

# Coversheet: Prohibiting Conversion Practices

Advising agencies	<i>Ministry of Justice</i>
Decision sought	<i>This analysis has been conducted to inform Cabinet decisions regarding the manifesto commitment to ban conversion practices.</i>
Proposing Ministers	<i>Minister of Justice</i>

## Summary: Problem and Proposed Approach

**Problem Definition**  
**What problem or opportunity does this proposal seek to address? Why is Government intervention required?**

Conversion practices seeking to change or suppress a person’s sexual orientation, gender identity or gender expression are not specifically illegal in New Zealand and media reports and public discussion indicate they occur. Conversion practices do not work and can contribute to low self-esteem, anxiety, and suicidal thoughts and attempts. Legislative intervention is necessary to clearly affirm that no sexual orientation, gender identity or gender expression is wrong, broken or in need of fixing.

**Summary of Preferred Option or Conclusion (if no preferred option)**  
**How will the agency’s preferred approach work to bring about the desired change? Why is this the preferred option? Why is it feasible? Is the preferred approach likely to be reflected in the Cabinet paper?**

The preferred option is to:

- create a criminal offence and penalties for any person performing conversion practices on children under the age of 18 or people with impaired decision-making capacity
- provide a civil redress process through the Human Rights Commission (the Commission) for adults who have experienced conversion practices
- create a criminal offence and penalties for a person who performs conversion practices on any person (child or adult) where the practices cause serious harm and is reckless as to whether serious harm would be caused.

This is the preferred option because it provides an enforceable prohibition of conversion practices through legislation and it protects both children and adults. The criminal offences and penalties and the civil redress process in themselves may not bring about a complete end to conversion practices. However, they would send a strong message that such practices are not tolerated in New Zealand society. Over time, it is to be expected that the attitudes of those that use conversion practices would change to align more closely with those of the wider society.

It is feasible because it uses the existing functions of the Commission, the Police and courts. However, additional funding would be needed for the Commission to take on the new function. Cabinet agreement to this preferred option will be sought in the Cabinet paper.

# Section B: Summary Impacts: Benefits and costs

## Who are the main expected beneficiaries and what is the nature of the expected benefit?

The main beneficiaries of the proposal are members of rainbow communities as they are the targets of conversion practices and the associated negative messaging about sexuality and gender diversity. Legal prohibition will affirm that no sexual orientation or gender identity is wrong or broken or needs correction. It will provide penalties to those who continue to use conversion practices and provide survivors with an avenue for redress.

## Where do the costs fall?

The main costs of the proposal are associated with enforcement. Costs therefore fall to the Commission, the Police, the courts, and Corrections. There are also likely be costs associated with the provision of education materials on the changes, and increased support services for survivors.

## What are the likely risks and unintended impacts? how significant are they and how will they be minimised or mitigated?

The lack of baseline data on the prevalence of conversion practices makes it difficult to estimate the costs of the preferred option. There is a risk that the impacts on agencies will be higher than anticipated.

The criminalisation of conversion practices may result in a change in how they are presented and performed. The way practices are described may become more subtle, for example through references to exploring sexuality rather than changing it, and on spiritual healing and development. Conversion practices have very low public visibility now so the prohibition will have little effect in that regard. However, if they become more difficult to identify, they may also be more difficult to prosecute.

Nevertheless, regardless of how conversion practices are presented, survivors will have recourse to the law to lay complaints.

# Section C: Evidence certainty and quality assurance

## Agency rating of evidence certainty?

There is little evidence on the prevalence or nature of conversion practices in New Zealand. In one recent survey, 17 percent of trans and non-binary people reported that a professional (such as a psychiatrist, psychologist or counsellor) had tried to stop them from being trans or non-binary<sup>1</sup>. There are several recent media reports with survivor accounts affirm that such practices do happen.

The evidence base on the harms of conversion practices and lack of evidence that sexual orientation and gender identity can be changed is robust and scientific. Legislative prohibitions in other countries have only recently been introduced and, as yet, there is no data on their effectiveness in preventing conversion practices from occurring.

<sup>1</sup> Veale J., Byrne J., Tan K., Guy S., Yee A., Nopera T. & Bentham R. (2019). *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand*. Transgender Health Research Lab, University of Waikato: Hamilton

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Ministry of Justice's RIA QA panel has reviewed the RIA: *Ending conversion practices* prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA partially meets the QA criteria.

Reviewer Comments and Recommendations:

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 paper 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. We therefore cannot be sure how widespread the practices are and therefore how many prosecutions, court cases, and imprisonments may follow. The paper assumes that not many cases will arise. If that assumption is incorrect, all agencies other than the Human Rights Commission will need to absorb the costs from baselines until such time as cost pressure budget bids may be sought.

The paper 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 paper meets the clear and concise and consulted elements, bearing in mind the declared constraints on consultation to date.

# Impact Statement: Prohibition of Conversion Practices

## Section 1: General information

### 1.1 Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing:

- key policy decisions to be taken by Cabinet
- final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

### 1.2 Key Limitations or Constraints on Analysis

#### **Banning conversion practices is a manifesto commitment**

The overall policy outcome is to bring about an end to conversion practices in New Zealand. In order to achieve this, the Government made banning conversion practices a manifesto commitment.

Conversion practices are attempts to change or suppress sexual orientation, gender identity or gender expression. Conversion practices are defined as practices that:

- are directed towards another person
- based on that person’s sexual orientation, gender identity, or gender expression, and
- are performed with the intention, or purported intention, of changing or suppressing the person’s sexual orientation, gender identity, or gender expression.

All settings where such practices might occur are in scope, including within regulated and unregulated health services and faith-based communities. Conversion practices are less likely to occur in regulated health services as there are a number of protections in place such as the Code of Health and Disability Services Consumer’s Rights and professional codes of ethics.

Some stakeholders have suggested that sex characteristics and surgical sex assignment of intersex children should also be included. However, the issues and potential interventions involved in changing sex characteristics are materially different from those attempting to change or suppress sexual orientation and gender identity and expression.

The inclusion of variations of sex characteristics in the prohibition of conversion practices could add significant complexity to the policy and legislation. The issues for, and experiences of, intersex people are important and merit specific consideration rather than as an addition to this work. We understand that the Ministry of Health will develop a rights-based protocol to prevent unnecessary medical interventions on intersex children.

#### *There is limited evidence on the use of conversion practices in New Zealand*

It is not known how prevalent the use of conversion practices is in New Zealand or the exact nature of those practices. The only survey available is *Counting Ourselves*, which reports on prevalence in health settings for transgender and non-binary people. There

are no other known surveys or quantitative data to draw on and information available is anecdotal.

A number of media stories on conversion practices, which include survivor accounts, have been published over the last three years. These media reports, and our engagements with survivors, confirm that conversion practices have occurred in New Zealand in the recent past. However, we have no data on current practices or how widespread they are.

### **Non-regulatory and regulatory options have been considered**

Non-regulatory options would centre around education of the harm and ineffectiveness of conversion practices and affirming sexual and gender diversity. Regulatory options include by civil and criminal law. Criminal offences send a clear signal that conversion practices are wrong, harmful and not tolerated in modern New Zealand society. Civil processes allow for redress and resolution in situations where criminal action may not be appropriate.

#### *Options were assessed against four criteria*

The criteria for assessing the options were:

- effectiveness
- equity
- simplicity
- timeliness.

### **Assumptions underpinning the impact analysis**

The impact analysis is underpinned by the assumption, based on research evidence, that conversion practices can have a long lasting, harmful impact on the mental health and wellbeing of survivors. By bringing conversion practices out into the open, the proposals may result in an increase in survivors seeking support from mental health services. This is a specialised field of psychology and counselling, and health practitioners may need upskilling.

It is assumed that the use of conversion practices is not widespread in New Zealand as anecdotal information is that the settings in which they occur are limited. The number of complaints per year is therefore not expected to be significant.

### **There is no reliable data for use in the impact analysis**

The impact analysis is constrained by the inability to quantify, with any certainty, the impacts of the preferred options. It is not possible for the Commission or Police to predict with sufficient certainty the volume of complaints or investigations that may result from the proposals, as well as the expected cost of Police investigations.

Only a very small proportion of the New Zealand population is likely to be exposed to conversion practices. The 2018 General Social Survey reported that 3.5 percent of respondents identified as lesbian, gay, bisexual or other non-heterosexual identity.<sup>2</sup> In the 2018 census, 45.4 percent of the total New Zealand population reported a religious affiliation. Of the number of people with a religious affiliation, it could be assumed that 3.5 percent, or 74,373 people, might be from rainbow communities.

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<sup>2</sup> The General Social Survey is a face to face interview and this could affect how people identify their sexual orientation. Consequently the proportion of lesbian, gay, bisexual and other non-heterosexual orientations may be under-reported.

### **Public consultation has not been undertaken**

Increasing public demand to ban conversion practices as soon as possible resulted in the Government committing to enacting legislation by the end of 2021. Formal consultation on policy proposals could not be undertaken within this timeframe.

The proposals have been informed by, and tested through, targeted discussions with conversion practice survivors, faith community leaders, health professional bodies and academics.

A more extensive consultation process may have resulted in a better-informed understanding of the nature and scale of the problem. It would also have better informed the development and analysis of the options. The only opportunity for public input would be during the select committee process.

### **1.3 Responsible Manager (signature and date):**



Jenna Reid

Policy Manager, Civil Law and Human Rights  
Policy Group  
Ministry of Justice

15 April 2021

# Section 2: Problem definition and objectives

## 2.1 What is the current state within which action is proposed?

Conversion practices encompass a broad range of activities that seek to change or suppress a person’s sexual orientation, gender identity, or gender expression. Suppression focuses on eliminating behaviours associated with sexual and gender expression.

Media reports and public discussion indicate that conversion practices in New Zealand largely occur in unregulated settings such as faith-based communities and counselling<sup>3</sup>. They tend to happen in private and there is little public acknowledgement by faith communities of their use.

Media and survivor reports indicate that, in New Zealand, conversion practices commonly take the form of unpaid purported talk-therapy and faith-based practices such as prayer, fasting, spiritual deliverance, 12-step type programmes, and individual, group and online counselling. In recent years there appears to have been an increasing shift towards suppressing the expression of non-heteronormative orientations and identity rather than attempting to change them.

## 2.2 What regulatory system(s) are already in place?

### There is no specific regulatory system in place covering conversion practices

There is no existing regulation or regulatory system that deals explicitly with conversion practices. However, there are some protections under the criminal and health regulatory systems, depending on the nature of the practices and who is performing them.

#### *The criminal justice system*

Some of the more extreme practices may be criminal offences if they are coercive, violent, and/or physically harmful. Parents or caregivers who consent to, or force their child to undergo, conversion practices could be in breach of section 195 of the Crimes Act 1961, which requires them to protect their child from injury. Legal protections against practices that are not assaultive or injurious are less clear.

#### *The health system*

The performance of conversion practices in health settings would be unlikely to comply with the Health and Disability Service Standard and the Code of Health and Disability Services Consumers’ Rights (the Code). The Code can apply to people who represent themselves as providing health services, including those outside the mainstream health care providers.

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

<sup>3</sup> TVNZ Sunday "Pray the gay away' - Homosexual conversion therapy in NZ" (18 June 2018) TVNZ <<https://www.tvnz.co.nz/one-news/new-zealand/tvnz-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 Lorean "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/>>.

position statement. Practitioners that do perform conversion practices would face disciplinary measures and, for those professions regulated under the Health Practitioners Competence Assurance Act 1993, this could affect their ability to practice.

There would be nothing to stop practitioners of unregulated professions, such as counsellors and youth workers, from performing conversion practices, unless they hold themselves out to be providing a health service (which would then be subject to the Code).

### *Human rights*

The types of conversion practices that happen in New Zealand engage some of the rights and freedoms in the New Zealand Bill of Rights Act 1990 (NZBORA). These rights include freedom from discrimination, freedom of expression, and manifestation of religion and belief. However, the anti-discrimination provisions of the Human Rights Act 1993 (HRA) apply to certain areas of public life, such as employment, housing, the provision of goods and services, and access to places and education. They are unlikely to protect against the types of conversion practices that appear to be happening in New Zealand.

### **Government regulation is needed to achieve a ban on conversion practices**

Existing statutory regulation appears to be effective in preventing conversion practices being performed by regulated health practitioners. Any complaints against a health practitioner would be dealt with through the relevant professional disciplinary process. If upheld, the practitioner's membership of their professional body could be cancelled or they could even be removed from the register and unable to practice.

Counsellors and faith-based practitioners are not regulated health professions. Any member of the New Zealand Association of Counsellors (NZAC) who performs or refers someone for conversion practices would be in breach of their code of ethics. However, not all counsellors are members of the NZAC and bound by the code of ethics.

Banning conversion practices would send a strong message that no sexual orientation is a disorder or abnormal and in need of correction. It would clearly signal that such practices are wrong and not tolerated in New Zealand. Legal prohibition would also give people who have been subjected to conversion practices clear, accessible avenues for redress.

Survivor accounts in media reports clearly demonstrate that conversion practices happen in faith-based settings. The use of these practices may reduce over time as more and more faith communities become accepting of different sexual orientations and gender identities and expression. However, such a change in attitudes cannot be guaranteed and could be slow.

Without Government regulation, a prohibition would not be enforceable. Clear prohibition would provide access to redress for people who may be subjected to conversion practices in the future.



## 2.3 What is the policy problem or opportunity?

### Conversion practices cause harm

The problem with conversion practices is that they are harmful to people's mental health and wellbeing. Research has shown that they can contribute to low self-esteem, negative self-image, distress, depression, anxiety, and suicidal ideation.<sup>4, 5, 6</sup>

There is no evidence that a person's sexual orientation or gender identity can be changed. Conversion practices have no therapeutic purpose or evidential basis and do not achieve their intended outcome. This can be further traumatising for survivors who may have participated in the practices expecting certain outcomes and then experience feelings of failure when they do not work.

Without prohibition, the types of conversion practices that occur in New Zealand will continue to be legal and are more likely to continue to happen than if they were banned. People will continue to be harmed with no avenue for redress. In recent years societal attitudes have changed and there is much greater acceptance of different sexual orientations, gender identities and expressions than previously. Attitudes in the settings in which conversion practices occur have not changed to the same degree and acceptance is likely to continue to be slow.

Some people may actively seek conversion practices in order to conform to perceived societal norms or the norms and teachings of their faith community. However, their participation in the practices is not likely to be fully informed as research has shown that conversion practices are not effective in achieving the intended outcome. Education and information on this lack of efficacy may assist in informing those that may be motivated to seek out conversion practices.

#### *Nature, scope and scale of harm*

As noted, there is little data on the prevalence of conversion practices in New Zealand. As they seek to change or suppress sexual orientation and gender identity or expression, members of rainbow communities are most at risk of being subjected to these practices.

Domestic evidence shows that New Zealand rainbow communities experience disproportionately poorer mental health and are at increased risk of suicide than the general population. The Youth12 health and wellbeing survey found that same and both-sex attracted secondary school students were more than three times more likely to exhibit significant depressive symptoms compared to their opposite-sex attracted peers. Same and both-sex attracted students were more than twice as likely to have deliberately self-harmed in the previous year and 18.3 percent had attempted suicide compared to 3.8 percent of opposite-sex attracted students.<sup>7</sup>

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<sup>4</sup> Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation. (2009).

<sup>5</sup> OutRight Action International. *Harmful Treatment: The Global Reach of So-Called Conversion Therapy* (New York: OutRight Action International), (2019).

<sup>6</sup> Jones, T., Brown, A., Carnie, L., Fletcher, G., & Leonard, W. *Preventing harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia*. Melbourne: GLHV@ARCSHS and the Human Rights Law Centre (2018).

<sup>7</sup> 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: Results for Young People Attracted to the Same Sex or Both Sexes, page 22. Auckland: The University of Auckland. Available at <https://www.fmhs.auckland.ac.nz/assets/fmhs/faculty/ahrg/docs/Youth'12%20Young%20People%20Attracted%20to%20the%20Same%20or%20Both%20Sexes%20Report.pdf>

The Youth19 survey revealed that 57 percent of transgender and non-binary secondary school students reported significant depressive symptoms compared to 22.6 percent of cisgender students. An equal proportion reported that they had self-harmed in the past year and 26 percent had attempted suicide.<sup>8</sup>

Evidence shows that members of rainbow communities experience discrimination in the form of personal rejection, hostility, harassment, bullying, and physical violence.<sup>9</sup> One especially powerful stressor for rainbow youth is rejection by parents and other family members. Several studies have found an association between parental rejection because of sexual orientation and higher risk of suicide attempts among rainbow youth.<sup>10</sup> Fear of such rejection may lead to rainbow youth agreeing to participate in conversion practices.

Young people are particularly vulnerable as may be coerced or forced to undergo conversion practices by their parents and spiritual leaders and may have less autonomy to refuse, or withdraw from, the practices. They are also at greater risk of harm than adults as they are still developing their identity and resilience. 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.<sup>11</sup>

#### *Underlying cause of the problem*

The underlying cause of the problem is a belief that only heterosexual and cisgender identities are normal and any other sexual orientation and gender identity and expression are deviant and need to be corrected. The problem also stems from a belief that sexual orientation and gender identity and expression can and should be changed or at least suppressed.

Media reports detailing survivor accounts clearly demonstrate that conversion practices occur in New Zealand and they are most likely to happen in unregulated and faith-based settings. The beliefs that give rise to conversion practices are strongly held and appear to be resistant to change in the face of evidence that the practices are ineffective and harmful. Because they are not illegal in New Zealand, there is no way to prevent conversion practices from being delivered with or without the cooperation of the person.

There are cases where people willingly seek out conversion practices. They may be presented as part of religious belief and the practices couched in the language of therapy or healing. As a result, people may believe that they are broken or sick and need to be fixed in order to remain within their faith community.

Conversion practices are not generally publicised and tend to happen behind closed doors within tight knit communities. As the science around the ineffectiveness of conversion practices has become clear and sexual and gender diversity is more accepted in society, the delivery of conversion practices has become more subtle and secretive.

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<sup>8</sup> Fenaughty, J., Sutcliffe, K., Fleming, T., Ker, A., Lucassen, M., Greaves, L., & Clark, T. (2021). A Youth19 Brief: Transgender and diverse gender students. Auckland: The University of Auckland.

<sup>9</sup> Haas AP, Eliason M, Mays VM, et al. Suicide and suicide risk in lesbian, gay, bisexual, and transgender populations: review and recommendations. (2011). *Journal of Homosexuality*. 2011;58(1):10-51. doi:10.1080/00918369.2011.534038 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3662085/>

<sup>10</sup> Ibid

<sup>11</sup> 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.

There may now be a growing focus on suppression of behaviour, rather than attempting to change sexual orientation and gender identity. Suppression practices are equally harmful because they still carry the message that the person is abnormal and deviant.

### **The evidence supporting this assessment is strong**

The evidence of harm resulting from conversion practices, and lack of evidence that sexual orientation and gender identity can be changed, is robust and well-accepted in research and health fields.

While the prevalence of conversion practices is not known, survivor accounts confirm that they do occur in New Zealand. However, the lack of data makes it impossible to reliably estimate the number of complaints and prosecutions that might result from prohibition.

## **2.4 What do stakeholders think about the problem?**

### **Stakeholder views vary**

There are a range of stakeholders with an interest in the proposals and their interests vary.

#### *Rainbow communities*

As the target of conversion practices, rainbow communities have a strong interest in their prohibition. Rainbow members of faith-based, or other, communities that use conversion practices are at risk of experiencing or feeling pressured into undergoing conversion attempts. They are also at risk of harm from the negative messaging around their sexual orientation and gender identity and expression.

The wider rainbow communities also have an interest in the issue of conversion practices. Some feel that the fact that conversion practices are not illegal implies a level of tolerance in society of these practices and of the underlying negative beliefs about sexual and gender diversity.

Rainbow communities agree that conversion practices are wrong and harmful. There is strong advocacy from the community to ban these practices.

#### *Faith-based communities*

Faith-based communities that use and promote conversion practices, and people who deliver them as a service, are unlikely to agree that they are wrong and harmful. These communities may see the prohibition of these practices as an intrusion on their religious beliefs and expression.

Several Australian states have banned conversion practices and the process revealed that many mainstream religions, even those that were publicly against conversion practices, opposed the particular forms of legal prohibition implemented. In submissions, they expressed concerns that the ban may impact the content of sermons and general religious discourse. There may also be concerns that a prohibition infringes on freedom of expression and manifestation of religion and belief.

#### *Health practitioners and support services*

Mental health professionals may also have an interest in the issue of conversion practices as they provide services to support survivors. Banning conversion practices may raise public awareness of the harms they cause and may increase demand for mental health services. The regulated mental health professional bodies have issued

position statements opposing conversion practices and prohibit their members from performing them.

Health practitioners may express an interest in the wording of a ban and seek to ensure it does not impact on legitimate clinical treatment or therapy. It is unlikely that legitimate clinical support or therapy would satisfy all three criteria of the definition of a conversion practice. For the avoidance of doubt, a general exclusion will apply for health practitioners to exercise their professional judgement.

## 2.5 What are the objectives sought in relation to the identified problem?

The primary outcome is to bring about an end to the use of conversion practices in New Zealand. The objectives are to:

- affirm the dignity of all people and that no sexual orientation or gender identity is broken and in need of fixing
- prevent 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.

## Section 3: Option identification

### 3.1 What options are available to address the problem?

Both non-regulatory and regulatory options have been considered.

#### **Non-regulatory option**

##### *Option 1 – education and information*

Non-regulatory approaches focus on influencing behaviour through education and information rather than controlling it through regulation. This option would involve information and education programmes designed to encourage an end to the use of conversion practices. Examples of the types of content that may be included in programmes might be information on the harms and ineffectiveness of conversion practices, affirming messaging to promote acceptance of people of different sexual orientations and gender identities and expression, and promoting discussion on different interpretations of scripture and doctrine.

Option 1 would seek to prevent the harm cause by conversion practices by encouraging communities to voluntarily end their use. This option relies on education materials and messages reaching and influencing faith communities that perform and promote conversion practices. It is unlikely to be successful as the faith communities that are most likely to use conversion practices tend to be insular and difficult to influence through secular channels.

Educational approaches would require funding for programme design and development, production of materials and resources, and programme delivery. A sustained delivery approach would be required because a one-off campaign is unlikely to have a significant impact on strongly held beliefs.

With non-regulatory approaches, such as education, conversion practices would still be legal in New Zealand and could continue to happen. While they would affirm the dignity of members of rainbow communities, they would not provide effective or timely protection from the harms of conversion practices. Without clear penalties or remedies,

educational approaches alone would not clearly signal that conversion practices are not tolerated in New Zealand society.

### **Regulatory options with increasing levels of protection**

#### *Option 2 – criminal offence for children and people with impaired decision-making capacity*

The second option would create a criminal offence and penalties for any person performing conversion practices on children under the age of 18 years and people with impaired decision-making capacity in relation to their health and welfare. The proposed maximum penalty for this offence would be three years imprisonment. It would also be an offence to publicly advertise conversion practices.

If a criminal offence is created, referring someone to conversion practices is likely to be covered by the existing provisions concerning parties to offences in the Crimes Act 1961. The relevant section of the Crimes Act would be cross-referenced in the legislation to make its application clear.

Option 2 would protect children and people with impaired decision-making capacity from harm caused by conversion practices. This is the minimum level of protection and only covers those who are most at risk of being compelled by others to undergo conversion practices and are less likely to have the autonomy to refuse.

This option would not provide any protection or redress for adults over the age of 18 years who have experienced conversion practices. Therefore it would not uphold the human rights of all New Zealanders.

#### *Option 3 – criminal offence and civil redress*

As with option 2, option 3 would create a criminal offence and penalties for any person performing conversion practices on children under the age of 18 years and people with impaired decision-making capacity in relation to their health and welfare. It would also provide a civil redress process through the Human Rights Commission for adults who have experienced conversion practices.

Referral to conversion practices would be specifically included in the civil process because the parties to offences sections of the Crimes Act 1961 would not apply.

Using its existing powers and functions, the Commission would handle complaints relating to conversion practices being performed on an adult and would provide services to facilitate a resolution. Where a resolution is not achieved, a claim could be taken to the Human Rights Review Tribunal (the Tribunal). The Tribunal could grant remedies such as damages and orders restraining a person or organisation from continuing to perform conversion practices.

This option would provide some protection to adults as well as the criminal offence for conversion practices performed on children and people with impaired decision-making capacity. The key difference is that option 3 would provide civil redress for adults that have been subjected to conversion practices, whether willingly or under coercion. By not criminalising the performance of conversion practices on adults, option 3 preserves the ability of adults to choose to participate in them if they wish.

Option 3 would affirm that no sexual orientation or gender identity is wrong and needs to be corrected. It would prevent harm to children and people with impaired decision-making capacity by prohibiting conversion practices and would provide an avenue for redress for adults through civil law. It would uphold human rights of adults as well as children, although through a different proceeding.

#### *Option 4 – civil and criminal offences including for serious harm (preferred option)*

Option 4 is a package that includes the protections of options 2 and 3 - creating a category 3 criminal offence through new legislation to protect children and people with impaired decision-making capacity and providing a civil redress process for conversion practices performed on adults. In addition, option 4 would create a criminal offence and penalties for a person who performs conversion practices on any person (including adults) where the practices cause serious harm and the person performing the practice is reckless as to whether serious harm would be caused. This offence also applies to a person who performs conversion practices on children and people with impaired decision-making capacity where serious harm is caused, thus providing additional protection for this group.

The proposed maximum penalty for the second offence would be five years imprisonment. This is higher than the penalty for option 2 because of the serious harm aspect and the additional mental element required (recklessness).

As with option 2, referring someone to conversion practices is likely to be covered by the existing provisions concerning parties to offences in the Crimes Act 1961. Public advertising of conversion practices would also be prohibited.

This option would meet all the policy objectives by protecting all people, regardless of age, from the harms of conversion practices through both criminal and civil law. Penalties would be higher where serious harm is caused.

#### **Education and support services might augment the regulatory options**

Education and information programmes might support implementation of any of the regulatory options. Information could be provided regarding, for example, the nature of the changes, what behaviours constitute conversion practices and are prohibited, the difference in penalties and remedies, and how people can lay complaints.

Survivors might benefit from support as they go through the complaints processes. This might be in the form of navigation services and/or support for dealing with harm they may still be experiencing from the conversion practices.

#### **Removing a person from New Zealand for conversion practices would be banned**

A prohibition against conversion practices in New Zealand may lead to attempts to send people to other countries for conversion. All options would also include the creation of a specific criminal offence for the removal from New Zealand of anyone for the purposes of receiving conversion practices in another jurisdiction. The offence and its penalties would be linked to the criminal offences in the preferred option. This would clarify that it would be illegal to procure practices in another country that it would be illegal to procure in New Zealand.

#### **International approaches have been considered**

We reviewed recent conversion practice prohibitions in Germany, Malta, and several states in the United States and Australia. The bans in Queensland, the Australian Capital Territory (ACT) and Victoria were of particular interest and the options were informed by discussion with officials in Victoria.

Option 2 aligns with the approach used in Malta, option 3 aligns with ACT, and option 4 is a slightly modified version of the prohibition implemented in Victoria.

### 3.2 What criteria, in addition to monetary costs and benefits have been used to assess the likely impacts of the options under consideration?

Options have been assessed against the following criteria:

1. *Effectiveness*

The option should provide adequate protections from the harms of conversion practices and, as far as possible, bring about an end to their use.

2. *Equity*

Protections should be fair, just and proportionate for all people at risk of conversion practices.

3. *Simplicity*

The option should be simple to implement and clear in its purpose and scope.

4. *Timeliness*

The option should provide protections against conversion practices within realistic and appropriate timeframes.

The criteria are not mutually exclusive and no trade-offs are required between them.

### 3.3 What other options have been ruled out of scope, or not considered, and why?

Options that were not considered were:

- limiting the ban to conversion practices performed in health settings because protections already exist in the health context and most conversion practices in New Zealand are understood to occur in faith-based settings
- options that provide only civil penalties as they would not be a proportionate response in all cases, particularly where serious harm has resulted, or where people have not willingly participated, and they may have less of a deterrent effect than a criminal offence
- having the same criminal offences and penalties for conversion practices performed on all people, regardless of age as it does not recognise the increased agency of adults to willingly participate
- civil options that would require changes to the functions and powers of the Commission as these would need to be considered as part of a wider review of the HRA
- the inclusion of practices in relation to sex characteristics and surgical sex assignment of intersex children as that is more appropriately addressed through the health system than the justice system.

## Section 4: Impact Analysis

**Marginal impact: How does each of the options identified in section 3.1 compare with taking no action under each of the criteria set out in section 3.2?**

Criterion	No action	Option 1 – education and information	Option 2 - criminal offence for children and people with impaired decision-making capacity	Option 3 – option 2 plus civil redress for adults	Option 4 – options 2 and 3 plus a criminal offence where conversion practices cause serious harm
<b>Effectiveness</b>	<b>0</b>	<b>+</b> It would increase awareness that conversion practices do not work. However, alone, they are unlikely to be effective in ending conversion practices. It does not prohibit conversion practices and they would legally be allowed to happen.	<b>+</b> Provides effective protection for children and people with impaired decision-making capacity. It does not provide any protection for adults.	<b>+</b> In addition to the criminal offence for children and people with impaired decision-making capacity, some protection would be provided to adults through civil law. It does not provide the same level of protection as a criminal offence.	<b>++</b> Effective protections would be provided to everyone and conversion practices would be effectively prohibited through legislation. This approach is the most likely to bring about an end to conversion practices.
<b>Equity</b>	<b>0</b>	<b>0</b> It does not provide a fair or just response for rainbow communities as conversion practices would still be legal and does not uphold their rights to live free from discrimination and harm.	<b>+</b> It is an equitable response for people who are particularly vulnerable. Young people are at increased risk of harm due to their developmental stage. It does not provide a fair and just response for adults or people who have suffered serious harm.	<b>+</b> It provides an equitable response for children and people with impaired decision-making capacity. Civil remedies are a fair, just and proportionate response for adults who have not experienced significant harm as they can take into account the circumstances and context in which the practices occurred. It does not provide an equitable response for people who have suffered serious harm from conversion practices	<b>++</b> It would provide fair, just and proportionate protection from the harms of conversion for all people.



<b>Simplicity</b>	<b>0</b>	<b>0</b> Education and information programmes would need to be carefully designed, targeted and delivered. Multiple education channels may be required.	<b>++</b> It would be implemented through legislation which would be clear in its purpose and scope. Prosecutions would use existing police and court processes. Education and information would support implementation.	<b>+</b> It would be implemented through legislation which would be clear in its purpose and scope. The civil process may be unfamiliar and unclear for some people. Education and information would support implementation.	<b>++</b> It would be implemented through legislation which would be clear in its purpose and scope. Existing processes would be used to address conversion practices. Education and information would support implementation.
<b>Timeliness</b>	<b>0</b>	<b>0</b> Education and information programmes rely on influencing behaviour and are unlikely to produce results or outcomes quickly. They would also need to be delivered over a period of time to change attitudes.	<b>+</b> Conversion practices performed on children and adults with impaired decision-making capacity would be prohibited as soon as the legislation is enacted. It does not provide a timely response for adults. Bringing about an end to conversion practices would take longer and require education and information on the implications of the new legislation.	<b>+</b> Conversion practices would be prohibited as soon as the legislation is enacted. Civil processes can be lengthy if a claim goes through the Tribunal.	<b>+</b> Conversion practices would be prohibited as soon as the legislation is enacted. Civil processes can be lengthy if a claim goes through the Tribunal.
<b>Overall assessment</b>	<b>0</b>	<b>+</b>	<b>+</b>	<b>+</b>	<b>++</b>

**Key:**

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

## Section 5: Conclusions

### 5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

#### Option 4 is the preferred approach

Option 4 is the preferred approach because it provides the strongest response and is therefore likely to have the greatest impact on the use of conversion practices. It would provide protection for all people and would provide a proportionate response for different circumstances and outcomes. It recognises the need to protect children and people with impaired decision making capacity due to their limited autonomy to refuse conversion practices. It would provide strong protection through a criminal offence and penalties for anyone who performs conversion practices on a person (regardless of their age) where serious harm results. Civil redress would be available for adults who were not seriously harmed or chose to make a complaint under the civil scheme.

Option 4 provides a clear message that conversion practices are wrong and not acceptable in New Zealand. It provides certainty on what is a criminal offence and what is more appropriately dealt with through civil remedies. It provides timely access to remedies. There is a clear process through the Commission and Tribunal for accessing civil remedies and normal criminal proceedings apply for the criminal offence.

#### Consultation has been limited

As noted above, the expedited timeframe for passing the legislation to prohibit conversion practices has precluded formal consultation on options or proposals. The options have been tested with, and informed by, discussions with survivors of conversion practices and stakeholders with academic, health profession, and faith-based expertise.

#### Māori interests and Treaty of Waitangi implications

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.<sup>12</sup>

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.

#### Stakeholder views

We have tested the options and discussed similar international approaches with a range of stakeholders including conversion practice survivors, faith groups, health professions and academics. All stakeholders we talked with were, at least in theory, supportive of a legislative ban of conversion practices. There were some concerns with option 4, relating to potential difficulties in proving beyond reasonable doubt that serious harm had resulted from conversion practices.

<sup>12</sup> Elizabeth Kerekere, *Part of the Whānau: The Emergence of Takatāpui Identity* (Thesis, Victoria University of Wellington, April 2017), at 5, 82.

However, the threshold and burden of proof for a criminal offence should be high given the proposed penalty of up to five years imprisonment. This is intended to act as a deterrent as well as provide a criminal justice process.

## 5.2 Summary table of costs and benefits of the preferred approach

<b>Affected parties</b> ( <i>identify</i> )	<b>Comment:</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>	<b>Evidence certainty</b> <i>(High, medium or low)</i>
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### Additional costs of proposed approach compared to taking no action

<b>Regulated parties:</b> Providers of conversion practices and anyone referring a person to a provider	Providers of conversion practices prosecuted under the criminal offence would face the legal costs associated with defending charges and appearing in court or Tribunal proceedings. The costs will vary from case to case depending on the length and complexity of the proceedings.  Dispute resolution services by the Commission are free of charge.	Unknown	Low
<b>Regulators:</b>			
Police	There are likely to be increased costs to the Police as a result of investigations and prosecutions under the new offences. It is not possible to predict how many investigations and prosecutions there might be. The costs of investigations and prosecutions will vary depending on the complexity and length of time involved.	Unknown	Low
Human Rights Commission	The Commission will require additional resources to respond to complaints under the civil provision. It will need initial funding for establishing processes and education resources for informing the public of its function in dealing with complaints of conversion practices. After the first two years,	\$1.5 million per year for two years.	Medium

	<p>ongoing funding would be sought through the budget process.</p> <p>It is not possible to predict the number of complaints the Commission would receive per year. There may be an initial wave of complaints in the first year after enactment, which would most likely reduce over time. Over the medium to long-term, we expect the number of complaints per year relating to conversion practices to be a small proportion of the overall volume of complaints received by the Commission.</p>		
The Human Rights Review Tribunal	The new civil law is likely to result in an increased number of cases to be administered and adjudicated by the Tribunal. Overall, the Tribunal receives approximately 50 new registrations per year. It is unlikely that the regulatory changes would add significantly to the Tribunal workload.	Unknown	Low
Ministry of Justice	Costs include court proceedings and legal aid. It is not possible to predict the number of cases per year that would be heard by the District Court or the number of appeals of Tribunal decisions to the High Court. The impacts of the regulatory changes are expected to be minor as the number of conversion practices cases would be a small proportion of the overall court volume.	Unknown	Low
<b>Wider government:</b>			
Crown Law Prosecution services	The costs of jury trials can be high. The overall impact on Crown Law Prosecution Services is expected to be low as the number of cases is likely to be small.		
Department of Corrections	The cost of imprisonment of one person for 12 months is approximately \$65,000. The proposed regulatory changes would have a negligible impact on the	\$65,000 to 325,000 per year	Medium

	overall prison population within the range of 1 to 5 additional inmates.		
Other: Mental health services	The proposed changes may result in increased demand for mental health services as survivors seek support. This may require specific training for mental health professionals on the effects and harms of conversion practices.	Unknown	Low
<b>Total Monetised Cost</b>		Unknown	Low
<b>Non-monetised costs</b>		Low	Medium

### Expected benefits of proposed approach compared to taking no action

Victims of conversion practices	People subjected to conversion practices would have access to redress. Fewer people would experience the practices as their use declines.	High	Medium
Regulated parties	They would have greater clarity and certainty that conversion practices are prohibited for everyone and cannot be performed with or without consent.	High	High
Regulators	The changes will support the Commission's human rights work.	Medium	Medium
Wider government	The regulatory changes fulfil a manifesto commitment.	High	High
<b>Total Monetised Benefit</b>		Nil	
<b>Non-monetised benefits</b>		High	

### 5.3 What other impacts is this approach likely to have?

#### Other impacts

##### *Human rights*

The proposal directly engages rights in the NZBORA and the HRA and recognises 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.

Cabinet has agreed-in-principle to explicitly include gender identity and expression in the prohibited grounds of discrimination in section 21 of the HRA. This change is expected to be enacted by the end of 2022. The proposal would strengthen the right to freedom

from discrimination on the grounds of sexual orientation and gender identity and expression. It would also provide greater protection to the right of members of rainbow communities to freedom of expression.

The proposals may raise concerns within faith communities regarding Government interference in church practices and beliefs and regulating the content of sermons and prayer. It may be seen as unjustifiably limiting the rights to freedom of religion, manifestation of religion and belief, and freedom of expression. However, the requirement for conversion practices to be directed towards a person is intended to exclude general expressions of religious beliefs or tenets about sexual orientation and gender issues. Sermons would not generally fit the definition as they are directed towards a congregation rather than an individual.

#### *Religious practices*

Conversion practices that take the form of prayer and counselling that are directed towards an individual would be captured by the preferred option. The defining features of a conversion practice include the intent to change or suppress a person's sexual orientation, gender identity or gender expression. Conversion practices are generally a pattern of behaviours, rather than a one-off interaction. The method or form of the practice is not material to the definition and the prohibition would not be effective if certain methods, such as prayer, were excluded.

#### *Family interactions*

Similarly, interactions within a family would also be captured if they meet the definition of conversion practices. It would be a criminal offence for parents, or other members of a family, to attempt to change or suppress the sexual orientation, gender identity or expression of children within the family. This would align with other existing regulatory controls on parental behaviour that could harm children.

#### **Risks and uncertainties**

The lack of baseline data on the prevalence of conversion practices makes it difficult to estimate the impacts and costs of the proposed regulatory changes. However, given the low numbers of people that would be likely targets of conversion practices, the impacts would be minimal.

There is a risk that, in response to the prohibition, practitioners may change the language around conversion practices. References to the processes and purported outcomes may become more subtle and seemingly innocuous. If conversion practices become more difficult to identify they may be more difficult to prosecute.

Cabinet agreement-in-principle is sought for the civil redress scheme subject to the availability of additional funding for the Commission. Should funding not be secured, further Cabinet decisions would be needed regarding the civil scheme.

Government may be consulting on strengthening the protections in the HRA against inciting speech (also referred to as hate speech) in mid-2021. If agreed by Cabinet, the Bill to prohibit conversion practices would be at select committee around the same time. Both proposals are likely to generate public debate about freedom of expression.

With the two processes occurring at similar times, the media and public debate may be particularly intense. Clear communication on what the proposals are and how they engage human rights would be necessary to inform the debate. Active engagement of Ministers with the media on these issues would assist with public understanding of the proposals and their limits.

# Section 6: Implementation and operation

## 6.1 How will the new arrangements work in practice?

The preferred option would be given effect through legislation. The Government has signalled its intention that the Bill would be introduced in mid-2021 and passed by the end of the year or February 2022 at the latest. The civil redress process would be achieved by amending Part 2 of the HRA to include the provision of conversion practices as unlawful discrimination.

The Police and the Commission would be primarily responsible for the ongoing implementation, operation and enforcements of the new arrangements. The Police and Commission have confirmed their respective roles in implementing and enforcing the prohibition of conversion practices.

The criminal offences will come into effect as soon as possible after enactment. However, the Commission would require a transition time of about six months, and additional funding, to resource the expansion of its complaints function to include conversion practices, train staff and develop education materials. Funding decisions for the civil redress scheme will be sought alongside approval to introduce the Bill. The civil redress scheme will therefore come into effect in mid-2022.

## 6.2 What are the implementation risks?

### Implementation issues

The civil redress scheme administered by the Commission is focused on disputes resolution through voluntary mediation. Respondents would be able to refuse to participate. In such cases there may be recourse to the Tribunal, which can award damages and other remedies, which could act as an incentive to participate.

For the criminal offence where the conversion practice causes serious harm, it may be difficult to establish that harm has occurred and that it is the result of the practice. This is an issue for a number of offences in the Crimes Act 1961 where harm or injury may not be physical. As such, similar investigative and prosecution approaches would apply.

The legislation may result in increased demand for support services for survivors. Additional psychological and counselling services may be needed to assist survivors experiencing trauma as a result of conversion practices and grief for those that have lost their faith community and family relationships. There may also be a demand for new services to be established such as peer support. Initial discussions have been had with the Ministry of Health on the potential need for appropriate survivor support.

### Underlying assumptions

It is assumed that the preferred option will require new capabilities and approaches. Police and Commission staff may need specific training on conversion practices and their effects in order to effectively respond to complaints.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

The Commission and the Police would monitor the impacts of the new arrangements through their standard data collection on complaints, investigations, and proceedings. The outcomes of court and Tribunal proceedings would also be monitored.

The Ministry of Justice will include the prohibition of conversion practices as a project for consideration on its ongoing monitoring programme.

### 7.2 When and how will the new arrangements be reviewed?

The legislation would be reviewed as part of normal regulatory stewardship processes and timeframes. An earlier review could be prompted by issues raised through monitoring of the implementation of the proposal.