



THE CHURCH IN MALTA

THE BILL ON CONVERSION THERAPY

A POSITION PAPER

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Position Paper

Introduction

1. The legislation, which is being proposed on the affirmation of sexual orientation, gender identity and gender expression, is apparently seeking to protect a category of people who may find it hard and painful to come to terms with their condition as being different from that of their peers or the rest of the population. An analysis of the provisions of the Bill, however, shows that everyone in practice will be hindered from having free access to professional guidance, advice and any other therapeutic help that may be appropriate and needed with respect to one's sexual orientation, gender identity and gender expression.
2. This position paper has been written at the request of the Church in Malta by a group that includes experts in law, psychology and ethics in response to the Government's call to the general public to participate in the consultation on a draft Bill that criminalises harmful conversion therapies.

Following a critique of the provisions of the Bill on unlawful actions or practices, the paper will show the inconsistency of the proposed legislation with the recent legislation on gender identity and the relevant rulings of the European Court of Human Rights and point out cases where some form of professional therapeutic intervention is certainly warranted and should be freely available for those who need it. In conclusion, the paper will underline the legitimate autonomy of the professions to regulate themselves on the basis of their respective codes of ethics.

Provisions on Unlawful Actions or Practices

3. The Bill defines 'conversion therapy' as "treatment that aims to change, repress or eliminate a person's sexual orientation, gender identity and, or gender expression". Clearly, the assumption is that the sexual orientation, gender identity and gender expression of each and every individual is to be affirmed (as is indicated in the title for the Act) rather than changed, repressed or eliminated. This is a valid ethical and legal principle. The problem, however, is that things may not be so simple and clear-cut in practice. In fact,

the Bill itself, allows “any counselling related to the exploration of one’s identity with regard to any of the characteristics being affirmed by this Act ...”. In other words, it acknowledges that one may not be sure about one’s own sexual orientation or gender identity. One may also be confused as to how to manifest one’s gender identity. In these circumstances, counselling will be allowed in so far as it can help in exploring one’s sexual identity but it can proceed no further, even if it can actually assist in affirming one’s sexual orientation, gender identity and gender expression through appropriate forms of therapy. This is a rather strange kind of logic.

4. The Bill mentions a number of circumstances in which conversion therapy will presumably involve deceit and harm and, hence, will be prohibited. These include (i) performance of conversion therapy on vulnerable persons, (ii) involuntary and, or forced performance of conversion therapy on a person and (iii) advertising of conversion therapy.

Read superficially, the Bill gives the impression that the law will only intervene to protect the vulnerable and to ensure that no conversion therapy is offered and much less applied against one’s own free will. In fact, however, the proposed legislation will affect persons who are not vulnerable and who out of their own free will seek to have appropriate forms of therapy to change their own sexual orientation, gender identity and, or gender expression.

5. By ‘vulnerable person’, the Bill means any person (i) under the age of 18, (ii) suffering from a physical or mental infirmity and (iii) considered by the court to be particularly at risk when taking into account the person’s age, maturity, health, disability, social or other conditions including any situation of dependence, as well as physical or psychological consequence of the offence on that person” (art. 2).

This definition of a vulnerable person excludes persons under the age of eighteen, even with the consent of their parents or legal guardians, as well as persons suffering from a physical or mental infirmity, even if they are in a position to give an informed consent, from having appropriate therapy regarding their respective sexual orientation, gender identity and gender expression. Besides, leaving it to the court to determine who is in a vulnerable position will keep away professionals from offering therapeutic services, even to those persons who actually ask for them, as they will be at risk that the court may find such persons to be in a vulnerable position.

In practice, nobody will be in a position to exercise freely the right to treat one's sexual orientation, gender identity and gender expression. In other words, everyone would be incapable to receive the treatment one may want to have after consultation with a professional person. This is inconsistent with the premises behind the Gender Identity, Gender Expression and Sex Characteristics Act (Chapter 540 of the Laws of Malta) that has just been passed and with the rulings of the European Court of Human Rights. It also violates the Constitutional provisions on discrimination on the basis of sexual orientation.

Legal Aspects

6. Chapter 540 of the Laws of Malta defines 'gender identity' as "each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve and/or functions by medical, surgical or other means)".

The Law, therefore, allows any person to change one's gender identity. The Bill, however, purports to render illegal, the resort to treatment "that aims to change ... a person's sexual orientation, gender identity and, or gender expression".

The Gender Identity, Gender Expression and Sex Characteristics Act does not exclude minors, from changing their respective gender identity. On the contrary, they are covered by article 7 which involves the Civil Court (Voluntary Jurisdiction Section), the parents or persons enjoying parental authority and, of course, the direct participation of the minors themselves.

7. The Bill seems to be placing the LGBTIQ within the category of persons who are vulnerable and, therefore, not fit to benefit from the legislation on gender identity. In doing so, it would render them as unfit to come to their own free and uninfluenced decisions as to whether to retain their gender identity, gender expression and/or sexual orientation or to seek measures which would allow them to acquire a different identity and/or orientation.

What would be even more oppressive of one's civil rights if the State purports to enter into the personal philosophical or religious reasons why one would want to change one's sexual orientation, gender identity and gender expression.

The State should respect the legitimate boundaries of individual freedom. It should only seek to ensure that the practices in matters relating to gender identity are undergone freely and that, as in any other therapy, they are not harmful to the person undergoing them.

8. The Bill should be seen also in the context of the decisions of European Court of Human Rights on the matter. The European Court of Human Rights in Strasbourg has been faced with the problems arising from shifting gender identity in individuals. It has ruled definitively on the issue. In *Goodwin vs UK*, 11 July 2002, the Grand Chamber of the Court has recognized as fundamental human rights (1) the right of a person to determine and change his/her gender, even through radical surgical intervention; (2) the right of the individual to coerce the state to recognise the new post-operative gender for all effects and purposes of law. This ruling has been followed in several subsequent judgements, both of the Court itself and in European national jurisdictions.

This judgement of the European Court of Human Rights is of major relevance to the issues raised by the new legislative proposals. Is it a fundamental human right for persons to change their gender, but a crime to counsel them about gender change?

The judgements of the European Court of Human Rights lay stress on the important role of counselling in gender identity matters, making it an integral and indispensable part of the process. Why is it imperative to have compulsory counselling about physical gender choices, but a criminal offence to have voluntary counselling about psychological gender choices? What so forcefully applies to the first, should, with equal force, apply to the second.

9. The Bill prohibits any therapy that aims at changing or repressing the sexual orientation of a person. If the Bill is converted into law, it will become a crime to assist persons with a paraphilic condition, such as paedophilia, were such condition to be manifested in same sex behaviour.

The Bill also suffers from a most basic and manifest 'discrimination.' The accepted meaning of 'conversion therapy' is treatment directed at changing the orientation of a person from homosexual to heterosexual. This is made a criminal offence by the Bill. If the Bill becomes law, it will be a crime to assist a person with homosexual orientation to become heterosexual, but perfectly legitimate to assist a heterosexual to become homosexual. Does this mean that homosexuals and heterosexuals are not afforded the same legal standing

and protection? If the Bill is turned into law it will affirm the superior status of homosexuality over heterosexuality.

In doing so the Bill would be inconsistent with the Human Rights provisions of the Constitution of Malta. Art. 32 of the Constitution declares that “every person in Malta is entitled to the fundamental human rights and freedoms of the individual whatever one's 'sex, sexual orientation or gender identity' in the enjoyment of one's 'private and family life'.” This means that no one may be discriminated against on the mere basis of one's sexual orientation (article 45 of the Constitution) and the different treatment by the Bill between homosexuals and heterosexuals would discriminate negatively against the private life of those homosexuals who believe they would benefit from therapy, when heterosexuals are not hindered by the Bill in seeking therapy to change their orientation to homosexual.

Grey Areas

10. The Bill fails to take into consideration the grey areas of complex sexual orientations encountered in clinical practice. It assumes a clear-cut legal solution to all categories of vulnerability. It fails to acknowledge that problems related to sexuality may be much deeper than what they appear at face value. In fact, they could be indicative of deeper structural problems or disorders affecting one's personal identity and not simply a case of sexual identity or orientation. It is to be noted that certain cases exhibiting such confusion could well be the result of trauma or early injuries, such as in the case of child sexual or emotional abuse. The therapist presented by such cases could have second thoughts in dealing with them lest being accused of breaking the law.

The Bill also fails to take into consideration other grey areas such as in the case of a married bisexual person voluntarily seeking help to curb on his or her homosexual inclinations because he or she wants to save their marriage. Similarly, a homosexual person who seeks help from a therapist or a mentor because he or she wants to live a chaste life in accordance with his or her religious values (or vows) would be putting the latter in a position of risk of breaking the law.

Professional Autonomy

11. The position taken by the Bill overrides the professional ethics of psychologists, counsellors, etc. which regulate their conduct in the best interests of their clients. Actually it defines upfront what is acceptable and not acceptable in an indiscriminate manner without considering the specific clinical evaluation of each case. The Bill takes away from the client the power to set the goals with the therapist in the former's best interest and criminalises any deviation from what it decrees. In doing so the Bill risks making professional people the most vulnerable when they are not only restricted in the free exercise of their profession but possibly also criminalised.

In the context of a professional relationship the main guiding principles are that the service being offered is in accordance with professional standards, that the person asking for the service remains free to accept or reject it and that the autonomy, including due discretion, of the individual professional is respected. The Bill hinders members of health and social work professions from exercising their profession in accordance with their respective codes of ethics by not allowing them to offer their therapeutic services to those who need them and are willing to receive them and by precluding them from applying their due discretion in the exercise of their profession.

12. Professionals, therefore, should not be excluded from the process but should be an integral part of the process. The severe penal sanctions contemplated by the Bill represent an inadmissible threat to the independence of professionals in Malta who must be guaranteed the right of each professional to be regulated solely by the ethical regimes as defined by their respective codes of ethics.

In addition to the unacceptable threat to the independence of professionals in Malta, the draconian restrictions contained in the Bill may preclude people from seeking counselling on such matters as this would put counsellors in a very vulnerable position by risking severe criminal sanctions should they be considered as "advertising conversion therapy".

Any person who seeks counselling by a professional person must be assured the right that the counselling will have only the person's best interests in mind without any limitations on the type of counsel professionals feel is in the person's best interests.

Conclusion

13. The legislation, which is being proposed on the affirmation of sexual orientation, gender identity and gender expression, raises a number of serious ethical and legal issues. Rather than fostering a 'culture of dignity' in which every citizen, irrespective of sexual orientation, lives in an inclusive culture of recognition between human beings, the underlying philosophy of the proposed bill promotes discrimination rather than inclusion, disrespect for personal autonomy to exercise one's own lawful rights rather than the defense of human dignity, distrust in the accountability of the professional bodies rather than the protection of their independence. Unfortunately, the bill seeks to address the needs of a particular vulnerable group who very often do find it socially hard and painful in trying to deal with a fundamental dimension of their own self-identity at the expense of exposing professional people to the grave risk of criminal action against them.

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