



March 24, 2022

OutRight's input to the consultation for a bill to eradicate conversion practices in the Netherlands

This document has been prepared based on the draft bill to eradicate Sexual Orientation, Gender Identity, and Expression Change Efforts (SOGIE CE) in the Netherlands (March 2022).

I. The importance of having legislation that explicitly eradicates *SOGIE CE*

1. Among the various actions that States must implement to prevent and punish these practices, it is positive to have legislation that expressly addresses the problem.

One of the functions of laws, especially criminal laws, is to convey a clear message to society regarding those behaviors that are prohibited and punished. While it could be argued that actions involving SOGIE CE are implicitly prohibited in several human rights norms, the fact is that expressly addressing the issue helps to make it more visible and raise awareness of their harmfulness.

2. This last issue -raising awareness- is key, considering that there is still much misinformation in society about people's sexual orientation, gender identity and gender expression. SOGIE CE promoters feed on this misinformation for their benefit, offering their services based on claims that are not supported by evidence and have long been discredited.
3. The eradication of these practices requires informed citizens who can help in this task, rejecting these services, being vocal in their communities about the risks involved, and denouncing them to the corresponding authorities.

II. International human rights obligations as a framework

4. It is important that States act to eradicate SOGIE CE within the framework of their international human rights obligations.
5. SOGIE CE are directed against a group of people based on their sexual orientation, gender identity, and gender expression to interfere in their autonomy and personal integrity, implying a violation of the principle of equality and non-discrimination. The Human Rights Committee (CCPR/C/KOR/CO/4) and the Committee on the Elimination of Discrimination against Women (CEDAW/C/MYS/Q/3-5) have pointed out that these practices are in themselves discriminatory.
6. The United Nations independent expert noted in his report on SOGIE CE that *"actions to subject lesbian, gay, bisexual, trans or gender-diverse persons to practices of "conversion therapy" are by their very nature degrading, inhuman and cruel and create a significant risk of torture"* (Madrigal-Borloz, 2020).

7. The Netherlands is a State Party to the International Covenant on Civil and Political Rights, which expressly states that *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”*. It is also a State Party to the International Covenant on Economic, Social and Cultural Rights, which stipulates that: *“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*.
8. Given this, to comply with its international obligations in the protection of human rights, State must take all necessary actions not only to punish these practices but also to prevent them from occurring in the first place. We suggest to the legislators that the preventive approach could be included in this legislative initiative.

III. The incorporation of the preventive approach in the bill

9. The proposal under consultation seeks to amend the Criminal Code to punish conversion therapies. By addressing this issue as a criminal matter, this legislative path has similarities with that followed by Malta (2016), Germany (2020), France (2021), New Zealand (2022) and Canada (2022).

The establishment of sanctions is fundamental to eradicate any conduct against the law. Studying the legislative proposals and laws proposed worldwide, we see that sanctions may be of a civil, administrative and/or criminal nature. We consider that it is up to each country to decide which path to follow to achieve more effectively the objectives pursued by the norm, based on its legislative tradition and jurisdictional reality.

10. However, we believe that the proposal should also consider other measures to prevent SOGIE CE from occurring in the first place. This implies confronting the origin of these practices: the homophobia and transphobia present in society.
11. As we state in the conclusions and recommendations of our report *"Harmful Treatment. The global reach of so-called conversion therapy"*: *“The demand for SOGIE change will only diminish when social, family, and religious condemnation of LGBTIQ lives ceases, and LGBTIQ people are free to access and enjoy their full human rights. Indeed, “conversion therapy” is a manifestation of the scourge of both societal and internalized homophobia and transphobia and is fueled by the messages that being LGBTIQ is pathological, disordered, and unacceptable”* (OutRight, 2019).
12. For example, the full exercise of the right to mental health of LGBTIQ+ people must be guaranteed through the availability of affirming or affirmative therapies in mental health centers. This therapeutic approach understands lesbian, gay, bisexual and trans identities, among others, as valid identities, and relationships. It also addresses the negative impacts of discrimination based on gender identity, sexual orientation, and gender expression on individuals. This type of therapy should not be limited to LGBTIQ+ people but should also be offered to heterosexual people to combat heterosexism and binary concepts of gender.

This is the case of the bill presented in Peru (2021). In addition to the articles referring to the express prohibition of SOGIE CE, it also includes the promotion of affirmative therapies, the right of access to health care without discrimination based on sexual orientation and gender identity, and the inclusion of a gender and sexual diversity approach in mental health care services.

13. Another aspect of the preventive approach is related to the educational component. In the law passed by the Australian State of Victoria, it gives the Victorian Equal Opportunity and Human Rights Commission educational functions: *"(1) The Commission must (a) establish and undertake information and education programs in relation to change or suppression practices; and (b) promote and advance the objects of this Act and be an advocate for this Act. (2) The Commission must undertake programs to disseminate information and educate the public with respect to (a) the objects of this Act; and (b) any other matters relevant to the provisions of this Act"*.
14. Regardless of the concrete actions established in the law to prevent SOGIE CE, the State must be aware that these practices will continue as long as homophobia and transphobia exist in society. Therefore, all efforts that can be made to fight discrimination and intolerance towards LGBTQ+ people -especially at the educational level- will help to address the problem of SOGIE CE.

IV. A survivor-centered approach in the bill

15. Providing reparations to SOGIE CE survivor is an essential pillar for addressing discrimination. Survivors suffer significant trauma, which may have lasting effects on their mental health and well-being. The bill, therefore, should include the provision of appropriate compensation, rehabilitation, and/or care for victims.
16. In that spirit, is important to generate the necessary communication channels to make it easier for survivors to report these practices, avoiding revictimization. These channels of communication should prevent victimization and provide the care services that victims require. Germany's law, for example, established the implementation of a counseling service: *"(1) The Federal Center for Health Education sets up a telephone and online counseling service. 2 The advice is aimed at 1. all persons who are or may be affected by conversion treatments and to their relatives as well 2. all persons who deal with or advise on sexual orientation and self-perceived gender identity for professional or private reasons. (2) Counseling is offered in multiple languages and anonymously"*.
17. We want to emphasize the importance of this parliamentary process to gather the voices of survivors and involve them in the process. Their testimony will allow us to know their expectations and will help to improve the legislative proposal. The participation mechanisms must be carefully designed to avoid any situation of re-victimization.

V. Mechanisms for documentation and monitoring

18. The bill should consider mechanisms to make visible the phenomenon of conversion therapies and the serious consequences it has for the health of those who undergo them and document the progress of government actions aimed at eradicating them.

The law passed in France includes a provision to that effect: *"The Government shall submit to Parliament, within twelve months of the promulgation of this law, a report presenting an overview of the practices, behaviors or repeated statements that claim to modify or repress the sexual orientation or gender identity of victims. This report shall be accompanied by figures on the number of persons concerned each year and the means to better prevent these phenomena, such as communication with citizens and training for professionals in the national education system, the judiciary, the national police and the national gendarmerie. It may be debated under the conditions provided for by the rules of the parliamentary assemblies"*.

VI. Terminology in the draft bill

19. The bill speaks to efforts to suppress or change gender identity and sexual orientation. We consider it pertinent to evaluate the inclusion of the concept of gender expression in addition to these two categories.

Gender expression refers to the ways in which a person chooses to present their gender to the world around them. This can include clothing, mannerisms, pronouns, names, etc. However, it is important to note that while things like names, clothing, and others can be an intentional part of a person's gender expression, these things also do not necessarily need to have a gender attached to them. This is to say that a person's gender identity can sometimes inform a person's gender expression, but a person's perceived gender expression does not dictate their gender identity. Expressly including the concept of gender expression, along with sexual orientation and gender identity, will help ensure that the bill includes all so-called "conversion therapies" in its prohibition.

20. The definition of SOGIE CE used in the draft bill could be broader, using a differentiation found in the law passed by Victoria (Australia). The law indicates that the purpose of the practice may be *"changing or suppressing the sexual orientation or gender identity of the person"* or *"inducing the person to change or suppress their sexual orientation or gender identity"*. This incorporation may seem subtle, but it will help ensure that none of these practices achieve impunity by taking refuge in more indirect methodologies.
21. Just as it is important to define what SOGIE CE is, it is also important to expressly state what actions do not constitute this type of practice. For example, in the case of the French law (2021), it is expressly stated: *"These practices, behaviors or remarks do not include those: (1) aimed at the free development or affirmation of a*

person's sexual orientation or gender identity; (2) aimed at sex change or any related service". Similar clarifications are made in the laws of Malta, Germany, Canada, New Zealand, among other examples.

22. We are attaching a table with the definitions of what is and what is not SOGIE CE, according to comparative legislation (Annex 1). We believe that they can help to enrich the definitions of this draft bill.

Conclusions

1. We congratulate the draft bill and welcome the consultation process prior to its submission. It is very positive that the Netherlands can count on a law that expressly eradicates SOGIE CE. This will raise awareness in society of the harmfulness of these practices and give a clear mandate to the authorities for their effective abolition.
2. Among the opportunities for improvement identified in the draft bill is to include a preventive approach, as well as to refine some definitions and have mechanisms for documentation and monitoring.
3. We believe it is important that the legislative process considers the voices and expectations of SOGIE CE survivors, ensuring mechanisms to avoid their re-victimization.
4. Regardless of the approval of the bill to eradicate SOGIE CE, the State must continue with efforts to address discrimination and intolerance towards LGBTQ persons in society. Putting an end to homophobia and transphobia are the only guarantee that this type of pernicious practices can be completely eradicated.

OutRight Action International thanks for the attention to these contributions. We are available to provide more information, answer any questions or contribute as deemed appropriate.

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Annex 1. Definitions used in comparative legislation

Law	Definition
<u>Malta (2016)</u>	<p>"conversion practices" refers to any treatment, practice or sustained effort that aims to change, repress and, or eliminate a person's sexual orientation, gender identity and, or gender expression; such practices do not include</p> <p>(a) any services and, or interventions related to the exploration and, or free development of a person and, or affirmation of one's identity with regard to one or more of the characteristics being affirmed by this Act, through counselling, psychotherapeutic services and, or similar services; or</p> <p>(b) any healthcare service related to the free development and, or affirmation of one's gender identity and, or gender expression of a person; and, or</p> <p>(c) any healthcare service related to the treatment of a mental disorder</p>
<u>Germany (2020)</u>	<p>§ 1 Scope of application of the law</p> <p>(1) This Act applies to all treatments carried out on people that are aimed at changing or suppressing sexual orientation or self-perceived gender identity (conversion treatment).</p> <p>(2) This Act does not apply to the treatment of medically recognized disorders of sexual preference.</p> <p>(3) Conversion treatment does not exist in the case of surgical medical interventions or hormone treatments that are aimed at expressing a person's self-perceived gender identity or to meet a person's desire for a more male or more female physical appearance.</p>
<u>Victoria, Australia (2021)</u>	<p>5. Meaning of change or suppression practice</p> <p>(1) In this Act, a change or suppression practice means a practice or conduct directed towards a person, whether with or without the person's consent—</p> <p>(a) on the basis of the person's sexual orientation or gender identity; and</p> <p>(b) for the purpose of—</p> <p>(i) changing or suppressing the sexual orientation or gender identity of the person; or</p> <p>(ii) inducing the person to change or suppress their sexual orientation or gender identity.</p> <p>(2) For the purposes of subsection (1), a practice or conduct is not a change or suppression practice if it—</p> <p>(a) is supportive of or affirms a person's gender identity or sexual orientation including, but not limited to, a practice or conduct for the purposes of—</p> <p>(i) assisting a person who is undergoing a gender transition; or</p> <p>(ii) assisting a person who is considering undergoing a gender transition; or</p> <p>(iii) assisting a person to express their gender identity; or</p> <p>(iv) providing acceptance, support or understanding of a person; or</p> <p>(v) facilitating a person's coping skills, social support or identity exploration and development; or</p>



	<p>(b) is a practice or conduct of a health service provider that is, in the health service provider's reasonable professional judgement, necessary—</p> <p>(i) to provide a health service; or</p> <p>(ii) to comply with the legal or professional obligations of the health service provider.</p> <p>(3) For the purposes of subsection (1), a practice includes, but is not limited to the following—</p> <p>(a) providing a psychiatry or psychotherapy consultation, treatment or therapy, or any other similar consultation, treatment or therapy;</p> <p>(b) carrying out a religious practice, including but not limited to, a prayer based practice, a deliverance practice or an exorcism;</p> <p>(c) giving a person a referral for the purposes of a change or suppression practice being directed towards the person.</p> <p>(4) For the purposes of subsection (1), a practice or conduct may be directed towards a person remotely (including online) or in person.</p>
<u>France (2021)</u>	<p>After Article 222-16 of the Criminal Code, an Article 222-16 1 A is inserted as follows:</p> <p>“ Art. 222 - 16 - 1 A. – Practices, behaviors or repeated remarks aimed at modifying or repressing the sexual orientation or gender identity, real or supposed, of a person and having the effect of altering their physical or mental health are punishable by two years' imprisonment and a fine of 30,000 euros.</p> <p>(...)</p> <p>These practices, behaviors or remarks do not include those :</p> <p>“ 1° aimed at the free development or affirmation of a person's sexual orientation or gender identity ;</p> <p>“ 2° aimed at sex change or any related service.</p>
<u>Canada (2022)</u>	<p>320.101 In sections 320.102 to 320.104, conversion therapy means a practice, treatment or service designed to</p> <p>(a) change a person's sexual orientation to heterosexual;</p> <p>(b) change a person's gender identity to cisgender;</p> <p>(c) change a person's gender expression so that it conforms to the sex assigned to the person at birth;</p> <p>(d) repress or reduce non-heterosexual attraction or sexual behaviour;</p> <p>(e) repress a person's non-cisgender gender identity; or</p> <p>(f) repress or reduce a person's gender expression that does not conform to the sex assigned to the person at birth.</p> <p>For greater certainty, this definition does not include a practice, treatment or service that relates to the exploration or development of an integrated personal</p>



	identity — such as a practice, treatment or service that relates to a person's gender transition — and that is not based on an assumption that a particular sexual orientation, gender identity or gender expression is to be preferred over another.
<u>New Zealand (2022)</u>	<p>Meaning of conversion practice</p> <p>(1) In this Act, conversion practice means any practice, sustained effort, or treatment that—</p> <p>(a) is directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression; and</p> <p>(b) is done with the intention of changing or suppressing the individual's sexual orientation, gender identity, or gender expression.</p> <p>(2) However, conversion practice does not include—</p> <p>(a) any action that a health practitioner takes when providing a health service if the health practitioner—</p> <p>(i) considers in their reasonable professional judgement it is appropriate to take that action; and</p> <p>(ii) complies with all legal, professional, and ethical standards when taking the action; or</p> <p>(b) assisting an individual who is undergoing, or considering undergoing, a gender transition; or</p> <p>(c) assisting an individual to express their gender identity; or</p> <p>(d) providing acceptance, support, or understanding of an individual; or (e) facilitating an individual's coping skills, development, or identity exploration, or facilitating social support for the individual; or</p> <p>(f) the expression only of a belief or a religious principle made to an individual that is not intended to change or suppress the individual's sexual orientation, gender identity, or gender expression.</p>