

ERADICATING CONVERSION PRACTICES IN SOUTH AFRICA: LEGAL AND POLICY APPROACHES

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Outright International works together for better LGBTIQ lives. Outright is dedicated to working with partners around the globe to strengthen the capacity of the LGBTIQ human rights movement, document and amplify human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies, governments, humanitarian and development institutions, and civil society partners. Outright holds consultative status at the United Nations, where it also serves as the secretariat of the UN LGBTI Core Group.

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Glossary of Terms

Cisgender: Denoting or relating to a person whose sense of personal identity and gender corresponds with their sex assigned at birth.

Cisheteronormativity: A pervasive belief system that centers and naturalizes heterosexuality and the binary female–male sexes to the extent that it is assumed that the only two “normal” ways of being are cisgender, heterosexual masculine men and cisgender, heterosexual feminine women.

Conversion Practices: Practices intended to suppress or change a person’s sexual orientation, gender identity, or gender expression based on cisgender, heteronormative indoctrination and/or the incorrect assumption that such persons’ orientation, identity, or expression is not normal.

Gender: The social and cultural codes (linked to but not congruent with ideas about biological sex) used to distinguish between society’s conceptions of “femininity” and “masculinity.”

Gender Expression: Gender expression is how we express our gender through actions and appearance, including attire, speech, and movement. Gender expression is on a spectrum. It can align with social constructs of what it means to be feminine, masculine, androgynous, or any combination thereof. It can also be fluid. For a lot of people, their gender expression aligns with characteristics that our societies deem to be appropriate for their gender or their sex assigned at birth. For other people, it does not. A person’s gender expression is not always linked to the person’s biological sex, gender identity or sexual orientation.

Gender Identity: A person’s internal, deeply felt sense of being a woman or girl, man or boy, a combination of these, neither, or something else.

Heteronormativity: A pervasive belief system that centers and naturalized heterosexuality to the extent that it is assumed that the only two “normal” ways of being are heterosexual men and heterosexual women.

Intersex: An umbrella term that refers to a range of traits and conditions that cause individuals to be born with chromosomes, gonads, and/or genitals that vary from what is considered typical for female or male bodies.

LGBTI: Acronym for lesbian, gay, bisexual, transgender, and intersex.

LGBTQ: Acronym for lesbian, gay, bisexual, transgender, queer and other diverse sexualities and gender identities.

Sexual Orientation: An individual's sexual orientation is indicated by one or more of the following: how a person identifies their sexual orientation, a person's capacity for experiencing sexual and/or affectional attraction to people of the same and/or different gender, and/or a person's sexual behavior with people of the same and/or different gender.

SOGIE: Acronym for sexual orientation, gender identity, and expression.

Transgender: A term to describe people whose sex assigned at birth does not conform to their gender identity. A transgender person usually adopts, or would prefer to adopt, a gender expression in accordance with their gender identity but may or may not desire to alter their physical characteristics to conform to their gender identity.

Introduction

“Conversion practices” is an umbrella term that describes the range of concerted efforts to change, suppress, or divert a person’s sexual orientation, gender identity, or expression (SOGIE). Other terms that have been used to describe conversion practices include conversion therapy, gay cure, reparative therapy, and ex-gay therapy, among others.¹ Conversion practices are rooted in the belief that a person’s SOGIE can and should be changed to conform to a cisgender, heterosexual norm.²

Conversion practices are rooted in homophobia and transphobia. They have been proven to have damaging and long-lasting consequences for those subjected to them.³ On that basis alone, governments and other stakeholders should take steps to eradicate these practices.⁴ Furthering the need to eliminate these harmful practices is the lack of evidence that sexual orientation or gender identity can be changed.⁵ Attempts to convert a person’s SOGIE are often futile in coercing cisheteronormativity.⁶ They have no positive impacts and are likely to result in physical and mental harm.

Outright’s 2019 report, *Harmful Treatment: The Global Reach of So-Called Conversion Therapy*, demonstrates that conversion practices exist around the world.⁷ Subsequent research by Outright and its partner organizations has highlighted the forms of conversion practices that are most common in Kenya, Nigeria, and South Africa, and the harms they cause.⁸

¹ Outright International, *Converting Mindsets, Not Our Identities: Summary of the Research Findings on the Nature, Extent, and Impact of Conversion Practices in Kenya, Nigeria, and South Africa*, 2022, https://outrightinternational.org/sites/default/files/2022-09/SOGIEReport_July192022_2.pdf, 10-11.

² Ibid; see also United Nations Office of the High Commissioner for Human Rights (OHCHR), “Practices of So-Called ‘Conversion Therapy’ – Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity,” A/HRC/44/53, 1 May 2020, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4453-practices-so-called-conversion-therapy-report-independent>, para. 17.

³ OHCHR, “Practices of So-Called ‘Conversion Therapy,’” para. 17.

⁴ Independent Forensic Expert Group (IFEG), “Statement on Conversion Therapy,” 23 April 2020, https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/CSOsAJ/IFEG_Statement_on_C.T._for_publication.pdf; OHCHR, “Practices of So-Called ‘Conversion Therapy,’” paras. 19, 39.

⁵ Dinesh Bhugra et al., “WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction and Behaviours,” *World Psychiatry* 15, no. 3 (2016), <https://doi.org/10.1002/wps.20340>. For a history of conversion practices in psychotherapy, see Pierre Brouard, Sohela Surajpal, and Ayodele Sogunro, *When Hostility Hurts: The Mental Health Effects of Criminalising Consensual Same-Sex Sexual Relations and the Efficacy of Conversion Practices*, 2023, www.chr.up.ac.za/images/researchunits/sogie/documents/A_Criminalisation_and_conversion_Therapy_Briefing_doc_draft6.pdf, 6-13.

⁶ Academy of Science of South Africa, *Diversity in Human Sexuality: Implications for Policy in Africa*, 2015, <http://dx.doi.org/10.17159/assaf/0022>, 50-52.

⁷ Outright, *Converting Mindsets*.

⁸ The Initiative for Equal Rights (TIERS) in Nigeria, galck+ in Kenya, and Access Chapter 2 (AC2) in South Africa conducted localized research into conversion practices. Outright, *Converting Mindsets*.

This guide narrows in on South Africa and aims to provide advocates with some strategies to curtail conversion efforts through the use of the law. South Africa already has a strong substantive legal framework on other elements of LGBTQ equality, but has not been successful in creating a society where LGBTQ people live free from discrimination, violence, and intolerance. There remain pervasive traditional, cultural, and religious elements that reject sexual and gender diversity and lead to conversion practices. South African politicians and advocates alike have in recent years floated the idea of adopting a law to regulate or prohibit conversion practices.

Given that other protective laws have not been sufficient themselves in rendering South Africa safe for LGBTQ people, an effective response to conversion practices in South Africa will need to go beyond legal responses alone. Legal approaches to eradicating conversion practices are only one part of the equation; a sustainable response will also require engagement with religious and traditional leaders, mental health practitioners, families, and others. Outright's advocacy toolkit, *Pathways for Eliminating Conversion Practices*, explores these holistic approaches.⁹ This guide, with its recommendations for legal strategies to end conversion practices, should be understood as one piece of a puzzle, and Outright will continue to partner with LGBTQ advocates in South Africa and beyond to explore effective responses within and outside the limitations of the law.

⁹ Outright, *Pathways for Eliminating Conversion Practices*, December 2022, <https://outrightinternational.org/our-work/human-rights-research/pathways-eliminating-conversion-practices>.

I. Conversion Practices in Africa

Conversion practices have been identified in all regions in the world, but these harmful acts have not been as widely documented in African countries as they have in other contexts such as North America and Australia.¹⁰ To fill this knowledge gap, in 2020 Outright partnered with organizations in Kenya, Nigeria, and South Africa to research the nature, extent, and impact of conversion practices in each country.¹¹ More than half of the 2,891 LGBTQ surveyed respondents disclosed that they had experienced some form of conversion practice, in most cases at the hands of family members, religious figures, or mental health professionals.¹²

MOTIVATORS FOR CONVERSION PRACTICES IN AFRICA

While each country has distinct cultural, social, and legal contexts, there are commonalities across the region.¹³ The South African, Nigerian, and Kenyan research identified familial shame, culture, and religious beliefs as the most common motivators for conversion practices experienced by the respondents, who reported being accused of having an illness, an ancestral or demonic curse, or being driven by outside influences.¹⁴ Respondents explained that their relatives feared and resented their family name being brought into disrepute. Humiliation within the community created tension between siblings and led to acts of emotional and physical violence from parents.¹⁵

“A family member once said, ‘Here at home we don’t practise gayness because we are a respectful family, and we don’t want you to let down our family name.’ I was either gay and disowned or I’m straight. I had to lie and say I’m straight just because I didn’t want them to disown me.”
– SOUTH AFRICAN RESPONDENT¹⁶

¹⁰ OHCHR, “Practices of So-Called ‘Conversion Therapy,’” para. 41.

¹¹ The Initiative for Equal Rights (TIERs) in Nigeria, galck+ in Kenya, and AC2 in South Africa conducted localized research into conversion practices. Outright, *Converting Mindsets*.

¹² *Ibid*, 3.

¹³ *Ibid*.

¹⁴ *Ibid*. galck+, “Shame is Not a Cure: So-Called ‘Conversion Therapy’ Practices in Kenya,” 2022, <https://www.galck.org/wp-content/uploads/2022/07/Shame-is-not-a-cure-doc-3.pdf>, 26; The Initiative for Equal Rights (TIERs), *2022 Report on Human Rights Violations*, 2022, https://theinitiativeforequalrights.org/wp-content/uploads/2023/01/PRESS_2022-Violations-Report_20Dec21.pdf, 67; AC2, *Inxeba Lam’: “Conversion Practices” and Implications in the South African Context*, February 2022, <https://outrightinternational.org/sites/default/files/2022-08/AC2-conversion-report.pdf>, 16.

¹⁵ AC2, *Inxeba Lam’*, 23-25.

¹⁶ *Ibid*, 25.

Religious beliefs combined with family and cultural values are also significant motivators for conversion practices.¹⁷ In Nigeria, 59 percent of the respondents who had undergone conversion practices indicated that they had been subjected to religious rituals in an effort to convert them.¹⁸

While most surveyed survivors in all three countries reported being forced or coerced into these practices, a notable minority—in South Africa, 30 percent of respondents—sought out the practices for themselves as an attempt to conform to heteronormativity due to personal religious beliefs, shame, and/or a desire for social acceptance.¹⁹

In Kenya and Nigeria, Outright’s partner organizations, galck+ and TIERS, surveyed practitioners of conversion efforts, many of whom said that homosexuality and gender diversity is seen as foreign and contrary to traditional African cultures. They view LGBTQ identities as learned behavior that can be cured by mentorship, therapy, or religious practices.²⁰

METHODS AND SETTINGS OF CONVERSION PRACTICES IN AFRICA

Conversion efforts are complex, occur on a continuum, and are not always easily identifiable.²¹ Research in all three countries suggests that once a person’s sexual or gender identity is exposed, conversion efforts escalate in severity over time and typically cease only when the survivor affirms that they are “cured.”²² These harmful acts most commonly start in the home.²³ The process frequently begins with family discussions, demands, and threats, then counseling and prayer, followed by violence, economic duress, and ostracization.²⁴ Family members often invite others to further the attempts, such as religious figures, extended family, community members, counselors, and traditional healers.²⁵ In some cases, various institutions offer structured programs for conversion practices.²⁶

Methods of Conversion Practices

Non-Physical: Prayer, talk therapy, religious counseling, exorcism, verbal abuse, loss of financial support or payment of tuition, family and community shaming.

Physical: Deprivation of food and water, forced confinement, laying of hands for healing, electric shocks, forced hormone therapy, kidnapping, beating, sexual assault, forced marriage.

¹⁷ Outright, *Harmful Treatment: The Global Reach of So-Called Conversion Therapy*, 19 August 2019, https://outrightinternational.org/sites/default/files/2022-09/ConversionFINAL_Web_0.pdf, 4, 31–33.

¹⁸ Outright, *Converting Mindsets*, 15.

¹⁹ *Ibid.*, 3.

²⁰ TIERS, *2022 Report on Human Rights Violations*, 92; galck+, “Shame is Not a Cure,” 28; see also Letlhogonolo Mokgoroane, “Homosexuality Is Not ‘UnAfrican,’” *Power 98.7*, June 2019, <https://www.power987.co.za/featured/homosexuality-is-not-unafrican/>.

²¹ TIERS, *2022 Report on Human Rights Violations*, 50; Outright interview with Hanzline R. Davids, Researcher at the Institute for Gender Studies at University of South Africa, 21 November 2022.

²² Outright, *Converting Mindsets*, 3; TIERS, *2022 Report on Human Rights Violations*, 50.

²³ AC2, *Inxeba Lam*, 23–25.

²⁴ Outright, *Converting Mindsets*, 3.

²⁵ Outright, *Converting Mindsets*, 3.

²⁶ galck+, “Shame is Not a Cure,” 11–13 (describing church programs and hospitals in East Africa offering LGBT patients hormone therapies to “cure” their sexuality), 26–27 (responses from conversion practitioners).

“They prayed for me, they forced me to wear dresses, and there were times where they told me to live with the pastors. I stayed there for like two days to wear dresses and had to follow a routine. We would pray the whole night and read the Bible and do the same when I wake up... I had to do all that to convince them I’ve changed.”

– SOUTH AFRICAN RESPONDENT²⁷

LEGAL FRAMEWORKS ALLOWING CONVERSION PRACTICES TO OCCUR

While there are similar motivators and methods of conversion practices in the three surveyed African countries, their legal systems differ significantly. Nigeria and Kenya both have statutory laws criminalizing consensual same-sex conduct, engendering a hostile legal and social environment for LGBTQ persons.²⁸ Kenya’s 2010 Constitution explicitly recognizes only different-sex marriages,²⁹ and in 2014, Nigeria passed legislation to prohibit same-sex marriage, participation in LGBTQ associations, and “public show of same sex amorous relationship directly or indirectly.”³⁰ Gender nonconformity is criminalized in some northern Nigerian states’ sharia enactments.³¹ These discriminatory legal infrastructures legitimize anti-LGBTQ attitudes and stigma, creating a ripe environment for conversion practices to endure.

Notably, Kenya’s judiciary has developed limited jurisprudence recognizing LGBTQ persons’ rights to dignity, privacy, and freedom of association,³² even though the High Court upheld the statutory criminalization of same-sex conduct in 2019.³³

Unlike Kenya and Nigeria, South Africa has a uniquely progressive legal system that protects the human rights of LGBTQ persons. The South African Constitution guarantees equality for all and prohibits discrimination on the basis of sexual orientation, sex, and gender.³⁴ The current constitutional dispensation contributes to a more accepting environment for LGBTQ persons, so much so that South Africa has become a haven for African LGBTQ migrants and

²⁷ AC2, *Inxeba Lam*, 23.

²⁸ Federal Republic of Nigeria, Laws of the Federation of Nigeria, Criminal Code Act, Chapter 77, 1990, http://www.commonlii.org/ng/legis/num_act/ccal15/, §§214, 215, 217; and Republic of Kenya, Penal Code, Cap. 63, 1930, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP%2063>, §§162, 165.

²⁹ Kenya, Constitution of Kenya, 2010, <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>, art. 45(2).

³⁰ Federal Republic of Nigeria, Same Sex Marriage (Prohibition) Act, 2013, <https://www.refworld.org/pdfid/52f4d9cc4.pdf>, §§4, 5.

³¹ Gender nonconforming persons have been charged under Sharia Law in Northern Nigeria. The 2007 case of 18 men arrested and accused of cross-dressing is further described in Nana Boakye, Jonathan Nomamiukor, and Jacqueline Bevilaqua, “Shadow Report: The Violations of Human Rights on The Basis Of Sexual Orientation And Gender Identity In The Federal Republic Of Nigeria Under The African Charter Of Human And Peoples’ Rights,” October 2011, https://www.heartlandalliance.org/gihr/wp-content/uploads/sites/12/2016/02/achpr_nigeria.pdf, 11-12.

³² NGOs Co-ordination Board v. EG, Supreme Court of Kenya, [2023] KESC 17 (KLR), Petition No. 16 of 2019, Judgement of 24 February 2023, <http://kenyalaw.org/caselaw/cases/view/252450/>, paras. 73-99; COI v. Chief Magistrate Ukundla Law Courts, Court of Appeal at Mombasa, 2018, Decision, <http://kenyalaw.org/caselaw/cases/view/171200/>, paras. 22-32.

³³ NGOs Co-ordination Board v. EG.

³⁴ South Africa, Constitution of the Republic of South Africa, 1996, <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-04-feb-1997>, Ch. 9.

refugees.³⁵ Despite South Africa's favorable legal environment, the reality for LGBTQ persons reflects many of the same social exclusions, violence, and discrimination seen in other African countries, including conversion practices.³⁶ Similar to the rest of the region, South African law does not explicitly prohibit any forms of conversion practices or provide specific protections to those affected.

The remainder of this guide will focus on South Africa, due to its guarantee of substantive equality to LGBTQ people, and will explore some of the potential strategies to eradicate conversion practices.

³⁵ Sections 1 and 3 of the Refugees Act 130 of 1998 provides that asylum may be granted on the basis of, *inter alia*, social group status including sexual orientation. However, LGBTQ asylum seekers and advocates commonly report that South African immigration officials unfairly deny asylum applications due to homophobia, transphobia, and xenophobia; see, e.g., Human Rights Watch, "Human Rights Watch Submission to the South Africa Department of Justice," 6 July 2021, <https://www.hrw.org/news/2021/07/06/human-rights-watch-submission-south-africa-department-justice>; B. Camminga et al., *Vulnerability Amplified: Assessing the Needs Of LGBTI+ Refugees In South Africa*. Johannesburg: African LGBTIQ+ Migration Research Network (ALMN) & African Centre for Migration and Society (ACMS), 2022, <https://almn.org.za/wp-content/uploads/2022/12/final-whatsapp-research-report.pdf>, p 5-6.

³⁶ Terry Leonard, "Fear and Violence Still Rule Gay Township Life," *Mail & Guardian*, 6 November 2006, <https://mg.co.za/article/2006-11-06-fear-and-violence-still-rule-gay-township-life/>; AC2, *Inxeba Lam*, 19.

II. Conversion Practices in South Africa

NATURE AND EXTENT OF CONVERSION PRACTICES IN SOUTH AFRICA

Access Chapter 2 (AC2) conducted research in South Africa using a mixed methodology approach. Three hundred and three respondents from nine provinces, reached through social media and civil society organizations, participated in an online survey. They were from Gauteng (149), Mpumalanga (9), Free State (36), North-West (24), Northern Cape (2), KwaZulu-Natal (7), Eastern Cape (42), Western Cape (28), and Limpopo (14). Participants were also asked to self-identify in terms of race, sexual orientation, gender identity, and religion, although not all participants responded to each question. AC2 reported that 209 respondents identified as Black African, seven respondents as White, and five identified as Coloured. Regarding sexual orientation, 144 identified as lesbian, 91 as gay, 25 as bisexual, and 31 as heterosexual. In addition, 40 identified as transgender and 64 identified as non-binary.³⁷ AC2 also reported, “Most of the respondents associated with the Christian faith (183), while 74 identified with African traditional religion, 40 did not associate with any religion, 1 Hindu and 1 Islam.”³⁸

The quantitative data emerging from the survey was complemented by in-depth one-on-one interviews with an additional 30 LGBTQ individuals who had experienced conversion practices.³⁹

The survey revealed fifty eight percent of respondents, or 175 individuals, had experienced conversion practices. Reflecting regional trends, conversion practices in South Africa most often begin under the compulsion or coercion of family members.⁴⁰ Fort-seven percent of the respondents who had experienced conversion practices said they were first subjected to conversion practices when they were under 18.⁴¹

³⁷ AC2, *Inxeba Lam*, 33-34.

³⁸ *Ibid*, 34.

³⁹ *Ibid*, 16.

⁴⁰ *Ibid*, 37.

⁴¹ *Ibid*, 37-38.

Respondents described conversion efforts in informal and formal settings, such as in the home and with a professional psychologist. Non-physical methods, such as prayer and counseling, are commonly used as well as physical tactics like beatings and corrective rape.⁴² Twenty-nine of the 303 survey respondents said they had experienced “corrective” or bias-motivated rape, a widely reported phenomenon in South Africa, during which cisgender men rape queer women and transgender men as a form of punishment and with the supposed intention of “curing” them of their same-sex attraction or lack of compliance with cisgender norms.⁴³ Bias-motivated sexual violence aimed at changing a person’s sexual orientation or gender identity may be organized or perpetrated by family members, intimate partners, community members, religious figures, or strangers.⁴⁴

Religion is also a salient factor in South African conversion efforts, whereby sessions with religious and spiritual representatives include exorcism, spiritual cleanse, prolonged fasting, and spiritual medication.⁴⁵ For those that practice African spirituality, a traditional healer may identify a curse or ancestral possession as the cause of a person’s sexuality or gender. The healer often provides instructions and medicines for cleansing rituals.⁴⁶

Forty-nine percent of the survivors whom AC2 surveyed indicated that they were coerced into conversion practices by the use of threats, physical force, and economic insecurity.⁴⁷ Thirty percent of the survivors said that they initiated the conversion practice on their own accord, incentivized by shame, fear of rejection, and stigma.⁴⁸

“Family members organised different sessions, firstly with the pastor, then the traditional healer then with a professional psychologist. None of it helped.” – SOUTH AFRICAN RESPONDENT⁴⁹

“I was continually prayed and fasted over and when that didn’t work, they made my cousin sleep with me forcefully. Actually, my cousin raped me.” – SOUTH AFRICAN RESPONDENT⁵⁰

“They told me I need to change and all of that and I had to lie and tell them that I will do whatever they want me to do because I could see I was losing everything at the moment since mom was the one supporting me financially and would stop supporting me financially if I didn’t change.” – SOUTH AFRICAN RESPONDENT⁵¹

⁴² Ibid, 21.

⁴³ Ibid, 39. Patrick Strudwick, “Crisis in South Africa: The Shocking Practice of ‘Corrective Rape’ – Aimed at ‘Curing’ Lesbians,” *The Independent*, 4 January 2014, <https://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html>.

⁴⁴ Ibid; Human Rights Watch, “We’ll Show You You’re a Woman”: *Violence and Discrimination Against Black Lesbians and Transgender Men in South Africa*, December 2011, <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>.

⁴⁵ AC2, *Inxeba Lam*, 27.

⁴⁶ Outright interviews with Hanzline R. Davids, Institute for Gender Studies at University of South Africa; Michelle Boonzaaier of IAM Ministries; and Thuli Mjwara of IAM Ministries, November 2022.

⁴⁷ AC2, *Inxeba Lam*, 22-25, 38.

⁴⁸ Ibid, 38.

⁴⁹ Ibid, 23.

⁵⁰ Ibid, 25.

⁵¹ Ibid, 23.

THE IMPACT OF CONVERSION PRACTICES

LGBTQ persons subjected to conversion practices in South Africa recounted the damaging and lasting impacts the process had on their mental and emotional health.⁵² Feelings of depression, anxiety, suicidal ideation, and self-hatred were common, along with unhealthy coping mechanisms including excessive alcohol consumption, high-risk sex, and self-isolation.⁵³ For respondents who were students at the time of the conversion practices, the process adversely impacted their studies, leading to failing and chronic absenteeism.⁵⁴ Unsurprisingly, the South African respondents' experiences are consistent with findings from both the United Nations and the Psychological Society of South Africa, both of whom decry conversion practices in part due to the psychological dangers that they pose, particularly to young people who are in vulnerable phases of their development.⁵⁵

"... [I]t's actually very dramatic because you feel like, something is wrong with you when you are there, because everyone is there to help you. But when you're not there, you know, you don't need... help. But when you sometimes, you get convinced that something might be wrong with me, because everyone believes it. And it makes you feel very unsure about yourself." – SOUTH AFRICAN RESPONDENT⁵⁶

"Well, it affected me badly in a way that I hated myself and fell into a mini depression, always isolated myself." – SOUTH AFRICAN RESPONDENT⁵⁷

CURTAILING CONVERSION PRACTICES IN SOUTH AFRICA

Legal, Political, and Social Context

This guide highlights South Africa because of its favorable conditions to eradicate conversion practices through legislation, courts, public policy, and awareness campaigns. These conditions stem not only from the constitutional protections of sexual orientation and gender, but also the willingness of the judiciary and politicians to take the rights of LGBTQ people seriously.

The Constitutional Court of South Africa decriminalized consensual same-sex conduct in 1998.⁵⁸ It continued developing its equality jurisprudence by repealing or remedying domestic laws that were discriminatory on the basis of sexual orientation.⁵⁹ These judicial victories

⁵² Ibid, 21; see also IFEG, "Statement on Conversion Therapy," 4; OHCHR, "Practices of So-Called 'Conversion Therapy,'" paras. 61, 71.

⁵³ AC2, *Inxeba Lam*, 42.

⁵⁴ Ibid, 30.

⁵⁵ OHCHR, "Practices of So-Called 'Conversion Therapy,'" para. 57 (describing the significant loss of self-esteem, potential for lifelong suicidality, and depressive tendencies that child have due to conversion practices); Psychological Society of South Africa (PsySSA), "The Psychological Society of South Africa's Position on Sexual and Gender Diversity," 11 November 2020, <https://www.psyssa.com/wp-content/uploads/2020/11/PsySSA-Statement.pdf>.

⁵⁶ AC2, *Inxeba Lam*, 29.

⁵⁷ Ibid, 29.

⁵⁸ National Coalition for Gay and Lesbian Equality v. Minister of Justice, South Africa Constitutional Court, CCT 11/98, 9 October 1998, <https://www.saflii.org/za/cases/ZACC/1998/15.html>.

⁵⁹ Ibid; Du Toit v. Minister for Welfare and Population Development, South Africa Constitutional Court, CCT 40/01, 10 September 2002, <http://www.saflii.org/za/cases/ZACC/2002/20.html>; Minister of Home Affairs v. Fourie, South Africa Constitutional Court, CCT 10/05, 1 December 2005, <https://www.saflii.org/za/cases/ZACC/2005/19.html>.

and subsequent legislation led to marriage equality, adoption by same-sex couples, and, in some circumstances, the ability of transgender individuals to change their gender marker on official documents.⁶⁰ Legally, LGBTQ people have achieved substantive equality in South Africa and this legal framework has become an example to much of the world.

The South African political landscape also recognizes the human rights of LGBTQ people and specifically the suffering caused by conversion practices. Political parties have sought to address gaps in the law that allow these harms to continue. The African National Congress, the ruling political party, held its 55th National Conference in December 2022, during which it passed a policy resolution to “[p]ass legislation that bans conversion practices (harmful practices and efforts that seek to change people on the basis of their sexual orientation and gender identity).”⁶¹

In 2011, the Department of Justice and Constitutional Development established a National Task Team (NTT) on Gender and Sexual Orientation-Based Violence in response to rampant reports of bias-motivated rapes of Black lesbian women. In 2014, the NTT issued its first “National Intervention Strategy for LGBTI Sector,” which addresses violence against lesbian, gay, bisexual, transgender, and intersex individuals and the shortcomings in the criminal legal system.⁶² The NTT created a Rapid Response Task Team, consisting of the National Prosecuting Authority, South African Police Services, and others, as a way to fast track pending criminal cases with LGBTI victims.⁶³

While these formal mechanisms and policy positions demonstrate the government’s willingness to acknowledge the problem of SOGIE-based discrimination and violence, they have, unfortunately, often fallen short of realization.⁶⁴ Anti-LGBTQ prejudice, lack of policy awareness, and inadequate funding in South Africa’s public institutions, especially in the criminal legal system,⁶⁵ contribute to the marginalization and secondary victimization of

⁶⁰ South Africa, Civil Union Act 17 of 2006, https://www.gov.za/sites/default/files/gcis_document/201409/a17-061.pdf; South Africa, Children’s Act 38 of 2005, <https://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>; South Africa, Alteration of Sex Description and Sex Status Act 49 of 2003, https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf.

⁶¹ African National Congress, “Social Transformation Resolutions as Adopted by the ANC 55th National Conference,” 5 January 2023, <https://www.anc1912.org.za/wp-content/uploads/2023/02/ANC-55th-Conference-Resolutions-Social-Transformation.pdf>.

⁶² South Africa, Department of Justice and Constitutional Development, “National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector,” 2014, <https://www.nationalgbitaskteam.co.za/images/Resources/NIS.pdf>.

⁶³ South Africa, Department of Justice and Constitutional Development, “Terms of Reference for the Rapid Response Team to Fast Track Pending and Reported LGBTI Related Cases in the Criminal Justice System,” 2014, <https://www.nationalgbitaskteam.co.za/images/Resources/RRT-ToRs.pdf>.

⁶⁴ Foundation for Human Rights, *The State of Intolerance and Discrimination in South Africa 2017 – 2019*, October 2021, <https://www.fhr.org.za/wp-content/uploads/2022/03/The-State-of-Intolerance-and-Discrimination-in-South-Africa-2017-2019-v5-2.pdf>, 44; Alex Müller and Talia Meer, *Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa: A Research Report*, University of Cape Town: Gender Health and Justice Research Unit, 2018, http://www.ghjru.uct.ac.za/sites/default/files/image_tool/images/242/report_images/1%20ICOP%20LGBT%20Doc%20PDF.pdf; Carl Collison, “Cops Can’t Cope with Hate Crimes,” *Mail & Guardian*, 23 November 2018, <https://mg.co.za/article/2018-11-23-00-cops-cant-cope-with-hate-crimes/>.

⁶⁵ South African Human Rights Commission (SAHRC), *Thematic Discussion Paper: Discrimination and Violence on the Basis of Sexual Orientation, Gender Identity and Expression (SOGIE) in South Africa*, February 2018, <https://www.sahrc.org.za/home/21/files/Thematic%20Discussion%20Paper%20on%20SOGIE%20based%20violence%20and%20discrimination%20in%20SA.pdf>, 3.

LGBTQ persons when seeking redress or protection from the state.⁶⁶ The South African Human Rights Commission concedes that there is a significant “disconnect between policy and legislative framework[s] on the one hand, and the actual lived experiences of LGBTIQ persons on the other.”⁶⁷

Human Rights Law and Conversion Practices

South Africa is a signatory to most key human rights treaties at the regional and international level that obligates the state to guarantee equality and non-discrimination of all people, including LGBTQ persons.⁶⁸ When conversion practices “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,” they constitute discrimination.⁶⁹

The most clearly egregious conversion practices, those that are physical and coercive, are potential violations of the prohibition on torture and ill-treatment as codified within the Convention Against Torture and Article 5 of the African Charter on Human and Peoples’ Rights (African Charter).⁷⁰ Conversion methods that consist of beatings, forced isolation, sexual violence, and forced starvation may amount to torture or cruel, inhuman or degrading treatment when the harm is intentional and results in severe physical or mental pain and suffering.⁷¹ Although the duty to prevent torture or ill-treatment is for public actors, the Committee Against Torture affirmed that states have a due diligence obligation to prevent, investigate, and hold accountable private actors who commit torture or ill-treatment.⁷²

When minors are subjected to conversion practices, this can constitute a contravention of the Convention on the Rights of the Child.⁷³ The treaty’s committee body has urged states to eliminate conversion practices on children due to their documented harms to a

⁶⁶ Ra’eesa Pather, “Policing Communities: How the SAPS is Failing to Uphold LGBTI Rights,” *Mail & Guardian*, 23 November 2016, <https://mg.co.za/article/2016-11-23-policing-communities-how-the-saps-is-failing-to-uphold-lgbti-rights/>; Network of African National Human Rights Institutions (NANHRI) and South African Human Rights Commission (SAHRC), *In-Country Meeting on Sexual Orientation, Gender Identity and Expression*, November 2017, <https://www.sahrc.org.za/home/21/files/South%20Africa%20Incountry%20Meeting%20Report.pdf>.

⁶⁷ SAHRC, *Thematic Discussion Paper*, 3.

⁶⁸ UN Treaty Body Database, “Ratification Status for South Africa,” https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN.

⁶⁹ OHCHR, “Practices of So-Called ‘Conversion Therapy,’” para. 59.

⁷⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

⁷¹ OHCHR, “Domestic Violence and the Prohibition of Torture and Ill-Treatment,” A/74/148, 12 July 2019, <https://www.ohchr.org/en/documents/thematic-reports/a74148-domestic-violence-and-prohibition-torture-and-ill-treatment>, para. 50; Special Rapporteur of the Commission on Human Rights, “Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” A/56/156, 3 July 2001, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/445/79/PDF/N0144579.pdf?OpenElement>, para. 24; OHCHR, “Report on Psychological Torture and Ill-Treatment,” A/HRC/43/49, 20 March 2020, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4349-report-psychological-torture-and-ill-treatment>; Committee Against Torture, “Concluding Observations on the Fifth Periodic Report of China,” CAT/C/CHN/CO/5, 3 February 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/017/44/PDF/G1601744.pdf?OpenElement>, para. 56.

⁷² Committee Against Torture, “General Comment No. 2 (2007) on the Implementation of Article 2 by States Parties,” CAT/C/GC/2, 24 January 2008, <https://www.ohchr.org/en/documents/general-comments/general-comments-and-recommendations/catcg2-general-comment-no-2-2007-implementation>, para. 18.

⁷³ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

child's development and well-being.⁷⁴ Attempts to convert a child's SOGIE run afoul of the "best interest of the child" standard.⁷⁵ States have a duty to protect children from violence, harmful practices, and cruel, inhuman and degrading treatment, which are forms that many conversion practices take.⁷⁶

The African Commission on Human and Peoples' Rights adopted Resolution 275 in 2014, which urges states to act according to their human rights obligations in the African Charter to end the alarming rates of violence and discrimination toward LGBTQ people. The Commission specifically condemns the conversion practice of "corrective rape" and implores states to act with due diligence to prevent and punish SOGIE-based violence committed by public and private actors.⁷⁷

Constitutional Rights Implicated

The South African Constitution of 1996 is heralded as one of the most progressive constitutions in the world for including sexual orientation as a prohibited ground of unfair discrimination as well as rights and protections that closely align with international and regional standards. The Bill of Rights includes the following guarantees, which may be implicated when a person is subjected to conversion practices.

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA) gives effect to the Constitution's equality clause by prohibiting unfair discrimination, harassment, and hate speech by public and private individuals.⁷⁸ PEPUDA establishes Equality Courts, where acts of unfair discrimination, hate speech, and harassment are adjudicated. Equality Courts can issue orders, including orders to pay damages, issue an apology, or comply with any provisions of the act, and can also refer cases to other constitutional institutions, such as criminal courts.

- **Section 9: Equality**
 - Section 9(4): No person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including... sexual orientation, sex, or gender
- **Section 10: Right to human dignity**
- **Section 12: Freedom and security of the person**
 - Section 12(1)(c): freedom from violence from public or private sources
 - Section 12(2): right to bodily and psychological integrity
- **Section 28: Children**
 - Section 28(1)(d): every child has the right to be protected from maltreatment, neglect, abuse, or degradation
 - Section 28(2): A child's best interests are of paramount importance in every matter concerning the child

⁷⁴ Committee on the Rights of the Child, "General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence," CRC/C/GC/20, 6 December 2016, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights>, paras. 33-34.

⁷⁵ Committee on the Rights of the Child, "General Comment No. 14 (2013) on the Right of the Child To Have His or Her Best Interests Taken as a Primary Consideration," CRC/C/GC/14, 29 May 2013, https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf, paras. 55, 73.

⁷⁶ Committee on the Rights of the Child, "General Comment No. 13 (2011) on the Right of the Child to Freedom From All Forms of Violence," CRC/C/GC/13, 11 April 2011, https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.13_en.pdf, para. 21

⁷⁷ African Commission on Human and Peoples' Rights, "Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity (Resolution 275)," adopted 12 May 2014, ACHPR/Res.275(LV)2014, <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations>.

⁷⁸ South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000, <https://www.justice.gov.za/legislation/acts/2000-004.pdf>.

USING LAW AND POLICY TO END CONVERSION PRACTICES

There are a myriad of ways in which South Africa can curtail, and eventually eradicate, conversion practices. The path will undoubtedly be multifaceted, involving legislation, professional regulation, public education, enhanced religious tolerance and cooperation, and community activism. While all these efforts should be pursued simultaneously, South Africa presents a ripe opportunity to use formal mechanisms to curb conversion practices due to its robust legal protections of LGBTQ persons and its active civil society.

This guide will explore three potential strategies to tackle the problem domestically through law and policy. First, this guide will examine the ways in which the South African healthcare sector has taken a stance against conversion practices and how government regulation can strengthen the implementation of this position. Second, advocates can utilize strategic litigation to develop legal precedent establishing that forms of conversion practices violate existing laws, such as the anti-discrimination law (PEPUDA), the Prevention and Combating of Hate Crimes and Hate Speech Act of 2023, or the Consumer Protection Act of 2008. Finally, the government can pass legislation aimed at preventing and prohibiting forms of conversion practices generally or for vulnerable groups like children.

Global Responses to Conversion Practices

To understand the range of approaches available, it can be useful to explore some of the measures adopted in other jurisdictions.

Regulation of the medical sector is a common approach. In many countries, laws or policies specifically target health or mental health practitioners, prohibiting licensed professionals from carrying out conversion practices, or in some cases from issuing diagnoses based solely on a person's sexual orientation or gender identity. Such prohibitions impose consequences ranging from fines, to delicensing, to carceral sentences. In 1999, Brazil was the first country to regulate the health sector by prohibiting licensed health professionals from providing conversion practices.⁷⁹ In 2022, Israel's Ministry of Health announced its policy prohibiting medical professionals from advertising, offering, or conducting conversion practices.⁸⁰

In other jurisdictions, victims of conversion practices have used the courts to hold perpetrators accountable under existing laws. In China, for example, a gay man successfully sued a conversion "therapy" clinic. The clinic was held liable for fraud for subjecting him to electric shock treatments to cure his homosexuality, a non-existent mental health disorder that thus cannot be cured. The court also determined that the clinic engaged in false advertising and ordered restitution and an apology.⁸¹

More recently, a number of countries have crafted legislation prohibiting a wide range of conversion practices, usually relying on criminal sanctions. In 2021, the regional government of Victoria, Australia passed a wide-ranging prohibition, the Change or Suppression

⁷⁹ In Brazil, the judiciary affirmed the ban after several challenges. The law was recently updated to extend the protection to transgender people. Supreme Federal Court of Brazil, 22 May 2020, <https://portal.stf.jus.br/processos/downloadPeca.asp?ext=.pdf&id=15343190456>; Brazil Federal Council of Psychology, Resolution 001/99, March 22, 1999, http://site.cfp.org.br/wp-content/uploads/1999/03/resolucao1999_1.pdf.

⁸⁰ Israel Ministry of Health, "The Position of the Ministry of Health in Relation to 'Treatments' for Changing Gender Identity and Sexual Orientation," No 03/2022, 14 February 2022, <https://www.gov.il/he/departments/policies/mk03-2022>.

⁸¹ *Peng v. Xinyu Piao Xiang Psychotherapy Centre*, Haidian District People's Court of Beijing, 2014 Haimin Chuzi No. 16680; Dan Levin, "Chinese Court Sides With Gay Man in 'Conversion' Suit," *New York Times*, 19 December 2014, <https://www.nytimes.com/2014/12/20/world/asia/chinese-court-sides-with-gay-man-against-clinic-that-tried-to-convert-him.html>.

(Conversion) Practices Prohibition Act.⁸² This ban proscribes all forms of conversion practices, in any setting, regardless of the age or consent of the LGBTQ person, and imposes criminal sanctions on those who cause injury or serious injury to victims. Germany has enacted a narrower, recipient-based restriction, which aims to protect vulnerable groups by prohibiting conversion practices on minors and adults under coercion or who are unable to consent.⁸³ Thus far, to Outright’s knowledge, no country has enacted a comprehensive law seeking to prevent conversion practices through measures such as mandating and funding public education about sexual and gender diversity and mandating affirming care for LGBTQ people.

While largely outside the scope of this paper, which focuses on domestic policy, another approach is to use foreign policy tools to address conversion practices abroad. For instance, in the United States, the State Department issued an “Interagency Action Plan to Combat So-Called ‘Conversion Therapy’ Practices Globally,” which, among other measures, restricts federal agencies from funding conversion practices.⁸⁴

Strategy 1. Healthcare Sector

South African advocates may also consider targeting conversion practices by way of regulation of the healthcare profession. This will likely be a less controversial measure considering that the local psychology and psychiatry professional associations are already firmly opposed to conversion practices.⁸⁵ The Psychological Society of South Africa (PsySSA) issued a position statement in 2013 that affirms diverse sexual orientations and genders and cautions against conversion practices.⁸⁶ Seven years later, the PsySSA issued a firmer position statement unequivocally rejecting any form of conversion practices and highlighting that such interventions “can be to the detriment of the person and cause immense psychological damage.”⁸⁷ The professional body issued its landmark “Practice Guidelines For Psychology Professionals Working With Sexually and Gender-Diverse People” to increase psychological knowledge of sexual and gender diversity and provide psychologists with the most current, affirmative global and local best practices. The practice guidelines make clear that conversion practices are harmful for adults and children. They advocate for culturally responsive care to be incorporated in ongoing training of psychologists.⁸⁸

⁸² Victoria, Australia, Change or Suppression (Conversion) Practices Prohibition Act, No. 3 of 2021, <https://content.legislation.vic.gov.au/sites/default/files/2021-02/21-003ad%20authorised.pdf>.

⁸³ Germany, Law on Protection against Conversion Treatments, No. 28 of 2020, <https://www.buzer.de/gesetz/13982/index.htm>.

⁸⁴ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, “Summary of Interagency Action Plan to Combat So-Called ‘Conversion Therapy’ Practices Globally in Accordance with E.O. 14075,” 17 May 2023, <https://www.state.gov/summary-of-interagency-action-plan-to-combat-so-called-conversion-therapy-practices-globally-in-accordance-with-e-o-14075/>.

⁸⁵ South African Society of Psychiatrists (SASOP), “SASOP Position Statement: Homosexuality,” 2015, https://www.sasop.co.za/_files/ugd/cc5d8c_4ec5b524d72145dab5f5f90f9c99d264.pdf; SASOP, “Transgender Youth at Highest Risk of Suicide,” <https://www.sasop.co.za/transgender-youth-at-higher-risk> (stating SASOP’s position of opposing any form of conversion practice).

⁸⁶ PsySSA, “Sexual and Gender Diversity Position Statement,” 2013, http://www.psyssa.com/wp-content/uploads/2015/12/PsySSA_position_statement_sexual_gender-1.pdf. In April 2023, PsySSA and Outright hosted a convening of African mental health professionals on eradicating conversion practices in Africa, during which they produced and signed the “Johannesburg Declaration Against SOGIE Change Efforts and Conversion Practices.” PsySSA, “PsySSA SGD Hosts Meeting of African Mental Health Professionals,” 26 April 2023, <https://www.psyssa.com/psyssa-sgd-hosts-meeting-of-african-mental-health-professionals/>.

⁸⁷ PsySSA, “The Psychological Society of South Africa’s Position on Sexual and Gender Diversity.”

⁸⁸ PsySSA, *Practice Guidelines for Psychology Professionals Working with Sexually and Gender-Diverse People*, 2017, <https://www.psyssa.com/practice-guidelines-for-psychology-professionals-working-with-sexually-and-gender-diverse-people>, 51-54.

While it is an important step for professional associations like PsySSA to reject conversion practices and provide guidelines on best practices, there is currently no legal regulatory oversight and penalty for conducting conversion practices. As the research into conversion practices demonstrates, victims are still being “treated” by professional psychologists.

“I get there and there was a professional therapist present. She was conducting hypno-therapy. She told me she needs to help me get rid of this thing. And I ask her what thing, and she told me being gay. She wanted to use hypnosis as a form of ‘therapy’ to convert me back to heterosexuality.” – SOUTH AFRICAN RESPONDENT⁸⁹

Those who were subjected to formal therapeutic attempts to cure their sexual orientation or gender identity reported that their parents were often the main initiator of the service due to a belief that the youth was confused, a narrative the therapist would continue. Victims were further under pressure due to the costs their families would bear to send them to these treatments, and participants “also reported how therapists appeared to be under pressure to have them ‘fixed’ as these services are costly.”⁹⁰

To address these ongoing practices, advocates should seek policy and regulatory changes that prohibit conversion treatments by registered psychologists and psychiatrists, as this supports the harm-avoidance approach of the South African Health Professions Act.⁹¹ The Health Professions Council of South Africa, the regulatory body of registered mental health practitioners, should be empowered to receive complaints, investigate, and sanction any member who is found to be engaging in prohibited conversion practices.

Strategy 2. Using Existing Laws and Strategic Litigation to Curb Conversion Practices

Another pathway toward eradicating conversion practices consists in leveraging South Africa’s current legislative framework, including through strategic litigation. This section will examine the Prevention and Combating of Hate Crimes and Hate Speech Act of 2023, current anti-discrimination laws, and consumer protection laws and the ways in which they can be leveraged to eliminate conversion practices. These statutes may also provide advocates with strategic litigation opportunities to develop legal precedents resulting in the reduction of conversion practices.

A. Prevention and Combating of Hate Crimes and Hate Speech Act of 2023

South Africa has recently introduced a hate crime law to address widespread anti-LGBTIQ violence or other forms of bias-motivated violence on 09 May 2024; however, there is no formal documentation of crimes against LGBTIQ people, yet.⁹² In 2016, the “Prevention and Combating of Hate Crimes and Hate Speech Bill” (Hate Crimes Bill) was first introduced in

⁸⁹ AC2, *Inxeba Lam*, 27.

⁹⁰ *Ibid.*

⁹¹ South Africa, Health Professions Act 56 of 1974, <https://www.sahpra.org.za/wp-content/uploads/2022/07/Health-Professions-Act-56-1974.pdf>; see also Health Professions Council of South Africa, “General Ethical Guidelines For the Healthcare Professions,” https://www.hpcs.co.za/Uploads/Professional_Practice/Ethics_Booklet.pdf.

⁹² South African Institute of International Affairs, Youth Policy Committee Gender Working Group, “Hate Crimes Against Members of the LGBTIQ+ Community in South Africa,” 2 August 2021, <https://saiia.org.za/youth-blogs/hate-crimes-against-members-of-the-lgbtqia-community-in-south-africa/>.

Parliament.⁹³ On 14 March 2023, the National Assembly passed the Bill, and in November 2023 it was debated before the Security and Justice committee of the National Council of Provinces.⁹⁴ The National Council of Provinces passed the Bill with proposed amendments and the Bill will be sent back to the Portfolio Committee on Justice to consider the Council's proposed amendments. The president assented to the Bill on 09 May 2024.⁹⁵

Hate Crimes

The Hate Crimes Act creates a new substantive offense of “hate crime,” which is the commission of a recognized crime that is motivated by prejudice or intolerance toward a victim due to, *inter alia*, gender identity, sex, and/or sexual orientation.⁹⁶ Procedurally, a conviction of a bias-motivated crime will mandate the presiding court to consider the hate element as an aggravating circumstance in sentencing.⁹⁷ For example, a person who is found guilty of committing bias-motivated rape will be convicted of a hate crime and may be subject to a sentencing enhancement.

The establishment of hate crime offenses typically intends to deliver a message to the public that the state does not tolerate hate crimes. If hate crimes statutes were to be applicable to conversion practices, any criminal activity committed with the intention to convert or suppress a person's sexual orientation or gender identity would not only be unlawful, but would be considered more serious than the base crime alone.

This new offense allows for the motivation of crimes committed against LGBTQ persons to be formally documented, from the charging and investigative stages to convictions in court. There is currently a dearth of disaggregated data on hate crimes in South Africa. Disaggregated data is needed to provide policymakers and other stakeholders with a clearer understanding of the problem of criminal conversion practices: a necessary step for the development of effective policy, targeted responses, and appropriate interventions. Since 2014, the National Task Team (NTT) on Gender and Sexual Orientation-Based Violence has attempted to fill this data gap through the establishment of a Rapid Response Team and creation of a monitoring template, but unfortunately the NTT has fallen short in providing an accurate or detailed reflection of anti-LGBTQ crimes.

Section 3(1) Offence of Hate Crime

“A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics:

- ...
- (h) gender or gender identity;
- ...
- (p) sex, which includes intersex; or
- (q) sexual orientation.”

⁹³ The Bill was reintroduced to the National Assembly by the Minister of Justice and Correctional Services in 2018. South Africa, Prevention and Combating of Hate Crimes and Hate Speech Bill, B 9-2018, Government Gazette No. 41543 of 29 March 2018, <https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf>.

⁹⁴ South Africa, Parliamentary Monitoring Group, “Protected Disclosures Act: Practical Guidelines for Employees; Prevention and Combating of Hate Crimes and Hate Speech Bill: Proposed Amendments,” NCOP Security and Justice, 1 November 2023, <https://pmg.org.za/committee-meeting/37868/>; see also the latest version of the Hate Crimes Bill: South Africa, Prevention and Combating of Hate Crimes and Hate Speech Bill, B 9B-2018, 2018, https://static.pmg.org.za/Hate_Speech_Bill_B9B-202316065.pdf.

⁹⁵ The Presidency: Republic of South Africa “President Ramaphosa Assents to Law On The Prevention And Combating Of Hate Crimes And Hate Speech”, 9 May 2024 <https://www.thepresidency.gov.za/president-ramaphosa-assents-law-prevention-and-combating-hate-crimes-and-hate-speech>.

⁹⁶ South Africa, Hate Crimes Bill, §3(1).

⁹⁷ *Ibid*, §6(2).

In analyzing NTT's data, civil society reports that "the case monitoring system developed ... only traces the progress of cases; it does not provide detailed information about them. If case information is provided, it is often inconsistent and irregular."⁹⁸ The Hate Crimes legislation seeks to rectify this problem by requiring regulations detailing the specific information that the South African Police Service and National Prosecuting Authority are required to collect and collate.⁹⁹

Hate Speech

The Hate Crimes Act includes a new offense of "hate speech," wherein "a person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm or to promote or propagate hatred" on the basis of, *inter alia*, sex, gender identity and sexual orientation.¹⁰⁰ A person convicted of hate speech can be subjected to a fine and imprisonment.¹⁰¹ This offense may address conversion practices that manifest in non-physical ways, such as prayer, therapy, and counseling.

However, some of the fiercest opposition to the Act concerns claims that the hate speech provision is an unjustifiable limitation of freedom of speech and that current South African common law of *crimen injuria* and anti-discrimination statute already sufficiently address hate speech.¹⁰² Opponents of the Act argue that the definition of "harm" being any emotional, psychological, physical, social, or economic harm is overly broad and will have a chilling effect due to a fear of criminal prosecution. This critique may have more force in a situation in which the harmful speech in question is sought out by an LGBTQ person, for instance in the case of a person who seeks out prayer or counseling to attempt to change.

The drafters of the Hate Crimes Bill responded to concerns about limiting religious freedom that arose from the 2016 draft of the bill. The 2018 Hate Crimes Bill includes a new hate speech exception for "the *bona fide* interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm."¹⁰³ This exception will mean that people can espouse their religious objection to sexual and gender diversity. But prayers and religious counseling that directly attempt to convert or suppress a person's sexual orientation or gender identity will need to be assessed in terms of the language used and harm caused, on a case-by-case basis, to determine if such acts meet the threshold for hate speech. This exception does not address other concerns that some human rights advocates have raised about laws that

⁹⁸ Foundation for Human Rights, *The State of Intolerance and Discrimination in South Africa 2017 – 2019*, 44.

⁹⁹ South Africa, Hate Crimes Bill, §3(1).

¹⁰⁰ *Ibid.*, §4(1)(a).

¹⁰¹ *Ibid.*

¹⁰² South African Institute of Race Relations NPC (IRR), "Submission to the Department of Justice and Constitutional Development Regarding the Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018 [B9-2018]," 1 October 2021, <https://irr.org.za/reports/submissions-on-proposed-legislation/irr-submission-hate-crimes-and-hate-speech-bill-2018-1-october-2021.pdf>; Luiz De Barros, "Why is the DA So Opposed to the Hate Crimes Bill?" *Mamba Online*, 13 February 2023, <https://www.mambaonline.com/2023/02/13/why-is-the-da-so-opposed-to-the-hate-crimes-bill/>.

¹⁰³ South Africa, Hate Crimes Bill, §4(2)(d).

prohibit “propagating hatred” against a group; for instance, that such laws could be used against marginalized groups, as has been the case in other countries.¹⁰⁴

Prevention Measures

The Hate Crimes Act also seeks to proactively prevent the commission of hate crimes and hate speech. The act requires the government to educate the public about the prohibition of hate crimes and hate speech and to train public officials on the prevention of hate crimes and hate speech, including through social context training.¹⁰⁵ The State, South African Human Rights Commission, and the Commission for Gender Equality are also required to promote awareness of the prohibitions against hate crimes and hate speech with the aim of preventing and combating them.¹⁰⁶

One possible shortcoming of the Act is that it does not require the authorities to educate the public about the *harms* of hate crimes and hate speech, only about the fact that they are unlawful. It does not require the authorities to amplify the voices of survivors or to mount public campaigns that have the objective of shifting public opinion in support of equality. Criminalization is the primary tool of prevention and response. The law also does not provide for services for survivors, including mental health care.

Advocates should urge for broader awareness efforts and trainings that seek to produce approbation of hate crimes and hate speech and empathy toward survivors. They should specifically urge the inclusion of conversion practices in these awareness efforts and trainings, detailing their harmful nature and ineffectiveness. Awareness campaigns are an integral part of eliminating conversion practices since these damaging acts can only manifest amongst societal beliefs that LGBTQ people are unacceptable.

Since the recent passage of the Hate Crimes Act, police and prosecutors will need to be guided on how to effectively investigate evidence of prejudice in criminal acts and hate speech and how to charge perpetrators. The National Task Team acknowledged the problem of “deprioritisation, marginalisation, exclusion and targeted victimization by those public institutions intended to provide services and protection ... for LGBTI persons ... lead[ing] to a lack of resources when crimes are committed and result in victims’ fear to even report crimes.”¹⁰⁷ The sensitization and training of law enforcement officials is vitally important for the realization of access to justice for LGBTQ survivors of conversion practices that may constitute hate crimes or hate speech. However, the Act does not provide funding for the implementation of these requirements. State agencies will need to stretch existing budgets to incorporate trainings and educational drives. The lack of available resources may negatively affect the implementation of these measures.

B. Anti-Discrimination Law

To give effect to the Constitution’s equality clause, Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) in 2000.¹⁰⁸ The law includes

¹⁰⁴ Glenn Greenwald, “In Europe, Hate Speech Laws are Often Used to Suppress and Punish Left-Wing Viewpoints,” *The Intercept*, 29 August 2017, <https://theintercept.com/2017/08/29/in-europe-hate-speech-laws-are-often-used-to-suppress-and-punish-left-wing-viewpoints/>.

¹⁰⁵ South Africa, Hate Crimes Bill, §9.

¹⁰⁶ *Ibid.*

¹⁰⁷ South Africa, Department of Justice and Constitutional Development, “National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector.”

¹⁰⁸ PEPUDA.

a general prohibition against public and private actors engaging in unfair discrimination on a number of grounds including sexual orientation, gender, and sex.¹⁰⁹ Under this law, unfair discrimination is an act or omission that directly or indirectly imposes burdens, obligations, or disadvantages on another person or withholds benefits or opportunities from any person due to any of the prohibited grounds.¹¹⁰ While conversion practices have not explicitly been identified as unfair discrimination under South African law, advocates may consider building strategic litigation cases to develop legal precedents declaring forms of conversions practices as acts of unfair discrimination. A legal precedent can be leveraged in advocacy efforts toward the development of legislation addressing conversion practices as well as the inclusion of measures to combat conversion practices among the mandated measures the State and Chapter 9 institutions must undertake to promote equality.¹¹¹

PEPUDA also prohibits harassment on the grounds of sexual orientation, sex, and gender. This provision may also serve as an avenue of redress for victims of some conversion practices. Harassment consists of “unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to a person’s sex, gender, or sexual orientation.”¹¹² Survivors in South Africa report experiencing multiple attempts to convert or suppress their identities, with perpetrators committing a series of humiliations, often escalating in severity.¹¹³ South African stakeholders may consider challenging coercive conversion practices as a form of harassment, as defined in PEPUDA. As with unfair discrimination, a precedent can provide legal clarity and leverage for further advocacy efforts.

C. Equality Courts as a Forum for PEPUDA Cases

PEPUDA establishes the creation of Equality Courts to adjudicate complaints of unfair discrimination, hate speech, or harassment.¹¹⁴ By eliminating many known barriers to judicial access—such as costs, required legal representation, travel burdens, and lengthy timeframes—Equality Courts are designed to be expeditious and accessible to the general public.¹¹⁵ The law asserts that adjudication of discrimination cases should be guided by corrective and restorative measures and remedies that are deterrent in nature.¹¹⁶ Therefore, these courts can issue a wide range of civil remedies including an order restraining the act of discrimination, an audit of practices and policies, an unconditional apology, a

¹⁰⁹ Ibid, §§1, 6.

¹¹⁰ Ibid.

¹¹¹ Ibid, §§24–29. Chapter 9 of the Constitution of South Africa mandates the creation of independent and impartial institutions designed to protect and support democracy. These institutions are the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Independent Authority to Regulate Broadcasting.

¹¹² PEPUDA, §§1(a), 12.

¹¹³ AC2, *Inxeba Lam*, 17–18.

¹¹⁴ PEPUDA, §§16–23.

¹¹⁵ Ibid, §§4(1)(a), 16–23 explains that litigants can represent themselves at Equality Courts, as lawyers are not mandatory. There are no required fees, and a specialized Equality Clerk is designated to assist complainants with forms and processes. The SAHRC is also obligated to assist persons wanting to lodge a complaint with an Equality Court. Litigation in the Equality Courts is mandated to take place in a “expeditious and informal manner which facilitates and promotes participation by the parties,” and the Courts are located at all High Courts and Magistrate Courts to reduce travel for litigants.

¹¹⁶ PEPUDA, §4(1)(d).

recommendation to the appropriate authority to suspend or revoke a license, a referral for criminal prosecution, and financial compensation for monetary loss, impairment to dignity, pain and suffering, or injury to emotional and psychological well-being.¹¹⁷

Given their uniquely simplified structure, bringing cases of conversion practices as acts of unfair discrimination and/or harassment to Equality Courts should, in theory, expand access to justice for victims. In reality, the Equality Courts have fallen short of fully realizing their mandate. The courts are often inaccessible for people to lodge complaints, since only an average of 50 out of 382 designated Courts were operational from 2009–2017.¹¹⁸ A representative of South Africa’s Commission for Gender Equality observed at a 2017 human rights convening that clerks have subjected LGBTQ persons to secondary victimization and there has been an insufficient number of presiding officers trained on equality and non-discrimination.¹¹⁹ This is despite the legislative requirement that the government train all persons who apply PEPUDA to “ensure effective implementation and administration thereof.”¹²⁰

Despite the Equality Courts’ noted shortcomings, they have at times been a forum for vindicating the rights of LGBTQ people.¹²¹ In 2019, a Western Cape Equality Court held that a prison’s refusal to allow an imprisoned transgender woman to express her gender identity constituted unfair discrimination and violated her rights to dignity and freedom of expression.¹²² The complainant, Jade September, was subjected to the suppression of her gender identity when officials in a male prison consistently misgendered her and prohibited her from using make-up and jewelry and from having long hair or underwear designated for women.¹²³ Although neither the Court nor the litigants explicitly labeled these acts “conversion practices,” the prison officials’ conduct effectively amounted to a form of conversion practice by coercing September to conform to cisgender expression. According to the ruling, “it is evident that not permitting the applicant to express her gender identity has caused her extreme hardship and prejudice, and that it is fundamentally important to her to do so.” Since the Equality Court declared that such behavior was unlawful, this litigation victory provides a strong basis for challenging conversion practices, particularly those in which a person’s gender identity or sexual orientation is forcibly suppressed, and it demonstrates that Equality Courts can be a

¹¹⁷ See PEPUDA, §§21(2) for the exhaustive list of a remedies available from the Equality Court.

¹¹⁸ Foundation for Human Rights, *The State of Intolerance and Discrimination in South Africa 2017 – 2019*, 42.

¹¹⁹ NANHRI and SAHRC, *In-Country Meeting on Sexual Orientation, Gender Identity and Expression*, 19.

¹²⁰ PEPUDA, §§4(1)(c). As of 2017, the requirement in §16(2) for judges and magistrates to undergo training in order to preside over an Equality Court matter has been removed by section 31(c) of the Judicial Matters Amendment Act 8 of 2017. Judges and magistrates may now be assigned to cases without such training. The training requirement for clerks to be appointed to the Equality Court remains in accordance with §§17(1)(a) and 17(2).

¹²¹ Successful SOGIE cases at Equality Courts include *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa, Transvaal Provincial Division, 26926/05, Judgment, 27 August 2008, <https://www.saflii.org/za/cases/ZAGPHC/2008/269.html>; *Lallu v. Van Staden Roodepoort*, South Africa Roodepoort Equality Court, Case No. 3 of 2011, Judgment, 28 September 2012, www.probono.org.za/wp-content/uploads/2013/07/201306031544.pdf; *Mphela (Transgender Learner) v. Manamela School Principal*, South Africa Seshego Equality Court, Case No. 1, 2016, <https://cge.org.za/wp-content/uploads/2021/01/Mphela-v-Manamela-and-others1.pdf>. The settlement agreement made an order of the court on 13 March 2023 against singer Steve Hofmeyr for his homophobic comments on social media. SAHRC, “South African Human Rights Commission Reaches Out of Court Settlement Agreement with Steve Hofmeyr on Hate Speech Matter,” 13 March 2023, www.sahrc.org.za/index.php/sahrc-media/news-2/item/3469-south-african-human-rights-commission-reaches-out-of-court-settlement-agreement-with-steve-hofmeyr-on-hate-speech-matter.

¹²² *September v. Subramoney NO and Others*, South Africa Equality Court, EC10/2016, ZAEQC 4, 2019, para. 164, <http://www.saflii.org/za/cases/ZAEQC/2019/4.html>.

¹²³ *Ibid*, para. 113.

successful forum to develop such precedent. South African advocates may consider developing further Equality Court strategic cases that specifically identify conversion practices as acts of unfair discrimination or harassment.

D. Consumer Protection

Engaging in conversion practices can be a profitable endeavor, wherein practitioners exploit desperate families and LGBTQ persons with false claims of curing or suppressing sexual orientation and gender identity. South Africa's Consumer Protection Act makes it illegal for suppliers of goods and services to "directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer."¹²⁴ South African advocates may make use of the overwhelming evidence that conversion practices are ineffective and harmful to take legal action against providers of conversion practices under the Consumer Protection Act. The National Consumer Commission or National Consumer Tribunal can penalize those found to have expressed false, misleading, or deceptive representations in their advertising or provision of conversion practices, including by ordering them to cease their services and/or pay damages to the consumer.¹²⁵

A consumer protection approach to preventing conversion practices has been successful in courts in China, Malta, the United States, and Canada. Illustratively, in 2015 a New Jersey court declared an organization once known as Jews Offering New Alternatives for Homosexuality (JONAH) guilty of consumer fraud and engaging in unconscionable commercial practices by selling a therapy it claimed would change young men from gay to straight. Victims testified about the distress and depression they experienced when they were unable to change their sexual orientation following their treatment.¹²⁶ JONAH was ordered to pay monetary damages and dissolve. However, in 2019, the court found that JONAH violated the 2015 court order by continuing to operate under a new name. It ordered the organization to pay US\$3.5 million in legal fees and permanently cease all operations.¹²⁷

This fraud case exemplifies the utility of using consumer protection laws to root out service providers that profit from claiming to cure diverse sexualities and genders: a service which cannot be delivered.

Strategy 3. New Legislation Targeting Conversion Practices

South African advocates may choose to pursue a direct legislative prohibition on some forms of conversion practices. In formulating the particulars of a law on conversion practices, advocates and policymakers should assess what is desirable, feasible in their local context, and aligned with international human rights law. They should also consider using legislation to address conversion practices holistically, including preventive and reparatory measures, rather than focusing wholly or primarily on punitive measures. Finally, they should assess whether legislation can be implemented in a manner that overcomes the challenges facing existing progressive laws in South Africa, including lack of capacity, lack of funding for

¹²⁴ South Africa, Consumer Protection Act, No. 68 of 2008, §§40–42.

¹²⁵ *Ibid.*, §§52, 76.

¹²⁶ *Ferguson v. JONAH*, Superior Court of New Jersey, Complaint, November 27, 2012, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/Ferguson_v._JONAH_-_Complaint.pdf.

¹²⁷ *Ferguson v. JONAH*, New Jersey, State Court, Order Granting Motion to Enforce Permanent Injunction and for Default Judgment, June 10, 2019, <http://files.eqcf.org/cases/I-5473-12-20191018249/>.

implementation, and inadequate implementation due to public officials' personal biases or ignorance.

Outright recommends that any new legislation responding to conversion practices be comprehensive in nature. Former UN Deputy Secretary-General Asha-Rose Migiro described comprehensive gender-based violence legislation:

Comprehensive legislation provides the foundation for a holistic and effective response. Such legislation must be consistently enforced and monitored, and adequate resources must be allocated to address the problem. Personnel and officials working in the field must have the skills, capacity and sensitivity to apply the spirit and letter of the law. Laws must inform a concerted effort that includes education, awareness raising and community mobilization. They must also contribute to tackling discriminatory stereotypes and attitudes, and they must mandate the research and knowledge-building that are necessary to support policy development.¹²⁸

Laws aimed at eradicating conversion practices should take the same approach, focusing on dismantling discriminatory attitudes. To the extent that new legislation may be desirable and practicable, below are five considerations to aid stakeholders in determining the scope, breadth, and nature of a potential ban on conversion practices.

A. Whether a Law Prohibits Both Coercive and Voluntary Practices

South African stakeholders should consider whether legislation will prohibit only coercive conversion practices or whether it will also forbid conversion practices when adults consent to them or proactively seek them out. Some survivors report being coerced into conversion efforts by threats of violence, duress, and abuse of power. There is overwhelming evidence demonstrating the intense physical and psychological pain that survivors experience, especially when subjected to such humiliating acts against their will. For these reasons, human rights experts insist that states urgently enact legal proscriptions for coercive practices.¹²⁹

In South Africa and elsewhere, some adults willingly participate in or even seek out ways to convert or suppress their sexual orientation or gender identity.¹³⁰ If a law seeks to restrict conversion practices that adults voluntarily seek out and engage in, certain constitutional and human rights may be implicated. Governments are required under international human rights law to protect the rights of freedom of association, freedom of expression, and freedom of religion. Opponents may challenge restrictions on adults' choices, even choices that are made in a context that is constrained by marginalization, as an infringement of the rights to self-determination, freedom of expression, freedom of religion, belief, and opinion, and the right to privacy.¹³¹

Some proponents of broader prohibitions on conversion practices argue that the harmful nature of the practices may reasonably justify the state preventing any person from

¹²⁸ UN Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, ST/ESA/329, July 2009, <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>, iii.

¹²⁹ OHCHR, "Practices of So-Called 'Conversion Therapy,'" Committee Against Torture, "General Comment No. 2," para. 18.

¹³⁰ AC2, *Inxeba Lam*, 38. Thirty percent of respondents sought out conversion practices.

¹³¹ ILGA World, *Curbing Deception: A World Survey on Legal Regulation of So-Called "Conversion Therapies,"* 2022, https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/CSOsAJ/ILGA_World_Curbing_Deception_world_survey_legal_restrictions_conversion_therapy.pdf, 69.

engaging in them. Seeking out conversion practices is driven by a fear of rejection and suffering, shame, and stigma.¹³² These negative feelings are common in social and religious contexts that are hostile toward sexual and gender diversity. Indoctrination, loyalty to family or community, and misleading claims can also induce someone to seek out “treatment.” Proponents of legislation that prohibits conversion practices in associative settings where there is no force or coercion may argue that the freedom of association and expression of those who seek and offer conversion can be limited under international law for reasons regarding the protection of public health.

In exploring prohibitions on actions that do not stem from force or coercion, advocates should be cautious of providing governments with broad authority to use the law, particularly criminal law, to deter voluntary associative behaviors. Outright believes that criminal penalties, especially those that result in the deprivation of liberty, should be a last resort. Criminal penalties are not an appropriate response to all harms. In most cases, they are levied in response to harm that is inflicted upon individuals by force or coercion. Strategies other than criminalization may be needed to tackle situations in which adults engage in religious practices and other activities in civic life that are harmful but that do not amount to force or coercion.

B. Whether to Prohibit All Forms of Conversion Practices or Only Physical Practices

This consideration relates closely to part (A) above regarding the involuntary or voluntary nature of some conversion practices. Legislation should always identify the specific conduct that it seeks to prohibit. Considering that conversion practices can manifest in physical and non-physical ways, policymakers can assess the costs and benefits of legislation that addresses physically violent methods or that also includes non-physical practices. A law addressing physical forms will target the most obviously egregious, violent conversion practices, such as forced confinement, deprivation of food and water, beatings, and sexual assault. Many of these harmful acts, like assault, kidnapping, and sexual violence, are existing offenses in South African criminal and delict law. Thus, advocating for their prohibition in the context of conversion practices may engender less resistance as the resulting harms caused are well understood. Opponents may argue that new legislation is not necessary since existing laws already prohibit such conduct, regardless of the motivation. There is solid precedent, however, for use of new laws to respond holistically to a related set of already-criminalized offenses, addressing not only prohibition but also prevention and restitution, as is the case with some countries’ laws on gender-based violence.

Some survivors of conversion practices report experiencing only non-physical methods, or a combination of physical and non-physical conduct.¹³³ Hence, advocates may seek to extend the scope of legislation to address non-physical change efforts, such as prayer, psychotherapy, religious counseling, and extortion, among others. Targeting both physical and non-physical conduct can prevent conversion practitioners from adapting their behavior to come into conformity with the law, while still committing pernicious conversion acts.¹³⁴ By broadening the range of conduct to include non-physical acts, legislation can potentially protect more LGBTQ people by better reflecting the reality in South Africa.¹³⁵

¹³² AC2, *Inxeba Lam*, 38.

¹³³ Outright, *Converting Mindsets*.

¹³⁴ OHCHR, “Practices of So-Called ‘Conversion Therapy,’” para. 40.

¹³⁵ AC2, *Inxeba Lam*.

However, under this framework, it may be difficult to prove that some non-physical acts constitute a conversion practice. A speaker's rights to freely express themselves and associate with others are likely to be implicated. For example, it may be challenging to discern when prayer and religious guidance meet the threshold of engaging in a concerted effort to change or suppress a person's sexual orientation or gender identity. In order to prevent ambiguity and comply with the principle of legality, and to address the abovementioned concerns regarding freedom of expression, association, and religion, the law should set out, as clearly as possible, how and when non-physical acts, such as prayer and counseling, constitute prohibited conversion practices and when they do not. South Africa's hate speech offense tackles this issue by carving out a religious exception for *bona fide* interpretation and espousal of religious tenants and beliefs as long as the speech does not "advocate hatred that constitutes incitement to cause harm."¹³⁶ South African advocates should aim to develop a standard for determining when non-religious speech, such as counseling, amounts to prohibited conversion practices and when it does not.

C. Whom Should the Law Protect?

Protection for Adults

A new legal restriction will need to identify who the law aims to protect from conversion practices. Local stakeholders should consider whether to advocate for a general application of the law to everyone, regardless of age, or for more limited legislation protecting vulnerable groups, like children and adults who cannot freely consent.

A legal provision prohibiting all persons from being subjected to conversion practices will likely encounter the debate concerning adult consent, discussed above. Some jurisdictions seek to strike a balance by protecting "vulnerable" persons, which may include minors, persons with a mental health disorder, and the elderly. Legislation in Malta allows for a court to determine whether a person is "vulnerable" by weighing various factors, including "any situation of dependence, the psychological state and or emotional state of that person."¹³⁷ This approach to defining vulnerability has the potential of expanding the pool of adults who are deemed vulnerable by considering personal circumstances and context. It also requires caution around not denying groups such as persons with disabilities or older persons the ability to legally consent.

Protection for Minors

The impact of conversion practices has been well documented to be particularly injurious for children under 18 years old, as they are in vulnerable stages of emotional, mental, and physical development.¹³⁸ International and South African mental health experts have attested to the severe damage conversion practices have on children.¹³⁹ The Psychological Society of South Africa explains that children who are exposed to conversion practices

¹³⁶ South Africa, Hate Crimes Bill, §4(2)(d).

¹³⁷ Republic of Malta, Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, Cap. 567, Act LV of 2016, §2, <https://legislation.mt/eli/cap/567/eng/pdf>.

¹³⁸ Human Rights Council, 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, 12 April 2019, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/34, paras. 63, 66; Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz, and Stephen T. Russell, "Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications For Young Adult Mental Health and Adjustment," *Journal of Homosexuality*, 67, no. 2 (2020): 159-173, <https://doi.org/10.1080/00918369.2018.1538407>.

¹³⁹ IFEG, "Statement on Conversion Therapy," 5; PsySSA, "The Psychological Society of South Africa's Position on Sexual and Gender Diversity."

experience increased self-hatred, anxiety, depression, aggression, isolation, substance abuse, and suicidal ideation.¹⁴⁰ These consequences have long lasting implications that can persist well beyond the commission of the harmful acts.¹⁴¹

Minors are exposed to conversion practices at an alarming rate; forty-seven percent of the 303 survivors whom AC2 surveyed in South Africa were first subjected to conversion practices before the age of 18.¹⁴² This high potential for youth exposure, along with the established damage it causes, may enhance political will to legislate to prevent and respond to conversion practices against children, as one South African political party has already presented.¹⁴³ Furthermore, the government has a constitutional and human rights obligation to provide special protections for children, as their legal capacity to consent is limited.

Children in South Africa have a right to be protected from maltreatment, neglect, abuse, or degradation, and the Constitution necessitates that a child's best interests must always be paramount in matters concerning the child.¹⁴⁴ Advocates may argue that the physical, emotional, and psychological harms likely to be inflicted on children during conversion practices run afoul of the constitutional imperatives set out in section 28. However, they may face resistance from those who view this type of ban as an infringement on parental rights to raise their children in ways that align with their family and religious beliefs.

South African legal precedent can be leveraged to support a prohibition on conversion practices directed toward minors. In *Christian Education South Africa v. Minister of Education* (2000), the Constitutional Court found that a caretaker's right to freedom of religion and a child's right to parental care cannot outweigh the constitutional protections afforded to children: the right to be free from violence and the right to dignity. The court sought to answer the question: "When Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?" The judgment affirmed that:

Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance... The principle is not excluded in cases where the religious rights of the parent are involved.¹⁴⁵

In *Freedom of Religion South Africa v. Minister of Justice* (2018), the Constitutional Court struck down the common-law defense of "reasonable and moderate chastisement," thereby removing a parent's defense to inflict physical punishment on their child under the

¹⁴⁰ PsySSA, *Practice Guidelines for Psychology Professionals Working with Sexually and Gender-Diverse People*, 52.

¹⁴¹ Independent Forensic Expert Group, "Statement on Conversion Therapy," https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/IESOGI/CSOAJ/IFEG_Statement_on_C.T._for_publication.pdf.

¹⁴² AC2, *Inxeba Lam*, 37-38. This is reflected supported by global trends. See Outright, *Harmful Treatment*.

¹⁴³ Siviwe Gwarube, MP, Parliament of the Republic of South Africa, "Notice of Intention to Introduce a Private Member's Bill, The Children's Amendment Bill, 2021, Notice 404 of 2021, Parliament of the Republic of South Africa, <https://static.pmg.org.za/210705childremsamendmentbill.pdf>.

¹⁴⁴ South Africa Constitution, §28; South Africa, Children's Act 38 of 2005, §7(1).

¹⁴⁵ *Christian Education South Africa v. Minister of Education*, South Africa Constitutional Court, CCT 4/00, 2000, para. 51, <https://www.saflii.org/za/cases/ZACC/2000/11.pdf>.

guise of discipline. Again, the Court declared that conduct that is harmful to a child's well-being cannot be legally justified based on the strength of a caretaker's religious, cultural, or social beliefs.¹⁴⁶ The limitation of a parent's constitutional rights in such contexts are justified.

D. Who Should Be Prohibited From Performing Conversion Practices?

Stakeholders will need to consider the local reality, political feasibility, and a balancing of human rights to determine who should be restricted from conducting conversion practices.

Prohibition or Regulation Targeting Professional Service Providers

Several jurisdictions have enacted prohibitions limited to mental health professionals.¹⁴⁷ This pathway is often seen as politically feasible due to the global health consensus rejecting conversion practices as ineffective and harmful, coupled with the fact that licensed mental health professionals already abide by legal regulations for the protection of patients and clients.¹⁴⁸ Legally forbidding South Africa's licensed mental health professionals from conducting conversion practices may have the support of the local mental health sector, since the psychological and psychiatry associations already urge their members to refrain from such treatments.¹⁴⁹ A law of this targeted nature may be politically feasible, but because a significant portion of conversion practices take place outside the mental health sector, it will not address the full extent of the problem.

Wide-Reaching Prohibitions Targeting the General Public

Civil society research and anecdotal accounts illustrate that conversion practices in South Africa overwhelmingly occur in informal settings, most commonly under the direction of family, community members, or religious leaders.¹⁵⁰ Legislation that addresses conversion practices conducted by these actors may be framed as a general prohibition, meaning any person, in any setting or sector, is precluded from engaging in conversion practices. Such a broad proscription captures the breadth and reality of perpetrators, but it may be more vulnerable to legal scrutiny, human rights challenges, and public opposition.

For example, South African religious advocates have lobbied against the Hate Crimes Bill¹⁵¹ because it includes provisions on speech and conduct that, they argue, will impede the rights to freedom of religion, belief, and opinion.¹⁵² A broad prohibition on conversion

¹⁴⁶ Freedom of Religion South Africa v. Minister of Justice and Constitutional Development, South Africa Constitutional Court, CCT320/17, 18 September 2019, para. 60, <https://www.saflii.org/za/cases/ZACC/2019/34.pdf>.

¹⁴⁷ Brazil Federal Council of Psychology, Resolution 001/99, March 22, 1999, http://site.cfp.org.br/wp-content/uploads/1999/03/resolucao1999_1.pdf; The Israeli Association of Child and Adolescent Psychiatry; Israel Psychiatry Association; Family Physicians Association, *The Israeli Society for Adolescent Medicine, Treatments for changing identity and sexual orientation*, August 1, 2019, <https://cdn.doctorsonly.co.il/2019/01/%D7%98%D7%99%D7%A4%D7%95%D7%9C%D7%99-%D7%94%D7%9E%D7%A8%D7%94-1.pdf>; Government of Argentina, National Mental Health Law, Law No. 26657, Chapter 2, Article 3, Official Gazette of the Argentine Republic, Year CXVIII, No. 32,041, December 3, 2010, <https://www.argentina.gob.ar/normativa/nacional/ley-26657-175977/texto>.

See also ILGA World, *Curbing Deception*, 74.

¹⁴⁸ ILGA World, *Curbing Deception*, 74.

¹⁴⁹ PsySSA, *Practice Guidelines for Psychology Professionals Working with Sexually and Gender-Diverse People*, 51; SASOP, "SASOP Position Statement: Homosexuality."

¹⁵⁰ AC2, *Inxeba Lam'*, 40-44.

¹⁵¹ South Africa, Hate Crimes Bill.

¹⁵² Freedom of Religion South Africa (FOR SA), "Press Release: The Hate Speech Bill is an Immediate and Severe Threat to Religious Freedom," 8 September 2022, <https://www.forsa.org.za/articles/press-release-the-hate-speech-bill-is-an-immediate-and-severe-threat-to-religious-freedom>.

Criminal Penalties

It will need to be determined if criminal sanctions are appropriate for the most severe conversion practices and harms. Criminal penalties, such as fines or imprisonment, can serve as a deterrent and signal to the public the seriousness of the conversion practices. Criminal sanctions are the most punitive tool in the legal system and are generally more retributive than reparative. A conviction, especially with imprisonment, can subject a person to a further set of human rights violations due to inhuman conditions, cruel, inhuman and degrading treatment, discriminatory enforcement, and violence.

Already, many of the most egregious and violent conversion methods, such as physical and sexual assault and kidnapping, are crimes under existing law.¹⁵⁷ Stakeholders may not find it necessary to create new criminal offenses since a basis for prosecution of these acts already exists. If stakeholders decide that new offenses should be established, the elements of criminal liability must be defined with specificity. These elements of *actus reas* (illegal conduct) and *mens rea* (intention to change or suppress a person's sexual orientation or gender identity) will need to be proven beyond a reasonable doubt.

Legislation prohibiting conversion practices can include both civil and criminal provisions. This hybrid system can respond to the different methods, harms, and contexts appropriately and proportionally.

Additional Measures

Regardless of the form that proposed legislation to eradicate conversion practices takes, any legislation should include measures to promote acceptance and understanding of LGBTQ people and educate the public and public officials of the ineffectiveness and harms of all forms of conversion practices. Such campaigns will contribute to combatting prevailing beliefs that reject and pathologize LGBTQ people and that create an enabling environment for conversion practices.

Lastly, funded survivor support should be an essential element of the legislation. Civil society and survivor groups best understand the resources needed for recovery and healing and should lead the considerations for these provisions. Legislation should not only prevent and combat conversion practices; it should also address the needs of those who are suffering the ramifications of having been subjected to conversion practices, for instance, by providing affirming care.¹⁵⁸

¹⁵⁷ South Africa, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, <https://www.justice.gov.za/legislation/acts/2007-032.pdf>; South Africa, Criminal Law Amendment Act 105 of 1997, <https://www.gov.za/documents/criminal-law-amendment-act>; South African Police Service, "Common Law Offenses," <https://www.saps.gov.za/faqdetail.php?fid=9>.

¹⁵⁸ Model laws and legislation from other jurisdictions can serve as a guide for support models.

III. Conclusion

The South African legal landscape creates a multitude of possible pathways for local advocates to pursue in seeking to eradicate conversion practices. While each legal and policy strategy discussed in this guide has distinct advantages and feasibility, the complete elimination of conversion practices cannot occur in a silo and will undoubtedly need a multi-sectoral advocacy approach. As Outright’s research elucidates, conversion practices are pursued in settings in which societal norms pathologize and reject LGBTQ persons. Advocacy efforts at all levels will be required to create a South Africa that fully accepts the human rights of its LGBTQ population.



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