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Minister for Women
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Mr Peter Cain

Chair

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

scrutiny@parliament.act.gov.au

Dear Mr Cain

I am writing to you in response to the comments of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) in Scrutiny Report 15 dated 27 April 2022.

I welcome the opportunity to respond to the Committee's comments 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.

Report under section 38 of the *Human Rights Act 2004* (HRA)

The Bill authorises the suspension, transfer, expulsion or exclusion of a student where their behaviour has been unsafe or non-compliant and expressly includes behaviour which does not happen on school premises or during school hours. The Committee noted that the Bill may therefore condition behaviour which might be considered private. While the Committee did not require a response regarding this, I want to take the opportunity to address it.

The reference to behaviour which does not happen on school premises or during school hours is intended to be limited to when the behaviour reduces the safety or effectiveness of the learning environment at the school. Examples of this would be using social media outside school hours to encourage violence against a student at school the next day. This behaviour has an impact on the safety and effectiveness of the victim's learning environment whilst at school. In response to the

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Committee's feedback, I am proposing a minor Government Amendment to clarify this further and be explicit that action may only be taken in relation to behaviour outside of school premises or school hours if it reduces the safety or effectiveness of the learning environment.

Retrospective operation and retrospective criminal laws (Section 25 HRA)

The Committee noted that by providing a fixed commencement date, this may result in the retrospective operation of the Education Bill if it is passed by the Assembly and registered after that date. The Committee also raised concerns that offences might apply retrospectively if the Bill is registered after the fixed dates.

This was not the intent of the fixed commencement date provisions in the Education Bill. The intent is to ensure certainty for all schools on the arrangements that would be in place for the 2023 school year to support implementation of these changes. In the case of non-government schools, to which several strict liability offences relate, as the majority of non-government schools already consistently deliver high quality educational services and are compliant with their legislative requirements, we do not expect to have to take action. In response to the Committee's feedback however, I am proposing a Government Amendment to the transitional provisions to ensure that actions can't be taken against a non-government school for the first nine months from commencement.

Following feedback from the non-government schools sectors, I am also proposing a minor Government Amendment for commencement of the Education Bill to be changed to 20 December 2022. This will provide protection for those non-government schools whose registration is due for renewal in 2022, should the COVID-19 pandemic prevent them from completing the renewal process this year. This would allow schools with registrations expiring on 31 December 2022 to transition to ongoing registration once the Bill commences on 20 December 2022.

Should it not be possible for the Bill to be enacted on the proposed commencement date, a further Government Amendment may be brought forward to commence at a timeframe to be fixed by the Minister. This will prevent the issue raised by the Committee regarding potential retrospective operation and retrospective criminal laws.

Henry VIII clause

The committee noted that the Bill will insert Part 10.2 into the Act providing for transitional regulations, however the explanatory statement does not include reference to transitional regulations nor their potential scope.

Section 312 enables the Executive to make regulations dealing with transitional matters. The section contains two different regulation making powers.

Section 312 (1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act's purpose.

Section 312 (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify chapter 10 of the Act, and only if the Executive is of the opinion that the

part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 312 (3) gives a regulation under section 312 (2) full effect according to its terms. A provision of chapter 10 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation.

The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Also, any modification by regulation of chapter 10 (Transitional- Education Amendment Act 2022) has no ongoing effect after the expiry of that chapter, 12 months after the day it commences.

The information provided above has been added to a supplementary explanatory statement to accompany the Education Bill.

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

The Committee notes that Clause 38 will substitute a new regulation-making power into the Act, allowing a regulation to apply, adopt or incorporate an instrument as in force from time to time. In doing so, the Bill expands the current provisions for regulations to incorporate Australian Standards as in force from time to time and the *National Principles for Child Safe Organisations*. However, the Committee notes that s47(6) is displaced which means that an instrument incorporated in the regulations or any future amendments to that instrument is not required to be notified on the Legislation Register.

AS 5725:2015 — *Boarding Standard for Australian schools and residences* (the Boarding Standard) is incorporated into the regulation. The Legislation Act, s 47 (6) provides that an incorporated document, and any amendment or replacement of such a document, are taken to be notifiable instruments. A notifiable instrument must be notified on the legislation register under the Legislation Act. However, the Legislation Act, s 47 (6) may be displaced by the authorising law (the Act) or the incorporating instrument (this regulation) (see s 47 (7)). The Legislation Act, s 47 (6) is displaced here because the incorporated standards are subject to copyright and may be purchased over the Internet. This standard is also already in the current *Education Act 2004* and is not a new instrument.

The use of the Boarding Standard ensures that children are residing in facilities that are kept to a recognised standard, in which the governance; facilities; parent, family and community engagement; staff; and the protection, safety, wellbeing and holistic development of boarders are being met.

The Boarding Standard also provides a common national framework that is intended to provide owners, operators, management and staff of schools who provide boarding facilities with guidance relating to a range of matters to ensure the delivery of a quality boarding facility. Whilst not freely available, the Education Directorate has ensured that all schools who provide residential boarding services have access to a copy and for prospective schools who wish to provide residential boarding

services or members of the public who wish to access the Boarding Standards, they are available from the Education Directorate, free of charge, upon request.

The *National Principles for Child Safe Organisations* (the National Principles) have been endorsed by members of the Council of Australian Governments and reflect ten child safe standards recommended by the *Royal Commission into Institutional Responses to Child Sexual Abuse*. They are intended to assist giving effect to recommendations and have a broad scope that covers sexual abuse and other forms of potential harm to children and young people. The National Principles are also available and freely accessible on the internet and therefore do not require notification.

The information provided above has been added to a supplementary explanatory statement to accompany the Education Bill.

Technical or stylistic standards expected of the explanatory statement

The Committee noted that whilst the explanatory statement accompanying the Bill provides an extensive and accessible overview of the Education Bill and human rights statement, the outline of the provisions in the Education Bill are considered brief. To assist with reading the Bill, a supplementary explanatory statement has been developed, providing more detail on each of the clauses in order to meet the expectations of the Committee.

Government Amendments

In addition to the responses provided, I am also pleased to provide the Committee with proposed Government Amendments to the Education Bill for visibility, along with the supplementary explanatory statement explaining these amendments. These amendments have been informed by stakeholder feedback on the Education Bill and support clarity of the provisions. They do not change the intent of the Bill.

The amendments are minor or technical in nature, either correcting errors, or replacing/removing words to support clarity. In some cases, this includes, providing notes to link key terms back to their definitions in the Act, providing definitions, or revising examples to ensure clarity of intent.

The following three amendments are proposed in response to the Scrutiny Committee's comments as outlined in this response:

- a) Amendments 3 and 4- to clarify that actions may only be taken in relation to behaviour outside of school premises or school hours if it reduces the safety or effectiveness of the learning environment. This does not change the original intent, but rather makes this explicit.
- b) Amendment 39- amending transitional provisions to ensure that actions can't be taken against non-government schools in the first nine months from the day of commencement. This is to avoid the risk of retrospective penalties.

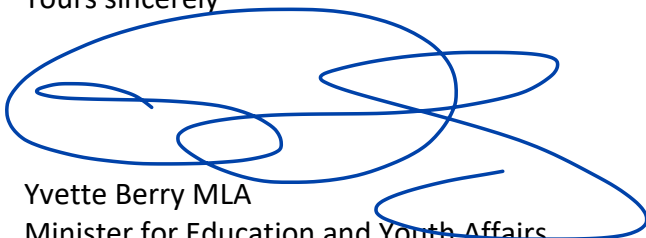
Finally, amendment 34 inserts a new provision requiring the Registrar to report concerns to the registration standards advisory board (RSAB) on a quarterly basis. This amendment does not change

the intent of the Bill, but rather supports the RSAB to undertake the functions already outlined in the Bill.

The significance of the Bill means that passing of the Bill is considered urgent to ensure schools have sufficient time to implement the changes for the 2023 school year. Since these amendments do not change the intent of the Bill and are informed by stakeholders, I intend to ask the Assembly to dispense of Standing Order 182A in this instance so that debate can proceed in the June 2022 sitting period.

I thank you for the opportunity to respond to the Committee's comments and to provide the proposed Government Amendments prior to debate.

Yours sincerely

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke, positioned over the printed name and title.

Yvette Berry MLA
Minister for Education and Youth Affairs
19/05/2022