



Education Legislation Amendment (Parental Rights) Bill 2020 Submission

About Freedom for Faith

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, the Seventh-day Adventist Church in Australia, and the Anglican Church Diocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

Education Legislation Amendment (Parental Rights) Bill 2020

This Bill addresses important issues about the rights of parents to have their views about morality (and sexual morality and issues of sexual identity in particular) respected and not undermined by the education system of NSW. Freedom for Faith has been greatly assisted in its consideration of the proposed Bill by comments provided by the Institute for Civil Society¹. We adopt and support that submission's recommendations for refinement and narrowing of certain provisions of the proposed Bill to make it more workable. The remainder of this submission addresses the general policy issues behind the Bill and why international religious freedom obligations support the enactment of legislation of this nature.

International Human Rights Obligations and Parental Rights

This Bill seeks to ensure NSW honours Australia's various international human rights obligations, in relation to the role and authority of parents in the ethical and moral formation of their children.

The Bill's intentions align with articles from the *International Covenant on Civil and Political Rights*:

- Article 18(4): This Article provides that parties to the 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"². The Bill is clearly consistent with this Article, as it seeks to clarify that parents (and not schools) are primarily responsible for the development and formation of their children in relation to core convictions such as moral standards. It also practically implements mechanisms by which teaching in relation to core virtues must not be inconsistent with the convictions of parents.

¹ <http://www.i4cs.com.au/>

² <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

- Article 23(1): This Article provides that the family “is the natural and fundamental group unit of society and is entitled to protection by society and the State”³. The Bill is clearly consistent with this Article, as it protects the rights of families and parents in respect of the development and formation of children.

The Bill aligns with fundamental rights set out in the United Nations *Universal Declaration of Human Rights* (UDHR):

- Article 16(3): That the family is the natural and fundamental group unit of society and is entitled to protection by the society and state. The Bill will give parents greater recognition as primarily responsible for the ethical and moral formation of their children⁴
- Article 26(3): That parents have a prior right to choose the kind of education that shall be given to their children. The Bill recognises parents’ rights in respect of matters of parental primacy and aligns well with Article 26(3).⁵

The Bill is also consistent with the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. For example, Article 5(2) provides that:

“Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.”⁶

The Bill is clearly consistent with this Article, as it provides for the education of children in conformity with the core convictions and wishes of parents. It also allows parents to withdraw students from instruction where parents object to particular teaching.

Further, it is consistent with the United Nations *Convention on the Rights of the Child*. For example:

- The preamble to the Convention, recognises that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”⁷
- Article 5: This Article provides that States Parties “shall respect the responsibilities, rights and duties of parents”.⁸ The Bill is consistent with this Article, as it seeks to respect the rights of parents in relation to matters of parental primacy.

³ Ibid

⁴ <https://www.un.org/en/universal-declaration-human-rights/>

⁵ <https://www.un.org/en/universal-declaration-human-rights/>

⁶ <https://www.ohchr.org/en/professionalinterest/pages/religionorbelief.aspx>

⁷ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁸ Ibid

- Article 14: This Article provides that “States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”⁹ The Bill is consistent with this Article, as it provides for parents to be primarily responsible for the development and formation of their children in relation to core convictions.

Where there is conflict between parents and educators in the formation of children, Australia’s treaty obligations are clear. The NSW Government should prioritise the liberty of parents to determine the ethical and moral education of their children.

These guarantees are undermined where parents are required to tacitly compete with educators and bureaucracies. This is a source of great confusion for children whose parents wish to locate their development in ethical frameworks, faith traditions and community standards reflecting their own.

Several international legal developments have clarified that instruction of children in religious and moral education must respect parental convictions, and be conducted objectively and neutrally.

The European Court of Human Rights (ECHR) has set out the following standard in the provision of religious 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.¹⁰

This limit was further defined by the courts to include ‘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, and that they 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 convictions’¹².

Further clarity is provided by the *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, who have 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.¹³

⁹ Ibid

¹⁰ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23 (*Kjeldsen*) [53].

¹¹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23 (*Kjeldsen*) [54].

¹² *Dojan v Germany* (2011)

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

These principles were developed as a tool to enhance understanding of religious freedom, religious diversity, and the growing presence of religion in the public sphere. Relevant statements from the *Principles* include:

[R]egardless 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.¹⁴

[A]s 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 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.¹⁵

Principles of this kind should guide best practice within NSW classrooms, ensuring information remains neutral, and educators and schools demonstrate a sensitivity to diverse backgrounds and religious freedom. The proposed Bill will fill an important gap in explicitly addressing these matters, bringing NSW education laws in line with Australia's human rights obligations and developments in international law.

Gender Fluidity Instruction and Parental Rights

Other provisions in this Bill address concerns that gender fluidity ideas are being presented as factually true, rather than as theoretical or ideological views.

Where children in NSW schools are subject to elements of the now-defunct Safe Schools program, it ostensibly undermines NSW Parliament's decision to abolish it in 2017.¹⁶ The Minister for Education and Early Childhood Learning at the time, Rob Stokes, advanced the view that it is the role of parents, not schools, to form the ethical and political convictions of their children. This view received bi-partisan support, with the leader of the NSW opposition (ALP), pledging the program 'would not return' if he was elected.¹⁷

¹⁴ Ibid, [70].

¹⁵ 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.

¹⁶ <https://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680>

¹⁷ <https://www.dailytelegraph.com.au/blogs/miranda-devine/miranda-live-safe-schools-gone-for-good-says-luke-foley/news-story/cb715bf0080519a3fe552129205267e6>

The NSW Government considered Safe Schools to be inappropriate material on ethical and political matters, one reason being its promotion of gender fluidity beliefs as fact (i.e. without objectivity and neutrality). It would usurp the wishes of parents if bi-partisan assurances from their political representatives were ignored by:

- The presence of objectionable teaching materials from Safe Schools, such as gender fluidity taught as fact
- A failure to regulate schools and educators continuing to teach controversial gender fluidity theories as fact

While theology and political ideologies may be considered dogmatic or polemical, it is also the case that some sex and gender ideologies may also be dogmatic or polemical.

International jurisprudence acknowledges that parents' moral and religious convictions may be asserted in respect of the entire curriculum, including sexual education, in public schools (not just in relation to religious instruction). Those rights require the State to ensure that all education is 'neutral and objective'¹⁸ and does not 'pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.'¹⁹

As Langlaude has clarified, under the International Covenant on Civil and Political Rights 1966 (ICCPR) 'States are forbidden from pursuing an aim of indoctrination that does not respect the religious convictions of the parents.'²⁰ This reflects the stated aim of the Bill.

The occasions on which the United Nations Human Rights Committee have had opportunity to consider Article 18(4) of the ICCPR have been limited. No decision of the United Nations Human Rights Council (UNHRC) has yet considered the interaction of Article 18(4) in the context of sex education, or in respect of education about sexual orientation or gender identity.

However, as recognised by the European Court of Human Rights (ECHR), the parental rights extend to the entirety of the public curriculum, including the provision of sex education. The strict application of the parental right to religious instruction, as developed within the jurisprudence of the UNHRC (as applied to NSW) is then informative of the appropriate protections that are to be afforded in respect of sex education and teaching on sexual orientation or gender identity that may conflict with the religious and moral convictions of parents whose children are being educated in public schools.

¹⁸ *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.*

¹⁹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976, Series A no. 23 (Kjeldsen) [53].*

²⁰ *The Right of the Child to Religious Freedom in International Law, Sylvie Langlaude, 87.*

Although various judgements of the ECHR have left untouched the content of curriculum on sex education, within ECHR law it remains within the permissible margin of appreciation for States to determine their own acceptable regimes (subject to the proviso that any teaching must be conveyed in an objective, critical and pluralistic manner and not comprise indoctrination).

This would extend to teaching on matters such as sexual orientation and gender fluidity. Thus, according to the principles of international human rights law developed by the ECHR, it is open to New South Wales to adopt the form of protections enshrined within the Bill (noting the margin of appreciation doctrine is not applicable under the ICCPR).

The Bill, through its prohibition on teaching 'gender fluidity' seeks to prevent the State from pursuing (in the words of the ECHR) 'an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions ... the limit that must not be exceeded'.

Relying on the conflict of loyalty analysis adopted in *Folgerø* and *Hasan and Zengin v Turkey*²¹, it can be asserted that that the Bill seeks to ensure that (again in the words of the ECHR) 'the education provided [does not] put into question the parents' sexual education of their children based on their religious convictions' and to ensure that 'children [are not] influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions'.

Failure to recognize the rights of parents to protect their children from teaching that detrimentally impacts upon the religious and moral education of their children would be a form of discrimination that is not reasonable and objective within the terms of the ICCPR.

This is because the detriment placed upon such parents arises because of their religious or moral convictions and in a way that does not occur comparably for other parents.

Contemporary Court Decisions

Recent international court decisions illustrate the cost of accelerating the adoption of gender ideologies into school curriculums, viz. the 2020 judgement of the United Kingdom *High Court in Bell v Tavistock and Portman NHS Foundation Trust and ors.*²² The Court gave consideration to a complaint by a biological female who had undergone gender transitioning to become a trans male under the advice of the Tavistock NHS GIDS Gender Clinic from the age of 16.

²¹ *Hasan and Eylem Zengin v Turkey* (2008) 46 EHRR 44, [2007] ECHR 787

²² [2020] EWHC 3274 (Admin).

Although the judgement concerned the ability of a minor to consent to the administration of puberty blockers [PB], a selection of primary findings from the judgement of the Court is illustrative of the concerns that may be held in respect of the teaching of what the Bill terms 'gender fluidity' of minors, including a lack of evidence, the possibly harmful effects, and the sudden explosion of diagnoses of gender dysphoria:

- The Court expressed surprise that data on the administration of puberty blockers [(PB)] to children was not collated 'given the young age of the patient group, the experimental nature of the treatment and the profound impact it has.'²³
- There is a concern with an unexplained recent growth in children reporting to professionals with gender identity issues:
 - o in 2011 the gender split was roughly 50/50 between natal girls and boys. However, in 2019 the split had changed so that 76 per cent of referrals were natal females. That change in the proportion of natal girls to boys is reflected in the statistics from the Netherlands (Brik et al "Trajectories of Adolescents Treated with Gonadotropin-Releasing Hormone Analogues for Gender Dysphoria" 2018). The defendant did not put forward any clinical explanation as to why there had been this significant change in the patient group over a relatively short time.²⁴
- There is a significant correlation with gender dysphoria and autistic spectrum disorder, with the Court finding 'the apparent lack of investigation of this issue [on the part of the Tavistock clinic] – surprising':
 - o It is recorded in the GIDS Service Specification and the wider literature that a significant proportion of those presenting with GD have a diagnosis of Autistic Spectrum Disorder (ASD). The Service Specification says:
 - "There seems to be a higher prevalence of autistic spectrum disorder (ASD) conditions in clinically referred, gender dysphoric adolescents than in the general adolescent population. Holt, Skagerberg & Dunsford (2014) found that 13.3% of referrals to the service in 2012 mentioned comorbid ASD (although this is likely to be an underestimate). This compares with 9.4% in the Dutch service; whereas in the Finnish service, 26% of adolescents were diagnosed to be on the autism spectrum (Kaltiala-Heino et al. 2015)."
 - The court asked for statistics on the number or proportion of young people referred by GIDS for PBs who had a diagnosis of ASD. Ms Morris said that such data was not available, although it would have been recorded on individual patient records. We therefore do not know the proportion of those who were found by GIDS to be Gillick competent who had ASD, or indeed a mental health diagnosis.
 - Again, we have found this lack of data analysis – and the apparent lack of investigation of this issue - surprising.²⁵

²³ Ibid [28].

²⁴ Ibid [32].

²⁵ Ibid [33]-[35].

- 'For young people on PB that maturing process is stopped or delayed with potential social and psychological impacts which could be described as non-reversible.'²⁶
- 'the lack of a firm evidence base for their PB use is evident from the very limited published material as to the effectiveness of the treatment, however it is measured.'²⁷
- 'the degree to which the treatment is experimental and has, as yet, an unknown impact, does go to the critical issue of whether a young person can have sufficient understanding of the risks and benefits to be able lawfully to consent to that treatment.'²⁸
- 'the nature of this issue highlights the highly complex and unusual nature of this treatment and the great difficulty there is in fully understanding its implications for the individual young person. In short, the treatment may be supporting the persistence of GD in circumstances in which it is at least possible that without that treatment, the GD would resolve itself.'²⁹
- 'in deciding what facts are salient and what level of understanding is sufficient, it is necessary to have regard to matters which are those which objectively ought to be given weight in the future although the child might be unconcerned about them now. On the facts of this case there are some obvious examples, including the impact on fertility and on future sexual functioning.'³⁰
- In respect of the administration of puberty blockers the Court concluded:
 - o The starting point is to consider the nature of the treatment proposed. The administration of PBs to people going through puberty is a very unusual treatment for the following reasons. Firstly, there is real uncertainty over the short and long-term consequences of the treatment with very limited evidence as to its efficacy, or indeed quite what it is seeking to achieve. This means it is, in our view, properly described as experimental treatment. Secondly, there is a lack of clarity over the purpose of the treatment: in particular, whether it provides a "pause to think" in a "hormone neutral" state or is a treatment to limit the effects of puberty, and thus the need for greater surgical and chemical intervention later, as referred to in the Health Research Authority report. Thirdly, the consequences of the treatment are highly complex and potentially lifelong and life changing in the most fundamental way imaginable. The treatment goes to the heart of an individual's identity, and is thus, quite possibly, unique as a medical treatment.³¹
- The Court also expressed concern with the irreversible effects of the treatment: 'The condition being treated, GD, has no direct physical manifestation. In contrast, the treatment provided for that condition has direct physical consequences, as the medication is intended to and does prevent the physical changes that would otherwise occur within the body, in particular by stopping the biological and physical development that would otherwise take place at that age.'³²

²⁶ Ibid [64].

²⁷ Ibid [71].

²⁸ Ibid [74].

²⁹ Ibid [77].

³⁰ Ibid [132].

³¹ Ibid [134].

³² Ibid [135].

The above is relevant to the Bill, to the extent that the Court was concerned with the novel and untested propositions made in respect of gender fluidity, particularly as pertains to minors. It demonstrates that there are legitimate grounds on which the Parliament may act to ensure that ideological teaching in respect of gender fluidity should be avoided in all public schools.

Conclusion

It is clear from international human rights guarantees, legal precedents and unintended consequences (via *Tavistock*) that NSW is failing to rightly order or supervise their education standards. The undue certainties about gender fluidity material, in concert with the pace of their incorporation into school curriculums, should alarm legislators and educators. Parental primacy must be prioritised in the ethical, moral, religious and political formation of children.