



UNSW Law & Justice Research Series

**Conversion Therapy and
Children's Rights**

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[2024] *UNSWLRS* 31
In Ilias Trispiotis and Craig Purshouse (eds),
*Banning 'Conversion Therapy' Legal and Policy
Perspectives* (Hart 2023)

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'Conversion Therapy' and Children's Rights

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'Conversion therapy' is an umbrella term used to describe a range of practices that have one goal: making LGBTQ+ children straight and/or cis-gendered. When it comes to children, 'conversion therapy' is offered by adults to other adults, primarily parents, with the promise to transform children's sexual orientation, gender identity or gender expressions.¹ As the recipients of these practices, children are usually, but not always, coerced to attend these so-called therapeutic sessions by their parents.

'Conversion therapy' has been subject to extensive debates in law and policy over the last couple of years, with some countries banning all, or some forms, of these practices, while others have stopped short of regulating it.² Most, if not all, of the discussions about the legality of these practices centre on adults, their rights and interests, whether it is human or civil rights frameworks, such as discussing parents' or providers' right to religious freedom or to free speech, or their legal positionalities under other bodies of the law such as tort law, to name one example.³

But while children are victimised by 'conversion therapy', their rights and interests are often overlooked and forgotten, let alone being front and centre of the discussion about the legality of these practices. This chapter seeks to centre children in the discussions about the legality of 'conversion therapy' by taking a child-centred approach⁴ to analyse 'conversion therapy' from a children's rights

¹TC Graham, 'Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts' (2019) 52 *Creighton Law Review* 419, 420.

²For a review see F Ashley, *Banning Transgender Conversion Practices: A Legal and Policy Analysis* (Vancouver, University of British Columbia, 2022).

³I Trispiotis and C Purshouse, 'Conversion Therapy' As Degrading Treatment' (2022) 42 *Oxford Journal of Legal Studies* 104; S Boulos and C González-Cantón, 'No Such Thing as Acceptable Sexual Orientation Change Efforts: An International Human rights Analysis' (2021) 32 *Women and Criminal Justice* 185; PCW Chan, 'No, It Is not Just a Phase: An Adolescent's Right to Sexual Minority Identity under the United Nations Convention on the Rights of the Child' (2006) 10 *The International Journal of Human Rights* 161; IY Nugraha, 'The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law' (2017) 35 *Netherland Quarterly of Human Rights* 176.

⁴N Peleg, 'Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 111, 112.

perspective, using the 1989 UN Convention on the Rights of the Child (UNCRC) as a normative framework. In doing so, it seeks to answer two questions: First, do these so-called therapeutic treatments constitute a violation of children's rights? Second, running in parallel to the first question, can 'conversion therapy' be considered justified if it is a lawful manifestation of parents' autonomy to raise their children, including to guide or influence their children's sexual orientation and gender identity?

A word about terminology, before we start: when talking about children, I refer to anyone below the age of 18, as per Article 1 of the UNCRC. I also use the term LGBTQ+ children while recognising the diverse experiences of children and the heterogeneity of this cohort of children in terms of identities, including gender identities, gender expressions and sexual orientations, the evolving and changing nature of children's identity and the intersectionality with race, religion, ethnicity, (dis)abilities and socio-economic status. This term should be read in an inclusive way, with the aim to respect the different experiences of children in exploring, questioning, coming to terms with, establishing, debating, and forming their own identities. In a similar vein, the analysis of children's rights in this chapter is done in broad terms too, while recognising that the theoretical meaning of rights should be contextualised in children's everyday living. The term 'conversion therapy' is used for convenience only, but refers to practices that are not a recognised therapeutic practice by any established, or reliable, medical association or regulatory body, and – importantly – convert no one.⁵ Unfortunately, the branding campaign to legitimise 'conversion therapy' has been successful, and the supporters of these practices have managed to mainstream this title, thus presenting it as something that it is most certainly not.

Adults' discomfort and disapproval of children being and behaving in ways that do not meet heteronormative imaginations are not new, and attempts to alter children's non heterosexual identities and diverse identity expressions are not new either. For example, in her book, Julian Gill-Peterson charts a gloomy history of trans children, and shows how adults have tried to change children's sexual and gender identities using pseudo medical treatments since, at least, the beginning of the twentieth century.⁶ These efforts have historically included the medicalisation of non-gender conforming children, and coercing them to a range of biological and behavioural treatments, including surgical interventions (lobotomies, castrations, clitoridectomies, and cauterisation of the spinal cord), convulsive electric shock treatments and hormonal injections. The behavioural methods included cognitive therapy and aversive conditioning, such as pairing electric shocks or nausea-inducing drugs while presenting homoerotic images, to create a psychological linkage between pain and sexual interaction between

⁵ J Ozanne, "Conversion Therapy", *Spiritual Abuse and Human Rights* (2021) 3 *European Human Rights Law Review* 241, 242.

⁶ J Gill-Peterson, *Histories of the Transgender Child* (Minneapolis, University of Minnesota Press, 2018).

same sex partners. As Gill-Peterson shows, for decades, medical doctors and other health care professionals were at the forefront of these methods, with the psychiatric profession only recently condemning these treatments, classifying aversive therapies as unethical and inhumane.⁷

A more common form of 'conversion therapy' these days is called 'speech therapy', where counsellors, some acting on their religious standing in the community such as priests but without having any professional training in psychology or psychiatry, tell 'patients' that due to their behaviour or identity they are alone, unnatural, and abomination(s) to be rejected.⁸ This, like in cases of attempted physical conversion, can result in anxiety, depression, shame, hopelessness, and suicide.⁹ The American Academy of Child and Adolescent Psychiatry (AACAP) concluded that there is no evidence to support the application of any 'therapeutic intervention' as non-heterosexual orientation is not pathological. Furthermore, based on the scientific evidence, the AACAP determined that any so-called therapeutic interventions with the intent of promoting a particular sexual orientation and/or gender identity as a preferred outcome lack scientific credibility and clinical utility. The AACAP also stated that there is ample evidence to suggest that such interventions are harmful, and when used on adolescents can be life threatening.¹⁰ Another study shows that survivors of 'conversion therapy' are 'more than twice as likely to report having attempted suicide',¹¹ and some recipients describe the experience as torture.¹² For these reasons the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formally classified 'conversion therapy' as a form of torture in 2016.¹³ Despite this classification, the question of the compatibility of 'conversion therapy' with human rights has begun to generate scholarly interest only recently, and children and their rights, as mentioned before are, by and large, left at the margin of these discussions.

The UN Committee on the Rights of the Child, which monitors the implementation of the UNCRC, gave scant attention to the rights of LGBTQ+ children and to the question of 'conversion therapy' over the years,¹⁴ even when reviewing state parties where these practices are widespread and legal. It was only

⁷ *ibid.*

⁸ MD Bracken, 'Torture Is Not Protected Speech: Free Speech Analysis of Bans on Gay Conversion Therapy' (2020) 63 *Washington University Law Journal and Policy* 325.

⁹ MA George, 'Expressive Ends: Understanding Conversion Therapy Bans' (2017) 68 *Alabama Law Review* 793, 817.

¹⁰ The American Academy of Child and Adolescent Psychiatry, 'Conversion Therapy' (2018), www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx.

¹¹ A Green et al, 'Self-Reported Conversion Efforts and Suicidality among US LGBTQ Youths and Young Adults, 2018' (2020) 8 *American Journal of Public Health* 1221.

¹² Bracken (n 8) 325.

¹³ UNHRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (5 January 2016) UN Doc A/ HRC/31/57, para 5.

¹⁴ P Gerber and A Timoshanko, 'Is the UN Committee on the Rights of the Child Doing Enough to Protect the Rights of LGBT Children and Children with Same-Sex Parents?' (2021) 21 *Human Rights Law Review* 786.

in 2016 that the Committee said that ‘all adolescents [should enjoy] freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. It condemns the imposition of so-called “treatments” to try to change sexual orientation and forced surgeries or treatments on intersex adolescents.’¹⁵ While condemning this practice is important, the Committee fell short in analysing the compatibility of ‘conversion therapy’ with UNCRC, let alone offering its own viewpoint on its compatibility with children’s rights.

The chapter continues with the following structure. The next section reviews and analyses recent legal challenges to bans on ‘conversion therapy’ that utilised human and civil rights language. Critically engaging with the ways in which Courts, especially in the United States, have dealt with the issue, this section highlights that while children are the main victims of ‘conversion therapy’, their rights and interests have been overlooked. Against this background, the next section will offer a child’s rights analysis to ‘conversion therapy’. Utilising the UNCRC, the section will focus on issues of harm and abuse, protection from torture, and the child’s rights to identity and development. It will then argue that ‘conversion therapy’ clearly violates a range of rights of the child not only due to the harm that it causes but also because it undermines the child’s right to develop and preserve their own identity, including sexual orientation and gender identity. The final section discusses whether parental autonomy can nonetheless be invoked as a justification for subjugating children to ‘conversion therapy’ when a child’s parents are not happy with their child’s sexual orientation, gender identity or gender expression.

I. Current Legal and Regulatory Frameworks

This section focuses on how courts in different countries, mainly the United States, have dealt with human and civil rights based claims against regulatory effort to ban ‘conversion therapy’. It shows that while the rights of adults are often invoked and discussed, children and their rights are mentioned rarely, if at all. This is the case even though children’s victimhood is often cited as justification for limiting alleged rights of adults, providers or parents alike, when banning ‘conversion therapy’. This invocation of victimhood perpetuates the image of children as eternal victims, cements their image as lacking in agency and, paradoxically, as both nonsexual and as heterosexual beings.

Attempts to ban or limit access to ‘conversion therapy’ usually take one of three forms: ban certain types of providers via administrative law; ban certain types of ‘therapy’ via criminal law; and offer tortious compensation for those who were

¹⁵ UN Committee on the Rights of the Child, ‘General Comment No 20: The Implementation of the Rights of the Child During Adolescence’ (6 December 2016) UN Doc CRC/C/GC/20, para 10.

subject to this form of abuse. Some laws ban specific types of 'therapy', usually the more overt physical types.¹⁶ However, religious actors are often exempt from such limitations and can continue to offer 'spiritual' therapy in the name of protecting their religious freedom. In practice this exemption means that many, if not most, providers are permitted to continue and operate, as religious and 'spiritual' leaders comprise most of the abusers.¹⁷ A more common, and practical, measure is to prohibit medical professionals, mainly registered psychologists, from offering this service and criminalising those who nonetheless continue to offer this practice. In other words, we either see public law attempting to limit or ban 'conversion therapy' by regulating the conduct of 'service deliveries', or attempting to use criminal law to criminalise some forms of therapies.¹⁸ A third option attempts to utilise private law measures, usually in the form of cases brought by victims, or potential victims, against individual providers, asking for tortious compensation.¹⁹

In the USA, California was the first state to prohibit licensed mental health professionals from providing 'conversion therapy' to minors, and soon after other states, and some local municipalities, have followed.²⁰ Legal challenges to these laws were based on three key arguments: freedom of speech and religious freedom, both entrenched in the First Amendment to the US Constitution, and parental autonomy. All these arguments focus on adults: either as treatment providers, who claim to hold the First Amendment rights, or as a child's parents, who claim to hold parental autonomy that gives them the power to subjugate their children to – and to consent on their behalf for – these so-called treatments.

Free speech challenges centre on the argument that therapy is essentially a form of speech, as it is conducted verbally (hence the branding of 'talk therapy').²¹ As such, it is a protected act under the First Amendment, and banning it is therefore constitutionally invalid. Courts struggled with the attempt to draw a distinction between therapy as an action and therapy as an act of communication, differences which are relevant to the decision whether the First Amendment applies or not, and the subsequent argument that 'talking therapy' is a form of speech, and therefore constitutionally protected, while 'action therapy' can be restricted. The Ninth Circuit Court of Appeal, for example, when deciding a case challenging the constitutional validity of the California ban on 'conversion therapy', concluded that the ban centres on regulating professional conduct. It held that the professional regulation is not an unconstitutional limitation of free speech.²² By way of contrast, the Third Circuit Court of Appeal, when reviewing New Jersey's ban on

¹⁶ Graham (n 1).

¹⁷ *ibid.*

¹⁸ Bracken (n 8) 325.

¹⁹ Trispiotis and Purshouse (n 3) 107.

²⁰ JJ Lapin, 'The Legal Status of Conversion Therapy' (2020) 22 *Georgetown Journal of Gender and the Law* 251.

²¹ 'First Amendment – Professional Speech – Eleventh Circuit Invalidates Minor Conversion Therapy Bans – *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020)' (2021) 134 *Harvard Law Review* 2863.

²² *Pickup v Brown*, 740 F3d 1208 (9th Cir 2014), cert denied, 573 US 945 (2014).

‘conversion therapy’, ruled that providers of ‘conversion therapy’ are using speech to provide a specialised service, which is designed to alter the patients’ behaviours and thoughts. As such, the providers are exercising professional speech, rather than a conduct.²³ And this form of speech, the Court ruled, as with any other speech, is protected under the Constitution.

While some forms of ‘conversion therapy’, Mason Bracken claims, involve spoken words, nonetheless it is not ‘speech’ for the purposes of the First Amendment, but rather a means of torture.²⁴ The same analysis applies under international human rights law, where so-called medical interventions like this fall under the provisions on torture and cruel, inhuman and degrading treatment.²⁵ Further, the logic behind this prohibition is to protect the patient from abuse, rather than focusing on the administrator of treatment. This approach, unlike the freedom of expression argument, which centres around the provider, focuses on the victim, and in our case the child.

Lapin takes this argument further, arguing that it would be illogical for therapy effectuated by speech to be given greater protection than the same therapy effectuated by physical treatment. Consider that practitioners used to induce nausea, vomiting, or paralysis; provide electric shocks; or have an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Practitioners now reframe desires, redirect thoughts, or use hypnosis, with the goal of changing sexual arousal, behaviour, and orientation. ‘Why’, he asks, ‘should a therapist be more protected when he screams “faggot” or “homo” at a client in a mock locker room than when he directs the client to snap an elastic band on his wrist each time the client is attracted to a man?’²⁶

The US case law continued to develop around questions of the meaning of professional speech, what sort of speech should be considered as such, the differentiation between speech and conduct, and the subsequent states’ power to regulate one and not the other.²⁷ This constitutional law issue is not the focus of this chapter, but rather the fact that in all of those cases, the debates centred around the rights of adults, mostly the rights of therapy providers. Only a fraction of the cases were concerned with the rights of adults’ ‘patients’, who argued that a ban on ‘conversion therapy’ violates their own constitutional rights as it prevents them from benefiting from the providers’ protected speech.

The religious freedom argument shifts the focus from the action to the humans. The core of this claim is that individuals have the right to exercise their religion without government interference, and that one possible manifestation of their

²³ *King v Governor of NJ*, 767 F3d 216 (3d Cir 2014), cert denied, 135 S Ct 2048 (2015).

²⁴ Bracken (n 8) 325.

²⁵ For example, OHCHR ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (10 December 1984) 1465 UNTS 85, 113.

²⁶ Lapin (n 20) 251, 261.

²⁷ For a comprehensive review see J Hampton, ‘The First Amendment and the Future of Conversion Therapy Bans in Light of *National Institute of Family and Life Advocates v. Harris*’ (2020) 35 *Berkeley Journal of Gender, Law & Justice* 169.

belief is aiding members of their congregation 'to heal, not to sin, and such like. This argument, again in the context of US constitutional law, but in a similar fashion to international human rights law, potentially carries some weight. However, courts in the US have rejected this line of argument, saying that the laws do not prohibit clergymen from engaging in religious 'conversion therapy', nor do they preclude individuals from providing religious counselling to congregants.²⁸ Courts also concluded that these bans are neutral and generally applicable, and therefore constitutionally valid.²⁹ But a big question mark remains over the effectiveness of these bans, given all these exclusions, in stopping treatments from being offered to parents and imposed on children. The issue of religious freedom, or freedom of conscience of children, has not been part of these adjudications in any meaningful way.

A third argument against the legality of 'conversion therapy' bans centres around parental responsibility, parental autonomy, and parental rights. In a nutshell, this argument suggests that parents should be able to raise their children as they choose, without government interference, and if parents are unhappy with their child's sexual orientation or gender identity, they have the prerogative to try to change it. I will come back to this argument later, when discussing parental responsibility from a child's rights perspective.

'Consent' is another form of justification that is sometimes invoked by supporters of 'conversion therapy', in an attempt to salvage the legality of 'conversion therapy', and sometimes introduced as an exception to a ban.³⁰ According to this line of argument, if a child consents to undergoing this treatment, then it should be legal. Ignoring the question whether consent in this space can ever be free, or whether it is obtained as a result of coercion or pressure by parents, I argue that consent – and the entire discourse that utilises concepts, jargon and case law borrowed from the medical law world – is irrelevant. 'Conversion therapy' is not a therapy, or a medical treatment, and therefore using medical law's conception of consent is just not relevant. Moreover, the pain and harm that it causes means that parents are under a duty to talk their child out of engaging with this practice, rather than offering or encouraging it.

II. Systematic Analysis of the Relevant Rights of Children

This section analyses questions concerning 'conversion therapy' from a child's rights perspective, using the 1989 UNCRC as a normative and positive framework.

This section does not look at the morality of 'conversion therapy' but focuses on the rights of children involved. As Trispiotis and Purshouse have argued before,

²⁸ *Welch v Brown*, 834 F3d 1041, (9th Cir 2016) at 1044–45.

²⁹ *Lapin* (n 20) 251, 256.

³⁰ *Ozanne* (n 5) 241, 248.

not only is 'conversion therapy' morally wrong, but from human rights perspective, it 'fails to respect the equal moral personhood of LGBTQ+ people',³¹ and violates the prohibition of torture and/or degrading treatment under European and international human rights law.³² Boulos and González-Cantón make a similar claim, and argue that all forms of 'conversion therapy', including 'talk therapy', should be considered as degrading and inhuman treatment, and therefore incompatible with international human rights law norms.³³ When it comes to children, I argue that 'conversion therapy' violates other key rights of children, beyond the prohibitions on torture and on inhuman and degrading treatment.

The UNCRC includes a myriad of relevant provisions on the question of 'conversion therapy', which I suggest dividing into three groups: The first group includes a set of specific rights that are directly relevant to 'conversion therapy', and this includes protection for the right to identity (Articles 7–8), freedom of conscience (Article 14), right to privacy (Article 16), right to freedom from abuse (Article 19), protection from harmful traditional practices (Article 24(3)), and protection from torture and other cruel, inhuman or degrading treatment (Articles 37 and 40). The second group includes two articles that regulate parental roles and duties: Article 18, which positions parents with the 'primary responsibility for the upbringing and development of the child', and setting the child's best interests as parents' basic concern; and Article 5 that asks parents to provide children with appropriate guidance in exercising their own rights, in accordance with the child's evolving capacities. The third group is the UNCRC's four guiding principles,³⁴ namely the right to non-discrimination (Article 2), the right of the child to have their best interests considered as a primary consideration (Article 3), the rights to life, survival and development (Article 6), and the right to participate in decisions concerning their lives (Article 12). Questions about the compatibility of 'conversion therapy' with the UNCRC, or parental capacity to force children to attend this 'therapy', will be analysed from an assumed child's point of view to consider their rights. In other words, a child, and their rights, will be the focal point of analysis, against a reality where children are subject to these treatments, but their rights are rarely addressed or given adequate weight.

It is worth noting from the outset that the UNCRC does not explicitly identify gender in Article 2, which includes an open-ended list of prohibited grounds for discrimination. It also reflects a narrow conception of childhood where children are seen as victims, specifically victims of sexual violence, who require protection. As mentioned, the UNCRC is silent on children's sexual rights and gender identity. Some even go so far as to argue that the UNCRC denied children's sexual

³¹ Boulos and González-Cantón (n 3) 3.

³² Trispiotis and Purshouse (n 3) 107.

³³ Boulos and González-Cantón (n 3).

³⁴ Committee on the Rights of the Child 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6) (27 November 2003) UN Doc CRC/GC/2003/4.

agency altogether.³⁵ But as Sandberg convincingly argued, despite some of these shortcomings, the UNCRC can be utilised, and interpreted to provide meaningful protection for the rights of LGBTQ+ children.³⁶

III. Protection from Abuse and Harm, and the Prohibition on Torture

Protection from harm and abuse, as stipulated in Article 19, is a key issue in the context of 'conversion therapy'. The choice to begin the analysis with Article 19 centres on children's dreadful experiences of 'conversion therapy', especially the harmful and painful impacts that this practice has on them. This departs from other approaches, which takes the best interests principle as a focal point.³⁷ This is not to say that the best interests principle is not important, or a key feature of children's rights, but there are at least three good reasons to start with Article 19. First, there is ample evidence about the harm that 'conversion therapy' causes. Second, the explicit and unequivocal obligations to ban practices that harm the child physically or mentally are less contentious than the obligations that Article 3 might give rise to. Third, Article 3 is often criticised for being subjective, or constructing a narrow view of children and childhood,³⁸ and for its potential to be hijacked by parents and other adults who euphemistically argue that attempts to alter children's identity is in the children's best interests. In contrast, Article 19 is not often subject to such criticism. Article 19(1) reads:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The article provides a broad protection for children from violence, a term that has been defined in general terms by the UN Committee on the Rights of the Child to include 'physical, psychological, or emotional harm to a child's development and sense of dignity'.³⁹ Moreover, the Committee emphasises that the term 'violence' should not be interpreted in any way to minimise the impact of non-physical and non-intentional forms of harm, and that all forms of harm 'carry equal weight'.⁴⁰

³⁵ R Linde, 'The Rights of Queer Children' (2019) 27 *International Journal of Children's Rights* 719.

³⁶ K Sandberg, 'The Rights of LGBTI Children under the Convention on the Rights of the Child' (2015) 33 *Nordic Journal of Human Rights* 337.

³⁷ Nugraha (n 3).

³⁸ FR Ammaturo and MF Moscati, 'Children's Rights and Gender Identity: A New Frontier of Children's Protagonism?' (2021) 39 *Nordic Journal of Children's Rights* 146, 155.

³⁹ Committee on the Rights of the Child 'General Comment 13: The Right of the Child to Freedom from all forms of Violence' (18 April 2011) UN Doc CRC/C/GC13, para 19.

⁴⁰ *ibid* para 19.

In our context, this covers all forms of ‘conversion therapy’, including ‘talk therapy’, even if some forms of ‘conversion therapy’ seem harmless to parents.

The latter point is the logical conclusion when Article 19 is read in conjunction with Article 12 that acknowledges a child’s right to participate in decisions concerning their life. This means that the perspective of children must be included when interpreting the meaning of harm. In other words, it is children’s experience of harm that counts, and not what adults might think to be harmful or painful, or whether certain level of pain is justified. Further, Article 19 directly addresses inter-familial harm caused to children, and subsequently requires states to protect children against harm inflicted by family members, including parents, and it does not matter whether it was inflicted intentionally, or unintentionally.⁴¹ When it comes to ‘conversion therapy’, even if parents are acting in good faith and compel their child to attend sessions with the intention of supporting their child, the proven harm that ‘conversion therapy’ causes means that this parental decision is a violation of Article 19.

Two additional articles should be considered in the context of harm and violence: Article 37 and Article 24(3). Article 37 protects the child from torture and inhuman and degrading treatment.⁴² Torture, a *jus cogens* norm in international law, as previously argued about the meaning of harm, is a term that need to be interpreted and contextualised too, and that should be done in a way that takes children’s perspective and experience into account. An example for such approach is the interpretation that Tobin and Hobbs suggest:

... torture should be considered the intentional infliction of severe pain and suffering, whether physical or mental, on a child by a person who has the control or custody of a child. In contrast, the other forms of ill-treatment prohibited under article 37(a) need not involve intentional infliction of harm but must still reach a certain threshold of pain and suffering. The assessment of this minimum level of harm is relative and depends on the circumstances of the case, including: the duration of the treatment; the effects on the child; and other factors such as the age, gender, and health of the child.⁴³

This definition centres around children’s experiences rather than the experiences of adults, or adults’ assessment as to what can be, for example, an acceptable level of pain. Evidence from children’s own testimonies, as mentioned earlier in this chapter, provide vivid descriptions for the pain that ‘conversion therapy’ has caused them, some referring to it as torture, a definition that was also

⁴¹ *ibid* para 4.

⁴² Article 37: States Parties shall ensure that: ‘(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.’

⁴³ J Tobin and H Hobbs, ‘Article 37: Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty’ in J Tobin (ed), *Commentary on the Convention on the Rights of the Child* (Oxford, Oxford University Press, 2019) 1420, 1424.

accepted by the UN Special Rapporteur on Torture.⁴⁴ Moreover, even if one casts doubts about the characterisation of 'conversion therapy' as either torture or as inhuman or degrading treatment, it is difficult to argue that it is not a violation of Article 37. This is because it is beyond any doubt that it falls under the broad protection provided for the child's right to protection from abuse, as discussed above.

Another dimension where the UNCRC goes beyond other international human rights law instruments is the scope of the prohibition on torture. As in the case of Article 19, this prohibition is not confined to states and their agents, but includes private actors too,⁴⁵ including parents. Article 37 requires states to take active measures, including, but not limited to, legislating a prohibition on torture. This ban should be absolute, and include no exceptions for adults who might claim that by offering 'conversion therapy' they exercise their right to religious freedom or freedom of speech. Article 37, as well as the entire international human rights law corpus on torture, is clear that no exception to this prohibition is allowed.

The second article that requires attention is Article 24(3). This article requires states to abolish 'traditional practices prejudicial to the health of children'. The common interpretation of this article, in the literature and by the UN Committee on the Rights of the Child, refers to a wide range of practices, including, but not limited to, female genital mutilation or cutting, breast ironing, early or forced marriage and forced abortion. When states attempt to defend the legality of these practices, they often invoke arguments grounded in religion or cultural practices. But these arguments have been rejected by UN human rights bodies, including by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women.⁴⁶ As mentioned above, efforts to convert children's sexual orientation or gender identity are not new. Moreover, these practices are often, if not always, rooted in parents' religious beliefs, cultures or traditions. It can therefore be argued that 'conversion therapy' is a form of traditional practice, and therefore falls under Article 24(3). Further, nothing in the text of the UNCRC suggests that the interpretation of this provision is confined to western imaginaries about cultures, traditions, and children's sexuality (although it should be noted that the drafting process of the UNCRC shows a clear bias against non-western practices).⁴⁷

⁴⁴ UNHRC (n 13).

⁴⁵ Tobin and Hobbs (n 43) 1428–29.

⁴⁶ Committee on the Rights of the Child (n 39); Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 'Joint General Comment No. 31. Committee on the Elimination of Discrimination against Women/ General Comment 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18.

⁴⁷ S Harris-Short, 'Listening to "The Other"? The Convention of the Rights of the Child' (2001) 2 *Melbourne Journal of International Law* 304; S Harris-Short, 'International Human Rights Law: Imperialism, Inept and Ineffective? Cultural Relativism under the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130.

IV. The Rights to Identity(ies) and Development

The UNCRC recognises the child's right to establish, develop and practise their identity, or identities, in Articles 7 and 8. Article 7 is less relevant in relation to 'conversion therapy', as it mainly focuses on bureaucratic identity, like having a nationality, registration of birth and having a birth certificate. All these are crucial elements of identity in and of themselves, but also serve as prerequisites to being able to enjoy other rights. Further, birth registration is highly relevant to transgender or intersex children, and its importance goes beyond the logistical importance and to the heart of their sense of self. The focus here, though, is on 'conversion therapy'.

The objective of 'conversion therapy' is to change a child's sexual orientation and gender identities and expressions, usually by associating negative attributes to non-heterosexual sexual preferences, and non-cisgender identities. Article 8 of the UNCRC therefore seems more relevant to the discussion here. This article requires state parties to 'respect the right of the child to preserve his or her identity ... without unlawful interference'. It is an open-ended list. Cahn has argued that, given the high level of harassment, bullying, poor mental health, and stigmatisation that non-heterosexual children experience, Article 8 should be read as seeing gender identity as an identity aspect that requires recognition and protection. According to Phil Chan, this aspect of identity is not less important than nationality, which is explicitly mentioned in the text, and the right of children to form a counter-majoritarian identity should be protected.⁴⁸ Reading Article 8 together with Article 6(2), which protects the rights to survival and development, can also suggest that the UNCRC supports the right of the child to develop their own intrinsic identity.

When looking at 'conversion therapy', the focus should not only be on the right to develop sexual and gender identities as a process, but also the right to preserve and practise any identity the child might have, or have already developed.⁴⁹ What adults try to do with 'conversion therapy' is presumably to alter expressions of an identity that is non-conforming to cis-gender or heterosexual norms, which presumably the child has intended to express. Whether the child has formulated that expression knowingly or not, they have chosen to perform that expression as a reflection of their selves. Adults assume that an identity has already been formed, meaning that the child has grappled, realised, or come to terms with their sexual orientation and gender identity. It also means that the child's parents know about it (whether because the child told them, or for any other reason), and that the parents are not happy with this identity and want to alter it. 'Conversion therapy' therefore interferes with both the right to develop and the right to preserve the child's identity. Therefore, in this context it is imperative to recognise the child's right to

⁴⁸ Chan (n 3) 170.

⁴⁹ Sandberg (n 36) 344.

preserve their identity. The Committee notes, in General Comment number 20, that adolescents:

explore and forge their own individual and community identities on the basis of a complex interaction with their own family and cultural history, and experience the creation of an emergent sense of self, often expressed through language, arts and culture, both as individuals and through association with their peers ... The process of construction and expression of identity is particularly complex for adolescents as they create a pathway between minority and mainstream cultures.⁵⁰

This right to an identity establishes corresponding duties for parents and the state. For parents, it falls under the general purview of supporting their child's upbringing and development (Article 18) and to act in accordance with the child's best interests. For the state, Tobin and Todres write, the obligation:

... consists of two broad elements: an obligation to enable the child to access information that will enable him or her to understand the historical elements of his or her identity; and an obligation to take reasonable measures to ensure that the child can explore, define, express, and enjoy his or her identity without unlawful interference.⁵¹

Commenting specifically about a child who identifies as being gay, lesbian, bisexual, or transgender, Tobin and Todres suggest that 'states would be required to take effective measures to ensure that the child is able to express and enjoy their sexual orientation or gender identity without fear of discrimination or violence.'⁵² Exposing children to 'conversion therapy' fundamentally contradicts this duty.

An issue related to the right to an identity is self-determination. Although the UNCRC does not explicitly recognise a right to self-determination for children, Sandberg suggests that in the context of analysing the relevance of the UNCRC to LGBTQ+ children this right can be inferred from Articles 12 (right to respect for the views of the child) and 16 (right to privacy).⁵³ But Sandberg also claims that this interpretation is probably only relevant to certain children: those who are 'capable of understanding the consequences of the existing alternatives.'⁵⁴ This approach ignores the role, and weight, that should be given to the right to development in this context and process, and that the realisation of the right to development is not subject to the 'age and maturity' limitations that Article 12 is subject to. If the right to development is considered in the analysis, and considering the explicit obligation on parents to support their child's development that Article 18 stipulates, then the age or 'understanding' limitation that Sandberg mentions should be removed in favour of an argument that supports the right of every child to self-determination. While adults might think that, for example, puberty is the relevant age here, this physical change that the child's body undergoes might come months and years

⁵⁰ UN Committee on the Rights of the Child (n 15) para 10.

⁵¹ J Tobin and J Todres, 'Art 8 The Right to Preservation of a Child's Identity' in Tobin (n 43) 295.

⁵² *ibid.*

⁵³ Sandberg (n 36) 344.

⁵⁴ *ibid.*

after the psychological and cognitive processes of developing and realising one's identities.

This section has asked whether 'conversion therapy' is a practice that upholds, or violates, the right of children, as stipulated in the UNCRC. It has focused on some key rights like the right to freedom from abuse, freedom from torture, the right to identity, and the right to development. So far, the conclusion is that 'conversion therapy', in all its forms, is a clear violation of the rights of children. But a question that still requires attention is whether, despite all of this, parents should be able to influence, or try to reverse, their child's sexual orientation or gender identity, so that it will correspond with what they believe is right, moral or in accordance with their religious beliefs.

V. Parental Responsibility

The question of whether 'conversion therapy' can be undertaken so that the child's identity matches one that parents think is moral or aligned with their religious convictions, is one that should be considered from a child's rights perspective. This is in sharp contrast to the hegemonic approach, which is often invoked in litigation or advocacy efforts against banning 'conversion therapy'. The hegemonic approach maintains that parents have a right to raise their children in accordance with their own set of moral or religious values. Such values would include influencing and directing their child's sexual orientation and gender identity, without external interference.

This section asks this question even though it has already concluded that 'conversion therapy' is a clear violation of children's rights. If this conclusion is rejected, or if someone asks to salvage the legitimacy or legality of 'conversion therapy' by using a 'parental rights' argument, then there is a need to address this question. Examining the question of parental discretion from a children's rights perspective mandates, first and foremost, a change in terminology. Instead of talking about parental rights, one should talk about parental duties and obligations.

Article 18 is the main article of the UNCRC that frames the child-parent relationship. It constructs the roles of parents in these terms:

[B]oth parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 5 affirms parents' autonomy in raising their children, and their duty to 'provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'. Reading these two articles together from a child's rights perspective shows that the objective of parenting is to support the child's

'upbringing and development' and that parents should be guided by their child's best interests in their decisions. Parents, under the UNCRC, have rights vis-à-vis the state, and are free to exercise their duties and responsibilities towards their child. Moreover, the UNCRC emphasises several times the importance of the family, traditions, and culture to the child, and respect for the child's rights to know, enjoy and practise their family's identities.⁵⁵ Parents can raise their children and tell them, for example, that same-sex relationships are a sin, if this is what the parents believe. But the question here is different. In the case of 'conversion therapy', the issue is not about interfering with or limiting parents' ability to raise and educate their children in accordance with their moral values and religious beliefs, but rather a forward-looking one about the scope of the parental prerogative to respond to an identity of their child of which they disapprove.

Parental decisions should also be guided by the principle of the best interests of the child. The best interest of the child, as defined in Article 3, is also one of the four guiding principles of the UNCRC.⁵⁶ The objective of the best interests principle is to ensure the full and effective enjoyment of all the rights recognised in the UNCRC, and its meaning is dynamic, rather than pre-determined. Its meaning depends, first and foremost, on the specific child in question, their characteristics, identities, and own views on the issue at stake. In addition to being an explicit consideration that parents should attend to, the best interests principle is a substantive right of the child. It is also an interpretive principle and a procedural rule of the UNCRC. This means that any decision-making process that can affect a child (or children) should include an evaluation of the possible impacts, positive and negative alike, of the decision on the child.⁵⁷

When it comes to 'conversion therapy', one of the key factors that ought to be considered is how the child understands and identifies itself. The child's sense of self, belonging, and right to development also ought to be considered, together with the harm and pain that 'conversion therapy' causes, including the implications this will have on a child's physical and mental health. It is not that parents who subjugate their child to 'conversion therapy' necessarily have bad intentions and knowingly want to harm their child. Most of them are genuinely unhappy with who their child is or hold prejudicial fears for their child. But this dissatisfaction is not a *carte blanche* to do whatever they think is right, just or morally correct.

In the context of US law, Rachmilovitz goes so far as arguing that the parental autonomy of parents who fail to exercise their duty to protect their child's identity development should be limited by the state.⁵⁸ She further claims that parents who pressure children into mainstream sexual identities harm those children, infringe upon their identity interests, and therefore are beyond the scope of parental

⁵⁵ See Arts 7, 8, 10 and 30.

⁵⁶ Committee on the Rights of the Child (n 34).

⁵⁷ *ibid.*

⁵⁸ O Rachmilovitz, 'Family Assimilation Demands and Sexual Minority Youth (2014) 98 *Minnesota Law Review* 1374.

autonomy and warrant state intervention.⁵⁹ Translating this line of argument into the context of the UNCRC, the second half is more relevant. In a nutshell, under the UNCRC, subjugating children to 'conversion therapy' is beyond parental powers.

VI. Conclusion

Looking at 'conversion therapy' from a children's rights perspective, it is clear that these practices, whether spoken or physical, violate a myriad of rights. They harm and torture children, and violate their right to identity, privacy and development. Subjugating children to them falls outside the remit of parental responsibility.

Under the UNCRC, states have the obligation not only to ban practices that are harmful to children, but also to take measures to protect their rights, and to support parents so they can fulfil their duties towards their children's development and upbringing. Banning 'conversion therapy' in legislation is a necessary step, but it cannot be the only one. Not only is the effectiveness of a legalised ban questionable, but it also does not guarantee that the practice will not be carried out against the law. Nor does it solve the root cause, which is the bias against the non-cisgender and/or non-heterosexual children. States are under a duty to educate the public, including children, about the severe negative effects of these sorts of 'treatments'⁶⁰ in order to reduce the likelihood that a child will ask to undergo them.

⁵⁹ *ibid* 1380.

⁶⁰ UN Committee on the Rights of the Child (n 15) para 34.