



Yvette Berry MLA

Deputy Chief Minister
Minister for Early Childhood Development
Minister for Education and Youth Affairs
Minister for Housing and Suburban Development
Minister for Women
Minister for the Prevention of Domestic and Family Violence
Minister for Sport and Recreation

Member for Ginninderra

Mr Peter Cain MLA

Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
scrutiny@parliament.act.gov.au

Dear Mr Cain

I am writing in response to comments of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) in Scrutiny Report 41 of May 2024.

Thank you to the Committee for their constructive engagement on the *Education Amendment Bill 2024* (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 noted that the Bill will insert a transitional chapter into the Education Act which will allow regulations to prescribe transitional matters necessary or convenient to be prescribed as well as regulations which may modify the chapter, including in relation to another territory law and which has effect despite anything elsewhere in the Bill or another Territory law. However, the Committee noted that the Explanatory Statement only covers one of the two regulation making powers.

The Committee requested further information from myself, as Minister, on why the Henry VIII clause is considered necessary in the context of this Bill, including what limits, if any, are placed on the scope, subject matter and duration of the Henry VIII clause so as to restrict the potential impact of any regulations; and what alternatives to the Henry VIII clause, either to the clause itself or the use of a Henry VIII clause in general, were considered and why those alternatives were not accepted.

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601



+61 2 6205 0233



berry@act.gov.au



[@YvetteSBerry](https://twitter.com/YvetteSBerry)



[YvetteSBerry](https://www.facebook.com/YvetteSBerry)



[Yvette_berry_mla](https://www.instagram.com/Yvette_berry_mla)

Chapter 11, to which this amendment relates, includes necessary transitional arrangements to ensure that any student currently accessing distance education through an unregistered distance education provider, does not have their education disrupted during the transition period. While due diligence has been taken to consider all necessary transitional arrangements, the significance of the amendments to protecting the right to education for children and young people requires that any unforeseen matters can be addressed appropriately and in a timely manner. The regulation making powers referred to by the Committee are specifically limited to Chapter 11 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 316 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 316(2) 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 ACT Government considers that limiting transitional regulation-making powers to the chapter related to transitional provisions, ensuring these powers expire 24 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 the education of children and young people as distance education providers transition to new substantive arrangements. It is not envisaged that regulations would be required to support transition of other aspects of the Bill, though where this is necessary, the regulation making power has been limited to transitional matters only.

The alternative to subsection 316 would be to correct any unforeseen transitional issues through further legislative amendments which would not provide a timely response sufficient to ensure children and young people's education is not disrupted while distance education providers are transitioning to new registration requirements. 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

The explanatory statement has been updated to provide additional details regarding the intent and limitations of subsection 316.

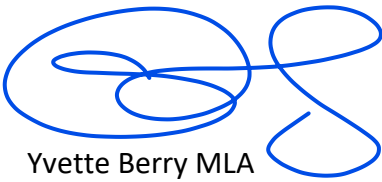
Explanatory Statement

The Committee recommended that consideration was given to amend the explanatory statement accompanying the Bill to provide further detail in outlining the clauses in the Bill, to assist the reader in identifying the nature and purpose of the proposed amendments.

A revised explanatory statement has been developed providing more detail to the clause notes and is attached to this letter, for the Committee's consideration.

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 several loops and a long horizontal stroke, positioned above the typed name.

Yvette Berry MLA
Minister for Education and Youth Affairs
18/06/2024