

Submission
No 49

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

Organisation: Australian Lawyers for Human Rights

Date Received: 28 February 2021



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28 February 2021

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

Dear Mr Hanna

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

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make the following submissions to the inquiry (the **Inquiry**) into the *Education Legislation Amendment (Parental Rights) Bill 2020* (the **Bill**).

1. Summary

The long title of the Bill states that it will create an:

Act to amend the Education Act 1990, the Education Standards Authority Act 2013 and the Teacher Accreditation Act 2004 to provide that schools must recognise that parents are primarily responsible for the development and formation of moral and ethical standards and social and political values in their children, including an understanding of personal identity and questions of gender and sexuality and to prohibit schools, teachers, and training courses from teaching gender fluidity, and for other purposes.

ALHR holds serious concerns about the **Bill** and notes **it's inconsistency with the New South Wales Government's international human rights law obligations**. ALHR warns that, if passed,

the Bill will significantly impact the human rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) young people in New South Wales (**NSW**).

The Bill:

1. Ignores law and policies which direct curricula in NSW (and across Australia);
2. Ignores the fact that LGBTI young people remain some of our most vulnerable to abuse, harassment and violence; and
3. Ignores the human right of LGBTI young people to learn in inclusive, supportive environments, free from discrimination, which are enshrined in international human rights instruments to which Australia is a party.

ALHR submits that the Bill should be rejected in its entirety.

2. The Bill is contrary to NSW laws and policies directing curricula

The Bill purports to remedy an alleged issue in NSW that teachers in schools ‘teach gender fluidity’. This assertion is not based in fact. The data on which this claim is made is non-existent. Teachers are obliged by law and subsidiary codes of ethics to honour the identities of children as they identify.

Research demonstrates that social inclusion must be embedded into the school curriculum, in programs and policies. *Writing Themselves In 3* found that young people who attended a school that was supportive, rather than homophobic, were less likely to self-harm and suicide.¹ Research from *Beyond Blue* identifies this population as needing targeted and tailored support at school:

Inclusive schools were those where leadership and teachers tried to address students with their preferred pronouns, were flexible about uniform and toilet arrangements, took a stand against bullying, and aimed to be accommodating to the individual’s needs.²

In jurisdictions such as Victoria, schools are required to take reasonable steps to eliminate discrimination and support same sex attracted, gender diverse, transgender and intersex students by:

- providing a positive, supportive and respectful environment
- respecting privacy and confidentiality in relation to all students
- supporting students who want to affirm or transition gender identity at school

¹ Ibid above at 3.

² Need to find this reference

- challenging all forms of homophobia, biphobia, transphobia and intersexism to prevent discrimination and bullying³

Creating an inclusive school environment does not leave out girls and boys, but rather creates space for the diverse ways in which other children are telling us that they identify.

Contrary to this, indeed at complete odds with this, the *Bill* proposes a law to:

- (a) Prohibit schools from teaching that trans and gender diverse people exist and should be treated with respect.
- (b) Prohibit school counsellors from affirming a trans or gender diverse student or providing them with any support or referrals to gender affirming support.
- (c) Puts teachers at risk of losing their job when they support a trans or gender diverse student in affirming their identity.
- (d) Allows parents to deny their children access to lessons in public schools which may contradict their political, social or personal values, including their views about LGBTI people.
- (e) Requires schools to present discredited counter narratives when teaching classes like science or history.

ALHR submits that this is a dangerous Bill driven by fear and drafted with contempt for evidence-based best practice with respect to pedagogy and children's psychological development.

3. The Bill puts vulnerable LGBTI young people at risk

Over recent years, Australia has made progress in making our country safer for LGBT people, with strengthened anti-discrimination protections in the *Sex Discrimination Act 1984* (Cth), the removal of the 'gay panic' defence from various state legislation across Australia (including in New South Wales⁴), the passing of bills across states and territories allowing same-sex couples to adopt children and access surrogacy, and amendments to the *Marriage Act 1954* (Cth) in 2017, as a consequence of a strong "yes" vote in a national survey.

³ "Safe Schools: Guide to making your school safe and inclusive for LGBTI students" Victorian State Government Education and Training available at:

<https://www.education.vic.gov.au/Documents/about/programs/health/safeschoolsguide.pdf>

⁴ *Crimes Amendment (Provocation) Act 2014* (NSW).

While similar legislation is yet to pass in New South Wales, many States have also made progress for trans and gender diverse constituents by passing legislation which removes barriers to obtaining accurate identity documents.

Yet, this Bill flies in the face of this progress, particularly in circumstances where LGBTI youth remain some of our most vulnerable to abuse, harassment and violence.

In fact, LGBTI students represent a significant minority population: 10% of students are same-sex attracted, 4% of students are trans and gender diverse and 1.7% of students are intersex.⁵

A La Trobe University study of 3,134 same-sex-attracted and gender questioning (SSAGQ) young people, *Writing Themselves In 3*, found that:

- (a) 10% of young people reported that their school did not provide any form of Sexuality Education at all;
- (b) 40% attended a school with no social or structural support features for sexual difference;
- (c) only 19% of young people attended a school that was supportive of their sexuality; and
- (d) over a third described their school as homophobic.⁶

A survey of 564 LGBTI individuals in 2015 by the Bully Zero Australia Foundation reported that:

- (a) Over 50% of same-sex-attracted or gender diverse young people in Australia have experienced verbal abuse;
- (b) Over 15% of same-sex-attracted or gender diverse young people in Australia have experienced physical abuse; and
- (c) Over 70% of these homophobic and transphobic incidents take place in schools.⁷

Bullying and discrimination can impact on young people's mental health, self-esteem and sense of safety. This can in turn affect attendance, concentration and academic achievement.

⁵ Radcliffe, J. Ward, R. Scott, M. Richardson, S. 2013. *Safe Schools Do Better: Supporting sexual diversity, intersex and gender diversity in schools*. Safe Schools Coalition Australia.

⁶ Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., & Mitchell, A. 2010. *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, 79.

⁷ Bully Zero Australia Foundation. 2017. *What is Homophobic Bullying?* accessed at <http://bzaf.org.au/homophobic-bullying/> on 29 March 2017

The Beyond Blue report *From Blues to Rainbows* on mental health and wellbeing of Australian trans and gender diverse young people found that almost two thirds of the young people had experienced verbal abuse in response to their gender presentation or non-conformity, and one fifth had experienced physical abuse. Over 90% of young people who experienced physical abuse had thought about suicide in response to their experience.⁸

In the United States of America, a study by Kosciw, Greytak, Zongrone, Clark, & Truong, in 2018) found that:

- (a) 70.1% of LGBTQ students were verbally bullied (e.g., called names, threatened) in the past year because of their sexual orientation and 59.1% because of their gender expression, and 53.2% based on gender.
- (b) 28.9% of LGBTQ students were physically bullied (e.g., pushed, shoved) in the past year because of their sexual orientation and 24.4% because of their gender expression, and 22.8% based on gender.
- (c) 48.7% of LGBTQ students experienced cyberbullying in the past year.
- (d) 59.5% of LGBTQ students feel unsafe at school because of their sexual orientation, 44.6% because of their gender expression, and 35% because of their gender.
- (e) 34.8% of LGBTQ students missed at least one entire day at school in the past month because they felt unsafe or uncomfortable, and 10.5% missed four or more days in the past month.

In the same study, of the LGBTQ students who reported they were considering dropping out of school, 42.2% indicated they were doing so because of the harassment they faced at school.

In the same vein, compared to LGBTQ students with no supportive school staff, students with many (11 or more) supportive staff at school were less likely to miss school because they felt unsafe (20.1% to 48.8%) and felt greater belonging to their school community.

ALHR is concerned that this Bill completely ignores empirical evidence-based data and research into the safety and wellbeing of children.

⁸ Smith, E., Jones, T., Ward, R., Dixon, J., Mitchell, A., & Hillier, L. 2014. *From Blues to Rainbows: Mental Health and Wellbeing of gender diverse and transgender young people in Australia*. Melbourne: The Australian Research Centre in Sex, Health, and Society, 12

4. The Bill and international human rights law standards and obligations

A. Right to information

Children have the right to receive factual information about sexuality and gender diversity. The UN Special Rapporteur on the right to education has highlighted children's right to comprehensive sexual education without discrimination on grounds of sexual orientation and gender identity.⁹ The European Committee of Social Rights has found a violation of the European Social Charter with reference to teaching materials which were "manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted".¹⁰

As the Council of Europe has noted, "*the protection of children is sometimes evoked as an argument to block the availability of information about LGBTI people to children. The Venice Commission has stressed that such arguments fail to pass the essential necessity and proportionality tests required by the European Court. There is no evidence that dissemination of information advocating a positive attitude towards LGBTI people would adversely affect children. Rather, it is in the best interests of children to be informed about sexuality and gender diversity.*"

B. The Convention on the Rights of the Child - Australia's binding international legal obligations

Australia is a party to the *United Nations Convention on the Rights of the Child*¹¹ (the **CRC**). Australia signed the CRC very soon after its inception¹², and it has since become the most widely ratified human rights treaty in the world. The CRC remains the most ratified international human rights law convention. It forms an integral part of the framework established by the Universal Declaration of Human Rights as one of the 9 core international human rights law treaties.

By signing (on 22 August 1990) and ratifying (on 17 December 1990) the CRC, Australia, and therefore the New South Wales Government, has taken on binding international legal obligations to always uphold the **four guiding principles** of the Convention, outlined below.

⁹ Report of the United Nations Special Rapporteur on the right to education A/65/162 available at: https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Sexual_Education_2010.pdf

¹⁰ See <https://www.coe.int/en/web/european-social-charter>

¹¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

¹² Signed by Australia on 22nd August 1990 and ratified on 17 December 1990

Best Interests of the Child

Pursuant to Article 3 of the CRC the NSW Government must ensure that all actions concerning children take into account the best interests of the child or group of children as the primary consideration. The interests of others (parents, community, State) should ¹³not be the overriding concern.¹⁴

Right to non-discrimination

Pursuant to Article 2 of the CRC the NSW Government must take all appropriate measures to ensure children are protected against all forms of discrimination, irrespective of their gender or sexuality. The CRC makes it very clear that all children are entitled to the same rights without discrimination of any kind, including as individual children, groups of children or children in general.¹⁵

Right to survival and development

Pursuant to Article 6 of the CRC the NSW Government is obliged to protect and ensure the right of all children to survival and to development to their full potential and to the maximum extent possible.¹⁶

Right to participation and inclusion

Pursuant to Article 12 of the CRC the NSW Government is obliged to take steps to ensure the right of all children to express their views in all matters affecting them and give these views due weight.¹⁷

ALHR submits that this Bill very clearly and substantively undermines the four core guiding principles of the CRC. It passed, it will limit the rights of LGBTI children in NSW to:

- non-discrimination;
- survival and development to their full potential
- To expression of their views freely in all matters affecting them

It follows therefore that ALHR strenuously submits that the Bill is not in the best interests of New South Wales' children.

¹³ "LGBTI Children Have a Right to Equality and Safety," Council of Europe, 2 October 2014

¹⁴ CRC Article 3 and see <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.7.html>

¹⁵ Ibid Article 2

¹⁶ Ibid Article 6

¹⁷ Ibid Article 12

Further, ALHR notes that the Bill would impinge upon numerous other rights protected by the CRC. For instance, if passed, it would also render New South Wales in breach of its CRC obligations to:

1. Ensure that all children have access to information aimed at the promotion of their physical and mental health¹⁸.
2. Protect children from physical or mental abuse when they are in care¹⁹.
3. Recognise the rights of the child to the enjoyment of the highest attainable standard of health through education.²⁰

As UNICEF: explains

*The (CRC) establishes in international law that States Parties must ensure that all children – **without discrimination in any form** – benefit from special protection measures and assistance; have access to services such as education and health care; can develop their personalities, abilities and talents to the fullest potential; grow up in an environment of happiness, love and understanding; and are informed about and participate in, achieving their rights in an accessible and active manner.²¹*

If the Bill passes, these obligations cannot be upheld by New South Wales. Our institutions would effectively become complicit in serious human rights abuses against LGBTI children.

5. ALHR's concerns about the conduct of the Inquiry

Finally, ALHR holds significant concerns in relation to the what in which the Inquiry into this Bill has been constituted and gone about seeking the views of the New South Wales community, namely:

1. Mr Mark Latham is the Chair of the Committee conducting this Inquiry, and is therefore inquiring into his own proposed legislation. This undermines any confidence that the inquiry will objectively examine the adverse impacts of the proposed reforms on vulnerable young people.
2. The inquiry is primarily being conducted by way of an online questionnaire. ALHR is concerned that the questions appear to have been formulated in

¹⁸ Ibid Article 17

¹⁹ Ibid Article 19

²⁰ Ibid Article 24

²¹ Emphasis added. See <https://www.unicef.org/child-rights-convention/frequently-asked-questions>

such a way as to obtain self-serving data in order to further Mr Latham's extreme ideologies, and to limit the views and information that members of the NSW public can provide to the Inquiry. For instance, the questions fail to provide any means to address whether NSW should pass laws that effectively prohibit schools from abiding by Australian and international human rights standards, policies and codes of ethics, to honour the identities of children *as they choose to identify.*"

ALHR therefore calls on the Committee to treat the Inquiry results with circumspection.

6. Conclusion

No Australian jurisdiction should contemplate let alone seriously inquire into,, laws that tolerate homophobia or transphobia in schools The NSW Parliament must give due and proper weight to its international human rights law obligations concerning children. Our laws should not protect, let alone require of teachers and schools behaviour that is discriminatory, harmful and likely to most heavily impact already vulnerable LGBTIQ+ children at a time in their lives when the empirical evidence tells us they most need support within the education system.

ALHR urges all sides of politics to reject the Bill in its entirety as an egregious attack on the rights of LGBT young people.

ALHR would be very happy to provide further information to the Committee, including by appearing in person before the Committee or by submitting any further written information.

Yours sincerely

Nicholas Stewart
Co-Chair ALHR LGBTI Committee

Georgia Burke
Co-Chair ALHR LGBTI Committee

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.