

Conversion Practices Legislation in Victoria – A Potential Crisis for Church Authority?

Rhett Martin*

The Victorian Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic) prohibits change and suppression practices that alter or fundamentally change someone's sexual orientation or gender identity. Whilst the intent of the Act is worthy, the devil is very much in the detail, especially in how the Act includes religious and psychiatric practices and services in its potential ambit. The other contentious issue is the range of powers provided to the Victorian Equal Opportunity and Human Rights Commission, which some argue potentially blur the lines on separation of powers between the judiciary and the legislature. This paper argues some amendments to the Act may be required in order to address these issues.

INTRODUCTION

This paper examines the *Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic)* ('Act') and asks the question whether it represents a problem for the exercise of church authority over its members. Whilst the discussion in this paper is exclusively concerned with Victoria's new prohibition against conversion therapy, it is worth noting Queensland and the ACT have their own version of legislation banning conversion therapy.¹ The object of the ACT legislation is to recognise and prevent harm caused by sexuality and gender identity conversion practices.² The 2020 amendment to the Queensland *Public Health Act 2005* prohibits a health practitioner from performing conversion practices.³ The prohibition does not apply to religious or spiritual practices that do not involve the provision of a health service. The interstate examples are sufficiently different to not group them together with the discussion of Victoria's Act. Accordingly, the commentary in this article is limited to Victorian law and cannot be taken as a general reference to all prohibitions on conversion therapy.

BRIEF HISTORY OF CONVERSION THERAPY

The history of conversion therapy is one that primarily relates to religious and spiritual leaders and teachers.⁴ Conversion therapy, as currently understood, can be traced back to late nineteenth-century Europe where it then spread to the United States.⁵ The medical fraternity in the United States at the time generally viewed homosexuality as a medical problem and

* Senior Lecturer, University of Southern Queensland.

¹ *Sexuality and Gender Identity Conversion Practices Act 2020 (ACT)*; *Public Health Act 2005 (Qld)* ch 5B, as inserted by *Health Legislation Amendment Act 2020 (Qld)* s 28.

² *Sexuality and Gender Identity Conversion Practices Act 2020 (ACT)* s 6.

³ *Public Health Act 2005 (Qld)* s 213H; *Health Ombudsman Act 2013 (Qld)* s 8.

⁴ Christy Mallory, Taylor N T Brown and Keith J Conron, 'Conversion Therapy and LGBT Youth', *Williams Institute* (Web Page, January 2018) <<https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>>.

⁵ Tommy Dickinson, *Curing Queers: Mental Nurses and Their Patients, 1935–74* (Manchester University Press, 2015).

therefore aimed to ‘cure’ individuals.⁶ The ‘cure’ could include such extreme practices as bladder washing, rectal massage, testicle implants, and castration. Such ‘treatments’ were eventually discarded when it became clear they did not work.⁷ Whilst physical intervention was still practiced, the emphasis changed to conversion through mental health treatment.⁸ Psychotherapy in the early twentieth century could range from talk therapy to electric shock treatment all the way to extremes like lobotomies (the latter representing an example of physical interventions still practiced into the mid-twentieth century). By the 1960s, however, behavioural therapy became more mainstream.⁹

Behavioural therapy focused on aversion training, including ‘inducing nausea or paralysis in response to homoerotic imagery’ or ‘instructing patients to snap’ themselves ‘with a rubber band’ every time they were aroused by such images.¹⁰ Other treatments included trying ‘to improve the patient’s dating skills with members of the opposite sex’, male assertiveness training, the teaching of ‘stereotypically masculine and feminine behaviours’, and reconditioning orgasmic responses through the use of hypnosis.¹¹ Gradually, the position in the United States changed, especially amongst medical and psychiatry associations, towards the rejection of conversion therapy on the basis that it harmed patients and was largely ineffective.¹² The changes happening at a therapeutic level began to be taken up by United States legislatures, with California becoming the first state to prohibit mental health practitioners offering conversion therapy to minors.¹³ This has been replicated in seventeen other United States state legislatures.¹⁴

Recently the United Kingdom and Wales announced plans to ban conversion therapy targeting LGBTI people.¹⁵ A member of Cabinet, Michelle Donelan, was reported as saying the Bill is designed to ‘protect everyone’ including ‘those targeted on the basis of their sexuality, or being transgender’.¹⁶ The developments in the United States and recently in the United Kingdom highlight that Australia, at least at a State and Territory level, is responding to calls for a ban on conversion practices. These developments, however, do not resolve the debate brought by some who argue that the bans should not outlaw conversations with clinicians or therapists helping people with sexual orientation and gender identity issues. The issue is very much about the ‘devil is in the detail’. How clear is the legislation in these various jurisdictions about the position of medical therapists and religious leaders who advise and help people with sexuality

⁶ J. Seth Anderson, ‘Why We Still Haven’t Banished Conversion Therapy in 2018’, *Washington Post* (online August 5 2018) <<https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/>>.

⁷ Ibid.

⁸ Ibid.

⁹ American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Task Force Report, 2009) 22 <<https://www.apa.org/pilgbt/resources/therapeutic-response.pdf>>.

¹⁰ Tiffany C. Graham, ‘Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts’ (2019) 52(4) *Creighton Law Review* 419, 422.

¹¹ Ibid.

¹² Ibid 423.

¹³ Cal Bus & Prof Code § 865-865.2 (West 2019).

¹⁴ Including Colorado, Connecticut, Washington DC, Illinois, Massachusetts, Nevada, New Jersey, New York, New Mexico, Oregon, and Vermont.

¹⁵ Sachin Ravikumar, ‘Britain Vows New Law to Ban Conversion Therapy for LGBT People’, *Reuters* (online 17 January 2023) <<https://www.reuters.com/world/uk/britain-promises-new-law-ban-conversion-therapy-targeting-lgbt-people-2023-01-17/>>.

¹⁶ Ibid.

and gender issues? To help answer that question, the next section considers Victoria's conversion legislation.

THE VICTORIA ACT

The intent of the *Act* is to ban change or suppression practices ('practices') that seek to alter or fundamentally change someone's sexual orientation or gender identity. These practices are sometimes referred to colloquially as 'gay conversion' or 'conversion therapy', although these names do not necessarily reflect an accurate description of what change the practices seek to achieve. Such practices can include teaching, counselling, spiritual and pastoral care, and psychological or medical interventions designed to alter a perceived negative sexual orientation. A common premise inherent in these practices is that there is something wrong or broken in people who exhibit diverse gender identities or sexualities. These practices are not supported by medical research, and there is little support to the idea that sexual orientation or gender identity can be changed or suppressed.¹⁷ The literature supports the view that conversion practices are correlated with poor well-being outcomes, thereby providing support to arguments for expanding health (including mental health) services to affirm the religious and non-religious identities of LGBTQIA+ youth.¹⁸ The foregoing inferentially supports bans on conversion practices, which is the intent of the *Act*.

The *Act* states that a prohibited change or suppression practice can occur despite the recipient's consent.¹⁹ A 'practice' is defined as conduct directed to the purpose of changing or suppressing the sexual orientation or gender identity of a person or inducing a person to change or suppress their sexual orientation or gender identity. A 'practice' includes psychiatry or psychotherapy consultation treatment or therapy,²⁰ but important for present purposes it also includes the carrying out of a religious practice, including (but not limited to) a prayer, a deliverance, or an exorcism.²¹ All offences under the *Act* must be proved under the criminal standard of beyond reasonable doubt.²²

Section 5 also defines what is *not* a change or suppression practice, and this extends to anything supportive of or affirming a person's gender identity or sexual orientation (which includes, but is not limited to, assisting a person who is undergoing gender transition). Another exclusion is treatment provided by a health service provider which, in their reasonable professional judgment, is supportive of a person's gender identity or sexual orientation or is necessary or otherwise needed to comply with the provider's legal professional obligations.²³ Whilst these exemptions provide some level of defence for psychiatrists and religious practitioners, they depend on a positive affirmation of a person's gender identity or sexual orientation and do not expressly provide any exemption for religious practitioners.

Section 9 of the *Act* contains a general prohibition against change or suppression practices. An individual or organisation may be reported under the Civil Response Scheme set up by the *Act*

¹⁷ See, eg, Katie Heiden-Rootes, Christi R. McGregor and Joanne Salas, 'The Effects of Gender Identity Change Efforts on Black, Latinx, and White Transgender and Gender Non-binary Adults: Implications for Ethical Clinical Practice' (2022) 48 *Journal of Marital Family Therapy* 927, 927–44.

¹⁸ Tiffany Jones et al, 'Religious Conversion Practices and LGBTQIA + Youth,' (2022) 19 *Sexual Research and Social Policy* 1155, 1155–64.

¹⁹ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) ss 5(1)(a)–(b) ('*Act*').

²⁰ *Ibid* s 5(3)(b).

²¹ *Ibid* s 5(3)(b).

²² *Ibid* ss 5, 15.

²³ *Ibid* ss 5(2)(a)–(b).

or charged with a criminal offence under the *Act*. Under s 10 of the *Act*, it is unlawful for a person to intentionally engage in a change or suppression practice towards another person that negligently causes serious injury. A breach of s 10 by a body corporate incurs a maximum fine of 10,000 penalty units.²⁴ Section 11 of the *Act* makes it an offence for a person to intentionally engage in a change or suppression practice with another person that negligently causes injury. Breach of s 11 carries a maximum fine of 3000 units.²⁵ An individual is guilty of an offence under s 12 of the *Act* if they take another person from Victoria with the intention to direct change practices at that person outside of Victoria and are negligent as to whether the change or suppression practice will cause injury.²⁶ Section 13 states it is unlawful for individuals to publish, display, or authorise the display of their intent to engage in a change or suppression practice (other than for the purposes of warning of the harm caused by such practices).²⁷

Practices that cause credible injury can be investigated by the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), but only if they are serious, systemic, or persisting. Otherwise, the VEOHRC is limited to offering education and voluntary facilitation services or referring the matter to another agency if it considers a law or professional obligation has been breached.

CONCERNS OVER OPERATION OF THE ACT

The *Act* has been the subject of heavy criticism by a number of religious commentators, some stating that 'the most antireligious laws in the Western world [are] now in force in the State of Victoria'.²⁸ The focus of criticism relates to powers in the *Act* which allow scrutiny of churches, organisations, and individuals who believe in and teach orthodox Biblical doctrines of sexuality and gender. In particular, the criticism relates to fears that the practical effect of the *Act* is to ban spiritual or therapeutic help for those experiencing unwanted same-sex attraction or gender identity confusion. As the ban is backed by fines and possible jail time for offenders, many are concerned that religious ministers and health practitioners working in good faith to help a troubled person could run afoul of the law. The VEOHRC, for example, has power to investigate churches, religious organisations, religious schools, and individuals for alleged breaches of the law. According to critics of the *Act*, traditional religious beliefs are now squarely at risk given what they view as the vaguely defined practices prohibited by the law. Further, these critics view the definitions of 'sexual orientation' and 'gender identity' as too broad in that they could very well encompass a wide variety of speech, teaching, and conduct that may have only an indirect relevance to sexual orientation or gender identity. The powers given to the VEOHRC over investigation, re-education, and censure, critics argue, risks unwarranted persecution of anyone teaching Christian sexual ethics. Because the VEOHRC has wide discretionary power to accept a report from anyone and instigate an investigation, critics argue there is a real danger of persecution. Thus, pastors, parents, teachers, counsellors, and anyone else engaged in professional or private interaction with people concerned about their sexual and gender identity are seen as being potentially at risk.

A variety of religious groups in Victoria have expressed their views on the Bill or the *Act*. This section canvasses some of those views.

²⁴ This equates to a maximum fine of \$1,090,440.

²⁵ This equates to a maximum fine of \$545,220.

²⁶ This incurs 1200 penalty units equating to \$218,088.

²⁷ This incurs 200 penalty unit trying equating to \$36,348.

²⁸ John Steenhof, 'Anti-religious Victorian Conversion Therapy Law is Now in Force. Christians Beware', *Human Rights Law Alliance* (Blog Post, 18 February 2022) <<https://www.hrla.org.au/vic-conth>>.

The Baptist Union of Victoria ('BUV') stated that the Bill that was before the Victorian Parliament to introduce this *Act* placed Christians in a vulnerable position and challenged fundamental aspects of their faith. Of particular concern in its view was a perceived intent of the Bill to outlaw the view that homosexuality is sinful.²⁹ The BUV argued the Bill should only ban conversion practices directed in childhood or to a person with impaired capacity but not to an adult who has consented to the practice. Further, it argued that the Bill should permit communication of religious beliefs through religious counselling, pastoral care, and prayer for people over 16 (provided this occurs through informed consent).

The Catholic Archbishop of Melbourne, Peter Comensoli, was reported as being opposed to the Bill and was reported as arguing that it 'targets prayer and that it prevents people of faith from sharing their beliefs in an open and honest and faithful way'.³⁰ A news article by John Sandeman presented further arguments attributed to the Archbishop where he further argued that the Bill transgresses the rights of parents and children to speak plainly and honestly with one another about beliefs and sexuality. The Archbishop was quoted as arguing that, in practical terms, the Bill denied adults the right to seek guidance and pastoral support when addressing matters of personal concern which should not be intruded upon by the state.

Sandeman's article also canvassed opinions from the Presbyterian Church of Victoria. The Church argued that the Bill would make ordinary Christian practice 'illegal under the pretence of banning those hateful, forced, and violent conversion therapies which have already been illegal for decades ...'.³¹ The Australian Christian Lobby also strongly opposed the Bill, arguing its effect made prayer a potential criminal offence and that the government has no business in deciding what people can pray for or how they pray.³² Similarly, Neil Chambers, a Council member of the Gospel Coalition Australia, argued the Bill conflates issues regarding gender identity and sexual orientation within the definition of change or suppression practices, criticised the extent of its reach into private and voluntary conversations, and decried the potential criminalisation of therapy.³³ In addition, it was presented that in conflating sexual orientation and gender identity, the Bill potentially creates a scenario that the only correct stance is insistence of a young person affirming a change to the desired gender rather than exploring all of their options. To preclude consideration of other treatments of gender dysphoria, it was argued, goes against scientific evidence and has the potential to do harm, a view supported by the National Association of Practising Psychiatrists.³⁴

²⁹ Daniel Bullock et al, 'Change or Suppression (Conversion) Practices Prohibition Bill 2020', *Baptist Union of Victoria* (Letter, 8 December 2020) <<https://www.buv.com.au/wp-content/uploads/2021/01/Change-or-Suppression-Conversion-Practices-Prohibition-Bill-2020-Email-081220.pdf>>.

³⁰ John Sandeman, 'Catholics and Presbyterians Say No, Other Church Voices Muted on Vic Conversion Practices Bill,' *Eternity* (Web Page, 10 December 2020) <<https://www.eternitynews.com.au/australia/catholics-and-presbyterians-say-no-other-church-voices-muted-on-vic-conversion-practices-bill/>>.

³¹ Ibid.

³² Ibid.

³³ Neil Chambers, 'Urgent Concerns over Victoria's Change or Suppression Bill', *The Gospel Coalition Australia* (Web Page, 1 February 2021) <<https://au.thegospelcoalition.org/article/urgent-concerns-over-victorias-change-or-suppression-bill/>>.

³⁴ Phillip Morris and Patrick Parkinson, 'Change or Suppression (Conversion) Practices Prohibition Bill 2010', *National Association of Practising Psychiatrists* (Public Letter, 7 January 2021) <https://bpc.org.au/mt-content/uploads/2021/01/letter_to_attorney_vic_jan_7th_conversion_practices_bill.pdf> quoted by Neil Chambers, 'Urgent Concerns over Victoria's Change or Suppression Bill', *The Gospel Coalition Australia* (Web Page, 1 February 2021) <<https://au.thegospelcoalition.org/article/urgent-concerns-over-victorias-change-or-suppression-bill/>>.

Opposition to the current form of the *Act* is not limited to Christian churches in Victoria. The *Act* is described by a Muslim commentator as ‘criminalising nasiha (advice) to same-sex attracted (‘SSA’) Muslims to abstain from sex with the same gender, or counselling to abide by traditional gender norms’.³⁵ The concern expressed was that parents will be stigmatised as committing ‘family violence’ if they advise gender dysphoric children to adhere to Islamic norms or take gender dysphoric children for advice to a sheik. This position was supported in an article by Dr Rateb Jneid, President of the Australian Federation of Islamic Councils, who stated: ‘I pledge to work with other faith groups to mount a legal challenge to this repressive and oppressive law. We will immediately establish a legal fighting fund to protect religious freedoms, families and children in Australia.’³⁶ Dr Jneid was also reported as saying the *Act* ‘criminalises speech, advice and parental protection’. The views of Dr Jneid and the Islamic Council of Victoria were that the Bill was ‘poorly written and vague and could capture parental discussions with their children’. The issue from an Islamic perspective appears to relate to at least two concerns. The first is that the Bill potentially stigmatises some teachings from the Quran, and secondly, it has been introduced without appropriate education for parents who may be unsure how they can speak to their children on issues such as gender dysphoria without getting in trouble with the law.

The chairperson of the Sikh Interfaith Council of Victoria, Mr Jasbir Singh Suropada, was reported as stating:

[W]ith this new Bill, parents might feel a bit more disempowered because they don’t know how to go about doing it (what is or what is not allowed in talking to their children). So I think more education is required for parents and communities, and faith communities, to promote...what this Bill actually means in layman’s terms.³⁷

In opposition to the foregoing views, the Uniting Network, which is the Uniting Church’s LGBTIQ+ network, urged its members to lobby in support of the Bill, arguing it would make an important difference in the lives of its LGBTIQ+ members. This view is also supported by those that argue a plain reading of the *Act* and its Statement of Compatibility with the Victorian *Charter of Human Rights and Responsibilities*³⁸ places most fears to one side. In particular, they argue the intent of the *Act* is to balance the protection of religious freedom with the protection of the rights of LGBTIQ+ people. In doing this it does not ban prayer, preaching, or pastoral support about gender and sexuality in general. However, it does prevent these spiritual practices being misused if they seek to change or suppress a person’s sexuality or gender identity, and as a result, cause harm. Further, they state that while it may have the practical effect of placing limits on religious practices in some quarters, this only occurs in circumstances that would seriously burden an individual’s right to equality under Australian law or international human rights law (such as the *International Covenant on Civil and Political Rights*).

³⁵ Daud Batchelor, ‘Oppressive Law Banning “Conversion” Prohibits Religious Healing Practices,’ (Opinion, 25 February 2021) <<https://www.amust.com.au/2021/02/oppressive-law-banning-conversion-prohibits-religious-healing-practices/>>.

³⁶ Ibid.

³⁷ Rashida Yosufzai, “‘Unintended Consequences’: Faith Groups, Psychiatrists say Victoria’s New Gay Conversion Ban Laws are Too Vague’, *SBS News* (online, 5 February 2021) <<https://www.sbs.com.au/news/article/unintended-consequences-faith-groups-psychiatrists-say-victorias-new-gay-conversion-ban-laws-are-too-vague/z9jcq51jx>>.

³⁸ *Act* (n 19) s 1(a).

These opposing views mean that a forensic examination of the *Act* is necessary to interpret its provisions and discuss its practical impact free of a political or religious overlay that may or may not be justified. The next section examines key provisions of the *Act* under general principles of statutory interpretation, with a focus on legislative intent as a touchstone to resolve ambiguity.

INTERPRETATION OF THE ACT

Are the critics' fears about the reach of the *Act* realistic? It is possible to identify certain risk scenarios that may be subject to unnecessary scrutiny under the *Act*. For example: (1) a church member who discusses unwanted same-sex attraction with a pastor of the church; (2) a counsellor for a religious counselling service making a presentation on how to live in accordance with biblical sexual ethics; (3) a person who is same-sex attracted being advised by a Catholic priest to remain celibate outside of marriage; and (4) parents of a child struggling with gender identity who refuse or wish to delay that child's wish to undergo hormone therapy treatment. In response to these identified risk scenarios, the VEOHRC has stated that the normal religious activities engaged by people of faith will not be impacted.³⁹ Even in the face of this reassurance, the concern is that religious communities will engage in self-censorship or even cease preaching and teaching the full breadth of their beliefs for fear of attracting criminal prosecution or investigation by the VEOHRC.

Another concern with the *Act* is the potential for a breach of the law where someone is trying to change or suppress a person's sexual orientation or gender identity even where that person seeks help or asks for assistance to achieve this objective. It is permissible under the *Act* to assist a person who is undergoing gender transition, or who is considering undergoing gender transition, and it is permissible to assist a person to express their gender identity or provide facilitation to a person's coping skills, social support, or identity exploration and development in this context. However, it is arguably illegal to convey the view that, despite all their best efforts, a person cannot actually change their sex. Further it may not be permissible to run a peer-to-peer support group designed to coach a person who is exploring their gender identity to accept the sex they were assigned at birth or help someone accept their biological reality. According to a strict reading of the *Act*, even parents are not allowed to speak with their own child about the reality of their gender at birth if their child is expressing any form of gender confusion.

The stated purpose of the *Act* is to denounce and prohibit change or suppression practices.⁴⁰ The extension into 'denouncing' is not a common scenario for legislation. A subsidiary purpose is to establish a Civil Response Scheme within the VEOHRC to 'promote' understanding of the prohibition on practices and to investigate reports of serious or systemic conversion practices.⁴¹

From a legal point of view, the powers given to the VEOHRC raise concern over the separation of powers. The VEOHRC has wide investigatory powers and may seek agreement on compliance or an undertaking, take enforceable actions, or issue a compliance notice. The risk area arises from s 24 of the *Act* providing that a person affected by a prohibited practice, or any

³⁹ 'For People of Faith, Professionals, and Other Communities', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/change-or-suppression-practices/for-professionals-institutions-and-communities/>>.

⁴⁰ *Act* (n 19) s 1.

⁴¹ *Ibid* s 1(b).

other person, may make a report to the VEOHRC. This creates a risk that a disaffected person may make a complaint to the VEOHRC resulting in an investigation and possible issuing of a compliance notice or arrangement regarding an undertaking. Whilst prosecution will only occur from referral to the police, the compliance arrangement or undertaking could act as a precursor to police prosecution, and potentially blur the lines between enforcing compliance and prosecution. The worst case scenario is the VEOHRC becoming a ‘Star Chamber’ that works in parallel to the courts. Whilst it is acknowledged this risk is taking an extreme worst case risk scenario, it is submitted it cannot be excluded entirely. If the powers of the VEOHRC are to remain in their current form, then at the very least, clarification on due process rights to those accused and procedures surrounding the enforcement of compliance is required. Until this is done it is legitimate to raise issues about the separation of powers under the *Act*.

The VEOHRC may investigate any matter arising under the *Act* as it considers fit.⁴² In conducting an investigation, the VEOHRC is bound by the principles of natural justice ‘unless otherwise expressly provided in this Division’.⁴³ This added requirement seems to preclude application of natural justice in some circumstances, without clarifying when that may arise. When this is taken in conjunction with wide powers to compel the provision of information and the production of documents when deemed necessary for an investigation⁴⁴ and to compel attendance before the VEOHRC,⁴⁵ it is possible to conclude that the VEOHRC has a wide-ranging investigatory power that may potentially be outside the parameters of natural justice. This view is reinforced by the law allowing the VEOHRC to issue a compliance notice after investigation.⁴⁶ Whilst the primary purpose is clear in the prohibition against suppression practices, the subsidiary purpose of a Civil Response Scheme potentially risks targeted ‘witch hunts’ instigated by people reporting the actions of others for conduct that does not genuinely warrant reporting. To be successful and fair, the VEOHRC must manage this process efficiently, but also reasonably, whilst considering diverse opinions from churches and other groups.

The objects of the *Act*, dealt with under a separate section, restate the purpose to eliminate, as far as possible, the occurrence of practices in Victoria.⁴⁷ Further, the objects include promoting and protecting rights set out in the Victorian *Charter of Human Rights and Responsibilities Act (2006)*.⁴⁸ This means that the requirements of the Charter in the context of individual rights regarding sexual orientation or gender identity must be upheld at all times. The objects section also states it is the intention of Parliament to ‘denounce and give statutory recognition to serious harm caused by ... [such] practices’.⁴⁹ It further seeks ‘to affirm’ that these practices ‘are deceptive and harmful both to the person subject to the change or suppression practice and to the community as a whole’.⁵⁰ It is clear therefore that the object of the *Act* includes a very definitive statement about these practices being wholly inappropriate and wrong. This view has been criticised as being inflexible and not taking account all of the circumstances which may arise, especially, in regards to medical intervention in diverse case scenarios.

⁴² Ibid ss 34–35.

⁴³ Ibid s 51(2).

⁴⁴ Ibid s 36.

⁴⁵ Ibid s 37.

⁴⁶ Ibid ss 42, 45.

⁴⁷ Ibid s 1.

⁴⁸ Ibid s (3)(1)(b). See ‘About the Charter’, *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/>>.

⁴⁹ Act (n 19) s 3(2)(a).

⁵⁰ Ibid s 3(2)(d).

The definition of ‘change or suppression practice’ includes ‘a practice ... directed towards a person ... with or without a person’s consent, on the basis of the person’s sexual orientation or gender identity, for the purpose of changing ... sexual orientation or gender identity ...’.⁵¹ Conduct of a health service provider that is, in the health service provider’s reasonable professional judgement, necessary to provide a health service or comply with a legal professional obligation provider, is not a prohibited practice. Whilst practice includes ‘carrying out a religious practice, including but not limited to, a prayer-based practice, deliverance practice or an exorcism’,⁵² the general exception to the prohibition against suppression practices includes ‘assisting a person who is considering undergoing gender transition or providing acceptance support or understanding of a person’.⁵³ Concerns of various churches about prayer-based practice are allayed to some extent by the fact it would only be a prohibited practice if it seeks to deny a person from expressing their sexual orientation or gender identity. In other words, the focus is on the individual freedom of a person to express their sexual orientation or gender identity and to prohibit any activity that is designed to inhibit that being given expression.

The *Act* creates an offence if a person intentionally engages in a practice toward another person and the practice causes serious injury to the other person and is negligent thereto as to whether it will cause serious injury to the other person.⁵⁴ This section expressly refers to intentionally engaging in a practice which causes serious injury and being negligent as to whether the practice will cause serious injury. This posits an express intention with a negligent disregard of the outcome of the practice. The addition of the negligence requirement seems unnecessary given that the offence will only arise if the intentional act gives rise to serious injury, thereby requiring a causal connection between the intentional act and the outcome of serious injury, which is not, in itself, dependent on a negligent attitude to the outcome.

The *Act* creates corporate liability, presumably requiring the guilty mind being established by the intention of the body corporate’s board of directors.⁵⁵ If an officer of the body corporate engages in conduct that constitutes an offence, then the body corporate must be taken to have also engaged in conduct constituting the offence, thus creating a vicarious liability in the body corporate. This has the potential to widen considerably executive officer responsibility and arguably creates an added level of compliance that must be dealt with within the corporate governance paradigm.

Does the *Act* go too far in relation to prohibiting legitimate activities in Victoria? Arguably, the concerns of religious groups over the potential criminalisation of some prayer practices are unfounded when considered only in the context of breaching the ban on suppression practices. However, the devil is in the detail as to what constitutes a prohibited practice when prayer is undertaken.

A potentially greater risk arises in respect to the treatment provided by mental health professionals for those experiencing gender incongruence issues. Such treatment may give rise to a patient not engaging in sex reassignment surgery. Such an outcome may not fall within the exceptions allowed for under the definition of prohibited practices in s 5 of the *Act*. The

⁵¹ *Act* (n 19) ss 5(1)(a)–(b)(i).

⁵² *Ibid* s 5(3)(b).

⁵³ *Ibid* ss 5(2)(ii), (iv).

⁵⁴ *Ibid* s 10.

⁵⁵ *Ibid* s 15(1)(c).

concerns of some health professionals, including psychiatrists,⁵⁶ support the idea that an individual's understanding of their own gender may fluctuate in different times and situations. These professionals argue that there is evidence to support the value and importance of therapeutic counselling for adolescents identifying as transgender, and that this type of psychotherapeutic counselling will be discouraged by threats to practitioners of criminal prosecution in the *Act*. The concern is that young, troubled people will be prevented from receiving health care and will instead embark upon irreversible medical transitions that they may regret later. Further, there is a fear that the *Act* criminalises the practice of psychiatry and psychotherapy under s 5(3), which includes psychiatry or psychotherapy consultation treatment or therapy when conducted as a prohibited change or suppression practice. A defence is permitted under s 5(2) which states that a practice is not a prohibited practice if the conduct of the health service provider is, in the health service provider's reasonable professional judgement, a necessary service.⁵⁷

The National Association of Practising Psychiatrists ('NAPP') argues this provision is of dubious benefit as a defence because it leaves considerable room for argument about whether a particular treatment approach was or was not 'reasonably necessary.' The NAPP argues that a defence should be an absolute defence that the treatment approach is, in the mental health professional's reasonable professional judgement, clinically appropriate. The NAPP states that '[t]here is no medical justification for Parliament to stipulate that a therapeutic program supporting a person to transition is lawful, while an intervention which aims to help the patient explore other explanations for their gender identity concerns risks a jail term'.⁵⁸

The position advanced by the NAPP provides an arguable case that the *Act*, in its current form, risks criminalising some psychotherapeutic practices. Whilst a similar argument could be raised in respect to prayer-based practices, it is arguable such a risk is less for religious practitioners as compared to medical health practitioners, although neither can be dismissed out of hand. A religious practitioner is only at risk if a prayer-based or other identified religious practice is directed at changing or suppressing the sexual orientation or gender identity of a person. In contrast, a medical practitioner may be presenting a range of potential options to a patient as part of their professional and ethical obligations to discuss all relevant available treatments and options to a patient, and as a result, may potentially be in technical breach of the *Act* when presenting such options.

CONCLUSION

Despite the foregoing there is still concern from many religious groups that the wide definition of prohibited practices in s 5 of the *Act* will place at risk a pastor or youth group leader expressing biblical teaching about same-sex activity even if participation in the conversation was voluntary by all parties involved. Similarly, another concern is that simply praying with someone to be strengthened to 'resist temptation and live a chaste and godly life' could incur legal consequences.

The other major risk in the *Act* relates to what is seen as the conflation of gender identity and sexual orientation in the *Act*. Including gender identity in the *Act* and implicitly stating that the only acceptable course is to affirm gender transition is potentially at odds with recent case law

⁵⁶ Morris and Parkinson (n 34).

⁵⁷ *Act* (n 19) s 5(2)(b)(i).

⁵⁸ Morris and Parkinson (n 34).

in England. The English High Court judgement *Bell v Tavistock*⁵⁹ described gender reassignment treatment as ‘experimental.’ The Court stated:

We express that view for these reasons. First, clinical interventions involve significant, long-term and, in part, potentially irreversible long-term physical, and psychological consequences for young persons, going as it does to the very heart of an individual’s identity. Secondly, at present, it is right to call the treatment experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment.⁶⁰

According to this view, to preclude looking at other treatments for gender dysphoria and insist that one course only should be pursued may go beyond current scientific evidence and even, despite the best of intentions of adults, be potentially harmful to young persons.

Given this scientific uncertainty, the *Act*’s interpretive difficulties, and the plausible risk scenarios discussed above, the opinion of the present author is that the *Act* should be amended to address these concerns.

⁵⁹ *Bell v Tavistock* [2020] EWHC 3274.

⁶⁰ *Ibid* [152].