

# The Feds and a Conversion Therapy Ban: Mixed Messages and Constitutional Challenges

In 2019, the federal government has been inconsistent about a potential ban on conversion therapy even though the practice is harmful and professionally disregarded. This article will pose and attempt to answer a series of questions:

- What is the 'therapy' and why is the government considering a ban?
- Why has the government been inconsistent in its messaging about the practice? And,
- What are the potential constitutional hurdles to banning conversion therapy in Canada?

## A Discredited 'Therapy'

Conversion therapy is the discredited practice of attempting to “stop an individual from being homosexual or transgender”[\[1\]](#) or any other diverse gender or sexual identity. This article will use the label “GSD” [gender and sexually diverse] as an umbrella term to describe anyone with a gender or sexual identity outside of heterosexual and cisgender. Conversion therapy is used to attempt to ‘convert’ GSD people to become heterosexual or cisgender.

Conversion therapy was widely practiced in the past when GSD identities were disdained - this lead GSD people or their families to seek ‘therapy’ to turn GSD people ‘normal’ (heterosexual or cisgender). Conversion therapy was “the treatment of choice when homosexuality was thought to be an illness” but the practice has declined as GSD identities have become more accepted in wider society.[\[2\]](#) Nonetheless, it is still practiced.

Conversion therapy can have a psychological or religious basis.[\[3\]](#) Common ‘treatment’ techniques include “psychotherapy, psychoanalysis, hormones, and several types of aversion therapy.”[\[4\]](#) A subject can experience deep psychological trauma from these methods even if no physical pain is inflicted. Many survivors of conversion therapy express that they have deep psychological scars from the practice - for example, one survivor called his experiences “soul-crushing torture.”[\[5\]](#)

The Canadian Psychological Association stated that conversion therapy does not accomplish its goals and “can result in negative outcomes such as distress, anxiety, depression, negative self-image, a feeling of personal failure, difficulty sustaining relationships, and sexual dysfunction.”[\[6\]](#) Thus, conversion therapy is a painful and harmful exercise that does not work - so why has the federal government not banned the practice?

## **Mixed Messages**

In March 2019, despite acknowledging the practice as “immoral” and “painful,” the federal government said that it would not ban the practice throughout Canada.<sup>[7]</sup> However, in a June 21, 2019 letter to the Alberta Minister of Justice, the federal government stated that they are “committed to doing everything within [our] jurisdiction to combat conversion therapy” through *Criminal Code* reforms.<sup>[8]</sup>

There is no doubt that pre-election politics are influencing the federal government’s evolving stance on banning conversion therapy. With a federal election scheduled for October 21, 2019, it is realistic that political parties would attempt to curry favour among GSD Canadians and their allies.

What are some reasons the government has been reluctant to ban the discredited practice throughout the country? What constitutional hurdles would the government face if it attempted to ban the practice through criminal law?

## **A Provincial Domain?**

In March 2019, the federal government’s refusal to outlaw conversion therapy was because they believed that the provincial governments had jurisdiction for the issue through the regulation of health care.<sup>[9]</sup> While health care is not exclusively in the jurisdiction of the either the federal or provincial governments, on-the-ground delivery of health care is administered by provincial governments. The constitutional authority is found in a number of sections of the *Constitution Act, 1867*, including the expansive s 92(13)- the control of property and civil rights in the provinces.<sup>[10]</sup> Since provinces can decide what is and what is not considered health care, the regulation of a discredited practice like conversion therapy is thought to rest with the provinces.

Currently, Ontario, Manitoba, and Nova Scotia have enacted bans on conversion therapy.<sup>[11]</sup> Also, cities such as Vancouver and St. Albert, Alberta have banned businesses from practicing conversion therapy in their municipalities.<sup>[12]</sup> In Alberta, the previous New Democratic Party Government established a working group to recommend a plan to ban conversion therapy but the new United Conservative government has been noncommittal about whether they will implement any recommendations.<sup>[13]</sup>

Thus, the federal government may desire to leave the banning conversion therapy to the provinces through the regulation of health care. Ottawa may have been fearful that a federal law could encroach on provincial jurisdiction and be struck down for being out of the powers of the federal government.

Ottawa was also reluctant to further regulate conversion therapy because they believed that *Criminal Code* offences already captured many of the criminal acts in the practice. Other “offences such as kidnapping, forcible confinement and assault may apply where a person is forcibly compelled to undergo conversion therapy.”<sup>[14]</sup> However, pre-election politics and the desire to stop a harmful practice may have led the federal government to consider

criminally banning the practice.

## **Criminal Law**

The federal government has the sole authority to make criminal laws in Canada.[\[15\]](#) The standard test for whether legislative action is a “criminal law” is:

- The law creates a prohibition,
- there is a penalty for breaching the prohibition, and
- the law has a criminal law purpose (“public purpose which can support it as being in relation to the criminal law”).[\[16\]](#)

The criminal barring of conversion therapy would need to be found to have a criminal purpose for the federal government to use its criminal law power.

Esteemed constitutional scholar Peter Hogg notes that there “is a criminal-law aspect of health,” allowing the federal Parliament to “punish conduct that is dangerous to health.”[\[17\]](#) If the federal government created a criminal law banning conversion therapy, they could justify it as conduct dangerous to the health of GSD persons, and thus arguably with a criminal law purpose.

However, if a federal criminal law is enacted, it risks other potential constitutional challenges. At least two *Charter* challenges exist. The first is that a ban on conversion therapy is a potential infringement on liberty.

### **Loss of Liberty?**

Any law that can lead to imprisonment is as a deprivation of liberty, and thus an infringement on s 7 of the *Charter* unless it is found to be “in accordance with the principles of fundamental justice.”[\[18\]](#) Carissima Mathen, vice-dean of the University of Ottawa Faculty of Law, states that “there is a potential Section 7 challenge [to a conversion therapy ban] on the basis that the law is just too blunt a tool and you're putting people at risk of imprisonment in ways that are fundamentally unfair.”[\[19\]](#)

Of course, it is impossible to know whether an infringement on liberty would be in accordance with the principles of fundamental justice without first seeing a law. Much would depend on what exactly was prohibited, who was targeted, and what the penalty was. If a ban was comprehensive, it may be harder to justify than a narrower ban against minors undergoing the ‘treatment.’ If those seeking conversion therapy were targeted as well as providers, it may also be harder to justify.

As with any infringement on liberty, a law with jail time could be subject to a s 7 *Charter* challenge which would depend on the details of the law. Even if the ban was found to breach the *Charter*, the government would get the chance to [justify the law under s 1](#) by arguing that the benefits to outlawing conversion therapy outweigh any *Charter* infringement. The question becomes, could the law as drafted be sold as a reasonable limit on rights,

demonstrably justified in a free and democratic society?

## **Freedom of Religion**

An outright ban on conversion therapy could also infringe the freedom of religion guaranteed by s 2(a) of the *Charter*. Conversion therapy is often practiced in religious settings by people who believe that their religion is incompatible with GSD identities.

Freedom of religion allows individuals to “be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates” if the religious practices “do not injure his or her neighbours.”<sup>[20]</sup> Arguably, a ban could not apply to recipients who actively choose to participate in conversion therapy because of their deeply held religious beliefs. Daniel Lerner, a Toronto criminal defence attorney, states that he could see a freedom of religion argument from individuals who believe that a ban would stop them from exercising their religious beliefs.<sup>[21]</sup>

Without a draft law, it is difficult to speculate whether religious rights would be infringed. However, it is a possible route for a religious person who wants to try and change their sexuality or gender identity to challenge a federal ban. It remains to be seen how the courts would handle such a challenge, or how much significance would be given to the harmful nature of the practice.

## **Conclusion**

It is likely that a debate about banning conversion therapy in the *Criminal Code* will be part of the political gamesmanship of the upcoming federal election campaign. The federal Liberals have sent mixed messages, the federal New Democrats have called for a ban on conversion therapy throughout Canada,<sup>[22]</sup> and Conservative leader Andrew Scheer says that he will “wait and see” before taking a position on a conversion therapy ban.<sup>[23]</sup>

If after the election, a law banning conversion therapy is enacted there are several potential constitutional challenges. This includes assessing if the law is in federal jurisdiction and if the ban infringes an individual’s *Charter* rights. However, it is important to note that even if a *Charter* breach is found, the government can try and justify the law under s 1 of the *Charter*.

What is clear is that conversion ‘therapy’ is a discredited and harmful practice. The provinces are slowly banning the practice through regulation of health, but there has been no federal ban because of constitutional concerns. As the federal election campaign politics heats up, the issue will likely be discussed, and a ban could follow the election. Thus, the potential regulation of conversion therapy in Canada has been slow, fraught with mixed messages, and has several constitutional hurdles. Time will tell if the harmful effects of the practice will outweigh the uncertain constitutional status and lead the federal government to action.

[1] Devinn Larsen, "Striving for Change: California's Attempt to Outlaw Conversion Therapy" (2019) 50:2 McGeorge L Rev 285 at 286.

[2] Douglas C Halderman, "The Practice and Ethics of Sexual Orientation Conversion Therapy" (1994) 62:2 Journal of Consulting and Clinical Psychology 221.

[3] *Ibid.*

[4] MJ MacCulloch & MP Feldman, "Aversion therapy in Management of 43 Homosexuals" (1967) 2 British Medical Journal 594. Aversion therapy commonly uses the technique of showing pictures of men or women that the subject finds sexually desirable and then inflicting pain, such as electroshock therapy, in an attempt to 'train' the subject not to be attracted to a member of the same gender.

[5] Peter Gajdics, "I experienced 'conversion therapy' - and it's time to ban it across Canada," *Maclean's* (6 June 2018), online: <[macleans.ca/opinion/i-experienced-conversion-therapy-and-its-time-to-ban-it-across-canada/](https://www.macleans.ca/opinion/i-experienced-conversion-therapy-and-its-time-to-ban-it-across-canada/)>.

[6] Canadian Psychological Association, "CPA Policy Statement on Conversion/Reparative Therapy for Sexual Orientation" (2015), online (pdf): *Canadian Psychological Association* <[cpa.ca/docs/File/Position/SOGII%20Policy%20Statement%20-%20LGB%20Conversion%20Therapy%20FINALAPPROVED2015.pdf](https://cpa.ca/docs/File/Position/SOGII%20Policy%20Statement%20-%20LGB%20Conversion%20Therapy%20FINALAPPROVED2015.pdf)>.

[7] Hannah Thibedeau, "Ottawa looking at Criminal Code reforms to deter 'shameful' conversion therapy," *Canadian Broadcasting Corporation* (9 July 2019), online: <[cbc.ca/news/politics/conversion-therapy-criminal-code-1.5204919](https://www.cbc.ca/news/politics/conversion-therapy-criminal-code-1.5204919)>.

[8] *Ibid.*

[9] Perlita Stroh, "Ottawa rejects plans for nationwide conversion therapy ban," *Canadian Broadcasting Corporation* (23 March 2019), online: <[cbc.ca/news/canada/the-national-conversion-therapy-federal-petition-1.5066899](https://www.cbc.ca/news/canada/the-national-conversion-therapy-federal-petition-1.5066899)> [Stroh].

[10] Peter W Hogg, *Constitutional Law of Canada (2017 Student Edition)* (Toronto: Thompson Reuters, 2017) at 32-2 [Hogg].

[11] Stroh *supra* note 9.

[12] *Ibid.*; Phil Heidenreich, "St. Albert City Council unanimously passes motion to crack down on conversion therapy" *Global News* (8 July 2019), online: <[globalnews.ca/news/5473416/st-albert-city-council-conversion-therapy-motion-passes/](https://www.globalnews.ca/news/5473416/st-albert-city-council-conversion-therapy-motion-passes/)>.

[13] Phil Heidenreich, "Email from Alberta health minister offers mixed message on conversion therapy group's status," *Global News* (7 June 2019), online: <[globalnews.ca/news/5368734/tyler-shandro-conversion-therapy-group-alberta/](http://globalnews.ca/news/5368734/tyler-shandro-conversion-therapy-group-alberta/)>.

[14] Stroh *supra* note 9.

[15] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

[16] *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1 at 50.

[17] Hogg *supra* note 10 at 18-12.1.

[18] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[19] Mark Gollom, "Federal ban on conversion therapy could face constitutional hurdles," *Canadian Broadcasting Corporation* (10 July 2019), online: <[cbc.ca/news/politics/conversion-therapy-ban-federal-government-1.5205696](http://cbc.ca/news/politics/conversion-therapy-ban-federal-government-1.5205696)> [Gollom].

[20] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346.

[21] Gollom *supra* note 19.

[22] New Democratic Party of Canada, "NDP: Let's Put an End to Conversion Therapy" (4 August 2019), online: <[ndp.ca/news/ndp-lets-put-end-conversion-therapy](http://ndp.ca/news/ndp-lets-put-end-conversion-therapy)>.

[23] Rachel Browne, "Andrew Scheer will 'wait and see' before taking stance on Liberal plan for conversion therapy ban," *Global News* (10 July 2019), online: <[globalnews.ca/news/5479933/conversion-therapy-ban-2/](http://globalnews.ca/news/5479933/conversion-therapy-ban-2/)>.