Submission No 2

INQUIRY INTO EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020

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Portfolio Committee No 3
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Inquiry into the Education Legislation Amendment (Parental Rights) Bill 2020

This submission addresses the *Education Legislation Amendment (Parental Rights) Bill 2020* (NSW) under consideration by the Legislative Council Portfolio Committee No. 3.

Summary

Overall the Bill is neither necessary nor administratively viable.

It addresses a non-existent problem. Neither common law nor the *Education Act 1990* (NSW) and other legislation derive parents and guardians of primary responsibility for the development among children of 'ethical and moral standards, social and political values and an understanding of personal identity, including in relation to gender and sexuality'.

In ostensibly fixing that problem the proposed legislation disregards the reality of what is taught in Australian schools, how teaching occurs and why it occurs. It is contrary to a range of international agreements such as the Convention on the Rights of the Child and the International Convention on Civil & Political Rights. It is contrary to community expectations regarding education, ie young people grow by encountering ideas and values with which they are unfamiliar and by developing independence. The Bill seeks to prohibit expression of an ideology. In doing so it is a manifestation of ideology that disregards human rights, the consensus within the medical and scientific communities regarding identity, and extensive case law at both the national and state levels.

The Bill cannot be successfully implemented. It will result in litigation, unhappiness and disharmony. It should be rejected by the NSW Parliament.

Basis

The submission reflects my teaching of law at the University of Canberra. I have doctoral and other qualifications relevant to the Committee's inquiry, alongside acknowledgment in a range of reports by law reform commissions, parliamentary committees, human rights and regulatory bodies.

The submission does not represent what would be reasonably construed as a conflict of interest. It does not purport to speak for the trans community.

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Inquiry into the Education Legislation Amendment (Parental Rights) Bill 2020

This Submission initially contextualises concerns regarding the *Education Legislation Amendment (Parental Rights) Bill 2020* (NSW) and then comments on specific features of the proposed legislation. It concludes that the Bill is not necessary or appropriate. It further concludes that the Bill is legally and administratively unviable.

Context

Education is a basis of individual and collective flourishing. It involves equipping students with skills, exposing students to ideas and values, and fostering respect for people who do not necessarily share the views or have the same attributes as those of a particular student. On occasion students will encounter ideas that they find confronting. They will encounter people who are different from themselves, for example have

- different religious, ethnic, political or other affinities
- different physical and intellectual capabilities
- different personal circumstances, such as wealth, parental expectations regarding educational achievement, and advantageous family connections.

That is reflected in a range of international agreements, with the Convention on the Rights of the Child (CROC) for example stating that 'education of the child shall be directed to' –

> (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
>
> (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>
> (c) the development of respect for
>
> - the child's parents,
>
> - his or her own cultural identity, language and values,
>
> - the national values of the country in which the child is living, the country from which he or she may originate,
>
> - civilizations different from his or her own;
>
> (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

It is also reflected in Australian frameworks regarding the education of young people, for example Goal 2 of the 2009 Melbourne Declaration on Educational Goals for Young Australians and the Personal & Social Capability facet of the Australian Curriculum.

In making sense of the Bill it is important to recognise that Australia is a pluralist (aka multicultural) society, with a wide range of backgrounds and diversity in family structures (including blended families and families in which both parents are of the same gender). It is also important to recognise that NSW and other law acknowledges diversity regarding sexual affinity (a same sex affinity is for example not regarded as a disability, a medical disorder or a crime). That law acknowledges diversity in bodies, for example does not regard intersex status as a disorder that must be 'fixed'. It does respect the choice of individuals to transition from one sex to another, reflecting a recognition that the assignment of sex at birth is not definitive

and that the well-being of an individual may be predicated on what the Bill appears to characterise as 'gender fluidity'.

Respect for that pluralism is inherent in a wide range of human rights enactments at the Commonwealth and state/territory level.

It is also inherent in enactments and case law that deal with

- the family,
- the autonomy of individuals (including that of young people through recognition of Gillick Competence about life decisions),
- birth and marriage registration,
- passports and other identity documents,
- employment,
- law enforcement,
- the regulation of health practitioners,
- vilification, and
- education.

As discussed below, Australian and international law recognises the importance of the family and the role of parents or guardians but does not regard parentage as something that trumps all rights of the child. That law does not regard religious adherence as something that trumps the rights of the child or of an adult. It does not enshrine a particular religious doctrine or belief as representing an exclusive truth. It does not privilege any faith by giving specific doctrinal tenets or broader values a freedom from critique.

Education that is consistent with the needs of children and the realities of the contemporary economy inevitably involves encounters with ideas (such as evolution, gender equality, female autonomy and scepticism about magic) that some people dislike or deny. The public education system expressly encourages students to think critically rather than blindly accept statements made by teachers, journalists, other authority figures and members of parliament. The system seeks to build capability rather than stifling individuals in cotton wool.

In making sense of the Bill it is also important to recognise that NSW has a pluralist education system. Importantly, that system has substantial government support (in other words through grants and tax concessions) of private education institutions that might operate under the auspices of a religious entity. Children are not conscripted into state schools. Parents/guardians have scope to send children to non-government schools in which teaching might emphasise values – such as disrespect for gay people and for women – that are inconsistent with law and the values of the broader community.

That teaching, and the expression of doctrine by religious entities, might denigrate anyone who has a same sex affinity (stigmatise a gay teen or gay parent as sick, evil, headed for hellfire). It might feature practice such as 'gay conversion therapy'. It might also denigrate a young person who does not fit into what the Bill appears to assume is a neat binary identity (ie the medically uninformed belief that everyone is either physically 'male' or 'female' and must be restricted to 'male' and 'female' roles) or who experiences a gender dysphoria substantive enough for transition from one gender to another.

In making that comment I note that Australian courts in considering the best interests of the child – which are not necessarily the same as the parents' values – has recognised the

lawfulness and appropriateness of gender reassignment. Examples are *Re Alex* (2004) 31 Fam LR 503; *Re Lucy* [2013] FamCA 518; *Re Sam and Terry* [2013] FamCA 563; *Re Jamie* [2013] FamCACF 110; *Re Shane* [2013] FamCA 864; and *Re Kelvin* [2017] FamCAFC 258.

Australian courts have expressly recognised the reality of gender dysphoria; law clearly does not regard gender dysphoria as a fiction or an ideology. Courts have also recognised the reality and legitimacy of a same sex affinity. They do not construe that affinity as an illness or an ideology, irrespective of condemnation by some adherents of a faith or in a religious text.

There is no reason to believe that government schools in NSW are advocating expression of a same sex affinity or promoting gender reassignment. Teaching expressly recognises the diversity of belief. It encourages respect for diversity. It recognises the acknowledgment by Australian law and medical practice that the traditional binary and heterosexual understanding of bodies and roles is both inadequate and contrary to the flourishing of minors and adults. That teaching does not disrespect the role of parents. It does however introduce students to values that may not be endorsed by parents. It does not require students to embrace the values. It does encourage students to question assumptions and to respect the choices and needs of their peers. As such the education system is what we need for a caring and inclusive society. The Bill proposes a regime that is contrary to expectations regarding public education and that, as discussed below, is neither legally nor administratively viable.

The Bill

The following paragraphs address legal and administrative flaws in the Bill that are so serious as to require the NSW Parliament to reject the proposed legislation outright and signal an abhorrence of any similar proposals.

<u>The Bill misunderstands the three Acts</u>

The Objects of the Bill, as identified in the Explanatory Statement, are founded on a misunderstanding of current Australian law, including the *Education Act 1990* (NSW), *Education Standards Authority Act 2013* (NSW) and *Teacher Accreditation Act 2004* (NSW).

The statement indicates that amendment of the Education Act is necessary to

> clarify that parents and not schools are primarily responsible for the development and formation of their children in relation to core values such as ethical and moral standards, social and political values and an understanding of personal identity, including in relation to gender and sexuality

The Education Act, other NSW and Commonwealth enactments, and common law currently do **not** deprive parents of primary responsibility for articulating and reinforcing values and understanding. The same law does **not** deprive guardians of primary responsibility. Instead the default position is that parents/guardians have primary responsibility. There is no evidence at the state or national level of a legislative program to remove that responsibility. There is no requirement under international law to remove responsibility. What we see instead is an emphasis on what is best for the child and a recognition that the rights of the child sit alongside those of the parent/guardian.

<u>The Bill's characterisation of 'gender fluidity' lacks substance</u>

As things stand parents/guardians who have faith-based views that are at odds with the curriculum in NSW public schools are free to alert their children that they disagree with what is taught in primary and secondary schools. That guidance might well be reinforced by other relatives, by religious institutions and by influential figures such as Israel Folau. Just as importantly, parents/guardian have the ability to choose schooling provided by parochial

schools. Some of those schools emphasise teaching on the basis of particular texts that feature values that are at odds with the views of most Australians, for example the subordination of women, the denigration of 'unbelievers' and people with a same-sex affinity, or disregard of scientific theories such as evolution and geology.

The Statement indicates that the proposed legislation will 'prohibit the teaching of the ideology of gender fluidity to children in schools'. That fluidity is characterised as

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

From a medical and scientific perspective that characterisation is uninformed. From a legal perspective the statement is both flawed and abhorrent. It is at odds with Australian law. As noted above Australian statute and common law for example recognises the scope for gender reassignment, the irrelevance of gender in many situations and the legitimacy of same-sex relationships despite the Bill's assumption regarding heteronormativity. It is also at odds with the lived experience of many Australians, for example of people with a same-sex affinity and of people who legitimately identify as of a different gender in the face of denigration, incomprehension, violence and the hostility inherent in the Bill. There is no reason to believe that people are making life choices about sexual affinity or gender identity for frivolous reasons or that those choices are being determined by a teacher who read Judith Butler rather than John Finnis and St Thomas Aquinas.

There is no evidence that decisions are being determined by what is encountered in classrooms. Notably, the Bill does not seek to restrict expression outside the classroom. That is salient given that many people rely on sources such as the *Daily Telegraph*, Wikipedia, YouTube and Facebook or books in a public library for understanding issues rather than what they encounter in class.

<u>There is no evidence for a prevalent or determinative ideology</u>

The Bill centres on an unsubstantiated claim of a prevalent ideology, one that is implicitly shaping decisions contrary to the wishes of some parents.

There is no reason to believe that teaching in state schools is a matter of ideology. As noted above, students are not conscripted into state schools. Parents whose children encounter ideas such as evolution, the age of the earth (including scepticism about a Christian deity creating the world at 9am on 23 October in 4004BC), the non-subservience of women, the legal validity of same-sex marriage or the idiosyncratic nature of some dietary restrictions are quite free to inform their children that 'we do not believe that' or to enrol the children at a religious school. Parental distaste for 'gender fluidity' should not dictate what is taught in schools and how it is taught (for example the banning of textbooks that feature claims contrary to the belief of a handful of parents).

<u>Whose parents get to choose the curriculum?</u>

The Bill is intended

> to provide that schools should not usurp the role of parents – that teaching in relation to core values is to be strictly non-ideological and should not advocate or promote dogmatic or polemical ideology that is inconsistent with the values held by parents of students

The Bill does not identify what are those 'core values'. and will, I believe, be legitimately and vigorously contested in both NSW and Commonwealth courts if passed by the state Parliament.

The Bill does not indicate what is meant by 'promotion or advocacy of what is inconsistent with the values held by parents' and presumably held by guardians.

The Bill does not identify which parents determine the curriculum. Instead there is a reference to 'values held by parents of students'. Which parents? All parents? All parents at a specific school? All parents across the state? Parents whose views are at odds with most of their peers but who seek publicity by complaining and who seek to override the views of other parents?

The Bill is an invitation to discrimination

The lack of care in legal drafting means that some parents/guardians will consider that the legislation prevents the teaching of anything that is different or offensive, including –

- the equality and non-subservience of adult and minor females
- religious pluralism, in other words that respect should be given to faiths that differ from those of the parent/guardian and to people without a religious faith
- scientific explanations such as astronomy (eg that the earth rotates around the sun) and evolution
- the scientific basis and community value of vaccination.

The Bill provides no practical guidance about what constitutes the 'dogmatic or polemical ideology'.

It offers no practical guidance about identifying the 'values' that are inconsistent with those of 'parents'.

Administrative Ineffectiveness

Item 1(d) in the Explanatory Statement refers to a statutory amendment

> to ensure that curriculum, syllabuses, and courses of instruction at all levels of schooling do not include the teaching of gender fluidity and recognise parental primacy in relation to core values

Given the earlier statements that requirement is redundant.

Irrespective of the fact that it is unnecessary, it is hard to see how the recognition would be achieved. Would it for example require all textbooks and other teaching material to feature a disclaimer that 'your parents know best' and that each class begin with a pronouncement that 'your parent or guardian is the one who decides your ethical and moral standards, social and political values and an understanding of personal identity'?

Presumably, just in case anyone has forgotten, item 1(e) refers to amendment that will ensure

> all school staff - including non-teaching staff, counsellors, advisors and consultants - do not teach gender fluidity and that such staff undertake their duties and engage with students in schools in a way that recognises parental primacy in relation to core values

Inadequate drafting means the Consultation requirement is not viable

From an administrative perspective the Committee should question the requirement for schools at the beginning of each academic year to consult with parents about courses of study that will include teaching on core values

It is unclear whether that requirement mandates consultation with all parents collectively or with a representative group of parents?

What form will consultation take? Will it involve parents being able to determine the curriculum for only their children or for other children (ie the children of parents/guardians who do not have the same background and same values as another family, something that is both legal and quite common in a multicultural society)? Students will be able to opt out of biology classes, geology classes, physics classes and history classes on the basis that some aspect of the teaching is inconsistent with religious doctrine or the parent's personal values? That is not in the best interests of the child and is contrary to community expectations regarding educational goals.

The statement refers to allowing parents to withdraw students from instruction on 'core values' where parents object to the particular teaching on these matters of parental primacy. Read as a whole the Bill goes beyond any teaching that specifically refers to parental authority. Instead it appears to extend to any teaching that deals with what the unidentified parents consider to be contrary to their values. Such vagueness is a recipe for litigation. It may well result in teachers, a valuable resource, leaving the education system in response to unsubstantiated complaints/demands by a handful of parents whose views are not shared by most of the community.

What are the 'convictions' and the 'matters of parental primacy'?

The problematical Explanatory Statement exacerbates rather than alleviates problems in the Bill. Schedule 1[4] refers to a requirement that 'provision of education must be consistent with parental convictions in relation to matters of parental primacy'.

Other than some sort of statement to the effect that 'your parents know best' it is difficult to see how consistency would be achieved in practice. There is no consensus within Australia about the authority of religious doctrine or the tenets of particular faiths/denominations. The the basis for elevating one family's convictions over that of another family is unclear. Allowing one family to determine the curriculum is contrary to social harmony, will result in litigation and is inconsistent with both national and state law.

Disregard of the rights and best interests of children

The Statement refers to 'the fundament [sic] human rights of parents' in the International Covenant on Civil & Political Rights (ICCPR). That reference disregards the rights of children and teenagers under international and Australian law. As noted above, young people are recognised in that law as having rights independent of the parent/guardian.

The Higher School Certificate is not a tool for religious indoctrination

The Statement indicates that Schedule 1[5]

> adds wording to establish that courses of study for a Higher School Certificate must foster physical and spiritual development consistently with parental convictions in relation to matters of parental primacy.

It is unclear how that can be achieved and indeed whether it should be achieved.

Many Australians are not religious adherents. There is no requirement for them to be adherents. They may have a coherent and deeply-felt commitment to ethics but do not recognise 'spiritual development'. Many self-identify as secular. That is perhaps unsurprising given that religious institutions that base their authority on matters spiritual have, regrettably, recurrently behaved in ways that most Australians regard as unconscionable and that religious figures have faced litigation (and in numerous instances are in prison for criminal offences) over sexual abuse of adults and minors founded on their authority as spiritual guides.

The wording is very unclear. Is the expectation that there will be a discrete spiritual component in one course? Is there to be a spiritual component in every course? What will the component comprise? Will it enshrine the authority of the father (irrespective of the reality that many children do not have a father, for example because of death or divorce)? Will it require reference to a specific religious doctrine? Will children be able to opt out of doctrinal education in any/every course?

Given the body of international and domestic law referring to the rights of children, why is the statement restricted to 'physical and spiritual development' given that many parents in aspiring to act in the best interests of the child are conscious of intellectual development and – very importantly – are seek to foster the resilience, health, happiness and sociability of the child. Those attributes are salient because faith-based denigration of people who are different results in self-harm, depression, disengagement, fear and even violence that blights the lives of vulnerable young people and leaves scars that are apparent in adulthood.

I have referred above to scope for parents to send their children to non-government schools. Given comments about pluralism that scope is appropriate. It should not however determine the content of the state-wide Higher School Certificate and 'parental primacy' cannot be used as a trojan horse for religious adherents to impose values on their secular peers.

Conclusion

The Bill as presented to the Parliament is neither necessary nor coherent. It is so deficient as to preclude implementation in ways that most of the community would consider to be legitimate. It appears likely to be exploited by a minority of parents at the expense of other families and without endorsement by the overall community. It cherry-picks one of the international human rights agreements. It egregiously ignores Commonwealth and NSW law. It will foster disharmony and litigation. It is a manifestation of 'gesture politics' rather than a practical response to an actual problem. Most importantly, it will not meet the needs of children in NSW, in other words people with rights to explore, grow and not be condemned because they are different to the beliefs/values of a minority whose assertion of authority is based on religious dogma that is not accepted by most Australians.

Readers of the Bill, 2nd Reading Speech and Explanatory Statement might be forgiven for thinking that the Bill is a gesture aimed at securing media attention and building a constituency among people who wish to return to the 1830s rather than a substantive proposal for improved public administration and community wellbeing.