Submission No 42

INQUIRY INTO EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020

Organisation: New South Wales Council for Civil Liberties (NSWCCL)

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NSW PARLIAMENT
LEGISLATIVE COUNCIL
PORTFOLIO COMMITTEE NO. 3 – EDUCATION

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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NSW PARLIAMENT LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO. 3 – EDUCATION

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

Executive Summary

1. The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Education Committee concerning the *Education Legislation Amendment (Parental Rights) Bill 2020* ("The Bill").
2. NSWCCL considers that the Bill should not be passed. Not a single aspect of the Bill improves upon the law as it currently stands in NSW. Moreover, the Bill is an appalling contribution to public debate and education policy in this State.
3. In this submission, NSWCCL will argue that the Bill should not be passed for the following compelling reasons. The Bill:
    a. is plainly bigoted, discriminatory and cruel;
    b. is likely unconstitutional;
    c. is injurious to fundamental human rights, including freedom of expression;
    d. would harm education in NSW;
    e. is unnecessary; and
    f. violates the principle of coherence.
4. This is a remarkable combination of defects. Residents of NSW deserve better from their lawmakers.
5. We are happy to expand upon our submission if invited to provide evidence before the Committee.

Recommendation 1: NSWCCL recommends that the Committee and the NSW Parliament reject the *Education Legislation Amendment (Parental Rights) Bill 2020* **in its entirety.**

The Bill is bigoted, discriminatory and cruel

6. All students in NSW, regardless of their gender identity, should feel safe, comfortable, and encouraged to be themselves in the school environment. They should feel supported by their teachers. The nationally agreed Teaching Accreditation Standards urge teachers to develop productive and inclusive learning environments to support student participation.[1] One legislative object of the NSW education system is encouraging diversity within schools.[2] It is departmental policy that NSW public schools contribute to a society that values all people, assists and empowers those from disadvantaged groups and rejects discrimination.[3] Contrary to these laudable statements of principle, this Bill would create a learning environment hostile to gender diverse children.
7. NSWCCL recognises that issues relating to gender diversity are sensitive and remain contentious in some parts of the community and particularly in some religious communities. This is also still the case, though to a significantly lesser extent, with regards to diversity in sexual identity/orientation and marriage equality issues. But diversity of identity and experience across these areas has always been a reality for many people. Until recent times such persons were subject to great prejudice, discrimination and personal harm. It has been one of great civilising achievements of the last 50 years that some of that prejudice has dropped away and that sex and gender diverse persons are more widely accepted and have their rights protected.
8. This Bill is an assault on that progress in relation to gender diverse persons and particularly in relation to children and young persons seeking understanding, support and acceptance in the school context.
9. The Bill directly prohibits the teaching in government and non-government schools of gender fluidity as defined.[4] That term is taken to mean "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".[5]

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[1] NSW Education Standards Authority, *Australian Professional Standards for Teachers* (January 2018), accessed at <https://educationstandards.nsw.edu.au/wps/wcm/connect/9ba4a706-221f-413c-843b-d5f390c2109f/australian-professional-standards-teachers.pdf?MOD=AJPERES&CVID=>, 16.
[2] *Education Act 1900 (NSW)*, s6(c).
[3] NSW Department of Education, Policy Library, 'Values in NSW Public Schools' (Last updated 29/07/2020 PD-2005-0131-VO1), accessed at < https://policies.education.nsw.gov.au/policy-library/policies/values-in-nsw-public-schools>.
[4] *Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)*, Sch 1[10] (proposed s17A of *Education Act 1990 (NSW*)).
[5] Ibid Sch 1[1] (proposed s3(1) of *Education Act 1990 (NSW*)).

10. This definition itself is premised on a number of offensive and ignorant views. It downgrades to the status of 'belief' the reality that biological sex - itself not a simple bifurcated category -[6] and human gender may diverge.[7] Gender diverse people exist; this is both a social and scientific reality.[8] And gender is definitionally not equivalent to biological sex. Rather, that term "is socially, culturally and personally defined. It includes how individuals see themselves (gender identity), how others perceive them and expect them to behave (gender norms), and the interactions (gender relations) that they have with others."[9] Thus, gender is not merely equivalent to a person's biological sex, and social conditions play a role in gender construction. So much has been recognised in law by the High Court of Australia.[10] As the Court wrote:

> *[2] …gender should not be regarded merely as a matter of chromosomes. It is partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual…*
>
> *[23] …the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female….a person's gender characteristics may be ambiguous.*[11]

11. The definition in the Bill also offensively characterises intersex people, or those with physical characteristics that do not align with male and female norms, as 'disordered'.

12. The Bill prohibits the teaching, instruction, counselling and advice of 'gender fluidity' by an astonishing range of persons in a school environment, including non-teaching school executives, non-teaching school counsellors, non-teaching school staff, contractors, advisors and consultants, non-school based staff, contractors, advisors and consultants and

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[6] *Norrie v NSWS Registrar of Births, Deaths and Marriages* (2014) 250 CLR 490 [1].
[7] See e.g. Nature, US proposal for defining gender has no basis in science', (Online Journal Editorial, *Nature* **563**, 5 (30 October 2018) *doi: https://doi.org/10.1038/d41586-018-07238-8* <https://www nature.com/articles/d41586-018-07238-8>; Special Report: Sex, Gender and Medicine, 2017(2) *Stanford Medicine*, accessed at <https://stanmed.stanford.edu/content/dam/sm/stanmed/documents/2017spring.pdf>; Simon(e) D Sun, Scientific American, *Stop using phony science to justify transphobia*, (Blog, 13 June 2019) <https://blogs.scientificamerican.com/voices/stop-using-phony-science-to-justify-transphobia/>; Katherine J. Wu, Brad Wierbowski, 'Harvard University Graduate School of Arts and Sciences, Science in the News Special Edition: Dear Madam/Mister President', *Between the (Gender) Lines: The Science of Transgender Identity*, Blog Post, 25 October 2016, <https://sitn.hms.harvard.edu/flash/2016/gender-lines-science-transgender-identity/.>
[8] Ibid.
[9] Special Report: Sex, Gender and Medicine, 2017(2) *Stanford Medicine*, accessed at <https://stanmed.stanford.edu/content/dam/sm/stanmed/documents/2017spring.pdf>, 9; Also see Oxford English Dictionary, 'gender'.
[10] *AB v Western Ausralia* (2011) 244 CLR 390 [2], [23]; *Secretary, Department of Social Security v "SRA"* (1993) 43 FCR 299 at 325.
[11] Ibid.

volunteers at a school.[12] It should be noted that given the definition of 'gender fluidity' as "a belief", the Bill does not prohibit teaching or instruction or counselling which condemns, rejects or denies 'gender fluidity'.

13. The net effect of this extraordinary incursion onto the free speech rights of adults in a school context, of which more will shortly be said, is that gender diverse children will be unable to learn about their identity from responsible adults in a school context. Their educational prospects will be curtailed, on a matter of great personal importance, merely because their identity differs from the majority gender identities. The real and existing gender diversity of the student population will be treated with enforced and damaging silence and disrespect for the needs and well-being of those students. This is bigotry and cruelty in their distilled essence.

14. Of particular cruelty is the prohibition of school counsellors counselling gender fluidity, the effect of which would be that gender diverse children experiencing some of the most formative and vulnerable stages in their human development cannot receive adequate counselling when needed.

15. Furthermore, the Bill is discriminatory against gender diverse students and teachers in the ordinary sense of the word 'discrimination', meaning the unjust or prejudicial treatment of different categories of people.[13] There is a strong case to be made that the Bill also constitutes legal discrimination.

16. The *Sex Discrimination Act 1984 (Cth)* prohibits discrimination against persons on the grounds of gender identity, where "the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity" or if "the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.[14]

17. Gender identity is defined in that Act as "the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth."[15]

[12] Ibid Sch 1[10] (proposed s17C of *Education Act 1990 (NSW*)).
[13] Oxford Dictionary, entry for 'discriminatory'.
[14] *Sex Discrimination Act 1984 (Cth)*, 5B(1), (2).
[15] Ibid s4.

18. As noted above, the Bill prohibits the teaching of gender fluidity in NSW schools.[16] Attendant amendments require the Authority to ensure that the education and teaching legislation be developed, applied and monitored to ensure that school education does not include teaching of gender fluidity,[17] require that the professional teaching standards stipulate as a condition of accreditation of teachers and qualified persons under the *Teacher Accreditation Act 2004 (NSW)* that they must not teach gender fluidity,[18] and require that the Authority revoke the accreditation of teachers if they fail to comply with that requirement.[19]

19. By reason of these practices, conditions or requirements imposed by the Bill, the alleged discriminator may arguably be engaged in indirect discrimination under the *Sex Discrimination Act 1984 (Cth).* The decision by a person at the school to cease or avoid teaching, instructing, advising or counselling about gender fluidity, even where asked, seems to be a neutral practice, but arguably in fact operates in a manner that discriminates against members of groups with various gender identities, such as fluid or diverse gender identities.[20] It would be very likely to have the effect of disadvantaging persons who have the same gender identity (whatever it may be) as the aggrieved person, because such persons will no longer be able to learn about or discuss in any positive way their identity in the school environment, unlike gender normative children. It may be tentatively argued that, pending a case to test the proposition, the reasonableness defence established by section 7B of the Act is unlikely to aid the alleged discriminator here.[21]

20. Moreover, or in the alternative,[22] a teacher (or other staff caught by the Bill) who refuses to teach 'gender fluidity' could arguably be said to treat an aggrieved gender diverse student less favourably than a cisgender student in materially identical circumstances, because the cisgender student could successfully ask the teacher to teach them about the characteristics, history or social place of their gender identity, whereas the gender diverse student could not. However, this limb of the test for discrimination under section 5B of the Act may not be enlivened, because arguably the teacher would not be held to be treating the aggrieved person less favourably *by reason of* their gender identity, as required by section 5B(1)(a), but rather, by reason of their legal obligations under the Bill. In other words, the argument may

[16] *Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)*, Sch 1 Cl 10 (proposed s17A of *Education Act 1990 (NSW*))
[17] Ibid, Sch 2 Cl 2 (proposed s11(1)(d) of the *Education Standards Authority Act 2013 (NSW)).*
[18] Ibid Sch 3 Cl 2 (proposed s20(1A) of the *Teacher Accreditation Act 2004 (NSW)).*
[19] Ibid Sch 3 Cl 3 (proposed s24(2) of the *Teacher Accreditation Act 2004 (NSW)).*
[20] *Australian Medical Council v Wilson* (1996) 68 FCR 46
[21] *Sex Discrimination Act 1984 (Cth)*, s7B.
[22] Waters v Public Transport Corporation (1991) 173 CLR 349 at 393.

be that the teacher treats all students the same by refusing to teach gender fluidity, and is therefore not discriminating.

21. In NSW law, discrimination against persons on the grounds of the person or a relative or associate being transgender is unlawful.[23] However, since the *Anti-Discrimination Act 1977 (NSW)* lacks the 'likely effect of disadvantaging' limb of discrimination extant under the federal legislation, the same argument as just mentioned above may be run against the proposition that the Bill mandates legal discrimination.

22. In any case, NSWCCL considers it clear that the Bill is discriminatory in the layman's sense, and likely that it is legally discriminatory under federal legislation under the indirect discrimination limb. Any litigation about whether a practice is discriminatory under federal legislation is likely to be inextricably intermingled with the constitutional question about this Bill, which will be explored in a moment, because it may be argued in a pure discrimination claim that indirect discrimination is reasonable in the circumstances if mandated by a valid law of the NSW Parliament. As we will see, there is a real argument that the law would be rendered inoperative by the Constitution.

23. The bigoted, cruel and discriminatory aspects of this Bill alone should cause the NSW Parliament to reject the Bill. This is especially the case given the high levels of negative school experience, mental distress, bullying and suicide experienced by gender diverse people.[24]

The Bill is likely unconstitutional

24. Section 109 of the Commonwealth Constitution reads as follows:

> *Inconsistency of laws*
> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

25. In general, the High Court of Australia has identified three broad manifestations of inconsistency between Commonwealth and State laws under section 109, which can be understood as instances in which the state law alters, impairs or detracts from the operation of the Commonwealth law.[25] They are as follows: when the State and Commonwealth laws

[23] *Anti-Discrimination Act 1977* (NSW), S38B.
[24] Telethon Kids Institute, Trans Pathway Study (2017), accessed at <https://www.telethonkids.org.au/globalassets/media/documents/brain--behaviour/trans-pathways-report.pdf>.
[25] *Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618, 630.

cannot simultaneously be obeyed; where the State and Commonwealth laws alternatively confer or detracts from the same rights; and situations in which the Commonwealth has evinced an intention to exhaustively 'cover the field' in which the State legislation operates.[26] Where the State law is inconsistent with the Commonwealth law, the law is inoperative to the extent of the inconsistency, though the rest of the law may be saved by virtue of severance.[27]

26. The species of inconsistency at issue here is the simplest form: impossibility of obedience. There is at least a compelling constitutional argument that these two pieces of legislation would be inconsistent in the sense that it would be impossible to obey both at once.

27. We have previously outlined the gender discrimination provisions in the *Sex Discrimination Act 1984 (Cth).* We have seen that it is strongly arguable that the Bill would require teachers to discriminate on the ground of gender identity within the meaning of the Act. If that is so, it is impossible to obey both the *Sex Discrimination Act 1984 (Cth)* and the Bill.

28. Even considered alone, this constitutional concern should be enough for the Committee to recommend that the Bill not pass.

29. The committee should note that there are other possible constitutional objections to this Bill. Most notably, it is possible that the Bill would be rendered unconstitutional by virtue of the implied freedom of political communication required by the text and structure of the Commonwealth Constitution.[28] A comprehensive analysis of the legal issues at play is well beyond the scope of this submission, but it should suffice to consider that the sweeping prohibition on teaching gender fluidity in particular may place an effective burden on the freedom of political communication, and may be unlikely to be considered reasonably appropriate and adapted to achievement of a legitimate purpose in the sense of being suitable, necessary and adequate in its balance.[29]

The Bill is injurious to fundamental human rights, including freedom of expression

30. Article 19 of the *International Covenant on Civil and Political Rights 1966*,[30] states that:

[26] *R v Brisbane Licensing Court; Ex Parte Daniell* (1920) 28 CLR 23*; Clyde Engineering Co v Cowburn* (1926) 37 CLR 466*; Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151*; Ex Parte McLean* (1930) 43 CLR 472*; Jemena Asset Management (3) Pty Ltd v Coinvest* (2011) 244 CLR 508.
[27] *Western Australia v The Commonwealth (Native Title Act Case*) (1995) 183 CLR 373, 465; *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500.
[28] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; for the most recent High Court consideration of the issue, see *Comcare v Banerji* [2019] HCA 23; 93 ALJR 900.
[29] *McCloy v NSW* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 17; *Comcare v Banerji* [2019] HCA 23; 93 ALJR 900.
[30] Accessed at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

> *Everyone shall have the right to hold opinions without interference.*
> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
> *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary…*

31. In 1997, the High Court clarified that Australia's constitutionally mandated system of representative and responsible government guaranteed a minimum freedom of political communication.[31] Some degree of free expression is required for electors to make free and informed choices at elections and to participate in representative democracy. As the court said in *Australian Capital Television v The Commonwealth*:

> *Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.*[32]

32. The High Court has made it abundantly clear that when restrictions are placed on free speech, it is democracy and democratic governance itself that suffers. This is all to underscore the value that the Australian system of government places on freedom of speech.
33. It is unnecessary to fully traverse the familiar justifications for protecting this freedom; it is a value espoused universally by Australians, including, apparently, by the chief proponent of this Bill himself.[33]
34. Regrettably, the Bill's proponents have failed to recognise that this Bill severely curtails the right to freedom of expression in NSW.[34]
35. As noted, the Bill directly prohibits the teaching in all NSW schools, by all teachers, executives, employees, contractors, advisors, consultants (whether or not school based) or

[31] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[32] (1992) 177 CLR 106 [38].
[33] Mark Latham MLC, Inaugural Speech to the NSW Parliament, 8th of May 2019.
[34] The harmful effects on freedom of speech are recognised by the Legislation Review Committee Legislation Review Digest No19/57 (15 September 2020), 7.

volunteers of gender fluidity as defined.[35] This is as direct and brazen an imposition on freedom of expression as one could find. The Bill's chief proponent would have the State silence opponents of its views on gender in our schools, and not only declare, "you teachers cannot express your view" on the issue but "nor can the school counsellor, janitor, gardener, chess teacher or volunteer in the tuckshop."

36. That teachers will not be able to gain accreditation without agreeing to the condition that they must not teach gender fluidity exacerbates the problem.[36] The Bill would act as effectively as a State ideological filter for prospective teachers both who consider themselves gender diverse or who wish to teach gender fluidity. The Authority would be under a strict obligation to revoke the accreditation of any person if satisfied that the person would not comply with the obligation not to teach gender fluidity.[37] This is legal architecture redolent of authoritarian regimes, not liberal democracies like Australia.

37. No doubt it may be appropriate for the State to regulate some extreme forms of speech in schools, as it does in society generally. Yet this Bill would see the State censoring views which many people in the community, possibly a majority, would find utterly unobjectionable, and instead imposing a bigoted and ideological view of its own in our schools.

38. The free speech rights of students are also deeply compromised by this Bill. As the *ICCPR* makes clear, freedom of speech in international human rights law includes the right to seek and receive information of all kinds, regardless of frontiers. Students have the right to seek and receive information about gender fluidity appropriate to their age and context . As the Legislation Review Committee acknowledges, transgender and gender diverse students, especially within school communities which do not contain many families familiar with the idea of gender fluidity or diversity, may not have the chance to consider those ideas unless introduced to them in a school environment,[38] meaning their right to receive such ideas is offended in a particularly harmful and egregious manner.

39. It is easy to see why the proposed Bill is not only draconian in terms of its effects on freedom of expression, but unworkable and prone to cause unwanted side effects. The irony is also not lost on NSWCCL that a Bill attempting to enforce non-ideological teaching in our schools appears driven by a highly polemical and dogmatic ideology.

40. It may be acknowledged, as the Legislation Review Committee notes, that:

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[35] *Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)*, Sch 1[10] (proposed s17A of *Education Act 1990 (NSW)*); Ibid Sch 1[10] (proposed s17C of *Education Act 1990 (NSW)*).
[36] Ibid Sch 2[2] (proposed s20(1A)(b)(ii) of the *Teacher Accreditation Act 2004* (*NSW*)).
[37] Ibid Sch 2[3] proposed s24(1)(g) of the *Teacher Accreditation Act 2004* (*NSW*)).
[38] Legislation Review Committee Legislation Review Digest No 19/57 (15 September 2020), 7.

> *…statutory restrictions on freedom of speech are not uncommon and that the restrictions in question would apply in the context of the education of minors. Further, the Education Act 1990 already contains restrictions on what can be taught in schools – section 30 mandates secular instruction in government schools and bans sectarian instruction.*[39]

41. However, the restrictions on freedom of speech imposed by this Bill are entirely uncommon. NSWCCL is not aware of any similar provision in Australia to the proposed s17A of the *Education Act 1990*. Furthermore, the mandate in favour of secular instruction effected by section 30 of the that Act, including the prohibition on the teaching of "dogmatic or polemical theology", cannot be compared to the restrictions on freedom of expression in the Bill. That section neither enforces discrimination against a particular minority of students and of society, nor prohibits the teaching of sectarian religion by school chaplains or other staff, nor prohibits any teaching at all in non-government schools. That prohibition reflects the secular or at least pluralistic attitude of the Australian polity towards religion,[40] which itself is the product of the hard-won philosophical and political struggles waged over the past 500 years in favour of religious pluralism and in opposition to State sanctioned discrimination against members of non-majority religions.
42. As a matter of general human rights principles, restrictions on the rights of citizens to exercise freedom of expression can only be justified if they are rationally connected to a legitimate aim, necessary for the pursuit of that aim and proportionate in their effect. It simply cannot be argued that this Bill meets that test because of the very sweeping prohibition it imposes on every school in pursuit of a discriminatory and bigoted view not supported by the majority of parents.

Employment Rights

43. Article 6 of the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR) recognises the right of human beings to just and favourable conditions of work.[41] Article 2 of the *Discrimination (Employment and Occupation) Convention 1958* commits Australia to "declare and pursue a national policy designed to promote…equality of opportunity and

[39] Legislation Review Committee Legislation Review Digest No 19/57 (15 September 2020), 7.
[40] See e.g. <https://theconversation.com/is-australia-a-secular-country-it-depends-what-you-mean-38222>.
[41] Accessed at: < https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

treatment in respect of employment…with a view to eliminating any discrimination in respect thereof".[42] The *Government Sector Employment Act 2013 (NSW)* specifically mentions as core government sector values: considering people equally without prejudice; appreciating difference; and recruiting and promoting employees on merit.[43]

44. It is difficult to see how this Bill, which provides that the Authority must revoke the accreditation of any person if satisfied that the person has failed to comply with the requirements of the professional teaching standards - which would include the condition that gender fluidity must not be taught – can possibly be consistent with Australia's international human rights and treaty obligations or with the values of the NSW public sector.

45. The Bill would in effect create an ideological test for who could become a teacher in NSW. Practically, it may filter out those teachers who are gender diverse or are committed to inclusive teaching. This amounts for all practical purposes to discrimination in respect of employment. And in passing this Bill, the NSW Parliament would be turning away from a merit-based system in relation to the employment of teachers in NSW towards, in effect, an ideological one.

46. The "wide and ill-defined" power given to the Authority to revoke accreditations aggravates matters with respect to employment rights.[44] Given the wide definition of 'matters of parental primacy' already elucidated, the proposed power of the Authority to revoke accreditation where the teacher has not, to its satisfaction, taught in a way that recognises the primary responsibility of parents for education in matters of parental primacy, is highly concerning.[45] The Legislation Review Committee rendered the mildest of criticisms on this point, but it is one with which NSWCCL agrees: "the Committee would prefer provisions that affect rights to be drafted with more precision so that their scope and content is clear."[46]

The Bill would harm education in NSW

47. Article 13 of the *ICESCR* confers on all human beings the inherent right to education, "directed towards the full development of the human personality and the sense of its

[42] Accessed at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111>.
[43] *Government Sector Employment Act 2013 (NSW)*, s7.
[44] Legislation Review Committee Legislation Review Digest No 19/57 (15 September 2020), 6.
[45] Ibid.
[46] Ibid.

dignity…[which] shall enable all persons to participate effectively in a free society…"[47] This obligation includes the requirement that educational institutions should be accessible to everyone, without discrimination.[48] The right to fundamental education is not limited by gender.[49]

48. How can a gender diverse child fully develop their personality and sense of dignity in a school which is prohibited from teaching them about their identity and existence?

49. Furthermore, how can any gender normative child be prepared to participate effectively in a free society which includes gender diverse people if they have not been educated about such people?

50. It has been observed by the Committee on Economic, Social and Cultural Rights, which interprets and promotes the ICESCR, that "the right to education can only be enjoyed if accompanied by the academic freedom of staff and students."[50] There is no doubt that "academic freedom includes the liberty of individuals to express freely opinions…[and] to fulfil their functions without discrimination or fear of repression by the State or any other actor, [and] to participate in professional or representative academic bodies".[51]

51. How can teachers and students exercise their academic freedom when the State prohibits discussion of certain topics, and forces them to approach a wide array of controversial issues with an often nonsensical or impracticable pursuit of 'non-ideology'?

52. Furthermore, NSWCCL is seriously concerned about the proposed Section 17B in the Bill, which can only be described as ignorant, extreme and incoherent. The Bill restricts teaching on 'matters of parental primacy' to being of 'non-ideological' character in government schools - with the notable exception of special religious education, in which teachers can be as ideological as they please, including presumably on incidental non-religious issues.[52]

53. The first issue here is that the statutory phrase 'matters of parental primacy' is given such wide definition as to encompass an enormous range of issues across all areas of the curriculum which teachers or staff may wish to impart to students. '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

[47] Accessed at: < https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.
[48] General Comment 13
[49] [24] General Comment 13
[50] Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment 13 (Twenty-first session, 1999), The right to education at [38].
[51] Ibid.
[52] *Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)*, Sch 1[10] (proposed s17B of *Education Act 1990 (NSW*)).

and sexuality.[53] Thus, matters within the ambit of the definition may include a commitment to democracy, a commitment against genocide or murder, a commitment to freedom or equality (or both), a commitment against racism of any kind, etc.

54. The second issue is that the statutory language employed to define non-ideological instruction is extraordinarily confusing and unhelpful. If a teacher wishes to teach, say, the history of the Holocaust or another genocide, the teacher would be forced to avoid so called ideological teaching on the questions of the righteousness of murder, racism, democracy or genocide. Non-ideological teaching is taken to "*include general* teaching about matters of parental primacy as distinct from advocating or promoting *dogmatic* or *polemical ideology*".[54]

55. The use of the word "include" does not serve to clarify the statutory meaning one iota. The use of the phrase "general teaching" only serves to confuse; what is the meaning to be given by the public, teachers, courts and government to 'general teaching' about a topic? Relevant actors must then valiantly attempt to ascertain what is meant by "dogmatic" or "polemical". The former is generally defined as "inclined to lay down principles as undeniably true" and the latter as "involving strongly critical or disputatious writing or speech".[55] These words qualify the noun "ideology", itself defined as "a system of ideas and ideals" or a "set of beliefs characteristic of a social group or individual".[56] One may ask what a system of beliefs or ideas would amount to if it did not purport to lay down principles as undeniable; that would seem to be a relativistic or post-modern ideology of the type the Bill's proponent seems to worry about.[57] One may also ask what makes a system of belief which purports to uncover undeniable truths, or which is characterised by caustic argument, necessarily an undesirable proposition in a free society.

56. In any case, we are left with the notion that one must teach, say, the issue of the righteousness of genocide or racism, in a way that avoids promoting or advocating an idea or belief system which lays down purportedly undeniable principles or involves highly critical argument.

57. Such a belief system may be, it is posited, a belief in human rights. A corollary of this 'polemical or dogmatic ideology' is that human beings should emphatically not be subject to racism or genocide, a view accompanied by highly critical moral and ethical judgment directed towards perpetrators of racism or genocide. It is an unreal proposition that

[53] Ibid Sch 1[1] (proposed s3(1) of *Education Act 1990 (NSW)*).
[54] Ibid Sch 1[10] (proposed s17B of *Education Act 1990 (NSW)*).
[55] Oxford Dictionary, entries for 'dogmatic' and 'polemical'.
[56] Ibid entry for 'ideology'.
[57] Mark Latham MLC, Inaugural Speech to the NSW Parliament, 8th of May 2019.

expressing such views on the basis of a belief in human rights, without qualifying, juxtaposing or undermining belief in human rights in some way, may well be prohibited by this Bill. It would also be a deeply counterproductive, having regard to the values that our society wishes to convey to our children at school.

58. In order to avoid falling afoul of the Bill, teachers may resort to teaching the 'other side' of the 'debate' where no credible evidence for such a viewpoint exists, for example on climate change or the history of relations between colonists and the Aboriginal and Torres Strait Islander peoples in Australia. Or teachers may simply elect not to teach such subjects, for fear of the consequences imposed by this Bill. That would be the most damaging and likely outcome.

59. NSWCCL is also concerned that the Bill would allow a parent to object to any instruction in 'matters of parental primacy' in government schools.[58] As previously outlined, that phrase is of broad application. It is also ambulatory in its meaning; what constitutes matters of morality and ethics, political and social values or of personal wellbeing and identity are inherently susceptible of change (and expansion) over time. Allowing parents such free reign to effectively 'cancel' lessons that may not align with their social, moral, ethical or political values is contrary to the spirit of academic and intellectual inquiry and would deprive students of the opportunity to consider, adopt or challenge views different from their own, which is an essential aspect of a balanced education. Even one parent could derail an entire syllabus by objecting to the teaching of certain content, if the teacher chooses to remove content rather than countenance disruption to the class. This may occur even where the rest of the school community would have no objections to the teaching of such content. Further complications may arise where members of the parent community disagree, or even where parents of the same child disagree on what the child should be taught.

60. The obligation the Bill would place on government schools to provide a summary of content on matters of parental primacy being taught at the school, and to notify and consult with parents with respect to such content, is of further concern.[59] The time and resources government schools and teachers will be required to devote to such activities should give immediate pause to lawmakers troubled by the regulatory burden on schools. The uncertainty of the scope and extent of the obligations to summarise and consult should raise eyebrows yet higher. As Equality Australia have argued, the issue with this proposed

[58] *Education Legislation Amendment (Parental Rights) Bill 2020 (NSW)*, Sch 1[10] (proposed s17D of *Education Act 1990 (NSW)*).
[59] Ibid Sch 1[10] (proposed s17E of *Education Act 1990 (NSW)*).

provision is that, "rather than supporting our teachers to teach, this Bill requires them to spend time resolving conflicts among parents".[60]

61. It is worth noting that the obligations to engage in non-ideological teaching, instruction, counselling and advice, the ability to object to teaching on 'matters of parental primacy', and the forced consultation with parents on course content engaging 'matters of parental primacy', all apply only to government schools. Thus, the Bill displays a two-tiered approach to education policy in which non-government schools are the recipients of special privileges.

62. The NSWCCL acknowledges that international human rights law commits Australia to have respect for the liberty of parents to ensure the religious and moral education of children in conformity with their own convictions.[61] However, that right is subject to limitations which are reasonable, necessary and proportionate means for the pursuit of a legitimate aim. In NSWCCL's view, the aim of achieving an education system which provides a safe and accepting learning environment and prepares all children to participate harmoniously in a free society that contains gender diversity is an entirely legitimate one. As is the aim of achieving an education system which allows teachers and other staff the intellectual freedom, and practical space, to instil valuable moral, ethical political and social teachings to the children under their care. Children are human beings who should be afforded the opportunity to engage in a fulfilling and balanced education at school.

63. The current system is a reasonable and rational means of achieving those aims. It is necessary, to achieve those aims, that gender diverse children are not legally discriminated against; that parents cannot object to instruction on an extremely wide range of matters; and that staff are not subject to unworkable obligations to teach 'non-ideologically' on a very broad range of subjects. Furthermore, the current system does not go too far in limiting the right of parents to educate their child in religious or moral teachings because they can still do so at home, and have many other means of influencing their child's education.

The Bill is unnecessary

64. Those aspects of the Bill which are not plainly bigoted and cruel are justified on the basis of reasserting "the rights and role of parents in the moral, ethical, political and social

[60] Equality Australia, ONE NATION NSW IGNORANCE IN EDUCATION BILL, accessed 21 February 2021 from < https://equalityaustralia.org.au/ignoranceineducationbill/>.
[61] International Covenant on Civil and Political Rights 1966, Art 18(4), accessed at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

development of their children" and ensuring that children are not made "cannon fodder for the ideological and political obsessions of the education establishment".[62]

65. In NSWCCL's view, the education legislation and current departmental policy already adequately recognises the primary role of parents in their child's education.

66. The *Education Act 1900 (NSW)* clarifies that in enacting the Act, Parliament has regard to the principle that "the education of a child is primarily the responsibility of the child's parents."[63]

67. The Act declares the "intention of Parliament that every person concerned in the administration of his Act or of education for children of school-age in New South Wales is to have regard (as far as is practicable or appropriate) to…[the] provision of opportunities for parents to participate in the education of their children."[64]

68. The Act provides for the formation of parents and citizens associations, the statutory objects of which are "to bring parents citizens, students and teaching staff into close co-operation", and to "encourage parent and community participation in curriculum and other education issues where there is no school council."[65]

69. Parents already have multiple options where attempting to shape the education their child receives.

70. It is always open to the parent to engage in informal discussion with the school or teachers and attempt to seek accommodation for their moral, ethical, political or social views, at least in relation to their child.

71. Parents can form parents and citizens associations, through which they can work closely with the school and its teachers or seek to influence the curriculum.

72. If the parent objects to their child's being taught a course of study at a government school on the basis of their religious views - a very common source of strongly held moral, ethical, political or social views - the Act already allows them to provide written notice of conscientious objection to the Secretary, who can issue a certificate of exemption.[66]

73. Finally, a parent who objects to their children attending a school can apply for registration of the child for home schooling, where they have a high degree (though not total) control over the child's education.[67] If a parent has a conscientious objection to registration on religious grounds, and the Minister would be required to register the child for home schooling under the Act if an application had been made, the Minister may accept a notice of objection to

[62] NSW, *Parliamentary Debates*, NSW Legislative Council, 5 August 2020, (Mark Latham).
[63] Education Act 1900 (NSW), 4(b).
[64] Ibid s6(1)(m).
[65] Ibid ss114-116.
[66] Ibid s26.
[67] Ibid s22(1)(b), s71(1), s73(2).

registration of the child for home schooling.[68] This would do away with any minimum requirements for curriculums imposed by Part 3 of the Act, which otherwise apply to registered home schooled children.[69]

74. Furthermore, controversial issues at school are managed in accordance with the principles that schools are neutral places for rational discourse and objective study; discussion of controversial issues in schools should allow students to explore a range of viewpoints and not advance the interest of any particular group; material of an overtly political nature must not be distributed unless relevant to the delivery of the curriculum; and parents and carers should be informed about the participation of their children in curriculum delivery or school programs addressing controversial issues.[70] Principals must already ensure that where appropriate parents are notified of the participation of children in programs that address controversial issues, and provide the option for parents to withdraw children from activities addressing controversial issues where appropriate in accordance with their professional judgment.[71] Teachers must also maintain objectivity, avoiding distortion of discussion and acknowledge the rights of students, parents and carers to hold different viewpoints.[72]

75. Therefore, NSWCCL considers that these measures operate to give parents ample ability to influence their child's education at government schools.

The Bill violates the principle of coherence in the law

76. It is an important principle of legal systems that they seek to preserve a unified body of principles which are more or less coherent.[73] Even without considering the apparent inconsistency between the *Sex Discrimination Act 1984 (Cth)* (i.e. federal law) and the Bill, considered above, the Bill violates this principle because it seems inconsistent with other NSW laws.

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[68] Ibid ss75-77.
[69] Ibid s73(2)(b).
[70] NSW Department of Education, Policy Library, 'Controversial Issues in Schools' (Last updated 26/06/2020 PD-2002-0045), accessed at <https://policies.education nsw.gov.au/policy-library/policies/controversial-issues-in-schools>.
[71] Ibid.
[72] Ibid.
[73] *Miller v Miller* (2011) 242 CLR 446, [15]; see also *Sullivan v Moody* (2001) 207 CLR 562, [42], [53]-[55]; *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [100]; *CAL No14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, [39]-[42]; *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 at [289].

77. Firstly, the Bill's targeting of gender diverse students and teachers is plainly in tension with the legislative objects of the NSW education system, namely encouraging diversity within schools and mitigating the educational disadvantages arising from the child's gender…"[74]

78. Furthermore, as established above, the *Anti-Discrimination Act 1977 (NSW)* prohibits discrimination on transgender grounds.[75] Discrimination against transgender persons includes treating the person, if a recognised transgender person, as being of their former sex.[76] Vilification of transgender persons is also unlawful.[77]

79. Under the Act, transgender persons, whether or not recognised transgender persons, are those who identify as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or who have identified as a member of the opposite sex by living as a member of the opposite sex, or who, being of indeterminate sex, identify as a member of a particular sex by living as a member of that sex, and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.[78]

80. It is also a criminal offence in NSW to, by a public act, intentionally or recklessly threaten or incite violence towards a person or group on the grounds of gender identity.[79] Gender identity is defined as gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.[80]

81. These definitions accept, as a logical prerequisite, that gender fluidity exists. These provisions acknowledge that transgender people are discriminated against, vilified and incited against on the basis of their gender diverse identity, and deserve protection from the law. It is utterly incongruent for the NSW Parliament to prohibit the teaching of the belief that gender and sex are different when it continues to recognise, in law, that gender fluidity exists and is an attribute deserving of protection in our society. It is also inconsistent to on the one hand insist that gender identity is a protected attribute and on the other to deny people the ability to learn about that protected attribute at school.

82. Aside from the general legal principles at stake, the lawmaking and professional reputation of the NSW Parliament is jeopardised where the law is developed incoherently.

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[74] *Education Act 1900 (NSW)*, s6(c), (e).
[75] *Anti-Discrimination Act 1977* (NSW), s38B.
[76] Ibid s38B(1)(c).
[77] Ibid 38S.
[78] Ibid S38A.
[79] *Crimes Act 1900* (NSW), 93Z(1).
[80] Ibid 93Z.

Conclusion

83. This Bill is one of the most unworkable, authoritarian, ill-conceived and hateful pieces of legislation to have been introduced to the NSW Parliament in recent times.

84. NSWCCL can only assume that the primary motivation behind its introduction is to reignite the 'culture wars' fought over both the issue of gender diversity and the content of the school curriculum in NSW, given the Bill cannot represent a serious attempt to reach a balanced or just outcome with respect to education policy.

85. It is the usual practice of the NSWCCL, when it opposes a Bill in its entirety as harmful and unnecessary, to nonetheless put forward ameliorating amendments, if it seemed probable that the Parliament will, for political or other reasons, pass the Bill in some form. In this case we cannot do that. We cannot identify any positive educational or social outcomes resulting from its implementation. In our view there is only one responsible recommendation in relation to this Bill: that it be withdrawn or rejected by the Committee and/or Parliament.

Recommendation 1: **NSWCCL recommends that the Committee and the NSW Parliament reject the** *Education Legislation Amendment (Parental Rights) Bill 2020* **in its entirety.**

This submission was written by Jared Wilk, Vice-President and Convenor of the NSWCCL Civil and Human Rights Action Group with assistance from Dr Lesley Lynch, NSWCCL Committee member, on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Committee.

Yours sincerely,

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Secretary
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NSWCCL would like the submission to be published on the Committee's site. We would be happy to discuss further at a public hearing if the Committee would find that useful.