



THE LAW SOCIETY
OF NEW SOUTH WALES

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25 February 2021

The Hon Mark Latham MLC
Chair
Portfolio Committee No. 3 – Education
Parliament House, Macquarie Street
Sydney NSW 2000

By email: portfoliocommittee3@parliament.nsw.gov.au

Dear Mr Latham,

Education Legislation Amendment (Parental Rights) Bill 2020

Thank you for the opportunity to contribute a submission to the Portfolio Committee No. 3 – Education inquiry into the Education Legislation Amendment (Parental Rights) Bill 2020 (“the Bill”).

The Law Society’s Human Rights, Children’s Legal Issues, and Public Law Committees have contributed to this submission.

The Law Society recommends this Bill not be passed due to the uncertainty over key terms in the Bill, the likelihood of conflict with existing NSW and Commonwealth legislation, and potential for far-reaching negative consequences, including teachers having their accreditation revoked for breaching vaguely defined prohibitions. Further detail on these concerns is outlined below.

1. Concerns in relation to key terms in the Bill

The Bill’s objects, as stated in the explanatory note, including prohibiting “the teaching of the ideology of gender fluidity to children in schools” and to “recognise parental primacy in relation to core values”.¹

Although the term “core values” is left undefined by the Bill, the explanatory note states that “core values” include “moral and ethical standards, political and social values, and matters of personal wellbeing and identity which parents are primarily responsible for teaching and forming in their children”.²

Schedule 1, cl 1 of the Bill defines “gender fluidity” and “matters of parental primacy” as follows.

gender fluidity means a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of

¹ Explanatory Note, Education Legislation Amendment (Parental Rights) Bill 2020, 1.

² Explanatory Note, Education Legislation Amendment (Parental Rights) Bill 2020, 2.

sexual differentiation) and human gender and that human gender is socially constructed rather than being equivalent to a person's biological sex.

matters of parental primacy means, in relation to the education of children, moral and ethical standards, political and social values, and matters of personal wellbeing and identity including gender and sexuality.

Schedule 1, cl 10 of the Bill seeks to, *inter alia*:

- Prohibit “the teaching of gender fluidity” in government and non-government schools. This prohibition would extend to non-teaching school executives, school counsellors, volunteers at a school, and non-teaching staff, contractors, advisors and consultants of a school;
- Require that teaching in government schools be “strictly non-ideological” in matters of parental primacy. Similarly to the above, this requirement would extend to non-teaching school executives, school counsellors, volunteers at a school, and non-teaching staff, contractors, advisors and consultants of a school;
- Allow parents to elect to intervene to stop their child from receiving “any instruction in matters of parental primacy”; and
- Require schools to prepare an annual statement on content being taught that falls within matters of parental primacy and consult with parents on these matters.

The provisions that would require consultation on “matters of parental primacy” and allow individual parents to object to the teaching of such matters would be difficult to apply in practice. While the Bill does include a definition for “matters of parental primacy”, it is an inherently subjective term, making any determination of which part of a curriculum falls within the definition a near-impossible task for schools to undertake. The Bill also does not appear to envisage a scenario where a child's parents disagree on whether the child should receive instruction on something that is purportedly a matter of parental primacy. Given the consequences that would apply to teachers who fail to comply with the requirements of the Bill, which we consider further below, this uncertainty over the practical application of key provisions in the Bill is of significant concern.

The open-ended definition of matters of parental primacy in the Bill may also interfere with the role of schools and teachers in developing the values that are shared and enjoyed by Australians. By way of example, the *Values for Australian Schooling* resource series, funded by the Australian Government, notes that such values include care and compassion, responsibility, doing your best, a ‘fair go’, respect, understanding, tolerance and inclusion, and honesty and trustworthiness.³ These values are expressly encouraged by the Commonwealth Government through the National Framework for Values Education in Australian Schools. On an ordinary reading of the Bill, it is highly likely that these values would be construed as moral or ethical standards and thus precluded from being taught upon objection from a parent.

Law Society members have raised concerns over the definition of “gender fluidity” in the Bill. The Australian Senate Community Affairs References Committee recommended in 2013 that governments and other organisations use terms such as ‘intersex’ or ‘differences of sexual development’, rather than using the word ‘disorder’.⁴

The Bill's requirement for “teaching to be non-ideological” may have wide-ranging unintended consequences due to the vague nature of the terms used. Proposed s 17B at sch 1, cl 10 provides that:

³ Australian Government, *Building Values Across the Whole School: Teaching and Learning Units* <http://www.curriculum.edu.au/values/val_values_ed_cpl_resources_1_building_values,20874.html>

⁴ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) xiii.

17B Teaching to be non-ideological

In government schools, the education is to consist of strictly non-ideological instruction in matters of parental primacy. The words non-ideological instruction are to be taken to include general teaching about matters of parental primacy as distinct from advocating or promoting dogmatic or polemical ideology. For the avoidance of doubt, this section does not apply to special religious education provided under section 32 of this Act.

The terms “ideological” and “non-ideological” are left undefined in the Bill, and are not defined in the *Education Act 1990* (NSW) (“Education Act”). We note however that “ideology” is defined in the Oxford English Dictionary as “a system of ideas and ideals, especially one which forms the basis of economic or political theory and policy”.⁵ Under this definition, concepts familiar to Australians such as democracy, the rule of law, and freedom of expression⁶ arguably have a basis in ideology. Even secularism and secular instruction, specifically mandated by s 30 of the Education Act, has an ideological underpinning. The Bill’s intention to preclude “non-ideological” teaching may therefore have the consequence of prohibiting teaching on a vast range of topics; in our view, an unworkable and undesirable result.

We further note that the Bill may make it difficult for teachers to discharge their professional obligations, given the broad definitions of key terms including “gender fluidity”, “non-ideological” and “matters of parental primacy”. This is particularly concerning given sch 3, cl 3 would amend the *Teacher Accreditation Act 2004* (NSW) to require the revocation of a teacher’s accreditation in the event that a teacher taught “gender fluidity” or failed to recognise “that parents are primarily responsible for the development and formation of their children in relation to matters of parental primacy”.

2. Potential conflict with existing NSW and Commonwealth legislation

It is unclear how the Bill will operate alongside s 6(1)(n) of the Education Act, which provides that one of the Act’s objects is to provide for an education “that promotes family and community values”. The Bill’s proposed insertion of a new object relating to provision of an education “consistent with the moral and ethical standards and the political and social values of parents of students” (sch 1, cl 4) may conflict with the Education Act’s existing objective of promoting family and community values.

The Bill also appears to impose obligations contrary to the federal *Sex Discrimination Act 1984* (“SDA”). Section 5B of the SDA renders it unlawful to treat someone less favourably on the basis of their gender identity. The Bill, in seeking to prevent school counselling staff from talking to children about “gender fluidity”, may have the effect of treating a child differently on the basis of their gender identity. This inconsistency between the Bill and the SDA may result in the Bill being read down or declared invalid if the subject of constitutional challenge under s 109 of the Constitution.

3. Human rights considerations

3.1. *International Covenant on Civil and Political Rights*

Schedule 1, cl 4 of the Bill would add a further object to the Education Act requiring every person concerned in the administration of the Act or of education for children of school-age in NSW to have regard to “provision of an education that reflects the rights of parents that are codified in Article 18(4) the *International Covenant on Civil and Political Rights*” (“ICCPR”).

⁵ Lexico English Dictionary, ‘Ideology’ <[lexico.com/definition/ideology](https://www.lexico.com/definition/ideology)>.

⁶ Australian Government, *Australian Citizenship: Our Common Bond* (2020) <<https://immi.homeaffairs.gov.au/citizenship-subsite/files/our-common-bond-testable.pdf>>.

Article 18(4) of the ICCPR provides that:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.⁷

We note that the *Vienna Declaration and Programme of Action*, adopted in 1993 by 171 states (including Australia), affirms at Article 5 that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁸

The implication of this Article is that human rights are of equal importance, belong to everyone, must be implemented into the domestic laws of State parties (subject to any reservations registered), cannot be disregarded by governments, and apply regardless of distinctions such as race, sex, language or religion.

The Law Society is of the view that incorporating a discrete provision from the ICCPR into the Education Act, as proposed by the Bill, is not an appropriate legislative mechanism to allow the rights provided by art 18(4) to be considered alongside all other human rights, for example the right to equality and the right to freedom from discrimination. The Law Society has previously recommended that NSW would benefit from a well-drafted Human Rights Act containing a clear mechanism to consider and balance competing rights. This is the approach followed in Queensland, Victoria, the ACT, Canada, and New Zealand, among other jurisdictions.

3.2. *Convention on the Rights of the Child*

We further note that the Bill may contravene art 3 of the *Convention on the Rights of the Child* (“CROC”), which provides that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.⁹ The Bill places significant emphasis on matters of parental primacy, but does not contain reference to the best interests of the child. If the Bill were to pass, the NSW Government may also contravene the obligation under art 2 of the CROC to take all appropriate measures to ensure children are protected against all forms of discrimination.¹⁰

4. Comments regarding consultation method

The Law Society notes that Portfolio Committee 3 – Education has provided two ways for interested parties to provide a submission on the Bill. Organisations or people with specialist knowledge have the option of providing a written submission. Other interested individuals have been invited to submit their comments through a questionnaire on the SurveyMonkey platform.

⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (“ICCPR”) art 18(d).

⁸ UN General Assembly, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna, A/CONF.157/23 (25 June 1993), 5.

⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 16 January 1990) art 3.

¹⁰ *Ibid* art 2.

As a preliminary point, the Law Society is of the view that any interested member of the public should be entitled to make a written submission to a parliamentary inquiry, not merely organisations, or those with specialist knowledge in the field.

In relation to the questionnaire, we note that design is crucial. As the Australian Bureau of Statistics has noted, if a questionnaire is not-well designed, it can have adverse effects on the quality of information obtained.

A poorly designed questionnaire can be the biggest source of non-sampling error (either directly or indirectly). The questionnaire can influence the response rate achieved in the survey, the quality of responses obtained and consequently the conclusions drawn from the survey results.

Questionnaire design should be started by considering the objectives of the survey and the required output, and then devising a list of questions to accurately obtain this information. Careful consideration should be given to a number of factors including the types of questions to be asked, the questionnaire wording, the structure and design of the questionnaire and testing the questionnaire to ensure that quality data is collected.¹¹

Law Society members have raised concerns in relation to the high proportion of 'closed' questions in the questionnaire prepared for this inquiry, many of which only permit a yes/no response. Given the identified potential for questionnaire design to influence the quality of information obtained, we suggest that the Portfolio Committee No. 3 – Education ensure that any future questionnaires facilitating public input for parliamentary inquiries are informed by research design expertise, if this is not already the case.

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Juliana Warner', followed by a horizontal line.

Juliana Warner
President

¹¹ Australian Bureau of Statistics, *Questionnaire Design*
<<https://www.abs.gov.au/websitedbs/D3310114.nsf/home/Basic+Survey+Design+-+Questionnaire+Design>>.