NSW Legislative Council Hansard (Proof)

Anti-Discrimination Amendment (Equality in Education and Employment) Bill

Extract from NSW Legislative Council Hansard and Papers Thursday 13 October 2005 (Proof).

Second Reading

Ms LEE RHIANNON [3.15 p.m.]: I move:

That this bill be now read a second time.

The Anti-Discrimination Amendment (Equality in Education and Employment) Bill is about inclusion, equality and fairness. The Anti-Discrimination Act 1977 is one of the finest achievements of this Parliament, but it is not perfect. It contains some loopholes that allow legal discrimination to continue. The bill seeks to remove those loopholes. At present a student at a private school in New South Wales can legally be expelled for coming out as gay or lesbian. Imagine that—a young person, grappling to come to terms with his or her sexuality, perhaps struggling to deal with the emotions and confusion involved, is expelled for no other reason than his or her sexuality. At present a private school can legally fire a teacher because his or her marriage ends in divorce. In 2005 you would hardly believe that it could be the case, but it is. In 1977 this Parliament decided that it was unacceptable generally to discriminate on the grounds of marital status. However, in 2005 private schools can still do so. The Greens believe that that is a disgrace.

Further, at present, public schools in New South Wales accept every student who enrols. That is their great strength. Yet private schools are legally entitled to turn away a prospective student if that young person has a disability. Public schools are not allowed to discriminate against those with a disability, and rightly so, but private schools remain free to do so. The irony, of course, is that many private schools are better placed to afford the costs involved than the hard-pressed public school system. The Greens believe that these legal discrimination loopholes are morally repugnant. The principle upon which the Anti-Discrimination Act is founded—embodying the values of inclusion, equality and fairness—cannot be qualified or limited. Discrimination is either right or it is wrong. We say that it is wrong. It is a nonsense to have one rule for some and another rule for others.

There has been some misinformation about this bill, which is obvious from the number of form letters I have received inspired by groups such as the Christian Democratic Party. Let us be clear about what this bill does not do—it does not impinge upon religious freedom, and it does not limit the free exercise of religion. The existing section 56 of the Act is largely untouched. This bill does not seek to interfere in the internal affairs of churches or religious organisations. However, when religious organisations interact with the public as service providers, businesses or de facto government agencies the ordinary rules of society ought to apply. There is a clear and obvious distinction between religious organisations on the one hand, and schools, charities or businesses operated by religious organisations on the other. Moreover, any suggestion that the Greens would ever seek to limit religious freedom betrays a total lack of understanding of our core values.

The Greens stand strongly and proudly for freedom of religion, of association and of speech. But that does not mean that schools or charities, or businesses operated by religious organisations should not have to conform to normal, social standards. It is the proper role of Parliament to set those social standards, to set rules for fairness, to promote equality, and to protect the disadvantaged. That is what Parliament did in 1977 when it passed the Anti-Discrimination Act. That is what we ought to do today. This bill also seeks to remove the arbitrary distinction between businesses that employ five or fewer staff and those that employ six or more. There is no logical or credible basis for this distinction.

The Act already contains provisions to make life easier for businesses if circumstances merit it, and we do not propose to change those provisions. I will go through the provisions in the bill in order to explain exactly what they do and what they do not do. The first substantial amendment relates to the deletion of paragraphs (b) and (c) of section 25 (3). That section of the Act deals with discrimination on the grounds of sex. Section 25 deals specifically with applicants and employees and paragraphs (b) and (c) of subsection (3) exempt respectively businesses employing five or fewer staff and private educational authorities. Of course, I have been referring to private educational authorities as private schools. The great majority of them are, but it is equally applied to private universities and so on.

By deleting paragraphs (b) and (c) of section 25 (3), private schools and small businesses would not be able to discriminate on the grounds of sex when hiring staff. There is a related amendment to paragraph (a) of section 31A (3), which seeks to remove the right of private schools to discriminate against students on the grounds of sex. Of course, this applies only in co-educational schools. Paragraph (b) of section 31A (3), which protects single sex educational institutions from the provisions of this Act, would remain. This amendment is important because it is not just about admission to a school; it is also about how students are treated within a school. Paragraph (a) of section 31A (3) states:

It is unlawful for an educational authority to discriminate against a student on the ground of sex by denying the student access, or limiting the student's access, to any benefit provided by the educational authority.

In other words, schools cannot give one sex access to benefits that the other sex misses out on. This is currently the case for public schools and there is no reason for private schools to be any different. If it is wrong to so discriminate in a public school, surely it is equally wrong to do so in a private school. This amendment is also important because of the issue of pregnant schoolgirls. Section 31A currently allows private schools to discriminate against pregnant schoolgirls, to expel them, to ask them to leave or to provide a different level of education. This creates lasting problems. If there is one thing a pregnant schoolgirl needs, it is support to finish her education. Her potential in life and the wellbeing of her family may well be determined by her level of education. It is shameful that a school would abandon one of its students when so vulnerable, but it does occur. This bill is necessary to put a stop such practises.

Equivalent amendments are proposed for sections 38C and 38K relating to discrimination on transgender grounds. In New South Wales it is unlawful for a public school or a business with six or more staff to discriminate on transgender grounds with regard to employment or education. The bill would extend this protection to private schools and small businesses. The principle remains the same: either it is morally right to discriminate on transgender grounds, or it is morally wrong. The Greens say that it is wrong. Either way there is no logical basis to distinguish private schools and small business from the rest of society. The normal social standards ought to apply.

I refer next to amendments to sections 40 and 46A, which relate to discrimination on the grounds of marital status. It is truly remarkable that in 2005 discrimination based on marital status is legally tolerated. The amendment to section 40 would remove the loophole that allows small businesses and private educational authorities to discriminate in employment based on marital status. That loophole is a relic of a different time, and it is offensive to say the least. It harks back to the period in the nineteenth century and early twentieth century when women teachers were required to resign when they married. Thankfully, today the idea that one's marital status is irrelevant to one's professional abilities is a broadly accepted notion. It is an accepted social standard with which all in society ought to comply.

It is worth noting that section 46 would remain, creating an exception in the employment of a married couple. This is another example of the commonsense exceptions contained in the Act, which the bill leaves untouched. The amendment to section 46A would remove the loophole, allowing private educational authorities to discriminate in education on the grounds of marital status. This is a less common problem, although I am sure it does arise from time to time. Nevertheless, the same principle applies—discrimination is either right or wrong, and if it is wrong in a public school then it ought also to be wrong in a private school. The next portion of the bill relates to discrimination on the grounds of disability, an issue of tremendous importance to the Greens. The bill amends section 49D to close the loophole that allows small businesses and private education authorities to discriminate in employment based on disability. In this context it is essential to note that the bill does not amend section 49D (4), which states:

Nothing in subsection (1) (b) or (2 (c)—

which is about hiring and firing—

renders unlawful discrimination by an employer against a person on the grounds of the person's disability if taking into account the person's past training, qualifications and experience relevant to the particular employment and ... all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

(a) would be unable to carry out the inherent requirements of the particular employment, or

(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer.

Under this bill the section 49D (4) exception would be available to small businesses and private educational authorities. They would not be required to suffer unjustifiable financial hardship or to employ a person in a role that the person cannot fulfil. So there should be no concern about the burden that the bill might place on small businesses that could not, for example, afford the cost of installing a wheelchair ramp or something similar. No-one is trying to send small businesses broke—far from it. Nevertheless, people with disabilities deserve to be supported by this Parliament. If it is at all possible financially for businesses to comply with the Act, then they ought do so. That should apply regardless of the arbitrary threshold of six employees or more.

Discrimination is either right or wrong in principle and it is silly to pretend that it is suddenly okay if there are only five employees. The bill amends section 49L, which is also about discrimination based on disability but in relation to education. Section 49L (1) makes it unlawful for an educational authority to discriminate by refusing

or failing to accept an application for admission as a student, and also in the terms on which it is prepared to accept the student. But paragraph (a) of section 49L (3) exempts private educational authorities, and this bill will remove that exemption. This is an important issue.

One of the great and enduring strengths of the public school system is its diversity. Children grow and develop in an environment of tolerance and understanding. Difference is minimised and normalised. Private schools, on the other hand, remain free to discriminate as to whom they accept as students. They can refuse to enrol a student with a disability. This sends the opposite message—that that difference does not need to be tolerated or accepted and that some people are more deserving than others. It is an antisocial message. Ultimately it would be to the great benefit of the private system and society generally were private schools forced to accept students regardless of disability. It is important to note that subsections (4) and (5) of section 49L are untouched by the bill so that unjustifiable hardship exceptions would apply. A private school would not be forced to enrol a student with a disability if it would suffer unjustifiable hardship in doing so. So there is no need to be concerned that small, private schools might be unable to afford the extra resources required.

People with disabilities can be amongst the most vulnerable in our society. Our role as members of Parliament is to protect the vulnerable and to ensure that fair and decent social standards apply. The application of anti-discrimination rules to small businesses and private educational authorities is a logical extension of this role.

The bill next deals with discrimination against carers. Carers are defined in section 49S of the Act, and include persons with responsibility to care for or support a child or other family member who requires care and support. This is an important issue. I do not often agree with the Prime Minister, but when he described the work-family balance as a "BBQ stopper", it was one of those rare occasions when I did. Most families struggle to balance work with looking after children and perhaps an elderly relative. If we are to have healthy, functioning families, it is essential that Parliament support carers.

At present the Act prevents discrimination in employment based on a person's responsibilities as a carer. However, small businesses are again exempted, and the bill seeks to remove that exemption by deleting paragraph (b) of section 49V (3) from the Act. This would remove the arbitrary distinction between businesses that employ five or fewer people and those with six or more workers. It is important to note that the bill does not touch section 49V (4), which creates exceptions if the employee would be unable to carry out the inherent requirements of the particular employment or if the employer were to suffer unjustifiable hardship. So any threat to the viability of small business is negated. It is essential that Parliament send the strongest possible signal in support of carers. Extending their discrimination protection to small business would do that without endangering any business financially.

The next part of the bill deals with the very important issue of discrimination on the grounds of homosexuality. There can be no justification for allowing such discrimination to continue. The bill would remove the loophole that allows small businesses and private educational authorities to discriminate in employment on the grounds of homosexuality and the loophole that allows educational authorities to discriminate in education on those same grounds. The notion that someone could be judged as being suitable or unsuitable for a job based on his or her sexuality is plainly offensive. Objections have been raised with me about employing gay men to work as teachers. Such sentiments are ignorant, backward and plain wrong. Of course, gays and lesbians are free to teach in public schools and their sexuality generally remains their own business. I challenge any member to point to evidence of any detrimental impact whatsoever in that regard. There is no such evidence because sexuality is irrelevant to one's teaching abilities.

In 2002 the Queensland Government amended its anti-discrimination legislation and now, in this respect at least, is ahead of New South Wales. Private schools in that State are not allowed to discriminate against gay or lesbian teachers unless their conduct is contrary to the religious values of the school. In other words, there is a kind of "don't ask, don't tell" policy. That is certainly imperfect, but it is better than the state of affairs in New South Wales. The fact that Queensland, which is generally regarded as a socially conservative State, can adopt such a law shows just how out of step with mainstream views the New South Wales Act is.

I have also heard it argued that it could be disruptive to a small firm if other staff had to tolerate a gay man or lesbian at work. Such arguments usually reflect only the homophobia of the speaker. But they also miss the point entirely. It is our responsibility as a Parliament to set decent social standards of behaviour and to reinforce and promote the good in our society. I believe Australians are inherently tolerant and fair-minded. In fact, in 2005 the Act probably lags behind community sentiment. We should send a clear signal in favour of tolerance and fairness.

As regards discrimination in education, this amendment is crucial if we are to address rampant homophobia in our society. As we all know, schoolyards can be intolerant places and when prejudice is reinforced officially and legally it sends a message to kids that prejudice is legitimate. It institutionalises prejudice and intolerance, which is entirely the wrong way to go. A Newspoll survey commissioned by the Australia Institute for its discussion paper "The Accountability of Private Schools to Public Values", published in August 2004, tested public attitudes

on this question. Some 89 per cent of those surveyed disagreed with the proposition that "private schools should be able to expel students because they are gay". Only 8 per cent agreed with the proposition and 4 per cent were unsure. So clearly majority opinion is with the Greens on this issue.

Private schools should not be allowed to discriminate against gays and lesbians. I challenge any member who believes otherwise to say so and to explain why during the second reading debate. It would be fascinating to hear those arguments. I do not see how one could sustain that view without arguing explicitly that there is something wrong with being gay or lesbian. If such sentiments exist here, let us hear them and let us debate this issue.

The final important amendment in the bill is new section 56 (2), which deals with religious bodies. To put this in context we must understand section 56. It says that nothing in the Act affects the ordination or appointment of priests, ministers of religion or members of any religious order, the training or education of those seeking ordination or appointment as such, the appointment of any other person in any capacity by a body established to propagate religion or any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion. So religious bodies are exempted from the Act in the widest possible terms. The bill does not change the existing wording in section 56. However, it adds a new subsection. It does not operate so as to permit unlawful discrimination in the provision of services—such as social, charitable, welfare or similar services—to the public or in the provision of primary, secondary or tertiary education.

Let us be clear about the intention of the bill. The internal affairs of religious bodies will remain exempt from the Act. Issues such as the ordination of priests or internal church practices or doctrines are not subjects of this bill. The free exercise of religion is not impinged upon in any way whatsoever. The bill seeks to bring within the Act the activities of religious bodies only when interacting with the public. Many religious bodies own and operate services such as employment services, charities or aged care facilities. Those agencies should have to comply with the Act when providing services or selling goods and services to the public. Normal social standards should apply.

For example, when the Howard Government privatised the old Commonwealth Employment Service many private agencies stepped in to offer employment services to the public—usually with Commonwealth Government funding assistance. Many of these agencies are owned by or affiliated with religious bodies. At present section 56 allows those agencies to refer a straight man to a job vacancy in preference to a gay man, for example. Another example of the need to amend section 56 can be found in the area of aged care. Many aged care facilities are owned by religious bodies and there is a significant ongoing problem with discrimination against gay, lesbian and transgender applicants for employment in such facilities. This causes real hardship, particularly as it can be extremely difficult to find suitable aged care. These are glaring loopholes, and I suggest that does not reflect the original intention of section 56.

There is a very clear distinction between the free exercise of religion within religious bodies and the provision of goods and services, including education, to the general public. The principle of freedom of religion dictates that Parliaments should not attempt to legislate religious practice.

It is equally important to note that parliaments have responsibility to legislate to set standards for behaviour in general society. Those two ideas are not inconsistent. Discrimination is destructive. It marginalises, divides and limits human potential. The alternative to discrimination is a fair go: giving everyone a fair go to get a job or succeed at school regardless of gender, sexuality, marital status, disability and so on. The Greens believe in the power of government. Not in a utopian sense: not to legislate for perfect outcomes or to eliminate prejudice, but to articulate, promote and defend a vision for society based on the very best in our nature—a vision that uplifts the human spirit and shows us what we can be. The Anti-Discrimination Act embodies that vision.

No-one believes that the simple passing of a bill will, in itself, eliminate discrimination. But it is a vital step. The loopholes in the Act legitimise discrimination. They send a message to society that discrimination is okay. They demean the spirit and intent of the original Act, which is one of Parliament's finest achievements. In 1977 the Parliament was bold enough to pass the Anti-Discrimination Act and set forth a vision of a fair go for all. It was brave and it was visionary. I am sure that, at the time, plenty of detractors claimed that the sky would fall as a result of this Act, but, thankfully, they were disregarded and society today is better for the passing of that legislation in 1977. In 2005 it is time to finish the job. Nearly 30 years down the track it is time to close the loopholes. It is time to extend a fair go to everyone.

Debate adjourned on motion by Ms Lee Rhiannon.