as a note to the definition. We would work with the Parliamentary Counsel Office to determine the most appropriate approach.

Options for coverage and penalties of a prohibition

43. We have identified three options for who should be protected by a prohibition on conversion practices and whether criminal or civil penalties should apply.



Option 1

44. This option would create a criminal offence and penalties for any person performing conversion practices on children and people with impaired decision-making capacity.
45. We propose that the maximum penalty for this offence would be up to three years imprisonment. We consider that this penalty is proportionate to the harm that can be caused by conversion practices and the broad threshold for behaviour that this offence could capture. The penalty would act as a significant deterrent on the performance of conversion practices on children and people with impaired decision-making capacity. This penalty would sit above the maximum penalty for criminal harassment (2 years) and on par with the maximum penalty for assault with intent to injure (3 years). A comparison with other relevant penalties is attached as **Appendix 3**.
46. A “child” would be defined as a person under the age of 18 years, as this is the age at which a person becomes legally independent from their parents’ guardianship rights.
47. We would determine the most appropriate definition for a “person with impaired decision-making capacity” during drafting, including whether any existing definitions could be suitable. In general, however, the term is intended to capture people who have impaired decision-making capacity in relation their health or welfare.

Analysis

48. This option would provide protection for children and people with impaired decision-making capacity from the harms of conversion practices. This recognises that they are especially likely to be subjected to conversion practices at the request of parents or guardians and are less likely to have autonomy to refuse the practices. They are also particularly likely to suffer ongoing harm because of their developmental stage or other vulnerability. This option would provide certainty and clarity that performing conversion practices on children and people with impaired decision-making capacity is illegal in all instances.
49. While this option is likely to be the least restrictive in rights terms, we consider it is still not a proportionate response for adults. This option would not provide any additional protection or remedy for adults, even if they are harmed by conversion practices. Some adults may be willing to participate in conversion practices; this option would preserve their ability to do so. However, it would not protect other adults who may be pressured or induced to participate through false or misleading claims about the effectiveness of conversion practices. This option also does not recognise that, regardless of whether they were willing to participate in conversion practices, adults are also at risk of suffering harm.

Option 2

50. In addition to the criminal offence created by option 1, this option would utilise the Human Rights Commission's (the Commission) existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults (see discussion at para 73 below). We consider the Commission would be the appropriate body to deal with complaints about conversion practices due to its role and expertise in responding to discrimination, as conversion practices are a form of discrimination.
51. In response to a complaint concerning conversion practices being performed on an adult, the Commission would provide services to facilitate a resolution. Where resolution of a complaint is not achieved, a claim could be taken to the Human Rights Review Tribunal (the Tribunal). The Tribunal could grant a range of remedies, including:
- damages up to \$350,000
 - an order restraining a person or organisation from continuing to perform conversion practices
 - an order that a person or organisation perform specified acts to redress any loss or damage suffered.
52. Under section 5(2)(h) of the Human Rights Act 1993, the Commission would also have the power to conduct its own inquiries into conversion practices.

Analysis

53. As well as protecting children and people with impaired decision-making capacity from the harm of conversion practices through the criminal law, this option would increase protection for adults by providing civil remedies.
54. This option would preserve the ability of those adults who choose to participate in conversion practices but protect those who are pressured or induced to do so, as well as those who suffer harm. Adults would be provided with a broad range of civil remedies that could take into account the circumstances, including the family and community relationships that may exist between complainants and the performers of conversion practices. However, this option would not provide any additional protection or sanction where conversion practices cause serious harm to an adult, which might not be a proportionate response.

Option 3 (recommended)

55. As with options 1 and 2, this option would create a criminal offence to protect children and people with impaired decision-making capacity, and provide a civil redress scheme for conversion practices performed on adults.
56. In addition, this option would create a criminal offence and penalties for any person who:
 - performs conversion practices on any person (including children, adults with impaired decision-making capacity, **and** other adults) where the practices cause serious harm, and
 - is reckless as to whether serious harm would be caused.
57. This offence would be intended to capture the most egregious cases of conversion practices, regardless of whom the practices were performed on. The fact that serious harm has been caused would need to be established beyond reasonable doubt. This offence would also require a higher standard of knowledge (recklessness) to be proved than the criminal offence in option 1.
58. We propose that the maximum penalty for this offence would be up to five years imprisonment. We consider that this penalty is proportionate to the serious harm that is intended to be captured by this offence and the higher standard of knowledge required. It would act as a significant deterrent on the performance of conversion practices on all people. This penalty is on par with the maximum penalty for the Crimes Act offence of causing injury with intent to do so or with reckless disregard for the safety of others.³

Analysis

59. This is our recommended option, as it would protect all people from the harms of conversion practices regardless of their age through both the criminal and civil law, and provide a broad range of remedies. It would provide enhanced protection for

³ Crimes Act 1961, s 189(2).

children and people with impaired decision-making capacity where conversion practices result in serious harm.

60. This option would provide additional protection for adults through the criminal law. By doing so, this option might limit freedom of expression to a greater extent than other options. However, the impact of this would be offset by the imposition of a higher threshold for the offence, which would mean that serious harm would need to be proved for criminal liability to apply. This would recognise that, while some adults may choose to participate in conversion practices, they cannot consent to suffering serious harm.

Other options we considered

61. We considered but discounted:

- non-regulatory options, as it would not be possible to enforce a prohibition on conversion practices through non-regulatory means
- options that only include civil penalties, as it would not be possible to effectively prohibit conversion practices, or respond proportionately to the harm they can cause, without some criminal offences to deter their use
- options that would only capture conversion practices performed in health settings, as most conversion practices in New Zealand occur in faith-based settings and other protections already exist in health settings.

62. We also considered an option that would have the same criminal offences and penalties for conversion practices performed on all people, regardless of age. We consider that the additional criminal offence provided by option 3, which requires serious harm to be caused, is the most proportionate and rights-consistent criminal offence available that would cover both children and adults. The higher threshold for this offence recognises the increased agency of adults and that their right to receive information is being limited. However, we do not consider that this offence would adequately protect children and people with impaired decision-making capacity from the harms of conversion practices.

Regulating behaviours associated with conversion practices

63. We have also considered whether specific criminal or civil penalties are required to regulate behaviours associated with the provision of conversion practices.

Removing a person from New Zealand for the purposes of conversion practices

64. We expect that, once conversion practices are prohibited in New Zealand, there may be increased attempts to procure the practices in jurisdictions where they continue to be legal. Most international prohibitions include a specific criminal offence for removing someone from a jurisdiction for the purposes of conversion practices. The Crimes Act 1961 also contains similar offences concerning the removal of people from New Zealand for the purposes of female genital mutilation being performed.⁴

⁴ Crimes Act 1961, s 204B.

65. Some coverage for this situation may exist under the Crimes Act 1961, particularly under the provisions relating to parties to offences and, for people under the age of 16, kidnapping.⁵
66. However, for the avoidance of doubt, we recommend that a specific criminal offence for removal from New Zealand should be created. This offence and its penalties would be linked to the other criminal offences under your preferred option for coverage and penalties, so that it would be illegal to procure practices in an overseas jurisdiction that it would be illegal to procure in New Zealand.

Advertising conversion practices

67. We note that some international prohibitions, such as Victoria and Canada, include specific criminal offences for advertising conversion practices.
68. We do not know the extent to which advertising of conversion practices is a significant problem in New Zealand. We are aware of only two organisations that openly advertise the provision of conversion practices for the purpose of changing or suppressing sexuality or gender identity. However, we expect that once conversion practices have been prohibited such advertising will likely cease.
69. Accordingly, we do not recommend creating a specific criminal offence or civil penalty for advertising conversion practices at this time.

Referrals to conversion practices

70. Rather than paper- or electronic-based advertising, we understand that conversion practices in New Zealand are now primarily advertised by word-of-mouth referrals. This may involve, for instance, a church leader who refers a member of their congregation who is struggling with their sexuality or gender identity to a counsellor that performs conversion practices.
71. We consider that referrals to conversion practices where the practices are subject to criminal penalties would likely be covered by the existing provisions concerning parties to offences in the Crimes Act 1961. We would ensure that the relevant section of the Crimes Act is cross referenced in the legislation to make its application clear.
72. If you select an option for coverage and penalties with a civil redress scheme, we propose to make it clear that a civil complaint can also concern a referral to conversion practices, not just their performance. Depending on the circumstances of the particular case, this may be a more appropriate avenue for redress.

The scope of a civil redress scheme

73. We have considered what functions and powers would be necessary for the Commission under a civil redress scheme, if an option with a civil scheme is preferred. As outlined above, we are proposing to utilise the Commission's existing complaints function and other powers to respond to conversion practices.

⁵ Crimes Act 1961, ss 66, 209(c).

74. We note that there are other options for the scope of a civil redress scheme. Our proposal aligns with the ACT's civil scheme, which utilised the existing complaints process, functions and remedies of its Human Rights Commission and Civil and Administrative Tribunal. By contrast, the Victorian prohibition created a bespoke civil response scheme for conversion practices. It gave the Victorian Equal Opportunity and Human Rights Commission power to respond to allegations concerning conversion practices, investigate serious or systemic conversion practices, and powers to promote understanding of, and compliance with, the prohibition.⁶
75. Currently, we do not consider there is enough evidence of the scale of conversion practices in New Zealand to justify the creation of a bespoke civil redress scheme.

Other issues

Inclusion of sex characteristics

76. In our discussions, some stakeholders noted that there are likely to be calls for any prohibition of conversion practices to cover attempts to change or suppress sex characteristics, and particularly surgical interventions on intersex children. No international prohibitions of conversion practices have included sex characteristics.
77. We do not have a good understanding of the current scale or extent of any attempts to change or suppress sex characteristics in New Zealand. We note that, prior to 2007, some children were sent to Australia for treatment funded through a Special Fund. Between 2014 and 2019, seven children with an intersex condition underwent limited surgery to resolve specific functional problems. These cases did not involve sex assignment or re-assignment. In 2017, the Ministry of Health initiated the establishment of a Child and Youth Intersex Clinical Network to develop best practice guidelines, protocols and care pathways for intersex children up to 18 years.
78. We consider that the rationale for and potential implications of including sex characteristics within the scope of a conversion practices prohibition would need to be explored further. We note that intersex interventions involve different kinds of conduct than sexual orientation and gender identity change efforts that may, in the first instance, be more appropriately regulated in the Health context. We note that the Labour Party's 2020 election manifesto committed to developing a rights-based protocol to prevent unnecessary medical interventions on intersex children. We understand that the Ministry of Health is commencing work to give effect to this commitment. We will continue to discuss this issue with the Ministry of Health.

Support for survivors

79. Some stakeholders emphasised the importance of providing specialised support to survivors of conversion practices. We will discuss this issue with the Ministry of Health. We also expect that, if a civil redress scheme was to be created, the Commission could play a role in referring survivors of conversion practices to appropriate support services.

⁶ The Victorian civil scheme does not currently include any mechanism for redress; the question of whether it should will be considered as part of a review of the legislation two years after commencement.

Treaty of Waitangi implications

80. Pre-colonial and post-contact Māori society recognised and accepted diverse gender expressions and sexualities. The term 'takatāpui', meaning 'intimate companion of the same sex', has been adopted since the 1980s by Māori who are whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex, or queer.⁷
81. Takatāpui Māori, and particularly rangatahi takatāpui, may face discrimination based on their gender identity and sexuality. The Crown has a Treaty obligation to take positive action to reduce the disparities experienced by takatāpui Māori. Prohibiting conversion practices in New Zealand will better protect takatāpui Māori from discrimination based on their sexuality or gender identity and provide avenues for redress.

Consultation

82. Due to the expedited timeframes for this work, we have had limited opportunity to engage with stakeholders. In February, you directed us to undertake targeted discussions with affected communities on specific issues to ensure a prohibition works as intended and avoids unintended consequences. We have had discussions with faith groups, health professionals, the Commission, and academics. We have also had discussions with survivors who have experienced conversion practices in New Zealand. However, we have not conducted broader engagement, including any specific engagement on our options.
83. We have also had initial discussions with the Human Rights Commission, the Ministry of Health, Police, Crown Law Office, and the Parliamentary Counsel Office.

Implications of options

Criminal offences

84. All three options for coverage and penalties involve the creation of new criminal offences, which may have implications for Police, the courts, and the prison population. Offences carrying penalties of two years of imprisonment or more can be tried by jury which would increase the costs of prosecution. We are currently undertaking work to estimate the cost of the new offences across the justice sector and will provide further advice when this work is complete.

Civil redress scheme

85. Options 2 and 3 for coverage and penalties would create a civil redress scheme by adding conversion practice complaints to the scope of the Commission's existing complaints mechanism. This is likely to increase the demands on the Commission and the Tribunal to process and assess cases.
86. We do not know how many complaints concerning conversion practices might be made to the Commission under a civil redress scheme. We expect that there may, at first, be a larger number of complaints concerning both historic and contemporary

⁷ Elizabeth Kerekere, *Part of the Whānau: The Emergence of Takatāpui Identity* (Thesis, Victoria University of Wellington, April 2017), at 5, 82.

instances of conversion practices. We understand that, on average, dealing with one inquiry or complaint costs the Commission about \$250, while one mediation can cost \$4,000 or more.

87. We expect that the Commission may require up to \$1.5 million per year for the first two years after commencement of the Act to expand its complaints function, train staff, provide education on the prohibition and the civil redress scheme, and deal with an initial tranche of complaints. We do not consider that these initial costs could be met through the Commission's baseline funding. The pattern of demand for the scheme would inform a subsequent Budget bid for any required increase to baseline funding.
88. We have had an initial discussion with the Commission on the options and, subject to your preferred option, would work through these implications further.

Budget moratorium

89. We note that the budget moratorium on papers with financial implications going to Cabinet will begin on 12 April and run until budget day. As such, it will not be possible to seek any additional funding for the Commission alongside policy decisions.
90. If the Minister of Finance agrees, you could seek funding at another meeting of the Cabinet Social Wellbeing Committee once the moratorium is over or when the draft Bill goes to the Cabinet Legislation Committee in June. We recommend you seek confirmation of funding alongside the decision to approve the Bill for introduction. It is important that funding for the civil redress scheme is confirmed prior to the Bill being introduced to the House.
91. We will discuss this issue with Treasury to identify options. We suggest that you may also like to raise the issue with the Minister of Finance.

Next steps

92. We are available to meet with you if you would like to discuss the contents of this briefing.
93. Once you have selected your preferred option, we will prepare a Cabinet paper for you to take to the Cabinet Social Wellbeing Committee on 14 April 2021. We will provide you with a draft Cabinet paper for Ministerial and caucus consultation on 31 March 2021.

Recommendations

94. We recommend that you:

1. **Note** that, at your direction, we have carried out targeted discussions on key policy issues with a range of people and groups
2. **Indicate** any parts of the indicative definition of conversion practices (**Appendix 1**) that you would like to discuss
3. **Indicate** your preferred option for coverage and penalties:
 - EITHER**
 - 3.1. Option 1: Criminal offence and penalties for any person performing conversion practices on children and people with impaired decision-making capacity YES / NO
 - OR**
 - 3.2. Option 2: Criminal offence in option 1 **and** civil redress scheme for conversion practices performed on adults YES / NO
 - OR**
 - 3.3. Option 3: Criminal offence in option 1, civil redress scheme in option 2, **and** criminal offence and penalties for any person performing conversion practices on any person (including adults) where the practices cause serious harm (*recommended*) YES / NO
4. **Agree** to create a new criminal offence for removing someone from New Zealand for the purposes of conversion practices being performed YES / NO
5. **Agree** that a specific criminal offence for advertising conversion practices not be created YES / NO
6. **Note** that where conversion practices are criminal offences, the act of referring someone to conversion practices will be covered by the parties to offences provisions of the Crimes Act 1961
7. **Note** that, if an option with a civil redress scheme is preferred, legislation will make it clear that a civil complaint can relate to the act of referring someone to conversion practices
8. **Note** that the proposals in this paper may have financial implications and we will provide further information once we have your decisions on options to complete our analysis

9. **Note** that we will prepare a Cabinet paper for you to take to the Cabinet Social Wellbeing Committee on 14 April 2021 and provide you with a draft for Ministerial and caucus consultation on 31 March 2021
10. **Forward** a copy of this briefing to the Minister of Health.

s9(2)(a)

Jenna Reid

Policy Manager, Civil Law and Human Rights

APPROVED SEEN NOT AGREED

Hon Kris Faafoi

Minister of Justice

Date / /

Proactively Released

Appendix 1: Indicative definition of conversion practices

- (1) **Conversion practice** means a practice that:
- (a) is directed towards another person based on the person's sexual orientation, gender identity, or gender expression; and
 - (b) is performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression.
- (2) **Conversion practice** does not include:
- (a) a practice of a health practitioner that, in the practitioner's professional judgement, is necessary to:
 - i) provide a health service; or
 - ii) comply with the legal, professional, and ethical standards to which the health practitioner is subject.
 - (b) a practice intended to:
 - i) assist a person undergoing, or considering undergoing, gender transition;
 - ii) provide acceptance, support, and understanding to a person in respect of sexual orientation, gender identity, or gender expression issues;
 - iii) facilitate a person's coping, social support, or identity exploration or development.
 - (c) an expression of religious tenet or belief that is not:
 - i) directed towards another person based on the person's sexual orientation, gender identity, or gender expression; and
 - ii) performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression.

Appendix 2: Definition scenarios

	Directed towards another person	Based on the person's sexual orientation, gender identity, or gender expression	Performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression	Conversion practice?
<i>Scenario #1</i> A pastor gives a sermon denouncing homosexuality and gender diversity	×	×	×	×
<i>Scenario #2</i> In a discussion between a pastor and a member of their congregation who is struggling with their sexuality, the pastor shares their belief that homosexuality is wrong	✓	✓	×	×
<i>Scenario #3</i> In a discussion between a pastor and a member of their congregation who is struggling with their sexuality, the pastor shares their belief that homosexuality is wrong and prays with the congregant for them to be healed	✓	✓	✓	✓
<i>Scenario #4</i> The parents of a teenage who is struggling with their sexuality force the teenager to participate in an online course designed to change or suppress their sexuality	✓	✓	✓	✓
<i>Scenario #5</i> The parents of a teenager who is struggling with their gender identity react negatively and refuse to discuss it further	✓	✓	×	×

Appendix 3: Comparison of penalties

Offence	Provision	Penalties
Offensive language	Summary Offences Act, s 4	\$500
Hate speech with intention to incite hostility, ill-will, contempt or ridicule	Human Rights Act, s 131	3 months, \$7,000 (current)
Common assault	Summary Offences Act, s 9	6 months, \$4,000
Criminal nuisance	Crimes Act, s 145	1 year
Common assault	Crimes Act, s 196	1 year
Criminal harassment	Harassment Act, s 8	2 years
<i>Performing conversion practices on a child or person with impaired decision-making capacity</i>	<i>(proposed)</i>	<i>3 years</i>
Assault with intent to injure	Crimes Act, s 193	3 years
Hate speech with intention to incite hostility, ill-will, contempt or ridicule	Human Rights Act, s 131	3.5 years, \$50,000 (proposed)
<i>Performing conversion practices on any person where the practices cause serious harm</i>	<i>(proposed)</i>	<i>5 years</i>
Intent to cause injury or reckless disregard for safety of others, resulting in injury	Crimes Act, s 189(2)	5 years
Female genital mutilation	Crimes Act, s 204A	7 years
Removal from NZ for female genital mutilation	Crimes Act, s 204B	7 years
Wounding with intent to cause injury or with reckless disregard for safety of others	Crimes Act, s 188(2)	7 years
Intent to cause grievous bodily harm, resulting in injury	Crimes Act, s 189(1)	10 years
Ill-treatment or neglect of child or vulnerable adult	Crimes Act, s 195	10 years
Failure to protect child or vulnerable adult	Crimes Act, s 195A	10 years
Wounding with intent to cause grievous bodily harm	Crimes Act, s 188(1)	14 years
Kidnapping	Crimes Act, s 209	14 years

IN CONFIDENCE

Office of the Minister of Justice
Cabinet Business Committee

Prohibiting conversion practices

Proposal

- 1 This paper seeks agreement to proposals to prohibit the use of conversion practices (also known as “conversion therapy”) in New Zealand.

Relation to government priorities

- 2 These proposals will give effect to Labour’s 2020 Election Manifesto commitment to ban conversion practices. They will also contribute to several outcomes under the Child and Youth Wellbeing Strategy and the Government’s Youth Plan.

Executive Summary

- 3 Conversion practices encompass a broad range of practices that seek to change or suppress a person’s sexual orientation, gender identity, or gender expression. Research emphasises that the practices do not work and can contribute to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts. They are not expressly illegal in New Zealand and continue to occur in unregulated settings.
- 4 This paper proposes a prohibition on conversion practices with three key elements: a statutory definition of conversion practices, criminal offences and civil redress for their performance, and regulation of behaviours associated with their provision.
- 5 A statutory definition of conversion practices needs to be broad enough to capture the practices that a prohibition is intended to target while also protecting practices with a legitimate therapeutic or supportive intent.
- 6 My proposed definition focuses generally on practices intended to change or suppress someone’s sexual orientation, gender identity, or gender expression, rather than particular practices or settings. I propose that the definition should specifically exclude practices that are necessary in a health practitioner’s professional judgement, as well as other practices with a legitimate therapeutic or supportive intent.
- 7 My proposal would protect all people from the harms of conversion practices. I propose to create criminal offences to cover situations where there is either a heightened risk of harm (as in the case of children or people with impaired decision-making capacity) or where serious harm can be demonstrated to have been caused. I propose that civil redress should be available for adults where serious harm cannot be demonstrated.

- 8 I also propose the creation of a new criminal offence for removing someone from New Zealand for the purposes of conversion practices being performed. This would ensure that it would be illegal to procure practices in an overseas jurisdiction that it would be illegal to procure or perform in New Zealand.
- 9 The act of referring someone to conversion practices would be captured within the scope of the criminal offences and civil redress scheme. In addition, I am seeking the Committee's agreement-in-principle to prohibit the advertising of conversion practices, subject to receiving further advice.
- 10 I note there is a risk that some people will see these proposals as criminalising prayer or infringing on parental rights. The prohibition is intended to target practices that are harmful, regardless of their form, the setting in which they occur, or who is performing them.

Background

What are conversion practices?

- 11 Conversion practices encompass a broad range of practices that seek to change or suppress a person's sexual orientation, gender identity, or gender expression. They are motivated by a heteronormative belief that any form of sexual or gender diversity is deviant and abnormal behaviour that needs to be cured, treated or reversed so that a person is 'normal' again.
- 12 Conversion practices are commonly referred to as "gay conversion therapy" or "conversion therapy". I am using the term "conversion practices" to reflect the fact that the practices do not have any therapeutic purpose or medical basis.
- 13 Conversion practices have changed over time. At the more extreme end of the spectrum, conversion practices have included electroconvulsive therapy and hormone injections to suppress sexual desire. Common forms now include practices purporting to be talk-therapy and faith-based practices such as prayer, fasting, and exorcism.

Conversion practices are harmful and do not work

- 14 There is no evidence that conversion practices can change a person's sexuality or gender identity. Research emphasises that conversion practices are harmful to people's mental wellbeing and can be disabling, contributing to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts.¹ Parent or caregiver efforts to change an adolescent's sexual orientation, including sending them for conversion practices, are associated with multiple indicators of poor health and adjustment in young adulthood (including depressive symptoms and suicidal behaviour).² These harms can

¹ *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009).

² Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz & Stephen T. Russell (2018): Parent-Initiated Sexual Orientation Change Efforts With LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment, *Journal of Homosexuality*, DOI: 10.1080/00918369.2018.1538407.

be felt long after practices end and exacerbated when survivors experience social isolation, exclusion, or expulsion by their families or communities.³

Conversion practices are being condemned and banned internationally

- 15 In recent decades, conversion practices have become increasingly discredited and marginalised. Many health professional bodies and religious leaders both overseas and in New Zealand have condemned the use of conversion practices. In December 2020, for example, more than 400 religious leaders from over 35 countries signed a declaration calling for an end to attempts to change, suppress or erase a person's sexual orientation, gender identity or gender expression, and for the practices to be banned. I also note that, in the past decade, former leaders of international networks offering conversion practices have described them as ineffective and harmful, and apologised for the pain inflicted on so many people.
- 16 Several international jurisdictions have prohibited conversion practices in recent years, including Malta, several states in the United States, Germany, Queensland, the Australian Capital Territory (the ACT) and Victoria. Earlier international prohibitions, particularly in the United States, were limited to conversion practices performed on minors in health settings. However, more recent prohibitions – particularly those in Australia in the ACT and Victoria – apply more broadly to other settings, including faith settings, while also providing civil remedies alongside criminal penalties. I note that, because these prohibitions are so recent, there is little evidence so far of their impact or effectiveness.

Conversion practices are not expressly illegal and continue to occur in New Zealand

- 17 It is not clear how widespread or frequently used conversion practices are in New Zealand today. I understand that, while they have occurred in the past, the more physically invasive practices described above no longer happen in New Zealand. Media reporting and survivor accounts indicate that conversion practices now largely occur in unregulated settings such as faith communities and primarily involve unpaid practices purporting to be talk-therapy and faith-based practices. There is also some evidence that trans and non-binary people may still be vulnerable to conversion practices occurring in professional settings.⁴
- 18 Conversion practices target groups that are already at risk of experiencing discrimination and worse wellbeing outcomes in New Zealand. Rainbow communities experience disproportionately poorer mental health outcomes and are at increased risk of suicide than the general population.⁵

³ Timothy Jones, Tiffany Jones, Jennifer Power, Nathan Despott & Maria Pallotta-Chiarolli, *Healing Spiritual Harms: Supporting Recovery from LGBTQ+ Change and Suppression Practices* (2021) Melbourne: The Australian Research Centre in Sex, Health and Society, La Trobe University.

⁴ *Counting Ourselves*, a 2019 community-led health survey for trans and non-binary people living in New Zealand, found that 17 per cent of participants reported that a professional (such as a psychiatrist, psychologist or counsellor) had tried to stop them from being trans or non-binary.

⁵ Lucassen, M.F.G., Clark, T. C., Moselen, E., Robinson, E.M., & The Adolescent Health Research Group. (2014). Youth'12 The Health and Wellbeing of Secondary School Students in New Zealand:

- 19 Pre-colonial and post-contact Māori society recognised and accepted diverse gender expressions and sexualities. Takatāpui Māori, and particularly rangatahi takatāpui, may also face discrimination based on their gender identity and sexuality.
- 20 There are no explicit laws prohibiting conversion practices in New Zealand. The anti-discrimination provisions in the Human Rights Act 1993 are unlikely to protect against conversion practices. Some forms of conversion practices may fall under existing criminal offences, such as common assault. There are also protections that reduce the likelihood of conversion practices occurring in health settings, such as the Code of Health and Disability Services Consumers' Rights. However, it is unlikely that existing laws would protect against the types of conversion practices that media reporting indicates mainly occur in New Zealand today.

Prohibiting conversion practices will prevent harm and send a strong message

- 21 Conversion practices are ineffective, harmful, and outdated. They have no place in modern New Zealand. Prohibiting their use will:
- 21.1 affirm the dignity of all people and that no sexual orientation or gender identity is broken and in need of fixing
 - 21.2 prevent the harm they cause in New Zealand and provide an avenue for redress, and
 - 21.3 uphold the human rights of all New Zealanders, including of rainbow New Zealanders, to live free from discrimination and harm.

My proposed prohibition on conversion practices has three key elements

- 22 I have identified proposals for three key elements that will determine the scope and coverage of a prohibition on conversion practices:
- 22.1 how conversion practices are defined for the purposes of the prohibition
 - 22.2 who is protected by the prohibition and how
 - 22.3 how behaviours associated with the provision of conversion practices should be regulated.

Defining conversion practices

- 23 One of the most important elements of the prohibition will be the statutory definition of conversion practices. This definition needs to be broad enough to capture the practices that the prohibition is intended to target. However, if the definition is too broad, it could capture legitimate work by health practitioners and others to support people (such as gender affirmation or therapy to discuss identity) or general expressions of religious beliefs or tenets.

Results for Young People Attracted to the Same Sex or Both Sexes, page 22. Auckland: The University of Auckland.

- 24 Consistent with international examples, I do not recommend including a list of specific behaviours or practices within the statutory definition. Such a definition would not be flexible enough to respond to any changes in the nature of conversion practices and so would not be adequately future proof.
- 25 I outline the key components of my recommended definition of conversion practices below. I note the exact form of the definition and any exclusions will likely be further refined during the drafting process.

I propose a practice should meet three criteria to be a conversion practice

- 26 The distinguishing characteristic of a conversion practice is not the form it takes, the setting in which it occurs, or who performs it. Rather, it is the intention of the practice – to change or suppress a person’s sexual orientation, gender identity, or gender expression – that characterises a conversion practice.
- 27 Accordingly, I propose to define a conversion practice as a practice that:
- 27.1 is directed towards another person
 - 27.2 is based on that person’s sexual orientation, gender identity, or gender expression, and
 - 27.3 is performed with the intention, or purported intention, of changing or suppressing the person’s sexual orientation, gender identity, or gender expression.
- 28 Practices that do not meet all three criteria would not be conversion practices for the purpose of this definition. I note that the use of the term “practice” is intended to convey that a pattern of behaviour is likely to be required for the definition to apply, though it does not exclude the possibility of extending to one particularly serious event. **Appendix 1** maps a range of scenarios against the definition to indicate examples of what might and might not be captured.
- 29 The definition does not distinguish between practices occurring in health and more informal settings, including faith settings or at home. I consider this is necessary because most conversion practices in New Zealand occur in unregulated settings and can cause harm regardless of where they occur.
- 30 Practices to suppress sexual orientation, gender identity, or gender expression are included. If the definition only covered change efforts, there might be a shift to practices that focus on suppression. These practices can be just as harmful, as they can reinforce the message that someone’s sexual orientation, gender identity, or gender expression is abnormal.
- 31 The definition is intended to protect as many people as possible from conversion practices. I expect that the definition would protect against efforts to make an intersex person adopt or express a particular gender identity, provided those efforts otherwise met the definition of a conversion practice. However, it would not cover unnecessary medical interventions performed on

intersex children without their consent, which I understand are a concern for the intersex community. I am advised that the Ministry of Health is undertaking work to give effect to Labour's 2020 Manifesto commitment to develop a rights-based protocol to prevent such interventions.

The definition should exclude legitimate practices

- 32 It is important to ensure that health practitioners are not discouraged from offering legitimate, evidence-based support or therapy for fear of incurring liability under a prohibition on conversion practices. It is also important to protect other practices with a legitimate therapeutic or supportive intent
- 33 I consider it is unlikely that such support or therapy would satisfy all three criteria of the definition of a conversion practice. However, for the avoidance of doubt, I propose that the statutory definition should exclude:
- 33.1 a practice of a health practitioner⁶ that, in the practitioner's professional judgement, is necessary to provide a health service or comply with the legal, professional, and ethical standards to which they are subject,⁷ or
- 33.2 a practice intended to:
- 33.2.1 assist a person undergoing or considering undergoing, gender transition or gender affirming care
- 33.2.2 provide acceptance support, and understanding to a person in respect of sexual orientation, gender identity, or gender expression issues
- 33.2.3 facilitate a person's coping, social support, or identity exploration or development.

The definition is not intended to capture general expressions of religious beliefs or tenets

- 34 The requirement for a practice to be "directed towards another person" is intended to exclude general expressions of religious beliefs or tenets about sexual orientation and gender issues. I note that such expressions would also not be captured if they were not based on, and did not seek to change or suppress, a person's sexual orientation, gender identity, or gender expression. While determining whether these expressions were captured or excluded would be fact specific, I expect that expressions such as sermons would generally be unlikely to fall within the definition of a conversion practice.

⁶ "Health practitioner" would have the same meaning as in the Health Practitioners Competence Assurance Act 2003 (HPCA Act). Counsellors would not be covered by this general exclusion, as counsellors are not regulated health practitioners under the HPCA Act.

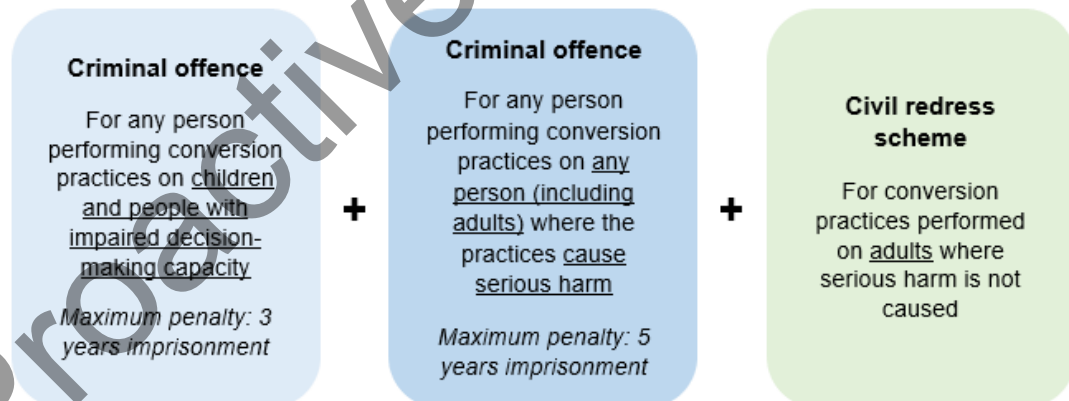
⁷ Legal standards would include that practitioners are acting in accordance with their scope of practice under the HPCA Act. The professional bodies of a range of health professions explicitly prohibit their members from performing conversion practices through their codes of ethics and/or a specific position statement.

- 35 My officials would work with the Parliamentary Counsel Office during drafting to determine the most appropriate way of making this intention clear.

Coverage of a prohibition and penalties

- 36 I consider that a prohibition should protect all people from the harms of conversion practices. This will send a strong message that conversion practices are wrong and should not be happening in modern New Zealand.
- 37 Given the range of practices and settings that might be captured by the statutory definition of conversion practices, however, I do not consider it would be appropriate to apply criminal penalties in every circumstance. As **Figure 1** illustrates, I propose:
- 37.1 to create *criminal offences* to cover situations where there is either a heightened risk of harm (as in the case of children or people with impaired decision-making capacity) or where serious harm can be demonstrated to have been caused
- 37.2 that *civil redress* should be available for adults where serious harm cannot be demonstrated.
- 38 I consider that these proposals would provide a balanced and proportionate response to conversion practices, while also making it clear that they are prohibited and subject to penalties under both the criminal and civil law. I note that the proposals would be similar in scope and coverage to the prohibitions passed recently in Australia in the ACT and Victoria.

Figure 1 – Proposed coverage of criminal offences and civil redress scheme



Conversion practices performed on children and people with impaired decision-making capacity should be criminalised in all circumstances

- 39 I propose to create a criminal offence for any person performing conversion practices on children and people with impaired decision-making capacity.
- 40 This offence would provide protection for these groups from the harms of conversion practices in all circumstances. This recognises that they are especially likely to be subjected to conversion practices at the request of

parents or guardians and are less likely to have autonomy to refuse the practices. They are also particularly likely to suffer ongoing harm because of their developmental stage or other vulnerability.

- 41 A “child” would be defined as a person under the age of 18 years, as a person becomes legally independent from their parents’ guardianship rights at the age of 18 years. The most appropriate definition for a “person with impaired decision-making capacity” would be determined during drafting. In general, however, the term is intended to capture people who, without support, would lack the capacity to make informed decisions about their health or welfare
- 42 I propose that the maximum penalty for this offence would be three years imprisonment. This penalty would sit above the maximum penalty for criminal harassment (2 years) and on par with the maximum penalty for assault with intent to injure (3 years).

Conversion practices performed on adults should be criminalised where they cause serious harm

- 43 I do not consider that a prohibition on conversion practices would be effective or proportionate if it only protected children and people with impaired decision-making capacity. It is also important to address the harm that conversion practices can cause to adults, while still recognising their increased agency.
- 44 I propose to create an additional criminal offence for any person who:
 - 44.1 performs conversion practices on any person (including children, adults with impaired decision-making capacity, **and** other adults) where the practices cause serious harm, and
 - 44.2 is reckless as to whether serious harm would be caused.
- 45 This offence would be intended to capture the most egregious cases of conversion practices, regardless of whom the practices were performed on. As well as protecting adults, it would provide enhanced protection for children and people with impaired decision-making capacity where the practices result in serious harm.
- 46 This offence would recognise that adults cannot consent to suffering serious harm. However, in light of their increased agency, the offence would have a high threshold. The fact that serious harm has been caused would need to be established beyond reasonable doubt, as would an additional mental element (recklessness).
- 47 I note that serious harm would be intended to include psychological or emotional injury, which are well-understood concepts in the criminal law and the courts.
- 48 I propose that the maximum penalty for this offence would be five years imprisonment. This penalty is on par with the maximum penalty for the Crimes

Act 1961 offence of causing injury with intent to do so or with reckless disregard for the safety of others.⁸

- 49 I note that the threshold for this offence is higher than that for the criminal offence specifically concerning conversion practices performed on children and people with impaired decision-making capacity. I consider that this penalty is proportionate to the serious harm that is intended to be captured by this offence and the additional mental element required. It is likely that, where serious harm has been caused to a child or person with impaired decision-making capacity, Police would only charge the more serious offence.

Civil redress should also be available

- 50 Serious harm will not be able to be demonstrated beyond reasonable doubt in all cases involving adults. For these cases, I propose to utilise the Human Rights Commission's (the Commission) existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults. This would be achieved by amending Part 2 of the Human Rights Act 1993 to include the provision of conversion practices as unlawful discrimination.
- 51 In response to a complaint concerning conversion practices being performed on an adult, the Commission would provide services to facilitate a resolution. Where resolution of a complaint is not achieved, a claim could be taken to the Human Rights Review Tribunal (the Tribunal). The Tribunal could grant a range of remedies, including:
- 51.1 damages up to \$350,000
 - 51.2 an order restraining a person or organisation from continuing to perform conversion practices
 - 51.3 an order that a person or organisation perform specified acts to redress any loss or damage suffered.⁹
- 52 I consider that a civil redress scheme would be more appropriate than criminal penalties for cases involving adults where serious harm cannot be demonstrated. Civil actions are intended to remedy harm and prevent it from happening again. Because they do not always require matters to be determined by courts or tribunals, they can also be more appropriate in situations that involve close relationships. This is particularly relevant given the family and community relationships that may exist between complainants and the performers of conversion practices.
- 53 I also consider that the civil redress scheme could be made available to children and people with impaired decision-making capacity in situations where criminal charges cannot be brought. This would be intended to capture situations such as where the practices were performed when the person was a child, but the limit period on the criminal offence has since run out, or where

⁸ Crimes Act 1961, s 189(2).

⁹ Human Rights Act 1993, s 92I.

there may not be sufficient evidence to bring criminal charges, but a civil action might succeed. I propose to further consider this issue and seek the Committee's agreement to make policy decisions during the drafting process, alongside any other additional policy decisions.

- 54 As well as dealing with complaints, I expect that the Commission would play an important role in providing education about conversion practices and the prohibition, and in assisting survivors – including those who have experienced the practices in the past – to access the support that they may need. I consider that these functions will be key to ensuring that the objectives of the prohibition are achieved.

Other features of the criminal offences

- 55 The criminal offences that I am proposing to create under this prohibition are intended to capture particularly serious cases. For these cases, I consider it is appropriate that the offences should specifically exclude consent as a defence.
- 56 It will also be important to ensure that a prohibition does not unintentionally criminalise someone who may seek out these practices for themselves. I therefore propose that the criminal offence should make it clear that the person who was subjected to the conversion practices could not be charged as a party to the offence.

Regulating behaviours associated with conversion practices

- 57 I have also considered whether specific criminal or civil penalties are required to regulate behaviours associated with the provision of conversion practices.

Removing a person from New Zealand for the purposes of conversion practices

- 58 Once conversion practices are prohibited in New Zealand, there may be increased attempts to procure the practices in jurisdictions where they continue to be legal. Most international prohibitions include a specific criminal offence for removing someone from a jurisdiction for the purposes of conversion practices being performed. The Crimes Act 1961 contains similar offences concerning the removal of people from New Zealand for the purposes of female genital mutilation being performed.
- 59 I propose that a specific criminal offence for removing a person from New Zealand for the purposes of conversion practices should be created. This offence and its penalties would be linked to the other criminal offences, so that it would be illegal to procure practices in an overseas jurisdiction that it would be illegal to procure or perform in New Zealand.

Referrals and advertising

- 60 Some international prohibitions, such as those in Victoria (Australia) and Canada, include specific criminal offences for advertising conversion practices.

- 61 Rather than paper- or electronic-based advertising, it appears that conversion practices in New Zealand are now primarily advertised by word-of-mouth referrals. As such, I consider it will be important to ensure that the act of referring someone to conversion practices should be captured within the scope of the criminal offences and civil redress scheme.
- 62 I propose that where conversion practices are subject to:
- 62.1 criminal penalties, it should be made clear in the legislation that the act of referring someone to conversion practices could be covered by the parties to offences provision of the Crimes Act 1961
 - 62.2 civil penalties, it should be made clear that a civil complaint can relate to the act of referring someone to conversion practices.
- 63 I note that, for a referral to be criminalised under section 66 of the Crimes Act 1961, the principal offence would need to be committed. The referrer would also need to have taken an active step in referring a person to the practices with the intention that they be performed. Referrals would not be criminalised if the referrer was unaware or did not intend that they would be performed, or if, despite their intentions, the conversion practice were not performed. However, the latter scenario may fall within the scope of the civil redress scheme.
- 64 For the avoidance of doubt, I consider there would also be merit in prohibiting the public advertising of conversion practices. I have instructed my officials to undertake further policy work on this issue, including consideration of whether a specific offence would need to be created or whether any existing offences or regulatory systems could be appropriate. I am seeking the Committee's agreement-in-principle to prohibit the advertising of conversion practices and authorisation to commence drafting of an appropriate provision once I have received that advice. I will highlight my decisions on this when the draft Bill is considered by Cabinet.

Financial Implications

- 65 The creation of new criminal offences may have implications for Police, Crown Law Office, the courts, and the prison population. Offences carrying penalties of two years of imprisonment or more can be tried by jury, which would increase the costs of prosecution. I expect that the likely volume of cases arising from these criminal offences will be small and that costs will be absorbed within existing baselines.
- 66 Adding conversion practice complaints to the scope of the Commission's existing complaints mechanism is likely to increase the demands on the Commission and the Tribunal to process and assess cases.
- 67 The Ministry of Justice estimates that the Commission may require up to \$1.5 million per year for the first two years after commencement of the legislation to expand its complaints function, train staff, provide education on the prohibition and the civil redress scheme, setup appropriate monitoring and

evaluation, and deal with an initial tranche of complaints. I do not consider that these initial costs could be met through the Commission's baseline funding. After the first two years, the pattern of demand for the scheme would inform a future Budget bid for any required increase to baseline funding.

- 68 It is important that funding for the civil redress scheme is confirmed prior to the Bill being introduced to the House. Officials will conduct further work to develop more robust cost estimates over the coming months. I intend to report back to Cabinet on options for funding in June 2021, when I seek approval to introduce legislation to give effect to the proposals in this paper.

Legislative Implications

- 69 Legislation is required to implement the proposals in this paper. The proposals will be given effect through the Prohibition of Conversion Practices Bill, which currently holds a category four priority on the 2021 Legislation Programme (to be referred to a select committee in 2021).
- 70 In February 2021, I announced the Government's intention to enact legislation to prohibit conversion practices by the end of this year or February 2022 at the latest. In order to do so, I intend to issue drafting instructions to the Parliamentary Counsel Office as soon as possible and return to Cabinet in June to seek approval to introduce draft legislation. I am therefore seeking the Committee's agreement to change the priority category of this bill to category three (to be passed if possible in the year).
- 71 The Bill will bind the Crown.

Impact Analysis

Regulatory Impact Statement

- 72 A Regulatory Impact Statement (RIS) has been completed and is attached as **Appendix 2**. The Ministry of Justice's Regulatory Quality Assurance panel (the Panel) has reviewed the RIS and considers that the information and analysis summarised in the RIS partially meets the Quality Assurance criteria.
- 73 The Panel notes that the RIS has been prepared in a limited timeframe and with limited data. Those constraints have impacted on the analysis possible. The RIS gives a comprehensive summary of the nature of the harm caused by conversion practices, but not of the extent of conversion practices in New Zealand. The Panel therefore cannot be sure how widespread the practices are and therefore how many prosecutions, court cases, and imprisonments may follow. The RIS assumes that not many cases will arise. If that assumption is incorrect, all agencies other than the Commission will need to absorb the costs from baselines until such time as cost pressure budget bids may be sought.
- 74 The RIS does not give sufficient weight to the impact of non-regulatory interventions such as education and information on changing behaviour and attitudes. Furthermore, the underlying assumption in the analysis is that

prohibition will change behaviour, although there is little evidence to support this assumption. For these reasons it is not possible to state with certainty that the preferred option will have the stated impacts. The RIS meets the clear and concise and consulted elements, bearing in mind the declared constraints on consultation to date.

Climate Implications of Policy Assessment

- 75 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as there is no direct emissions impact.

Population Implications

- 76 The proposals in this paper seek to better protect members of rainbow communities from the harms of conversion practices. Current protections in the criminal law and health regulatory systems are insufficient to protect against the kinds of conversion practices now occurring in New Zealand. The proposals will particularly improve protections for children, people who are gender diverse, and disabled people who are part of rainbow communities.

Human Rights

- 77 Everyone in New Zealand has the right to be who they are, free from harm, so that they can fully participate in society without discrimination. I intend for the proposals in this paper to enhance the enjoyment of rights of members of rainbow communities who presently cannot freely express their sexual orientation, gender identity, or gender expression. This is their fundamental human right, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
- 78 The proposals will recognise New Zealand's international human rights obligations relating to the rights of children, to prevent torture or other inhuman treatment or punishment, and the social and cultural rights to take part in societal life including enjoyment of the highest standard of physical and mental health. Such international commitments are to be promoted without discrimination of any kind, and therefore apply to everyone.
- 79 The conversion practices that occur in New Zealand today directly engage rights and freedoms in the Bill of Rights Act, predominantly the right to freedom of expression (section 14).
- 80 My view is that any limitations arising from these proposals are justifiable. It is proportionate to limit a person's ability to express themselves in a way that intentionally aims to change or suppress another person's sexual orientation, gender identity, or gender expression. Such expression currently restricts others from freely expressing who they are and can cause serious and sometimes life-altering harm.
- 81 For a person to be criminally or civilly liable, a conversion practice would need to be directed at another person, based on a person's sexual orientation,

gender identity, or gender expression, and practiced with an intention to change or suppress the person's sexual orientation, gender identity, or gender expression. Communication of a religious view or opinion on gender or sexuality more generally, including sermons, would not be covered by these proposals. This safeguard ensures the proposals are closely connected to the harm that can be caused.

- 82 I consider the proposals are also proportionate to the harm that conversion practices can cause. Conversion practices performed on adults would only be criminalised in the most egregious cases, where a high standard of serious harm would need to be demonstrated. Criminalising conversion practices performed on children and people with impaired decision-making ability is proportionate as the state has a responsibility through its international commitments and domestic obligations to protect those who cannot protect themselves.

Treaty of Waitangi Analysis

- 83 Takatāpui Māori, and particularly rangatahi takatāpui, may face discrimination based on their sexuality, gender identity, and gender expression. The Crown has a Treaty obligation to take positive action to reduce the disparities experienced by takatāpui Māori. Prohibiting conversion practices in New Zealand will better protect takatāpui Māori from discrimination based on their sexuality, gender identity, or gender expression and provide avenues for redress.
- 84 I note that Māori have not been specifically consulted on the proposals in this paper. It will be important to encourage Māori, and particularly takatāpui Māori, to submit on the draft Bill and participate in the select committee process.

Consultation

- 85 The following agencies have been consulted on the proposals in this paper: the Ministry of Health, New Zealand Police, the Department of Corrections, the Treasury, Oranga Tamariki, Ministry for Women, Office for Disability Issues, Office of Ethnic Communities, Ministry of Youth Development, Ministry of Social Development, Ministry of Education, Crown Law Office, Ministry for Pacific Peoples, the Department of Prime Minister and Cabinet (Child Wellbeing Unit), and Te Arawhiti. The Human Rights Commission has also been consulted.
- 86 The Department of Prime Minister and Cabinet and Te Puni Kōkiri have been informed.
- 87 The Leader of the House and the Parliamentary Counsel Office have been consulted on the proposal to change the priority category of the Prohibition of Conversion Practices Bill.
- 88 The Ministry of Justice has undertaken targeted discussions with a range of stakeholders on specific issues so that a prohibition works as intended and

avoids unintended consequences. These stakeholders have included survivors of conversion practices, faith groups, health professionals, and academics. I expect that the Ministry will continue to have these discussions, including with a broader range of groups, as drafting progresses.

Publicity and Risks

- 89 I expect that the proposals in this paper will attract significant public and media interest once a bill is introduced to the House of Representatives.
- 90 There is a risk that some people will see these proposals as criminalising prayer or infringing on parental rights. It will be important to emphasise that the prohibition is intended to target practices that are harmful, regardless of their form, the setting in which they occur, or who is performing them. Where conversion practices are potentially subject to criminal offences, normal police and prosecutorial discretion will apply.
- 91 The proposals in this paper have not been the subject of extensive consultation or engagement. The Select Committee process will offer an important opportunity for the public and groups that might be affected to consider the proposals and share their views, including takatāpui Māori and Pacific peoples, and ethnic rainbow communities.

Proactive Release

- 92 This paper will be proactively released when a bill is introduced to the House of Representatives and once all outstanding policy issues have been decided.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** that Labour's 2020 Election Manifesto committed to ban conversion practices in New Zealand;
- 2 **note** that, in February 2021, I announced the Government's intention to enact legislation to prohibit conversion practices by the end of this year or February 2022 at the latest;

Defining conversion practices

- 3 **agree** that a conversion practice should be defined as a practice that:
- 3.1 is directed towards another person;
 - 3.2 is based on that person's sexual orientation, gender identity, or gender expression; and
 - 3.3 is performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression;

- 4 **agree** that the statutory definition of a conversion practice should exclude practices with a legitimate therapeutic or supportive intent;
- 5 **agree** that the statutory definition should clarify that it is not intended to capture general expressions of religious beliefs or tenets, such as sermons, provided they do not otherwise meet the definition of a conversion practice;
- 6 **note** that the exact form of the statutory definition of a “conversion practice” and any exclusions will be refined during drafting of a bill;

Coverage of a prohibition and penalties

- 7 **agree** to create a criminal offence for any person performing conversion practices on a child or person with impaired decision-making capacity, subject to a maximum penalty of up to three years imprisonment;
- 8 **agree** to create a criminal offence for any person who performs conversion practices on any person (including adults) where the practices cause serious harm, subject to a maximum penalty of up to five years imprisonment;
- 9 **agree-in-principle** to utilise the Human Rights Commission’s existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults where the practices do not cause serious harm, subject to future decisions on funding referred to in recommendations 16-18;
- 10 **agree** that the criminal offences referred to in recommendations 7 and 8 will specifically exclude consent as a defence;
- 11 **agree** that the criminal offences referred to in recommendations 7 and 8 will make it clear that the person who was subjected to the conversion practices could not be charged as a party to the offence;

Regulating behaviours associated with the provision of conversion practices

- 12 **agree** to create a criminal offence for removing a person from New Zealand for the purposes of conversion practices being performed;
- 13 **agree** that where conversion practices are subject to:
 - 13.1 criminal penalties, it should be made clear in the legislation that the act of referring someone to conversion practices can be covered by the parties to offences provision of the Crimes Act 1961;
 - 13.2 civil penalties, it should be made clear in the legislation that a civil complaint can relate to the act of referring someone to conversion practices;
- 14 **agree-in-principle** to prohibit the advertising of conversion practices, subject to further decisions being made;

Financial implications

- 15 **note** that additional funding for the Human Rights Commission will be required to give effect to recommendation 9 above;
- 16 **note** that the additional funding required to utilise the Human Rights Commission's existing functions and complaints system is estimated by the Ministry of Justice to be up to \$1.500 million per year for the first two years after commencement of the legislation;
- 17 **note** that further work is underway to develop more robust cost estimates;
- 18 **invite** the Minister of Justice to report back to Cabinet on options for funding the civil redress scheme in 2021/22 and 2022/23 by 30 June 2021 as part of the paper seeking approval to introduce legislation to the House of Representatives;

Legislative implications

- 19 **agree** to change the priority category of the Prohibition of Conversion Practices Bill from category four (to be referred to a select committee in 2021) to category three (to be passed if possible this year);
- 20 **invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals, including the in-principle decision referred to in recommendation 14;
- 21 **authorise** the Minister of Justice to make additional policy decisions, in discussion with the Minister of Health or the Minister of Finance, as appropriate, and to inform Cabinet as part of seeking agreement for the Bill to be introduced.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice

IN CONFIDENCE

Appendix 1: Definition scenarios

	Directed towards another person	Based on the person's sexual orientation, gender identity, or gender expression	Performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression	Conversion practice?
Scenario #1 A pastor gives a sermon denouncing homosexuality and gender diversity	×	×	×	×
Scenario #2 In a discussion between a pastor and an adult member of their congregation who is struggling with their sexuality, the pastor shares their belief that homosexuality is wrong	✓	✓	×	×
Scenario #3 In a discussion between a pastor and an adult member of their congregation who is struggling with their sexuality, the pastor shares their belief that homosexuality is wrong and, over several sessions, prays with the congregant for them to be healed	✓	✓	✓	✓
Scenario #4 The parents of a teenager who is struggling with their sexuality force the teenager to participate in an online course designed to change or suppress their sexuality	✓	✓	✓	✓
Scenario #5 The parents of a teenager who is struggling with their gender identity react negatively and refuse to discuss it further	✓	✓	×	×



Cabinet Business Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Prohibiting Conversion Practices

Portfolio

Justice

On 19 April 2021, the Cabinet Business Committee:

- 1 **referred** the submission under CBC-21-SUB-0047 to Cabinet on 3 May 2021 for further consideration;
- 2 **agreed** that Parliamentary Counsel Office commence drafting of legislation to prohibit conversion practices.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Jacinda Ardern (Chair)
Hon Grant Robertson
Hon Kelvin Davis
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Damien O'Connor
Hon Stuart Nash
Hon Kris Faafoi
Hon Dr Ayesha Verrall

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet

IN CONFIDENCE

Office of the Minister of Justice
Cabinet

Appendix 3: Prohibiting conversion practices

- 1 This appendix provides further information on:
 - 1.1 the intended application of the proposed definition of a conversion practice, and
 - 1.2 what is intended to be captured as a sustained practice or serious event under the definition of conversion practices.

The intent of a practice determines whether it is a conversion practice

- 2 The purpose for which a practice is performed is the key factor in determining whether it is a conversion practice under the definition. Practices that do not seek the predetermined outcome of changing or suppressing a person's sexual orientation, gender identity, or gender expression will not be conversion practices under the definition.
- 3 I emphasise that exempting specific practices or settings, particularly unregulated settings, from the definition could run the risk of unintentionally creating a space where conversion practices can continue to happen lawfully.

Access to counselling and other support

- 4 People of all ages will continue to be able to seek therapy, counselling, and other forms of support. This includes support for those who may be struggling to reconcile their faith and their sexual orientation or gender identity. However, it will be incumbent on providers of this kind of support to not perform practices that have the intent of changing or suppressing a person's sexual orientation, gender identity, or gender expression.
- 5 I understand that this approach is consistent with the ethical standards of New Zealand's leading health professional bodies. The Royal Australian and New Zealand College of Psychiatrists, for example, recommends that patients struggling with their sexual identity:

should be assisted with treatment approaches that involve acceptance, support, and identity exploration, and aim to reduce the stigma associated with alternative sexual identities, and demonstrate respect for the person's religious, spiritual and/or cultural beliefs.¹

¹ Royal Australian and New Zealand College of Psychiatrists, *Position statement 60: Sexual orientation change efforts*, March 2019. Available at: <https://www.ranzcp.org/news-policy/policy-and-advocacy/position-statements/sexual-orientation-change-efforts>

Prayer-based activities and support

6 The definition is not intended to capture prayer-based activities and support that do not involve an intent to change or suppress a person's sexual orientation, gender identity, or gender expression. A distinction can be drawn between prayer as a supportive practice and praying for a specific outcome.

7 I am confident that it will be possible for people to continue to provide advice and support through prayer. I note that, in its position statement against conversion practices, the Salvation Army advises Salvationists that:

In response to the question, 'Then what do I do if someone wrestling with their sexual identity wants prayer?', Salvationists are encouraged to help people explore their identity – for instance, by praying that God will affirm their authentic identity and speak into their search for who they were made to be; or by pastorally exploring what it is that has led them to conclude that they need to change. Salvationists will not pray for a specific outcome with regards to someone's sexuality.²

8 In contrast, scenario #3 in Appendix 1 would be a conversion practice because the prayer is intended to 'heal' the person's sexual orientation by changing or suppressing it, consistent with the pastor's expressed belief that homosexuality is wrong. I expect this scenario would likely also be captured by the definitions in several international prohibitions, including in Australia in the ACT and Victoria.

9 The wider context in which this kind of scenario might occur means that conversion practices only involving prayer can be more harmful than they might first appear. Survivors emphasise that while prayer sessions attempting to change them can provide an initial sense of relief. However, their failure to make any long-term change to their sexual orientation or gender identity can be immensely disappointing, and contribute to and exacerbate feelings of self-doubt, hopelessness, and depression.³

Liability for conversion practices performed on adults will depend on whether serious harm was caused

10 I note that because the recipient in scenario #3 is an adult, and serious harm is unlikely to be caused, any complaint would most likely fall within scope of the civil redress scheme rather than a criminal offence. A key component of this is voluntary mediation in the first instance.

11 If the recipient made a complaint that was unable to be resolved by the Human Rights Commission's processes, it could be taken to the Human Rights Review Tribunal. The Tribunal could consider several factors in determining liability and the appropriate kind and level of any remedies. These

² Salvation Army, *Guideline for Salvationists: Gay Conversion Therapies*, September 2020. Available at: https://www.salvationarmy.org.nz/sites/default/files/uploads/2020/Oct/guideline_for_salvationists-gay_conversion_therapies.pdf

³ TVNZ Sunday, 'Pray the gay away' - Homosexual conversion therapy in NZ, 18 June 2018. Available at: <https://www.tvnz.co.nz/one-news/new-zealand/tvnz-sunday-exclusive-pray-gay-away-homosexual-conversion-therapy-in-nz>

factors might include the extent to which the recipient was encouraged or coerced to participate in the practices, the degree of harm caused, and the risk of others being subjected to the practices in the future.

Intended coverage of the definition of conversion practices

- 12 I expect that most of the practices that could be captured under the definition of conversion practices will be more than one-off events. Examples are likely to include counselling or courses and programmes that may include prayer, fasting, coursework, group sessions, online mentoring, and other practices purporting to be talk-therapy.
- 13 The definition is not intended to capture incidental moments as part of an act of prayer or single discussions that may involve negative reactions to someone's sexual orientation, gender identity, or gender expression.
- 14 As the Cabinet paper notes, the definition could extend to one particularly serious event or practice. This could include an exorcism or deliverance event, which survivors emphasise are especially traumatising.
- 15 I note that if the definition could apply to a practice, it does not necessarily mean that criminal or civil liability will follow. In particular, for circumstances where the criminal offences could apply, no mal police and criminal procedure would be followed. The offences would need to be proved beyond reasonable doubt, including whether serious harm had been caused for the offence concerning conversion practices performed on any person.

International definitions

- 16 An A3 table with examples of how conversion practices have been defined in four other jurisdictions – Malta, the Australian Capital Territory, Victoria, and Canada – is attached

International definitions of conversion practices

Malta <i>Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016</i>	Australian Capital Territory <i>Sexuality and Gender Identity Conversion Practices Act 2020</i>	Victoria (Australia) <i>Change or Suppression (Conversion) Practices Prohibition Act 2021</i>	Canada <i>Bill C-6: An Act to amend the Criminal Code (conversion therapy) (note: awaiting third reading)</i>
<p>“Conversion practices” refers to any treatment, practice, or sustained effort that aims to change, repress, or eliminate a person's sexual orientation, gender identity, or gender expression; such practices do not include –</p> <ul style="list-style-type: none"> (a) any services and, or interventions related to the exploration and, or free development of a person and, or affirmation of one's identity with regard to one or more of the characteristics being affirmed by this Act, through counselling, psychotherapeutic services and, or similar services; (b) any healthcare service related to free development and, or affirmation of one's gender identity and, or gender expression of a person; and, or (c) any healthcare service related to the treatment of a mental disorder. 	<p>Sexuality or gender identity conversion practice means a treatment or other practice the purpose, or purported purpose, of which is to change a person's sexuality or gender identity.</p> <p>However, sexuality or gender identity conversion practice does not include a practice the purpose of which is to–</p> <ul style="list-style-type: none"> (a) assist a person who is undergoing a gender transition; (b) assist a person who is considering undergoing a gender transition; or (c) assist a person to express their gender identity; or (d) provide acceptance, support or understanding of a person; or (e) facilitate a person's coping skills, social support and identity exploration and development. <p>Examples–</p> <ul style="list-style-type: none"> • diagnosis and assessment of a person with gender dysphoria or gender non-conforming behaviour or identity • support for a person with social adjustments related to gender dysphoria • gender-affirming hormone treatment • other gender transition services, for example speech pathology services for a transgender gender-diverse person who wishes to alter their voice and communication to better align with their gender identity • support for a person exploring and expressing their sexuality <p><i>Note</i> Under the <i>Human Rights Act 2004</i>, s 14, a person has the right to freedom of thought, conscience and religion, including the freedom to demonstrate their religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private. It is not intended that a mere expression of a religious tenet or belief would constitute a sexuality or gender identity conversion practice.</p> <p>Also sexuality or gender identity conversion practice does not include a practice by health service provider that in the provider's reasonable professional judgement is necessary to:</p> <ul style="list-style-type: none"> • provide a health service for a person in a manner that is safe and appropriate; or • comply with the provider's professional or legal obligations. 	<p>In this Act, a change or suppression practice means a practice or conduct directed towards a person, whether with or without that person's consent–</p> <ul style="list-style-type: none"> (a) on the basis of the person's sexual orientation or gender identity; and (b) for the purpose of– <ul style="list-style-type: none"> (i) changing or suppressing their sexual orientation or gender identity; or (ii) inducing the person to change or suppress their sexual orientation or gender identity. <p>A practice is not a change or suppression practice if it–</p> <ul style="list-style-type: none"> (a) is supportive of or affirms a person's gender identity or sexual orientation including, but not limited to, a practice or conduct for purposes of– <ul style="list-style-type: none"> (i) assisting a person who is undergoing a gender transition; or (ii) assisting a person who is considering undergoing a gender transition; or (iii) assisting a person to express their gender identity; or (iv) providing acceptance, support or understanding of a person; or (v) facilitating a person's coping skills, social support or identity exploration and development; or (b) a practice or conduct of a health service provider that is, in the health service provider's professional judgement, necessary– <ul style="list-style-type: none"> (i) to provide a health service; or (ii) comply with the legal or professional obligations of health service provider. <p>A change or suppression practice includes, but is not limited to the following–</p> <ul style="list-style-type: none"> • providing psychiatry or psychotherapy consultation, treatment, or therapy, or any other similar consultation, treatment or therapy; • carrying out a religious practice, including but not limited to, a prayer based practice, a deliverance practice or an exorcism; • giving a person a referral for the purposes of a change or suppression practice being directed towards the person. <p>A practice or conduct may be directed towards a person remotely (including online) or in person.</p>	<p>conversion therapy means a practice, treatment or service designed to change a person's sexual orientation to heterosexual, to change a person's gender identity or gender expression to cisgender or to repress or reduce non-heterosexual attraction or sexual behaviour or non-cisgender gender expression. For greater certainty, this definition does not include a practice, treatment or service that relates to the exploration and development of an integrated personal identity without favouring any particular sexual orientation, gender identity or gender expression.</p>



Cabinet

Minute of Decision

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Prohibiting Conversion Practices

Portfolio Justice

On 3 May 2021, following reference from the Cabinet Business Committee, Cabinet

Background

- 1 **noted** that Labour's 2020 Election Manifesto committed to ban conversion practices in New Zealand;
- 2 **noted** that in February 2021, the Minister of Justice announced the government's intention to enact legislation to prohibit conversion practices by the end of 2021 or February 2022 at the latest;

Defining conversion practices

- 3 **agreed** that a conversion practice should be defined as a practice that:
 - 3.1 is directed towards another person;
 - 3.2 is based on that person's sexual orientation, gender identity, or gender expression; and
 - 3.3 is performed with the intention, or purported intention, of changing or suppressing the person's sexual orientation, gender identity, or gender expression;
- 4 **agreed** that the statutory definition of a conversion practice should exclude practices with a legitimate therapeutic or supportive intent;
- 5 **noted** that:
 - 5.1 the New Zealand Bill of Rights Act 1990 enshrines a person's freedom of thought, conscience, and religion, including the freedom to manifest that religion or belief in worship, observance, practice or teaching, either individually or in community with others and either in public or in private;
 - 5.2 it is not intended that a mere expression of a religious tenet or belief would constitute a conversion practice;
- 6 **agreed** that the statutory definition should clarify that it is not intended to capture general expressions of religious beliefs or tenets, such as sermons, provided they do not otherwise meet the definition of a conversion practice;

- 7 **noted** that the exact form of the statutory definition of a “conversion practice” and any exclusions will be refined during drafting of a bill;

Coverage of a prohibition and penalties

- 8 **agreed** to create a criminal offence for any person performing conversion practices on a child or person with impaired decision-making capacity, subject to a maximum penalty of up to three years imprisonment;
- 9 **agreed** to create a criminal offence for any person who performs conversion practices on any person (including adults) where the practices cause serious harm, subject to a maximum penalty of up to five years imprisonment;
- 10 **agreed in principle** to utilise the Human Rights Commission’s existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults where the practices do not cause serious harm, **subject to** future funding decisions referred to in paragraphs 17-19 below;
- 11 **agreed** that the criminal offences referred to in paragraphs 8 and 9 above will specifically exclude consent as a defence;
- 12 **agreed** that the criminal offences referred to in paragraphs 8 and 9 above will make it clear that the person who was subjected to the conversion practices could not be charged as a party to the offence;

Regulating behaviours associated with the provision of conversion practices

- 13 **noted** that the Minister of Justice intends to request the select committee that considers the Bill to give consideration to whether there should be a criminal offence for removing a person from New Zealand for the purposes of conversion practices being performed;
- 14 **agreed** that where conversion practices are subject to:
- 14.1 criminal penalties, it should be made clear in the legislation that the act of referring someone to conversion practices can be covered by the parties to offences provision of the Crimes Act 1961;
 - 14.2 civil penalties, it should be made clear in the legislation that a civil complaint can relate to the act of referring someone to conversion practices;
- 15 **agreed in principle** to prohibit the advertising of conversion practices, **subject to** further decisions being made;

Financial implications

- 16 **noted** that additional funding for the Human Rights Commission will be required to give effect to paragraph 10 above;
- 17 **noted** that the additional funding required to utilise the Human Rights Commission’s existing functions and complaints system is estimated by the Ministry of Justice to be up to \$1.500 million per annum for the first two years after commencement of the legislation;
- 18 **noted** that further work is underway to develop more robust cost estimates;
- 19 **invited** the Minister of Justice to report back to the Cabinet Social Wellbeing Committee by 30 June 2021 on options for funding the civil redress scheme in 2021/22 and 2022/23 as part of the paper seeking approval to introduce legislation to the House of Representatives;

Legislative implications

- 20 **agreed** to change the priority category of the Prohibition of Conversion Practices Bill from category four (to be referred to a select committee in 2021) to category three (to be passed if possible in 2021) on the 2021 Legislation Programme;
- 21 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals, including the in-principle decision in paragraph 15 above;
- 22 **authorised** the Minister of Justice to make additional policy decisions, in discussion with the Minister of Health or the Minister of Finance, as appropriate, and to report back on this as part of the report back referred to in paragraph 19 above.

Michael Webster
Secretary of the Cabinet

Proactively Released



Hon Kris Faafoi, Minister of Justice

Additional policy decisions for prohibiting conversion practices

Date	21 May 2021	File reference	HUM-18-01
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Action Sought	Timeframe/Deadline
Indicate your preferred policy options	26 May 2021

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	Telephone (a/h)	1st contact
Caroline Greaney	General Manager, Civil and Constitutional	(04) 918 8584	s9(2)(a)	<input type="checkbox"/>
Jenna Reid	Policy Manager, Civil Law and Human Rights	(04) 918 8649	s9(2)(a)	<input checked="" type="checkbox"/>
s9(2)(a)	Policy Advisor, Civil Law and Human Rights	s9(2)(a)		<input type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office comments		

Purpose

1. This briefing seeks your decisions on two additional policy matters relating to the prohibition of conversion practices.

Key messages

2. In May, Cabinet agreed to your proposals to prohibit conversion practices in New Zealand. These proposals aim to protect as many people as possible through a range of criminal and civil law responses.
3. Your Cabinet paper noted that you would receive further advice on the availability of the civil redress scheme and a ban on the advertising of conversion practices.
4. Under your proposals, the primary protection for children and people with impaired decision-making capacity is a criminal offence prohibiting the use of conversion practices on these groups in all instances. We recommend that the civil redress scheme, which Cabinet agreed should be made available to adults, should also be made available to children and people with impaired decision-making capacity. Doing so will provide an alternative pathway for redress for these groups, consistent with the objectives of the prohibition.
5. You have indicated that you also want to ban the advertising of conversion practices. The underground nature of conversion practices in New Zealand today means that effectively prohibiting advertising of the practices will be challenging. Conversion practices are unlikely to be directly advertised. Instead, they may be advertised using vague language or presented as legitimate-appearing practices, such as relationship or sexuality counselling.
6. Our recommended option would make it unlawful under civil law to publish or display, or caused to be published or displayed, an advertisement that indicates, or could reasonably be understood as indicating, an intention to perform conversion practices. This would be implemented by the Human Rights Commission through the civil redress scheme. This option could capture more subtle advertising of conversion practices. Imposing civil rather than criminal liability would protect against the risk of unintentionally criminalising the advertising of legitimate services.

Previous decisions

7. On 3 May 2021, Cabinet considered and agreed to your proposals to prohibit conversion practices in New Zealand (CAB-21-MIN-0142). These proposals include the creation of new criminal offences to cover situations where there is either a heightened risk of harm (as in the case of children or people with impaired decision-making capacity) or where serious harm can be demonstrated to have been caused. The proposals also provide for civil redress for adults where serious harm cannot be demonstrated, utilising the Human Rights Commission's (the Commission) existing functions and complaints system.
8. The Parliamentary Counsel Office (PCO) has commenced drafting of the Bill on the basis of Cabinet's decisions so far.
9. Your Cabinet paper noted that you would receive further advice on two matters:
 - the availability of the civil redress scheme for children and people with impaired decision-making capacity, and

- a ban on the advertising of conversion practices.
10. These matters were raised during consultation on the proposals and Cabinet paper but, due to the policy work required to address them, were unable to be resolved before the Cabinet paper was finalised. Cabinet has authorised you to make additional policy decisions and to report back on these decisions to the Cabinet Social Wellbeing Committee by 30 June 2021 as part of the paper seeking approval to introduce legislation to the House of Representatives.

Availability of civil redress scheme

11. In March, you agreed to utilise the Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults.
12. Our recommendation to create a civil redress scheme was intended to provide a pathway for redress for adults who have experienced conversion practices. Given that conversion practices on children and people with impaired decision-making capacity were to be criminalised in all instances, we did not initially consider it necessary to extend the civil redress scheme to these groups.
13. We subsequently advised that the civil redress scheme could be made available to children and people with impaired decision-making capacity, particularly in situations where criminal charges are not or could not be brought. This could include situations such as where a prosecution does not proceed because it is not in the public interest, or because there is insufficient evidence (noting the differing burdens of proof for criminal and civil proceedings).¹ Your Cabinet paper noted that you would receive further advice on this issue.
14. During agency consultation on the Cabinet paper, the Child Wellbeing Unit and Oranga Tamariki noted their support for the civil redress scheme also being made available to children. The Commission noted that denial of access by children and young people aged 16 and 17 would constitute prima facie discrimination under the Human Rights Act. The Commission also noted that providing children with functional and accessible complaints mechanisms for when their right to health is violated or at risk would be consistent with guidance from the United Nations.
15. We accept the advice of these agencies and recommend that children and people with impaired decision-making capacity should not be excluded from bringing a complaint under the civil redress scheme. Doing so will provide an alternative pathway for redress for these groups, consistent with the objectives of the prohibition.
16. We note that both the criminal and civil provisions could apply in respect of the same conduct for conversion practices performed on these groups.² This could potentially raise issues in practice where both criminal and civil proceedings are brought. We expect that, if criminal proceedings were underway, the Commission or Human Rights Review Tribunal would defer further action on a civil complaint until the criminal matter is resolved. We will consider during drafting if it is necessary to establish a formal process in legislation for staying civil proceedings in these cases.

¹ In criminal proceedings, liability must be proved beyond a reasonable doubt. In civil proceedings, the burden of proof is on the balance of probabilities.

² The criminal offence will, however, require a mental element to be proved, and will also have a higher burden of proof.

17. We have also considered whether there may be a risk of abuse of process where criminal proceedings have concluded and civil proceedings then resume, particularly where the criminal proceedings resulted in either an acquittal or a conviction. We consider that this risk is low and should be managed on a case-by-case basis by the Tribunal using existing processes and protections, rather than be expressly dealt with in legislation. We note that the Tribunal's remedies are compensatory, not punitive. This can be distinguished from other regimes where limits are placed on civil proceedings occurring after completed criminal proceedings. These generally involve pecuniary (financial) penalties or exemplary damages, both of which are intended to punish conduct.³

Advertising of conversion practices

18. You have indicated that you want to ban the advertising of conversion practices. Cabinet has agreed in principle to such a ban and authorised you to issue drafting instructions of an appropriate provision.

Effectively prohibiting advertising of conversion practices will be challenging

19. We previously advised that we do not consider there is a strong rationale for specifically prohibiting the advertising of conversion practices in New Zealand. Rather than paper- or electronic-based advertising, we understand that conversion practices in New Zealand are now primarily promoted by word-of-mouth referrals. As such, we did not recommend creating a specific criminal offence or civil penalty for advertising conversion practices. Instead, we recommended that referrals to conversion practices should, where appropriate, be captured by the criminal offences or civil redress scheme.
20. We note that a further significant challenge with any prohibition on advertising is that advertisements for services that involve conversion practices are unlikely to be recognisable as such on their face.
21. We understand that, even though the practices are not expressly illegal in New Zealand, the social stigma attached to their provision means that they already largely occur underground and are only rarely openly advertised.
22. Instead, some conversion practices may be advertised using vague language or presented as legitimate practices, such as relationship or sexuality counselling. It will likely not be readily apparent from such advertisements whether the particular counselling will involve conversion practices. An advertising ban may not be able to capture these more subtle advertisements of conversion practices without also unintentionally capturing the advertising of legitimate services.
23. We note that, beyond advertising, there is also a range of activities that may be used to promote or generate demand for conversion practices more generally. These include, for example, sharing or publishing testimonials from people who claim the practices were successful in print, on radio, on the internet (including on social media platforms), or at events. The dissemination of these messages can help to create an environment where conversion practices are seen as necessary and valid. However, they do not necessarily involve the

³ Pecuniary penalties are non-criminal monetary penalties imposed by a court in civil proceedings. They are used to deter breaches of regulatory regimes where the breaches are not serious enough to warrant the denunciation of a criminal conviction. Exemplary damages are intended solely to punish a party for outrageous conduct, additional to what is necessary to compensate a plaintiff for the loss they have experienced.

advertising of a specific conversion practice and are unlikely to be captured by a prohibition on advertising.

Status quo

Existing regimes may provide some protection against advertising of conversion practices

24. The Fair Trading Act makes it illegal for traders to act in a deceptive or misleading way, or to make unsubstantiated representations about their product or service. It is possible that these provisions of the Act might apply to advertising some forms of conversion practices in New Zealand when the performer of the practices is in trade. This might include, for example, a counsellor who claims that homosexuality is a disorder that they can cure. The maximum penalty for the criminal offences under the Fair Trading Act is a fine of \$200,000 for an individual and \$600,000 for a business.
25. In addition, various statutory and industry bodies such as the Broadcasting Standards Authority and the Advertising Standards Authority receive and administer complaints about forms of media in New Zealand. This includes content and advertising that is alleged to be discriminatory or denigrating based on personal characteristics, including sex or sexual orientation. Advertising of conversion practices would likely be covered by these mechanisms. Additionally, private internet service providers and social media platforms also maintain and sometimes monitor community standards guidelines to protect against discrimination or harm on similar grounds. Platforms such as Vimeo, Facebook, Instagram and Twitter explicitly prohibit advertising and content promoting conversion practices.

Other prohibitions and restrictions on advertising

26. We note that the advertising of criminalised behaviours is not expressly banned in New Zealand, as it is generally unnecessary. Such advertising is likely to be regarded as evidence of an intention to commit a criminal offence or that a criminal offence is already being committed, in which case charges could be brought under the principal offence.
27. As far as we are aware, other restrictions on advertising only apply to regulated rather than prohibited activities, and are not complete prohibitions on advertising. For example:
 - The Prostitution Reform Act 2003 prohibits advertisements notifying the availability of commercial sexual services, either generally or specifically, except for in the classified advertisements section of newspapers.
 - The Smokefree Environments and Regulated Products Act 1990 imposes restrictions on the advertising, promotion, sale, and distribution of tobacco and vaping products. The purpose of these restrictions is to reduce the social approval of smoking and to discourage non-smokers from vaping and using tobacco products.
28. Other examples of restrictions or partial prohibitions on advertising include those for medical products and services, adoption, psychoactive substances, and the sale of human tissue.

International approaches

29. Four current or proposed international prohibitions of conversion practices ban advertising:
 - Malta and Ireland include advertising of conversion practices as a criminal offence alongside performing or offering to perform conversion practices. This offence is

punishable by a fine of up to €5,000, a maximum term of imprisonment of six months, or both.

- Victoria's prohibition includes a strict liability offence⁴ for publishing or authorising the publication of an advertisement or other notice that indicates, or could reasonably be understood as indicating, that a person intends to engage in one or more change or suppression practices. This offence is punishable by a fine of up to \$10,000 for individuals and \$50,000 for a body corporate.⁵
- Canada's proposed prohibition creates a separate offence for knowingly promoting or advertising an offer to perform conversion practices. This offence is punishable by a fine of up to \$5,000 or a maximum term of imprisonment of two years. The Bill also utilises Canada's existing obscene materials regime to allow judges to issue warrants authorising seizure, forfeiture, disposal, or removal of advertisements of conversion practices.

30. We do not have any evidence of the prevalence or nature of advertising for conversion practices in these jurisdictions, nor of the effectiveness of these prohibitions.

Purpose and scope of a prohibition on advertising

31. If you progress a ban on advertising, we consider it should be closely linked to the conduct that will be deemed unlawful under the broader prohibition – the performance of conversion practices. Its purpose should therefore be to deter the advertising of specific conversion practices with the aim of further preventing their performance and the harm they can cause. As such, it should be limited to advertisements that provide sufficient information for a person to seek out conversion practices.
32. The prohibition may also indirectly discourage the publication or dissemination of material generally promoting the purported necessity or effectiveness of conversion practices. However, unless this material is accompanied by information about where conversion practices can be procured in New Zealand, we do not consider it should be specifically included in the scope of a prohibition. A prohibition on this kind of general promotion of conversion practices could have freedom of expression implications, particularly if it involved criminal liability.
33. We note that the Department of Internal Affairs is initiating a review of New Zealand's media content regulatory system, which will include consideration of whether and how digital media content could be regulated. We consider this review will be a more appropriate avenue for consideration of how harmful internet content, including that which is related to conversion practices, could be regulated.

⁴ Strict liability offences impose a lower burden of proof on the prosecution. The prosecution has to prove that the act prohibited by the offence occurred, but does not need to establish that the defendant knew or intended to commit the offence. For example, a strict liability offence may provide that overstaying a work visa is an offence. The prosecution would only need to prove that the defendant overstayed their visa, not that they intended to do so. However, a defendant may be able to prove that they were not at fault for the act – if, for example, they were pregnant and unable to board a plane in order to avoid overstaying. Strict liability offences will usually come with a lower penalty, such as a fine rather than imprisonment, to balance out the lowered burden of proof.

⁵ This offence is based on a criminal offence in the Victorian Equal Opportunities Act 2010. As noted below, a similar provision exists in the Human Rights Act 1993, but it is not a criminal offence.

Options for banning advertising of conversion practices

34. We have developed three options for prohibiting advertising of conversion practices. We have assessed these options against the following criteria:

- efficacy, particularly at deterring the advertising and performance of conversion practices
- coverage, including the extent to which the option captures advertising of conversion practices while excluding advertising of legitimate practices
- feasibility, including of implementation and enforcement.

Option 1: Civil prohibition on advertising of conversion practices (recommended)

35. This option would make it unlawful under civil law to publish or display, or cause to be published or displayed, an advertisement that indicates, or could reasonably be understood as indicating, an intention to perform conversion practices. Depending on how the Conversion Practices Prohibition Bill is drafted, this option would either utilise an existing provision concerning advertising in the Human Rights Act 1993 or create a similar provision specifically concerning advertising of conversion practices.⁶
36. This option would allow the Commission to receive and resolve complaints about advertisements of conversion practices. Where those complaints could not be resolved, the Human Rights Review Tribunal could consider the issue and grant remedies, including orders restraining the continuation of the advertising.
37. This is our recommended option. The inclusion of an objective test ("could be reasonably understood as indicating") would allow for more subtle advertising of conversion practices to be captured. As with advertising of other criminalised behaviours, this option would not expressly criminalise advertising of conversion practices. Imposing civil rather than criminal liability would protect against the risk of unintentionally criminalising the advertising of legitimate services. It would also align well with the functions that the Commission already performs.
38. We note that, without a set penalty for advertising, a civil prohibition may not have the same deterrent effect as a criminal offence. However, the actual performance of conversion practices would continue to be covered by the criminal offences or civil redress scheme. The existing protections described above would also still apply.

Option 2: Criminal offence for knowingly publishing an advertisement for conversion practices

39. This option would make it a criminal offence to knowingly publish or display, or cause to be published or displayed, an advertisement for the performance of conversion practices.
40. This would be a narrowly defined prohibition. To be captured, an advertisement would need to make clear that conversion practices were being offered and provide sufficient detail about how to procure them.

⁶ Section 67 of the Human Rights Act 1993 makes it unlawful for any person to publish or display, or to cause or allow to be published or displayed, any advertisement or notice which indicates, or could reasonably be understood as indicating, an intention to commit a breach of any of the provisions of Part 2 of the Act.

41. This option could be relatively simple to apply and would be unlikely to unintentionally capture the advertising of legitimate activities such as counselling. However, given that conversion practices do not appear to be frequently advertised in this way, this offence would likely only apply in very limited circumstances. It may have a wider deterrent effect on attempts to advertise conversion practices in other ways, but this cannot be assured with any degree of certainty.
42. If you decide to have a criminal offence, we propose that the penalty for this offence would be a fine not exceeding \$10,000 for an individual and \$50,000 for a body corporate. These penalties are comparable to the offence prohibiting the advertisement of commercial sexual services in the Prostitution Reform Act 2003.

Option 3: Criminal offence for publishing an advertisement indicating an intention to perform conversion practices

43. This option would make it a criminal offence to publish or display, or caused to be published or displayed, an advertisement that indicates, or could reasonably be understood as indicating, that a person intends to perform conversion practices. This offence would be drafted similarly to the Victorian offence.
44. As with option 1, because of the inclusion of an objective test this offence could capture more subtle advertising of conversion practices. However, by extending beyond prima facie advertisements for conversion practices, this option may risk unintentionally criminalising the advertising of legitimate practices, which could have a chilling effect on such advertising.
45. We recommend that this offence should require a mental element (such as knowledge or intention) and not be a strict liability offence (as in Victoria). Strict liability offences are generally only appropriate to enforce regulatory regimes, not prohibited behaviour. They are also not appropriate for offending that is serious and morally blameworthy and requires an element of culpability. We would work with PCO to determine the most appropriate approach to incorporating a mental element into this offence.
46. As with option 2, if you decide to have a criminal offence, we propose that the penalty for this offence would be a fine not exceeding \$10,000 for an individual and \$50,000 for a body corporate.

Next steps

47. Once you have made decisions on the issues outlined in this briefing, we will provide additional drafting instructions to PCO so that your decisions can be incorporated into the draft legislation.
48. [9\(2\)\(\)](#)
49. We note that Cabinet also invited you to report back to the Cabinet Social Wellbeing Committee by 30 June 2021 on options for funding the civil redress scheme in 2021/22 and 2022/23 as part of the paper seeking approval to introduce legislation to the House of Representatives. We are conducting further work to develop more robust cost estimates and will provide this advice alongside the draft Bill and Cabinet paper seeking approval to introduce.

50. We are working to the following timeframes for introduction of the Bill:

<i>2 to 4 June</i>	Targeted agency consultation
<i>8 June</i>	Draft Cabinet paper and Bill to Minister
<i>9 to 15 June</i>	Ministerial and agency consultation
<i>16 June</i>	Bill to Crown Law Office for BORA vet
<i>24 June</i>	Finalise and lodge Cabinet paper and Bill
<i>30 June</i>	Social Wellbeing Committee
<i>5 July</i>	Cabinet
<i>5 July</i>	Introduction

Proactively Released

Recommendations

51. We recommend that you:

1. **Note** that on 3 May 2021, Cabinet agreed to your proposals to prohibit conversion practices in New Zealand
2. **Note** that your Cabinet paper noted that you would receive further advice on the availability of the civil redress scheme for children and people with impaired decision-making capacity, and a ban on the advertising of conversion practices
3. **Agree** that the civil redress scheme should be made available for children and people with impaired decision-making capacity YES / NO
4. **Indicate** your preferred option for a prohibition on advertising of conversion practices:

 EITHER

 4.1. Option 1: Civil prohibition on advertising of conversion practices (recommended) YES / NO

 OR

 4.2. Option 2: Criminal offence for knowingly publishing an advertisement for conversion practices YES / NO

 OR

 4.3. Option 3: Criminal offence for publishing an advertisement indicating an intention to perform conversion practices. YES / NO

s9(2)(a)

Jenna Reid
Policy Manager, Civil Law and Human Rights

APPROVED / SEEN / NOT AGREED

Hon Kris Faafoi
Minister of Justice
Date:

IN CONFIDENCE

Office of the Minister of Justice
Chair, Cabinet Social Wellbeing Committee

Conversion Practices Prohibition Legislation Bill: Approval for Introduction

Proposal

- 1 This paper seeks approval for the introduction of the Conversion Practices Prohibition Legislation Bill (the Bill). It also reports back on areas where we have made additional policy decisions in accordance with the authority granted by Cabinet and seeks decisions on those matters and on funding for a civil redress scheme.

Policy

Background

- 2 In May 2021, Cabinet agreed to prohibit the use of conversion practices with a Bill [CBC-21-MIN-0047 and CAB-21-MINN-0142 refer].
- 3 Conversion practices (sometimes referred to as “gay conversion therapy” or “conversion therapy”) encompass a broad range of practices that seek to change or suppress a person’s sexual orientation, gender identity, or gender expression. They are motivated by a heteronormative belief that any form of sexual or gender diversity is deviant and abnormal behaviour that needs to be cured, treated or reversed so that a person is ‘normal’ again.
- 4 Conversion practices have changed over time. At the more extreme end of the spectrum, conversion practices have included electroconvulsive therapy and hormone injections to suppress sexual desire. Common forms now include practices purporting to be talk-therapy and faith-based practices such as prayer, fasting, and exorcism.
- 5 International academic and medical research emphasises that conversion practices do not work and are harmful to a person’s mental wellbeing. Practices can be disabling, contributing to issues such as low self-esteem, depression, anxiety, and suicidal thoughts and attempts.

Why the Bill is needed

- 6 Conversion practices are not expressly illegal and continue to occur in New Zealand. The Bill will also give effect to the Labour Party’s 2020 Election Manifesto commitment to ban conversion practices.

- 7 A statutory prohibition will send a strong message that conversion practices are wrong and should not be happening in modern New Zealand. The prohibition has been developed with the following objectives:
- 7.1 affirming the dignity of all people and that no sexual orientation, gender identity, or gender expression is broken and in need of fixing
 - 7.2 preventing the harm practices cause in New Zealand and providing an avenue for redress, and
 - 7.3 upholding the human rights of all New Zealanders, including of rainbow New Zealanders, to live free from discrimination and harm.

Key aspects of the Bill

Definition of “conversion practice”

- 8 The Bill defines a conversion practice as a practice that is directed towards a person because of their sexual orientation, gender identity or gender expression, and is performed with the intention of changing or suppressing it.
- 9 The definition explicitly excludes practices by health practitioners acting within their scope of practice, as well as those with a legitimate therapeutic or supportive intent. Legitimate practices can include assisting a person with gender transition, or facilitating a person's coping skills, development, or identity exploration.

Criminal offences for performance of conversion practice

- 10 The Bill makes it a criminal offence for any person to perform conversion practices on a person under 18 years or a person who lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to their health or welfare. This offence carries a maximum penalty of three years imprisonment. I note that the language for a person who lacks capacity is taken from the Protection of Personal and Property Rights Act 1988.
- 11 It also makes it a criminal offence for any person to perform conversion practices on any person (including adults) where the practices cause serious harm, and is subject to a maximum penalty of five years imprisonment. I note that the Bill defines serious harm as any physical, psychological, or emotional harm that seriously and detrimentally affects the health, safety, or ongoing welfare of the individual.
- 12 These criminal offences cover situations where there is either a heightened risk of harm (as in the case of people under 18 years or people with impaired decision-making capacity) or where serious harm can be demonstrated to have been caused.

Amends the Human Rights Act 1993 to establish a civil redress scheme

- 13 The Bill also amends Part 2 of the Human Rights Act 1993 to make it unlawful to perform or arrange for the performance of conversion practices. The effect is that conversion practices then fall within the complaints process of the Human Rights Commission (the Commission) and allows the Human Rights Review Tribunal jurisdiction to hear cases.

Additional policy decisions

Previous decisions made by Cabinet

- 14 On 3 May 2021, Cabinet agreed-in-principle to a prohibition on advertising subject to further policy decisions on what form a prohibition would take.
- 15 At the same meeting, Cabinet also agreed-in-principle to utilise the Human Rights Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults where the practices do not cause serious harm, subject to future funding decisions.
- 16 In my Cabinet paper I noted that I would receive further advice on whether the civil redress scheme should also be made available to children and people with impaired decision-making capacity in situations where criminal charges cannot be brought.
- 17 Cabinet authorised me to make further policy decisions as appropriate and to report-back to the Committee on those decisions. Cabinet also invited me to report-back on options for funding the civil redress scheme for 2021/22 and 2022/23 [CAB-21-MIN-142 refers].

Attorney-General's consent to prosecute

- 18 Following further advice, I have decided to include in the Bill a requirement for the Attorney-General's consent to a prosecution of either of the offences contained in the Bill.
- 19 A requirement for the Attorney-General's consent will act as an additional safeguard against prosecutions that do not come within the intended scope of the prohibition on conversion practices, and better ensure consistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

A civil prohibition on the advertising of conversion practices

- 20 Following further advice, I have decided to make it unlawful under civil law to publish or display, or cause to be published or displayed, an advertisement that indicates, or could reasonably be understood as indicating, an intention to perform conversion practices. This prohibition utilises an existing provision in the Human Rights Act 1993 and will be implemented by the Commission through the civil redress scheme.
- 21 I consider that a civil prohibition is most appropriate given the current nature of advertising and promotion of conversion practices. I understand that

conversion practices are now unlikely to be directly advertised. Instead, they may be advertised using vague language or presented as legitimate-appearing practices, such as relationship or sexuality counselling.

- 22 Another option I considered was to create a criminal offence for the prohibition on advertising. However, I chose a civil prohibition on advertising because it will capture more subtle advertising of conversion practices that might not be captured by a criminal prohibition. Imposing civil rather than criminal liability will also protect against the risk of unintentionally criminalising the advertising of legitimate services.

Extending the availability of the civil redress scheme to children and people with impaired decision-making capacity

- 23 I have also decided that children and people with impaired decision-making capacity should not be excluded from bringing a complaint under the civil redress scheme. Doing so will provide an alternative pathway for redress for these groups, consistent with the objectives of the prohibition.
- 24 This approach is in line with our domestic human rights framework and consistent with guidance from the United Nations about providing children with functional and accessible complaints mechanisms when their right to health is violated or at risk.

Financial implications for civil redress scheme

- 25 As I noted in my earlier paper as well as dealing with complaints, I expect that the Commission will play an important role in providing education about conversion practices and the prohibition, and in making survivors – including those who have experienced the practices in the past – aware of how to access the support that they may need. I consider that these functions will be key to ensuring that the objectives of the prohibition are achieved. For that reason, it is important that funding for implementing the civil redress scheme is confirmed prior to the Bill being introduced to the House.
- 26 The Ministry of Justice has undertaken further work to develop more robust cost estimates in consultation with the Commission. It estimates that the Commission will require an additional \$750,000 in 2021/22 and \$1.500 million in 2022/23 to implement the civil redress scheme. This funding will allow the Commission to expand its complaints function, train staff, develop and provide education on the prohibition and the civil redress scheme, setup appropriate monitoring and evaluation, deal with an initial tranche of enquiries and complaints, and exercise its general powers and functions in respect of conversion practices. I expect that the Commission will engage with communities (particularly survivors of conversion practices and rainbow communities) and across agencies in designing and implementing the civil redress scheme.
- 27 I do not consider that these initial costs could be met through the Commission's baseline funding. I propose that the costs for 2021/22 and 2022/23 be charged against the between-Budget contingency established as

part of Budget 2021. The pattern of demand for the scheme in its first year of operation would then inform a future Budget bid for any required increase to baseline funding.

Impact analysis

- 28 A regulatory impact assessment was prepared in accordance with the necessary requirements, and was submitted to Cabinet along with the paper seeking policy approvals in April 2021 [CBC-21-MIN-0047 and CAB-21-MINN-0142 refer].

Compliance

- 29 The Bill complies with the following:
- 29.1 the principles of the Treaty of Waitangi;
 - 29.2 the disclosure statement requirements (a disclosure statement prepared by the Ministry of Justice is attached);
 - 29.3 the principles and guidelines set out in the Privacy Act 2020;
 - 29.4 relevant international standards and obligations; and
 - 29.5 the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990

- 30 I consider the Bill is consistent with the rights and freedoms contained in the Bill of Rights Act. The Bill places a justified limitation on section 14 (freedom of expression) of the Bill of Rights Act.
- 31 The limit is proportionate as any expression captured by the Bill currently restricts others from freely expressing who they are and can cause serious and sometimes life-altering harm.
- 32 The Bill contains safeguards to ensure civil and criminal liability is closely connected to the harm that can be caused; and conversion practices performed on adults would only be criminalised in the most egregious cases, where a high standard of serious harm would need to be demonstrated. As discussed above at paragraph 19, the requirement for the Attorney-General's consent to prosecute any of the offences in the Bill is an additional safeguard that lessens the limit on freedom of expression.
- 33 Criminalising conversion practices performed on children and people with impaired decision-making ability is proportionate as the state has a responsibility through its international commitments and domestic obligations to protect those who cannot protect themselves.

Consultation

- 34 The following agencies have been consulted on the proposals in this paper: the Ministry of Health, New Zealand Police, the Department of Corrections, the Treasury, Oranga Tamariki, Ministry for Women, Office for Disability Issues, Office of Ethnic Communities, Ministry of Youth Development, Ministry of Social Development, Ministry of Education, Crown Law Office, and Ministry for Pacific Peoples. The Human Rights Commission has also been consulted.
- 35 The Department of the Prime Minister and Cabinet, Te Puni Kōkiri, and the Department of the Prime Minister and Cabinet (Child Wellbeing Unit) have been informed.
- 36 I note that, since the policy paper was considered in April, Ministry of Justice officials have continued to conduct targeted discussions with a range of key stakeholders. These have included survivors of conversion practices, members of Māori, Pacific, and ethnic rainbow communities, professional associations, faith groups, and academics.

Binding on the Crown

- 37 I seek Cabinet approval that the Bill will bind the Crown.

Creating new agencies or amending law relating to existing agencies.

- 38 The Bill will amend Part 2 of the Human Rights Act 1993 so that it is unlawful to perform or arrange for the performance of conversion practices. This amends the existing coverage of the Human Rights Commission's complaints function and the Human Rights Review Tribunal's jurisdiction to enable civil redress to be pursued.

Allocation of decision making powers

- 39 The Bill does not involve the allocation of decision-making powers between the executive, the courts or tribunals.

Associated regulations

- 40 No regulations will be required to bring the Bill into operation.

Other instruments

- 41 The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

- 42 The Bill does not contain a definition of Minister, department, or equivalent government agency, or chief executive or equivalent position.

Commencement of legislation

- 43 The criminal offences in the Bill will come into force the day after Royal Assent, and the civil redress scheme will come into effect six months after Royal Assent.

Parliamentary stages

- 44 The Government has publicly announced that the Bill will be passed by February 2022 at the latest. [s9\(2\)\(f\)\(iv\)](#)

I propose that the Bill should be introduced to the House on 5 July 2021 and be enacted by February 2022 at the latest.

- 45 I propose the Bill be referred to the Justice Committee.

Proactive Release

- 46 I propose to release this Cabinet paper, and related Minute, with any necessary redactions, following the introduction of the Bill. The Cabinet paper considered by the Cabinet Business Committee in April, and by Cabinet in May, will also be released at the same time along with the related Minutes.

Recommendations

- 47 The Minister of Justice recommends that the Committee:

Approval of Conversion Practices Prohibition Legislation Bill for introduction

- 1 **note** that the Conversion Practices Prohibition Legislation Bill holds a category three priority on the 2021 Legislation Programme (to be passed if possible in 2021);
- 2 **note** that the Conversion Practices Prohibition Legislation Bill defines conversion practices, creates criminal offences prohibiting the performance of conversion practices, and amends Part 2 of the Human Rights Act 1993 to establish a civil redress scheme;
- 3 **agree** that the Conversion Practices Prohibition Legislation Bill will bind the Crown;
- 4 **approve** the Conversion Practices Prohibition Legislation Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 5 **agree** that the Conversion Practices Prohibition Legislation Bill be introduced on 5 July 2021;

6 **agree** that the government propose that the Conversion Practices Prohibition Legislation Bill be:

6.1 referred to the Justice committee ^{s9(2)(f)(iv)}
and

6.2 enacted by February 2022 at the latest;

Additional policy decisions

7 **note** that on 3 May 2021, Cabinet [CAB-21-MIN-142 refers]:

7.1 agreed-in-principle to utilise the Human Rights Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults where the practices do not cause serious harm, subject to future funding decisions;

7.2 agreed-in-principle to prohibit the advertising of conversion practices subject to future decisions being made;

7.3 authorised the Minister of Justice to make further policy decisions as appropriate;

8 **note** the requirement for the Attorney-General's consent to prosecute the offences in the Bill;

9 **agree** to utilise the Human Rights Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on all people (including children and people with impaired decision-making capacity);

10 **agree** to create a civil prohibition on the advertising of conversion practices that will be implemented by the Human Rights Commission as part of the civil redress scheme;

11 **approve** the following changes to appropriations to give effect to the policy decisions in recommendation 9 above with a corresponding impact on the operating balance and net core Crown debt:

	\$m – increase/(decrease)				
Vote Justice Minister of Justice	2020/21	2021/22	2022/23	2023/24	2024/25 & Outyears
Non-Departmental Output Expense: Services from the Human Rights Commission	-	0.750	1.500	-	-

12 **agree** that the proposed changes to appropriations for 2021/22 and 2022/23 above be included in the 2021/22 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

IN C O N F I D E N C E

- 13 **agree** that the proposed changes to appropriations for 2021/22 and 2022/23 above be charged against the between-Budget contingency established as part of Budget 2021.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice

Proactively Released



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Conversion Practices Prohibition Legislation Bill: Approval for Introduction

Portfolio **Justice**

On 30 June 2021, the Cabinet Social Wellbeing Committee:

Background

- 1 **noted** that in May 2021, Cabinet agreed to prohibit the use of conversion practices and agreed relevant policy decisions for inclusion in a bill and authorised the Minister of Justice to make any further policy decisions required and report back to Cabinet [CAB-21-MIN-0142];

Approval of the Conversion Practices Prohibition Legislation Bill for Introduction

- 2 **noted** that the Conversion Practices Prohibition Legislation Bill (the Bill) holds a category three priority on the 2021 Legislation Programme (to be passed if possible in 2021);
- 3 **noted** that the Bill defines conversion practices, creates criminal offences prohibiting the performance of conversion practices, and amends Part 2 of the Human Rights Act 1993 to establish a civil redress scheme;
- 4 **agreed** that the Bill will bind the Crown;
- 5 **approved** for introduction the Conversion Practices Prohibition Legislation Bill [PCO 23471/9.0], subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 **agreed** that the Bill be introduced in July 2021;
- 7 **agreed** that the government propose that the Bill be:
 - 7.1 referred to the Justice committee [s9\(2\)\(f\)\(iv\)](#)
 - 7.2 enacted by February 2022 at the latest;

Additional policy decisions

- 8 **noted** that on 3 May 2021, Cabinet:
 - 8.1 agreed-in-principle to utilise the Human Rights Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on adults where the practices do not cause serious harm, subject to future funding decisions;

- 8.2 agreed-in-principle to prohibit the advertising of conversion practices subject to future decisions being made;
- 8.3 authorised the Minister of Justice to make further policy decisions as appropriate; [CAB-21-MIN-0142];

- 9 **noted** the requirement for the Attorney-General's consent to prosecute the offences in the Bill;
- 10 **agreed** to utilise the Human Rights Commission's existing functions and complaints system to provide a civil redress scheme for conversion practices performed on all people (including children and people with impaired decision-making capacity);
- 11 **agreed** to create a civil prohibition on the advertising of conversion practices that will be implemented by the Human Rights Commission as part of the civil redress scheme;
- 12 **approved** the following changes to appropriations to give effect to the policy decisions in paragraph 9 above with a corresponding impact on the operating balance and net core Crown debt:

Vote Justice Minister of Justice	\$m – increase/(decrease)				
	2020/21	2021/22	2022/23	2023/24	2024/25 & Outyears
Non-Departmental Output Expense: Services from the Human Rights Commission	-	0.750	1.500	-	-

- 13 **agreed** that the changes to appropriations for 2021/22 and 2022/23 above be included in the 2021/22 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
- 14 **agreed** that the changes to appropriations for 2021/22 and 2022/23 above be charged against the between-Budget contingency established as part of Budget 2021.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Grant Robertson
Hon D. Megan Woods
Hon Chri Hipkins
Hon Carmel Sepuloni (Chair)
Hon Andrew Little
Hon Damien O'Connor
Hon Kris Faafoi
Hon Peeni Henare
Hon Jan Tinetti
Hon Dr Ayesha Verrall
Hon Meka Whaitiri
Hon Priyanka Radhakrishnan

Officials present from:

Office of the Prime Minister
Officials Committee for SWC