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Mr Peter Cain MLA

Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
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Dear Chair



I am writing to respond to the comments of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) in Scrutiny Report 17 of 6 June 2022.

Thank you to the Committee for their constructive engagement on the *Education Amendment Bill 2022* (the Education Bill), which continues the government's work ensuring all schools in the ACT are providing high-quality education, with the appropriate systems in place to ensure our children and young people are safe and able to access education.

Henry VIII clause

The Committee have requested additional justification for the inclusion of subsection 312 as part of the transitional provisions outlined in Chapter 10. Subsection 312 enables a regulation to modify the transitional provisions outlined in Chapter 10 if, in the Executive's opinion, it is not, or is not adequately, dealt with in this chapter. Subsection 312(3) specifies that a regulation made under this subsection has effect despite anything elsewhere in this Act or another territory law.

The Committee have raised a concern that the inclusion of subsection 312 within chapter 10 may allow for modifications to this subsection itself, which could include removing the current limitation whereby the clause expires after 12 months from commencement. The Committee also raised a concern that modifications made by regulation may impact on human rights and liberties. The



Committee's concerns are acknowledged, however do not reflect the intent of subsection 312 as outlined in the explanatory statement.

The intent of subsection 312 is to ensure any unforeseen matters affecting the transition to the legislative amendments can be appropriately addressed in the first 12 months from commencement. While due diligence has been taken to consider all necessary transitional arrangements, the significance of the amendments to protecting the safety and wellbeing of children and young people require that any unforeseen matters can be addressed appropriately and in a timely manner. Further, this subsection has been specifically limited to Chapter 10 which only deals with transitional matters. It does not allow for changes to other chapters of the Bill and will not be modified by regulation to broaden this scope.

By definition a Henry VIII clause allows primary legislation to be amended by secondary legislation. Since the regulations allowed for under subsection 312 are limited to the transitional provisions, they do not allow for modifications to sustained provisions of the primary legislation, in this case the *Education Act 2004*. While subsection 312(3) allows for regulations made under this subsection to have effect despite anything elsewhere in the Act or another Territory law, this does not allow for modification of anything elsewhere in the Act or another Territory law. Further, all regulations are required to be notified and may be disallowed by the Legislative Assembly should they be considered inappropriate. This would certainly apply if any such regulation was considered to impact on human rights or liberties. The ACT Government is committed to upholding human rights and does not intend to impact on human rights through subordinate legislation.

The Committee has requested specific advice on why more restrictive transitional regulation-making powers have not been included in the Bill. As outlined above, the ACT Government considers that limiting transitional regulation-making powers to the chapter related to transitional provisions, ensuring these powers expire 12 months from commencement, and clearly outlining the intent of these powers in the explanatory statement, is sufficiently restrictive in this context and appropriately balances the critical role of primary legislation with the significance of protecting children and young people as schools transition to new substantive arrangements. The alternative to subsection 312 would be to correct any unforeseen transitional issues through further legislative amendments which would not provide a timely response sufficient to protect children and young people.

Examples of similar transitional regulation-making powers are outlined below:

- Fair Trading and Other Justice Legislation Amendment Bill 2022
- Emergencies Amendment Bill 2021
- Employment and Workplace Safety Legislation Amendment Bill 2020

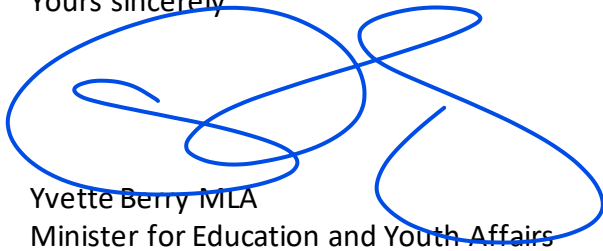
Displacement of Section 47(6) of the *Legislation Act 2001*

The Committee requested assurance that any incorporation of instruments in future legislative amendments to the *Education Act 2004* will be accompanied by a justification in the accompanying explanatory statement for both the incorporation of the instrument as in force from time to time and why the instrument and any amendments should not be notified on the legislation register.

I am pleased to provide this assurance and confirm that, while no further instruments are contemplated at this time, any future instruments intended for incorporation into the *Education Act 2004* will be thoroughly outlined in the explanatory statement, including why they or any amendments should not be notified if that is the case.

I thank you for the opportunity to respond to the Committee's comments prior to debate.

Yours sincerely

A handwritten signature in blue ink, consisting of a large, stylized 'Y' and 'B' intertwined.

Yvette Berry MLA
Minister for Education and Youth Affairs

7/06/2022