

**INQUIRY INTO EDUCATION LEGISLATION
AMENDMENT (PARENTAL RIGHTS) BILL 2020**

Organisation: Anglican Church Diocese of Sydney

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Anglican Church Diocese of Sydney

26 February 2020

The Director, Portfolio Committee No. 3,
Parliament House, Macquarie Street, Sydney NSW 2000.

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

Dear Director

Submission on the Education Legislation Amendment (Parental Rights) Bill 2020.

1. This submission is on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 270 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.
2. We welcome the opportunity to make this submission on the *Education Legislation Amendment (Parental Rights) Bill 2020* (NSW) (the Bill) and we give consent for this submission to be published.
3. Our contact details are as follows.

Full Name: The Right Reverend Dr Michael Stead

EXECUTIVE SUMMARY

4. While we support certain key principles that underpin the Bill, we do not support the Bill in its present form as an appropriate way to implement these principles.
5. There are two key principles underpinning the Bill which we strongly support.
 - a. *Parental Rights*.

As its accompanying Explanatory Note clarifies, the *Education Legislation Amendment (Parental Rights) Bill 2020* (NSW) (the Bill) seeks to give effect to Article 18(4) of the *International Covenant on Civil and Political Rights* (ICCPR), “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”.
 - b. Education should be neutral and objective.

The Bill seeks to ensure that add “teaching in relation to core values is ... strictly non-ideological and should not advocate or promote dogmatic or polemical ideology that is inconsistent with the values held by parents of students”.
6. However, we do not support the means by which the current Bill seeks to implement these principles. The proposed definition of “gender fluidity” is imprecise and too expansive, and the prohibition of any teaching about this topic impinges on the freedom to express information, ideas or opinions free of restrictions.
7. We recommend that the Government not proceed with this Bill, and instead bring forward a new Bill to ensure the protection of rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, and to ensure that education in NSW Schools in relation to sexual orientation and gender identity is neutral and objective.

PARENTAL RIGHTS

8. Existing section 26 of the *Education Act 1990* (NSW) (the Act) provides a regime by which parents may request an exemption for their children on ‘religious’ grounds. It states:
 - (1) The parent of a child enrolled at a government school may give the Secretary written notice that the parent conscientiously objects on religious grounds to the child being taught a particular part of a course of study.
 - (2) The Secretary may accept any such objection and grant a certificate exempting the child from attending classes relating to the part of the course concerned if satisfied that the objection is conscientiously held on religious grounds.

(3) A certificate of exemption under this section may be given subject to conditions.

(4) A certificate of exemption under this section may be cancelled by the Secretary.

9. The New South Wales Government has not issued any policy that provides content to or otherwise clarifies the scope of this right of conscientious objection. To that extent, New South Wales law fails to adequately outline the grounds upon which, and the procedures by which, parents may exercise their right to ensure that the education of their children in State institutions conforms with their religious *and moral* convictions.

10. We draw to the attention of the Committee the stringent requirements that apply to the rights enshrined by Article 18(4) (for convenience we will refer to those rights as the 'parental rights'). That clause contains the primary obligation, imposed by Australia's ratification of the Covenant, to protect the rights of parents in respect of the education of their children in international law. It provides:

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.

It will be noted that the protection is not limited solely to parental convictions in respect of the *religious* education of their children (as is the case with existing section 26 of the Act). It also extends to parents who hold a conviction pertaining to the *moral* (but not necessarily religious) education of their children.

11. As Taylor notes, although the existence of private religious schools itself gives effect to the parental right and, as such, is 'a part of institutionalised diversity within a modern pluralistic society, their existence cannot serve as an excuse for the State not to pay sufficient attention to religious and belief diversity in public school education.'¹ ICCPR Article 18(4) has two primary consequences: it grounds the right to establish private schools, and it requires the State to regard the moral and religious convictions of parents of children in State schools.

12. A significant body of international law has developed in relation to parental rights, which assists in guiding their interpretation and application. Citing the United Nations Human Rights Council, the Australian Human Rights Commission confirmed in its submission to the Expert Panel on Religious Freedom that:

the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.²

This important characteristic of the parental right distinguishes it from the general protection to religious activity provided at Article 18 (3). The fact that the right is not

¹ Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.

² Australian Human Rights Commission Submission to the Expert Panel, 14 February 2018, available at <https://humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>, cited 23 February 2021, [35].

subject to restriction serves to accentuate the foundational importance of the right of parents to provide direction in the education of their children, and its privileged place as a defining condition of free and plural democratic societies. This pivotal role has been recognised by the European Court of Human Rights (ECHR) in respect of the parallel right at Article 2 of the First Optional Protocol to the European Convention on Human Rights, wherein the Court stated that the parental right:

aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.³

The European Convention contains provisions that are modelled on the United Nations framework and United Nations organs frequently look to the European jurisprudence in interpreting obligations under the ICCPR. Decisions of that court have been highly influential in the Views of the UNHRC issued pursuant to the First Protocol of the ICCPR. To that extent, decisions of the ECHR, although not-binding in respect of the international law Australia has ratified, may be informative of Australia's treaty obligations.

NETURAL AND OBJECTIVE

13. International human rights law requires that State provided instruction be 'neutral and objective' in matters relevant to the religious and moral education of children,⁴ and that it does not 'pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.'⁵ The ECHR has set out the following standard for the provision of religious education and sex education:

The State ... must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.⁶

14. Importantly, international human rights law recognises that parents may express the parental rights in respect of the entire public school curriculum, including not only in religious education, but also in sex education.⁷ The seminal judgement in this area within the jurisprudence of the ECHR is *Kjeldsen, Busk Madsen and Pedersen v*

³ *Kjeldsen* [49].

⁴ *Hartikainen et. al v Finland* Communication No. 40/1978; *Leirvåg* U.N. Doc. CCPR/C/82/D/1155/2003 Communication No. 1155/2003 3 November 2004 (*Leirvåg*); UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (*Freedom of Thought, Conscience or Religion*), 30 July 1993, CCPR/C/21 Rev. 1/ Add.4.

⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23 (*Kjeldsen*) [53].

⁶ *Kjeldsen* [53].

⁷ *Kjeldsen* [51]; *Jiménez Alonso and Jiménez Merino v. Spain* (*dec.*), no. 51188/99, ECHR 2000-VI (*Alonso*); *Dojan and Others v. Germany* (*dec.*), nos. 319/08 and 4 others, 13 September 2011 (*Dojan*); *Appel-Irrgang and Others v. Germany* (*dec.*), no. 45216/07, ECHR 2009 (*Appel-Irgang*).

Denmark (Kjeldsen). In rejecting the contention of the State party that the Article 2 only extends to religious instruction, the Court affirmed that the parental right applies across the entire curriculum, including sex education:

The Government pleaded in the alternative that the second sentence of Article 2 (P1-2), assuming that it governed even the State schools where attendance is not obligatory, implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character".

The Court does not share this view. Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.⁸

In an oft-quoted passage, the Court set down the following requirements:

The second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.⁹

15. The Court offered direction as to what would be considered to be inappropriate material in the context of sex education. The Court considered that the requirement that 'information or knowledge must be conveyed in an objective, critical and pluralistic manner'¹⁰ would not be met by material 'exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible'.¹¹ In a more recent matter also concerning an objection to sex education, the ECHR has held that the following boundary line is to be observed: that the information be 'conveyed in an objective, critical and pluralistic manner' and should not

put into question the parents' sexual education of their children based on their religious convictions or [influence] the children ... to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions¹²

16. Returning to the United Nations jurisprudence, as noted above, the core requirement under the ICCPR is that teaching be 'neutral and objective'. In its jurisprudence the UNHCR has been particularly focussed on avoiding the prospect of a situation in which

⁸ *Kjeldsen* [51].

⁹ *Ibid* [53].

¹⁰ *Ibid* [53].

¹¹ *Ibid* [54].

¹² *Dojan*.

‘a conflict of loyalties arose between school and home’.¹³ In *Leirvåg and others v Norway (Leirvåg)* the Committee concluded that ‘loyalty conflicts experienced by the children’ illustrated the fact that the State exemption regime in question did not comply with Article 18(4) of the Covenant.¹⁴

17. Even where a majority of parents consider curriculum content to be neutral and objective, the State must afford the ability of other parents, according to their sincerely held convictions, to legitimately disagree. The *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools (Toledo Guiding Principles)*, a statement by the Advisory Council of Experts on Freedom of Religion or Belief of the Office for Democratic Institutions and Human Rights (Organization for Security and Cooperation in Europe), have on various occasions been cited by the United Nations Special Rapporteur on Freedom of Religion or Belief as providing ‘practical guidance’ for interpretation of the content of Article 18(4) rights.¹⁵ The Guiding Principles emphasise that:

regardless how objective and unoffending state officials may think their programme is, parents and children with diverse religious and non-religious beliefs may see things differently... there are likely to be some cases in which parents identify problems that school officials have not foreseen. Various kinds of malfeasance may be occurring that have not come to the attention of the officials. The content of the curriculum may have a proselytizing or indoctrinating character that was not envisioned or anticipated, or it may be offensive or misleading in ways that only believers in a particular tradition would recognize. The teacher responsible for providing the instruction may not be sufficiently sensitive.¹⁶

18. The United Nations Special Rapporteur on Freedom of Religion or Belief has also emphasised that

According to article 18, paragraph 2, of the International Covenant, the forum internum dimension of freedom of religion or belief receives unconditional protection and does not allow any restrictions or infringements, for any reason. Even the undeniably significant aim of promoting gender equality and using school education for that purpose cannot justify forms of teaching that may amount to violation of a student’s forum internum. States are therefore obliged to exercise due diligence in this area, for instance by sensitizing teachers, employing professional mediators and establishing suitable monitoring mechanisms.¹⁷

The Toledo Guiding Principles further clarify:

as important as the state’s interest in promoting education is, education per se is not one of the permissible grounds for limiting the right to manifest one’s

¹³ *Leirvåg U.N. Doc. CCPR/C/82/D/1155/2003 Communication No. 1155/2003 3 November 2004 (Leirvåg)* [3.3].

¹⁴ *Ibid* [14.6]-[14.7].

¹⁵ A/64/159, [68]; see also A/HRC/16/53, [47], [61]; A/HRC/13/40 [40].

¹⁶ *Ibid*, [70].

¹⁷ A/68/290, [56].

religion or belief. Thus, the state's interest in carrying out its educational programme is not, in and of itself, a ground for limiting rights asserted by pupils, parents or others under international human rights provisions.¹⁸

19. Given these important precepts, exemptions are a frequently employed means by which the concerns of parents may be accommodated and to ensure that, when viewed as a whole, the teaching of a curriculum is 'neutral and objective'.¹⁹ As the Toledo Guiding Principles make clear:

states may conclude that there is some advantage in allowing sensitive opt-out rights, since this will make it more likely that the course will meet international standards, and it is often difficult for administrators to determine in advance and in the abstract whether a course or other teaching about religions and beliefs is sufficiently impartial and objective.²⁰

The use of exemptions should not however diminish the requirement that the content of the curriculum, including in respect of sex education, must itself be 'neutral and objective'.

20. We consider the comments of Professor Carolyn Evans in her review of the international human rights law pertaining to religious instruction are equally applicable to the context of the provision of sex education:

While there has been a widespread acceptance of some requirement of objectivity and neutrality in teaching about religion, there has been far less analysis of what this means in practice. There are two levels of difficulty with the principle. The first, philosophical, problem arises from the acceptance of the idea that there is some 'objective and neutral' position from which religion can be taught. For some religious parents, teaching about all religions as if they were equally true, for example, is teaching a falsehood (and a dangerous falsehood at that). Others will see such an approach as promoting secularism, which they conceive of as hostile to a religious viewpoint. This difficulty is a significant one ... It is notable, however, that the international courts and tribunals have simply assumed that objectivity and neutrality in relation to matters on which there are fundamental disagreements is both possible and desirable.²¹

21. Sex education is an area of potential conflict with the religious or moral convictions of parents. Parents may hold the legitimate view that for a teacher in authority to provide teaching on how to perform certain practices not condoned by their religious beliefs would be to affirm their equivalence as life choices. In this way the teaching would undermine the parents' religious or moral upbringing of their children. Even

¹⁸ The Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools*, (2007) available at <https://www.osce.org/odihr/29154?download=true>, cited 23 February 2021, 65.

¹⁹ *Leirvåg*, [14.3].

²⁰ Toledo Guiding Principles, 72.

²¹ Carolyn Evans 'Religious education in public schools: an international human rights perspective', *Human Rights Law Review* 8(3), (2008), 463.

where such teaching is conveyed to minors in an objective fashion, many parents may hold the legitimate view that such can affect the development of the moral or religious conscience of their children, as it could be seen by the parents or child as amounting to a statement of the moral equivalence of such behaviour. Many parents consider that exposure to views that they see as harmful to the spiritual development of their child would be inconsistent with their desire to ensure the education of their children in accordance with their religious or moral convictions. The religious or moral convictions of many parents extend to teaching on matters such as engaging in sexual practices outside of marriage, and on sexual orientation and gender identity. In particular, many mainstream religions within Australia contain teaching on these matters. Accordingly the convictions of parents in regard to these matters are to be respected in the education of their children.

22. It is further noted that, in order to exercise their parental rights, parents must be (in the words of ECHR) ‘adequately informed of the details of the lesson plans to be able to identify and notify to the school in advance those parts of the teaching that would be incompatible with their own convictions and beliefs.’²² It is also noted that in the United Kingdom it is a requirement that all schools must have a written policy on sex education, which they must make available to parents.²³ Addressing religious instruction, the Toledo Guiding Principles also make clear:

religious and belief communities should be consulted and given the opportunity to give their expert advice and express their concerns. The quality of the curriculum and the acceptance and support of local communities will be improved by such an inclusive policy.²⁴

ASSESSMENT OF THE BILL

23. Notwithstanding our support for the principles of parental rights and neutral and objective education, we do not support the means by which the current Bill seeks to implement these principles.
24. The proposed definition of “gender fluidity” is imprecise and too expansive. The Bill adds this definition of gender fluidity.

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

This definition does not adequately distinguish between the psychological experiences such as gender dysphoria or gender incongruence and the philosophical or ideological commitment to certain forms of gender theory. It is also not clear as to whether intersex conditions are or are not considered part of “gender fluidity”.

²²*Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-III, [97].

²³ <https://www.gov.uk/national-curriculum/other-compulsory-subjects>, see also English Sex and Relationship Education Guidance, page 13,

²⁴ Toledo Guiding Principles, 51.

25. Clauses 6 to 10 of the Bill insert clauses which prohibit the teaching of gender fluidity in various contexts. We do not support the blanket prohibition of any teaching about this topic, because it impinges on the freedom to express information, ideas or opinions free of restrictions.

26. Clause 10 of the Bill also inserts a new Clause 17B, in the following terms.

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.

As noted above, while support the principle that Education should neutral and objective, we do not endorse the current form of Clause 17B to achieve this end, because the concept of “parental primacy” is not sufficiently defined.

27. Clause 10 of the Bill also inserts two clauses (17D and 17E) which seek to ensure that parents are informed about what their children are taught in matters of “parental primacy” and have the opportunity to withdraw children from classes where these matters are to be taught. Again, while we endorse the principle of parental rights, we do not support the current form of these clauses.

CONCLUSION

28. There are at present insufficient safeguards to ensure that education within public schools in New South Wales gives proper regard to the religious and moral convictions of parents, as required by the internationally protected parental rights. We recommend that the Government not proceed with this Bill, and instead bring forward a new Bill to ensure the protection of rights of parents to ensure the religious and moral education of their children in conformity with their own convictions, and to ensure that education in NSW Schools in relation to sexual orientation and gender identity is neutral and objective.

We thank the Committee for the opportunity to make this submission.

The Right Reverend Dr Michael Stead

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Anglican Church Diocese of Sydney

26 February 2020