



# **Submission: End Conversion Therapy, Call for Views Petition PE1817**

**13 August 2021**

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# 1. Introduction

This briefing responds to a call from the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament to submit views on a petition regarding ending “conversion therapy”.

In order to secure a fair and inclusive Scotland, effective measures need to exist to ensure that LGBT+ people have the opportunity to find happiness through the fulfilment of aspirations connected to the orientation and identities that are inherent to them.<sup>1</sup> LGBT+ people should be able to live a life of dignity in a society that welcomes diversity and does not force anyone to hide or change who they are.

As the United Nations (UN) Independent Expert on Sexual Orientation and Gender Identity has noted:

“attempts to pathologize and erase the identity of individuals, negate their existence as lesbian, gay, bisexual, trans or gender diverse and provoke self-loathing have profound consequences on their physical and psychological integrity and well-being.”<sup>2</sup>

Practices such as “conversion therapy,” that are founded on the incorrect and harmful notion that LGBT+ identities are disorders to be corrected, are discriminatory in nature.<sup>3</sup>

It is well documented that the injury caused by practices of “conversion therapy” are grounded on the premise that LGBT+ people are sick, diseased, and abnormal and must therefore be treated.<sup>4</sup> Some practices can potentially amount to cruel, inhuman and degrading treatment towards specific LGBT+ people, while the very existence of “conversion therapy” practices in our society promotes a culture in which LGBT+ people are seen as needing to be fixed, thereby undermining the dignity of all LGBT+ people.

Putting an end to “conversion therapy” is therefore necessary to uphold and protect the fundamental rights of life, health, equality, and freedom from cruel, inhuman and degrading treatment of LGBT+ persons.<sup>5</sup> In this briefing we provide a detailed analysis of some of the domestic and international legal obligations that Scotland is subject to and that support an end to “conversion therapy”.

The Scottish Human Rights Commission recommends that legislation be brought forward prohibiting the provision and the promotion of all forms of “conversion therapies.” Such legislation will require to contain relevant and appropriate safeguards to ensure that LGBT+ persons can still access non-judgmental physiological or spiritual support that is not aimed at changing their orientation or identity. The legislation will also have to be drafted in such a way as to ensure that there is no disproportionate interference with the rights to freedom of thought, conscience and religion or freedom of expression. The Commission also recommends other measures that are essential for a holistic end of “conversion therapy” and the effective protection of LGBT+ people in Scotland.

## 2. Background

### 2.1. “Conversion Therapy”

The United Nations Independent Expert on Sexual Orientation and Gender Identity (“the UN Independent Expert”) defines “conversion therapy” as an:

“umbrella term [used] to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person’s sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender.”<sup>6</sup>

In his seminal report, the UN Independent Expert concluded that there are at least three modalities of “conversion therapies”, based on the current available information. These are:

- **Psychotherapeutic:** this is based on the belief that sexual or gender diversity is a product of an abnormal upbringing or experience. Providers of this practice claim to rectify deviations and support the development of desire for members of the opposite sex by having subjects work through past experiences.<sup>7</sup> Another frequent practice, is that of aversion, through which a person is subjected to a negative, painful, or otherwise distressing sensation while being exposed to a certain stimulus, under the premise that the stimulus will become associated with the negative sensation.<sup>8</sup>
- **Medical:** These practices function on the postulation that sexual orientation and gender identity is the by-product of an inherent biological dysfunction which can be treated exogenously, relying on lobotomies or the removal of sexual organs. Current medical practices mostly rely on pharmaceutical approaches, such as medication or hormone or steroid therapy.<sup>9</sup>
- **Faith-based:** These practices act on the premise that there is something inherently evil in diverse sexual orientations and gender identities.<sup>10</sup> In

many faith-based settings, approaches are often aimed at treating a person's sexual orientation and gender identity as an addiction that can be overcome by following the tenets of a spiritual advisor.<sup>11</sup> Faith-based interventions are sometimes combined with exorcism.<sup>12</sup>

The evidence received by the UN Independent Expert demonstrated that practices of "conversion therapy" are conducive to psychological and physical pain and suffering. Such practices can include: beatings, rape, forced nudity, force-feeding or food deprivation, isolation and confinement, forced medication, verbal abuse, humiliation and electrocution.<sup>13</sup>

The Independent Forensic Expert Group of the International Rehabilitation Council for Torture Victims have strongly expressed that practices attempting conversion are inherently humiliating, demeaning and discriminatory. The combined effects of feeling powerless and extreme humiliation generate profound feelings of shame, guilt, self-disgust, and worthlessness, which can result in a damaged self-concept and enduring personality changes.<sup>14</sup>

Those who have been subject to "conversion therapy" may experience permanent and irreparable harm. This is confirmed by a survey performed in 2018 by the Ozanne Foundation which determined that 58.8% of those who had been subject to such practice within the UK had been left with mental health issues.<sup>15</sup> Of those:

- 68.7% having had suicidal thoughts
- 59.8% were left with depression requiring medication
- 40.2% indicated having committed self-harm
- 32.4% indicated having attempted suicide
- 24.6% were left with eating disorders

Furthermore, the Pan American Health Organisation ("PAHO") has expressed that practices of "conversion therapy" have no medical justification and represent a severe threat to the health and human rights of LGBT+ people. It indicated that efforts aimed at changing non-heterosexual sexual orientations lack medical justification since homosexuality cannot be considered a pathological condition.<sup>16</sup> Consequently, PAHO recommended that:

- "Reparative" or "conversion therapies" and the clinics offering them should be reported and subject to adequate sanctions.

- Institutions offering such ‘treatment’ at the margin of the health sector should be viewed as infringing the right to health by assuming a role properly pertaining to the health sector and by causing harm to individual and community well-being.
- Victims of homophobic ill-treatment must be treated in accordance with protocols that support them in the recovery of their dignity and self-esteem. This includes providing them with treatment for physical and emotional harm and protecting their human rights, especially the right to life, personal integrity, health, and equality before the law.

Given the overwhelming medical evidence, in 2017 NHS Scotland, NHS England, the Royal College of General Practitioners, the Royal College of Psychiatrists, and the UK Council for Psychotherapy, among others, signed a memorandum of understanding in which they acknowledge that the practice of “conversion therapy,” whether in relation to sexual orientation or gender identity, is unethical and potentially harmful. The memorandum also recognises that ethical practice in cases where people seek support in relation to their sexual orientation and gender identity requires the practitioner to have adequate knowledge and understanding of gender and sexual diversity and to be free from any agenda that favours one gender identity or sexual orientation as preferable over other gender and sexual diversities.<sup>17</sup>

So far as the Commission is aware, no detailed investigation has been carried out to determine the extent of the use of “conversion therapy” practices in Scotland. Evidence shows that these practices are often undertaken within the private sphere, making it more difficult to ascertain their prevalence. However, according to a UK National LGBT+ Survey, at least 2.2% of respondents in Scotland had been subject to “conversion therapy” and 4.8% had been offered it, with a further 1.5% unsure if they had been offered or been subject to it.<sup>18</sup> Overall in the UK, those who indicated that they had been subject to “conversion therapy” said that it was performed by the following:

- 46.5% Faith organisation or group
- 19.2% Parent, guardian or other family member
- 15.7% Healthcare provider or medical professionals
- 12.6% Other individual or organisation not listed
- 16.2 % Preferred not to say

In the absence of a detailed investigation into the prevalence of “conversion therapy” practices in Scotland and data regarding its prevalence here, it is all the more critical for the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament to carefully consider evidence brought to it by those with lived experience and organisations speaking on their behalf.

## **2.2. International Human Rights Standards**

The Scottish Parliament must pay careful attention to its international human rights obligations, particularly those enshrined in the European Convention on Human Rights (“ECHR”); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the International Covenant on Economic Social and Cultural Rights. All of these treaties have been ratified by the UK and so are binding on the UK and in turn the Scottish Government. Under the Scotland Act 1998, responsibility for observing and implementing international obligations, including international human rights obligations, is devolved to the Scottish Government and Scottish Parliament.<sup>19</sup>

The Scotland Act also specifically requires the Scottish Government and Scottish Parliament to act in compliance with the human rights contained in the ECHR.<sup>20</sup> Indeed, any act of the Scottish Parliament or Scottish Government that does not comply with ECHR rights is out with their competence. Consequently, compliance with ECHR obligations is part of the fabric of the Scottish legislative process.

As will be explained below, these international instruments, read harmoniously, impose a clear duty on the state to take positive steps to effectively protect LGBT+ people from practices such as “conversion therapy.”

### **3. The prohibition of torture and inhuman or degrading treatment**

#### **3.1. Article 3 – European Convention on Human Rights**

Article 3 of the European Convention on Human Rights (“ECHR”) enshrines that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. It is an absolute guarantee as ill-treatment within the terms of Article 3 is never permitted, even for the most pressing public interest reasons.

Torture has been defined by the European Court of Human Rights (“ECtHR”) as “deliberate inhuman treatment causing very serious and cruel suffering”.<sup>21</sup> For ill-treatment of an individual to amount to inhuman treatment under Article 3, it must attain a minimum level of severity. In particular, inhuman treatment must cause “either actual bodily injury or intense physical or mental suffering”.<sup>22</sup> The threshold is relative:

“It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”<sup>23</sup>

It is also relevant to consider whether the victim is within a further category of people who are “vulnerable”, including older people, children and young people, asylum seekers and people in detention.<sup>24</sup>

In contrast with torture, inhuman treatment does not need to be intended to cause suffering<sup>25</sup> and the suffering does not have to be inflicted for a purpose.<sup>26</sup> The crucial distinction between torture and inhuman treatment is in the degree of suffering caused.<sup>27</sup> It is not always necessary for the ECtHR to distinguish between the different types of ill-treatment listed in Article 3.

It is important to note that the Convention is a “living instrument” which “must be interpreted in light of present-day conditions”.<sup>28</sup> This means that treatment could now reach the minimum level of severity needed for Article 3, where those same practices may not have been considered a violation when the Convention was first drafted or even 20 years ago.

As discussed above, there is a wide range of treatment falling under the term “conversion therapy”. The Commission is of the view that many of these practices or types of treatment could foreseeably engage Article 3.<sup>29</sup> For a complete assessment, however, the individual facts and circumstances of each particular case would have to be considered.

### **Positive obligations under Article 3**

In addition to the negative obligation not to subject a person to torture or to inhuman or degrading treatment, Article 3 contains positive obligations to protect against ill-treatment and the obligation to investigate and to enforce the law.

States must have a framework of law in place, which is effectively enforced, that provides adequate protection against ill-treatment by either state officials or private parties.<sup>30</sup> States must take practical measures in order to avoid a known risk. Article 3 also carries a procedural obligation to conduct a thorough and effective investigation where a person raises an arguable claim of ill-treatment in breach of Article 3.<sup>31</sup>

Given developing understanding and evidence around the harmful impacts of various types of “conversion therapy,” while acknowledging that some of the more “extreme” practices are already criminalised (such as so called ‘corrective rape’), the Commission considers specific legislative action to ban certain practices would aid Article 3 compliance.

### **3.2. UN Convention Against Torture**

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the UK in 1988, requires States to take legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.<sup>32</sup>

The prohibition of torture, as a peremptory norm of international law (*ius cogens*), also signifies that under no circumstances – regardless of how exceptional they might be – can torture can be justified.<sup>33</sup>

As part of the necessary legislative measures that a State needs to implement, the Convention is clear that States are required to ensure all acts of torture – as

well as an attempt to commit torture and to be complicit in an act of torture – are criminal offences under its domestic law.<sup>34</sup> For such purposes, States are also required to make such criminal offenses punishable by appropriate penalties.<sup>35</sup>

The UN Committee Against Torture has expressed its grave concern in relation to reports about the existence of “conversion therapies.” It has particularly expressed concern regarding practices that include the administration of electroshocks and, sometimes, involuntary confinement in psychiatric and other facilities, which could result in physical and psychological harm.<sup>36</sup> Based on the obligations set forth in the Convention, the Committee has determined that States are required to:

- a) Take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and personal integrity of lesbian, gay, bisexual, transgender and intersex persons and prohibit the practice of so-called “conversion therapy,” and other forced, involuntary or otherwise coercive or abusive treatments against them;
- b) Ensure that health professionals and public officials receive training on respecting the human rights of lesbian, gay, bisexual, transgender and intersex persons, including their rights to autonomy and physical and psychological integrity; and
- c) Undertake investigations of instances of forced, involuntary or otherwise coercive or abusive treatments of lesbian, gay, bisexual, transgender and intersex persons and ensure adequate redress and compensation in such cases.<sup>37</sup>

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that there is an abundance of accounts and testimonies of persons who have been subject to so called “reparative therapies” and “conversion therapies.” Testimonies indicate that some of these practices can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticised as being unscientific, harmful and contributing to stigma.<sup>38</sup>

Based on such considerations, the Special Rapporteur has called for States to repeal any law allowing intrusive and irreversible treatments “reparative therapies” or “conversion therapies”, when enforced or administered without the free and informed consent of the person concerned.<sup>39</sup>

## **4. Non-discrimination**

### **4.1. Article 14 – European Convention on Human Rights**

Article 14 protects the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. This means that the right not to be discriminated against does not exist independently under the ECHR; it must be connected to the fulfilment of another Convention right, such as Article 3, the right to freedom from torture and inhuman or degrading treatment discussed above. This does not mean that there must be a violation of another Convention right before Article 14 applies, simply that the right must be engaged.<sup>40</sup>

The ECtHR has defined discrimination as “treating differently, without an objective and reasonable justification, persons in relatively similar situations”.<sup>41</sup> Issues relating to sexual orientation and gender identity have been considered consistently by the Court under Article 14 in conjunction with other applicable Convention rights.<sup>42</sup> A full discussion of Article 14 is beyond the scope of this briefing, particularly as discrimination matters in Scotland must also be considered under relevant equality law.<sup>43</sup> That said, when examining an approach to ending “conversion therapies,” discrimination should be a key consideration given the practices by their very nature impact on LGBT+ people.

### **4.2. Article 2 – International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights**

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights enshrine the guarantee that the rights enunciated in those treaties will be exercised without discrimination of any kind. Non-discrimination and equality are fundamental components of international human rights law and are essential to the exercise and enjoyment of all human rights.<sup>44</sup>

The UN Committee on Economic, Social and Cultural Rights has stressed that eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice, instead of merely comparing the formal treatment of individuals in similar situations. For

such purposes, States are required to immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.<sup>45</sup>

Under that premise, the UN Independent Expert on Sexual Orientation and Gender Identity has determined that practices of “conversion therapy” are per se discriminatory. This is because they target a specific group on the exclusive basis of sexual orientation and gender identity, with the specific aim of interfering in their personal integrity and autonomy.<sup>46</sup> The Special Rapporteur has also indicated that the existence of “conversion therapies” creates an societal environment of discrimination, as LGBT+ are perceived as being of lesser value and in need of cure and treatment.<sup>47</sup> This environment of discrimination can then lead to the further human rights violations, including torture.

The UN Human Rights Committee has also stressed that states should clearly and officially state that they do not tolerate any form of social stigmatisation of, or discrimination against, persons based on their sexual orientation or gender identity, including the propagation of “conversion therapies.”<sup>48</sup> Therefore, and in order to comply with their international legal obligations, states should:

- Strengthen their legal framework to protect lesbian, gay, bisexual, transgender and intersex individuals;
- Develop sex education programmes that provide students with comprehensive, accurate and age-appropriate information regarding sexuality and diverse gender identities;
- Develop and carry out public campaigns and provide training for public officials to promote awareness and respect for diversity in respect of sexual orientation and gender identity.<sup>49</sup>

## **5. Right to the Highest Attainable Standard of physical and mental health**

Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.<sup>50</sup> This right is closely related to and dependent upon the realisation of other human rights, including education, human dignity, life, non-discrimination, and the prohibition against torture, among others.<sup>51</sup> The right to health is not the right to be healthy, but a right to both conditions and services that are conducive to a life of dignity and equality, and non-discrimination in relation to health.<sup>52</sup>

The right to health implies that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, as well as being designed to improve the health status of those concerned.<sup>53</sup>

In order to guarantee the acceptability of the provision of health services, States are required to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.<sup>54</sup> This obligation must be read in connection with the obligation to take measures to protect all vulnerable or marginalised groups of society, such as LGBT+ persons.

The right to health also encompasses the right to sexual and reproductive health, as an integral part of the right.<sup>55</sup> Particularly, the right to health protects the right of lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. Therefore, the UN Committee on Economic, Social and Cultural rights determined that regulations requiring that LGBT+ persons be treated as mental or psychiatric patients, or requiring that they be 'cured' by so-called 'treatment', are a clear violation of their right to sexual and reproductive health.<sup>56</sup>

States are also obliged to restrict the marketing and advertising of certain goods and services in order to protect public health, as well as regulating other business activities in order to combat discrimination effectively.<sup>57</sup> States should impose criminal and administrative sanctions when the activities of non-state actors result in breaches of the right to health.<sup>58</sup>

As its name indicates, the right also encompasses the protection of mental health. The right acknowledges that everyone, throughout their lifetime, requires an environment that supports their mental health and well-being.<sup>59</sup> The right recognises that attaining positive mental health and well-being is a product of, and a path to, the full realisation of the rights enshrined in international law.<sup>60</sup>

Protecting mental health requires taking the adequate and effective measures necessary to prevent third party interference. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has indicated that harmful practices such as “conversion therapy” require positive, protective action from the State in order to prevent their occurrence.<sup>61</sup>

The Special Rapporteur has highlighted that any attempt to “cure” those who engage in same-sex conduct are not only inappropriate, but have the potential to cause significant psychological distress and increase stigmatisation of these vulnerable groups.<sup>62</sup> The pathologization of LGBT+ persons reduces their identities to diseases, which compounds stigma and discrimination.<sup>63</sup> Diversity must be broadly understood, recognizing the diversity of human experience and the variety of ways in which people process and experience life.<sup>64</sup>

Overall, the Special Rapporteur has emphasised that practices such as “conversion therapies” reflect a failure to fulfil right to health obligations, as they demonstrate a lack of political will to “support, replicate and sustain evidence-based social interventions that foster well-being, prevent discrimination and promote community inclusion”.<sup>65</sup>

## 6. Freedom of thought, conscience, and religion

As discussed above, some “conversion therapy” practices are faith based and some have suggested that measures to counter such “conversion therapy” practices, and thereby protect LGBT+ people from their harmful effects, may interfere with their right to freedom of religion.<sup>66</sup> The right to freedom of thought, conscience and religion is protected under the ECHR and other international human rights treaties. However, as discussed in more detail below, the right to manifest religious beliefs, to act in accordance with those beliefs, is not an absolute right

Manifestation of religious beliefs may lawfully be restricted by the state where necessary to secure a legitimate aim and provided it goes no further than necessary to do so. It is therefore possible to introduce appropriate measures to protect LGBT+ people from the kinds of harmful practices referred to above without unlawful interference with this right. This is set out in more detail in the following paragraphs.

### 6.1. Article 9 – European Convention on Human Rights

The right to freedom of thought, conscience and religion is very important to the functioning of a democratic state. As was stated by the ECtHR in the case of *Leyla Sahin v Turkey*:

“Freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.”<sup>67</sup>

The right to freedom of thought, conscience and religion under the ECHR contains two separate strands. The ‘internal’ dimension<sup>68</sup> guaranteeing freedom of thought, conscience and religion is absolute and unconditional and cannot be interfered with. The state cannot dictate what a person should believe. The

right also protects an 'external' element: the right to manifest a belief or religion in 'worship, teaching, practice and observance'.

Not every act that is influenced by a belief or religion will constitute a manifestation of it and the ECtHR has stated that the "existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on an applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question."<sup>69</sup> The ECtHR generally avoids being drawn on substituting their own views on what does and does not constitute a requirement of a religion.<sup>70</sup>

Whether or not any particular practice constituting "conversion therapy" would be considered by the ECtHR to be a manifestation of religious belief would depend on the facts and circumstances of the particular case.

The right to manifest religious beliefs is not absolute. A restriction or interference with a person's manifestation of their religion or belief may be justified by the state if the restriction is:

- prescribed by law: any law interfering with a right must be 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct';<sup>71</sup>
- in pursuit of a legitimate aim: interferences with the manifestation of religion or belief must be in 'the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others';<sup>72</sup> and
- necessary in a democratic society: there must be a genuine pressing social need for the measures and they must go no further than is necessary to achieve the legitimate aim.<sup>73</sup>

The ECtHR has granted member states a wide margin of appreciation in deciding to what extent interferences are justified.<sup>74</sup> This means that the ECtHR generally views the national authorities as well placed to evaluate local needs and conditions, while exercising supervision to ensure that the interference is proportionate, taking into account all of the circumstances of the individual case

balanced against the fundamental importance of preserving the right to freedom of thought, conscience and religion.

Given the clear and mounting evidence around the harmful effects of various practices collectively labelled “conversion therapy”, together with the recent clarity provided by various international human rights bodies and actors on the human rights implications of such practises, the Commission considers that a “conversion therapy” ban can be a proportionate inference with Article 9. As no legislation or concrete plans have yet been put forward, a full assessment of the legislation together with safeguards in place protecting appropriate and consensual religious activity would have to be undertaken in due course.

## **6.2. Article 18 – International Covenant on Civil and Political Rights**

Similar to the protection afforded through the ECHR, the International Covenant on Civil Political Rights protects the right to freedom of thought, conscience and religion. The right protected in the Covenant is far-reaching and profound, as it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.<sup>75</sup> As with the ECHR, the right contained in the Covenant distinguishes between the right to hold beliefs, which is absolute, and the right to manifest those beliefs, which may be limited where prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

As all rights are interrelated and interconnected, the UN Human Rights Committee has indicated that “[i]n interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.” In other words, a State is not only permitted to limit the enjoyment of the right to freedom of religion and belief, but is also obliged to do so to the extent lawfully permitted in order to guarantee the full enjoyment of all other rights.

In his seminal report in relation to gender-based violence and discrimination in the name of religion or belief, the UN Special Rapporteur on freedom of religion or belief reaffirmed that traditional, historical, religious or cultural attitudes must

not be used to justify violation of human rights.<sup>76</sup> The Special Rapporteur also called on states to:

- Review all laws and practices and ensure that all uphold the principles of universality of human rights and respect the right to equality and non-discrimination and do not create, perpetrate, or reinforce gender-based violence, discrimination or inequalities;<sup>77</sup> and
- Combat all forms of violence and coercion perpetrated against women, girls and LGBT+ persons justified with reference to religious practice or belief, ensure their personal safety and liberty, and hold accountable perpetrators of such violence and ensure victims obtain redress.<sup>78</sup>

In relation specifically to “conversion therapies,” the Special Rapporteur has concluded that manifesting a belief by targeting LGBT+ persons with attempts to change or suppress their sexual orientation or gender identity is not a practice protected by international human rights law.<sup>79</sup> He indicates, particularly in relation to the UK, that the fact that “conversion” practices are conducted within almost all major faith communities within the country cannot be an excuse for the state to treat it differently from other practices already prohibited in the country, such as female genital mutilation and forced marriage.<sup>80</sup>

The Special Rapporteur has also indicated that there are several safeguards that can be put in place to both protect LGBT+ persons *and* the enjoyment of the right to freedom of religion and belief, such as:

- To include in legislation a definition of “conversion” practices that requires that:
  - i. a specific person or class of persons is targeted;
  - ii. on the basis of their sexual orientation or gender identity; and
  - iii. for the purpose of changing or suppressing their sexual orientation or gender identity.
- Individuals would not be prohibited from discussing or exploring their sexuality or gender identity with their faith leaders (or a therapist) in a non-judgmental manner.

## 7. Freedom of Expression

In order to effectively protect LGBT+ people, countries that have banned the practice of “conversion therapies,” such as Germany, have also prohibited the advertisement or promotion of “conversion therapy” practices.<sup>81</sup> In order to comply with the international human rights standards set out above the Commission recommends that legislation is brought forward banning the practice of “conversion therapy” and its promotion. This may engage the right to freedom of expression, which is protected under the ECHR<sup>82</sup> and the International Covenant on Civil Political Rights.<sup>83</sup>

However, the right to freedom of expression is not absolute. As with freedom of thought, conscience and religion, the right may be restricted by the state where necessary to secure a legitimate aim and provided it goes no further than necessary to do so. It is therefore possible to introduce appropriate measures to protect LGBT+ people from the promotion of the kinds of harmful practices referred to above without unlawful interference with this right. This is set out in more detail in the following paragraphs.

### 7.1. Article 10 – European Convention on Human Rights

Freedom of expression is protected under Article 10 of the ECHR. The ECtHR has held that “freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every[one].”<sup>84</sup>

Freedom of expression applies “not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>85</sup>

However, the right to freedom of expression is not an absolute right. It may be restricted where such restriction is prescribed by law, in pursuit of a legitimate aim and necessary to achieve that aim, going no further than is required. This is the same test as referred to above in relation to lawful interference with the right to freedom of thought, conscience and religion.

The ECtHR has recognised that in the pursuit of ensuring tolerance and respect for the equal dignity of all human beings it may be necessary in a democratic

society to prevent or sanction “forms of expression which spread, incite, promote or justify hatred based on intolerance.”<sup>86</sup> For example, the ECtHR has upheld restrictions on freedom of expression in relation to homophobic expression.<sup>87</sup>

## **7.2. Article 19 – International Covenant on Civil and Political Rights**

Freedom of expression is also protected under Article 19 of the ICCPR. The Human Rights Committee has noted that freedom of opinion and expression are “indispensable conditions for the full development of the person. They are essential for any society.”<sup>88</sup>

However, Article 19 also provides that the exercise of the right to freedom of expression carries with it special duties and responsibilities, and it may therefore be subject to certain lawful restrictions, provided by law and necessary to protect the rights or reputations of others, national security, public order, public health or morals.<sup>89</sup> The Human Rights Committee has confirmed that such restrictions must also be proportionate, going no further than necessary to achieve the legitimate aim.<sup>90</sup>

UN human rights experts have therefore confirmed that “incitement to violence and discrimination on the basis of personal characteristics ... constitutes hate speech and is protected neither by freedom of expression nor by freedom of religion or belief.”<sup>91</sup>

Given the evidence about the harmful effects of “conversion therapies” and of the existence and promotion of those practices in society, the Commission considers that a ban on the promotion of “conversion therapy” can be a proportionate interference with the right to freedom of expression, provided adequate safeguards are put in place. As no legislation or concrete plans have yet been put forward, a full assessment of the legislation would have to be undertaken in due course.

## 8. Recommendations

Given Scotland's international human rights obligations, and the effects that "conversion therapies" have on LGBT+ people, the Scottish Human Rights Commission recommends that the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament encourage the Scottish Government and Scottish Parliament to:

1. Bring forward legislation that prohibits the provision and the promotion of all forms of "conversion therapy." Such legislation should contain appropriate safeguards to ensure that LGBT+ persons can still access non-judgmental physiological or spiritual support that is not aimed at changing their orientation or identity, and that there is no disproportionate interference with the rights to freedom of thought, conscience and religion or freedom of expression.

2. Establish clear sanctions for those who do not comply with the prohibition of providing and promoting "conversion therapy". This should take into account appropriate sanctions that reflect the gravity of the practice in question. Measures will also need to be put in place to ensure that future practice is investigated, prosecuted and held to account and that victims have a right to an effective remedy, in accordance with international human rights law.

3. Provide clear and unambiguous guidance for health professionals, counsellors, and spiritual guides, regarding appropriate ways to provide support for LGBT+ people.

4. Consider all appropriate and effective measures to support those who have been subject to this practice in the past and ensure measures of non-repetition are put in place, in accordance to international human rights law.

5. Develop educational programmes that provide comprehensive, accurate and age-appropriate information regarding sexuality and diverse gender identities.

6. Develop and implement public campaigns and provide training for public officials to promote awareness and respect for diversity in respect of sexual orientation and gender identity.

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- <sup>1</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 61
- <sup>2</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 19
- <sup>3</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 83
- <sup>4</sup> <https://www.sciencedirect.com/science/article/abs/pii/S1752928X20300366>
- <sup>5</sup> Ahmed Shaheed, There is no legal defence of LGBT+ conversions (23 April 2021). Available at <https://www.theguardian.com/commentisfree/2021/apr/23/legal-defence-lgbt-conversions-sexuality-rights-belief>
- <sup>6</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 17
- <sup>7</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 42
- <sup>8</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 43
- <sup>9</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 46.
- <sup>10</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 50
- <sup>11</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 51
- <sup>12</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 53
- <sup>13</sup> Report of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, (17 July 2019), A/74/181, para. 55
- <sup>14</sup> [Statement on conversion therapy - ScienceDirect](#)
- <sup>15</sup> Ozanne, 2018 National Faith & Sexuality Survey, <https://www.ozanne.foundation/project/faith-sexuality-survey-2018/>
- <sup>16</sup> PAHO, “Cures” for an illness that does not exist: Purported therapies aimed at changing sexual orientation lack medical justification and are ethically unacceptable. Available at <https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf>
- <sup>17</sup> Memorandum available at [https://www.psychotherapy.org.uk/media/cptnc5qm/mou2-reva\\_0421\\_web.pdf](https://www.psychotherapy.org.uk/media/cptnc5qm/mou2-reva_0421_web.pdf)
- <sup>18</sup> See <https://www.gov.uk/government/publications/national-lgbt-survey-data-viewer>
- <sup>19</sup> Scotland Act 1998 Sections 29, 53 and 54, and Schedule 5 paragraph 7(2)(a).
- <sup>20</sup> Scotland Act 1998, Section 29(2)(b) and Section 57(2)
- <sup>21</sup> *Ireland v UK*, no. 5310/71, 18 January 1978.
- <sup>22</sup> *Kudla v Poland*, no 30210/96, 26 October 2000
- <sup>23</sup> *Kudla v Poland*, no 30210/96, 26 October 2000
- <sup>24</sup> Harris, O’Boyle & Warbrick, ‘Law of the European Convention on Human Rights’, 4th ed. Oxford University Press, 2018 at pg. 239.
- <sup>25</sup> *Ireland v UK*.
- <sup>26</sup> *Denizci and Others v Cyprus*, nos. 25316-25321/94 and 27207/95, 23 August 2001.
- <sup>27</sup> *Ireland v UK*.
- <sup>28</sup> *Tyrer v UK*, no. 5856/72, 25 April 1978.
- <sup>29</sup> For a full discussion of “conversion therapy” and its potential relationship to Article 3 ECHR, see “conversion therapy As Degrading Treatment”, I Trispiotis and C Purshouse, *Oxford Journal of Legal Studies* 2021, Vol. 00, No. 0 pp. 1-29.
- <sup>30</sup> *MC v Bulgaria*, no. 39272/98, 4 March 2004.
- <sup>31</sup> *Gafgen v Germany*, no. 22978/05, 1 June 2010 at para 117.
- <sup>32</sup> Convention Against Torture, article 2.1
- <sup>33</sup> Convention Against Torture, article 2.2
- <sup>34</sup> Convention Against Torture, article 4.1
- <sup>35</sup> Convention Against Torture, article 4.2
- <sup>36</sup> Committee against Torture, Concluding Observations on China (CAT/C/CHN/CO/5), 2016, para. 55
- <sup>37</sup> Committee against Torture, Concluding Observations on China (CAT/C/CHN/CO/5), 2016, para. 56
- <sup>38</sup> Juan E. Méndez, Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (A/HRC/22/53), 2013, para. 76

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- <sup>39</sup> Juan E. Méndez, Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (A/HRC/22/53), 2013, para. 88
- <sup>40</sup> This is referred to as the Court's 'ambit test'. See *Rasmussen v Denmark*, no. 8777/79, 28 November 1984.
- <sup>41</sup> *Zarb Adami v Malta*, no. 17209/02, 20 September 2006.
- <sup>42</sup> See, for example, European Court of Human Rights Factsheets on [sexual orientation issues](#) and [gender identity issues](#).
- <sup>43</sup> The remit of the Equality and Human Rights Commission extends across Great Britain and is to promote equality and diversity and enforce equality laws, and to promote and protect human rights, by encouraging good practice and promoting mutual respect including good relations. In relation to human rights in Scotland, the EHRC's remit covers human rights issues arising in reserved areas.
- <sup>44</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20 para. 2; and / HRC GC18 at 1
- <sup>45</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para. 8.b
- <sup>46</sup> A/HRC/44/53 para. 59
- <sup>47</sup> Victor Madrigal, launch of report at <https://www.facebook.com/IESOGI/videos/277503046670312/>
- <sup>48</sup> Human Rights Committee, Concluding Observations on Korea (CCPR/C/KOR/CO/4), 2015, para. 15
- <sup>49</sup> Human Rights Committee, Concluding Observations on Korea (CCPR/C/KOR/CO/4), 2015, para. 15
- <sup>50</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 1
- <sup>51</sup> UN Committee on Economic, Social and Cultural Right, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 3
- <sup>52</sup> A/HRC/41/34 para. 11
- <sup>53</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para.12.c
- <sup>54</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para.35.
- <sup>55</sup> Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 1
- <sup>56</sup> Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para.23
- <sup>57</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 19
- <sup>58</sup> UN Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 15
- <sup>59</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/35/21, para. 4
- <sup>60</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/41/34
- <sup>61</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/41/34, para. 19
- <sup>62</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, para. 23
- <sup>63</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/35/21, para. 48.
- <sup>64</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/35/21, para. 50
- <sup>65</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/41/34 para. 19
- <sup>66</sup> See e.g. [Religious group warns against LGBT+ conversion therapy ban - BBC News](#)
- <sup>67</sup> Para. 104.
- <sup>68</sup> Referred to as the "forum internum".
- <sup>69</sup> *Eweida and Others v UK* nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

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<sup>70</sup>See for example *Leyla Sahin; Eweida and Others v UK; Jakobski v Poland*

<sup>71</sup>*Sunday Times v UK* A 30 (1979)

<sup>72</sup>Article 9(2) ECHR.

<sup>73</sup>*Bayatyan v Armenia*, no. 23459/03, 7 July 2011.

<sup>74</sup>*Manoussakis and Others v Greece*, no. 18748/91, 26 September 1996.

<sup>75</sup>HRC GC22, para. 1

<sup>76</sup>Report of the Special Rapporteur on freedom of religion or belief on gender-based violence and discrimination in the name of religion or belief, A/HRC/43/48 para. 77(i)

<sup>77</sup>Report of the Special Rapporteur on freedom of religion or belief on gender-based violence and discrimination in the name of religion or belief, A/HRC/43/48 para. 77(ii)

<sup>78</sup>Report of the Special Rapporteur on freedom of religion or belief on gender-based violence and discrimination in the name of religion or belief, A/HRC/43/48 para. 77(iv)

<sup>79</sup>Ahmed Shaheed, *There is no legal defence of LGBT+ conversions* (23 April 2021). Available at <https://www.theguardian.com/commentisfree/2021/apr/23/legal-defence-lgbt-conversions-sexuality-rights-belief>

<sup>80</sup>Ibid

<sup>81</sup>See [Act to Protect against Conversion Treatments - Bundesgesundheitsministerium](#)

<sup>82</sup>Article 10

<sup>83</sup>Article 19

<sup>84</sup>*Handyside v. the United Kingdom*, no. 5493/72 1976.

<sup>85</sup>*Handyside v. the United Kingdom*, no. 5493/72 1976 at para 49.

<sup>86</sup>*Erbakan v. Turkey*, 59405/00, 2006 para 56.

<sup>87</sup>*Vejdeland and Others v. Sweden*, 1813/07, 2012

<sup>88</sup>UN Human Rights Committee General Comment 34, 2011, CCPR/C/GC/34, para 2.

<sup>89</sup>Article 19(3).

<sup>90</sup>UN Human Rights Committee General Comment 34, 2011, CCPR/C/GC/34, para 42.

<sup>91</sup>Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, "The right to freedom of religion or belief and the right to live free from violence and discrimination based on SOGI are both built on a promise of human freedom" (17 May 2021)