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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TENTH ASSEMBLY

**EDUCATION AND CARE SERVICES NATIONAL LAW (ACT) AMENDMENT BILL
2024**

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Minister for Early Childhood Development
April 2024**

EDUCATION AND CARE SERVICES NATIONAL LAW (ACT) AMENDMENT BILL 2024

The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

Definitions

For ease of reference, the following terms are used in this Explanatory Statement:

NQF:	National Quality Framework for education and care services, commenced in 2012
National Law:	Education and Care Services National Law, contained in the Schedule to the Education and Care Services National Law Act 2010 (Vic)
Adopting Law:	<i>Education and Care Services National Law (ACT) Act 2011</i> , adopting the National Law as a territory law
ACT National Law:	<i>Education and Care Services National Law (ACT)</i> — the National Law as it applies in the ACT, by way of the section 6(1) of the Adopting Law.
National Regulations:	Education and Care Services National Regulations , published on the NSW Legislation website
Part 4 National Law:	Part 4 of the <i>Education and Care Services National Law (ACT)</i> , inserted by the Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023 , tabled in the ACT, with explanatory statement, on 8 February 2024.
AIP Process	The approval in principle process created by Part 4 of the Schedule to the <i>Education and Care Services National Law Act 2010 (Vic)</i>
Part 4 Building	Building of three or more storeys, with ground level and each level of a split level counted as a storey. There are no prescribed classes of Part 4 building under section 5 of the National Law
Centre-based service	Education and care service under the ACT National Law, other than a family day care service

The Bill amends the Adopting Law in the following three areas:

- (a) Application of the AIP Process in the ACT;
- (b) ACT tabling requirements for amendments to the National Law and National Regulations; and
- (c) Updating terminology to ensure that the ACT National Law is appropriately reflected and covered in the ACT's statute book.

National Scheme Implementation

In 2012, pursuant to the National Partnership Agreement on the National Quality Agenda, the NQF commenced, including the National Law and the National Regulations.

The NQF established a nationally uniform approach to the regulation and quality assessment of the education and care sector.

States and territories agreed to use model law to create the national regulatory framework. States, territories, and the Commonwealth agreed that the National Law would be drafted and amended by Victoria and sit in the Victorian statute book.

The ACT decided to adopt the National Law, as did other states and territories, with the exception of Western Australia, which enacted its own consistent law.

Part 4 National Law

The NQF is subject to cyclical review, with the most recent review commencing in 2019 (2019 NQF Review).

As well as increased risk to children in multi-storey buildings during emergencies, the 2019 NQF Review identified a particular issue for education and care services in multi-storey buildings in Victoria and ACT. Proposed education and care service premises were being developed and built consistent with planning requirements, but without meeting regulatory requirements under the NQF. Approved providers faced the risk that applications for service approval would be refused without costly post-construction rectification works.

The *Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023*, which inserted Part 4 National Law and related provisions, was tabled in the ACT Legislative Assembly on 8 February 2024.

The purposes of the AIP Process are to:

- (a) improve safety of children during emergency evacuations in Part 4 Buildings;
- (b) identify non-compliant designs for proposed centre-based service premises in Part 4 Buildings at an early stage, allowing changes to be made; and

- (c) provide a level of assurance to the development and early childhood sectors prior to construction.

The AIP Process provides for early decision-making within the existing regulatory framework, regarding proposed centre-based service premises in Part 4 Buildings.

Part 4 National Law does not operate in any jurisdiction unless that jurisdiction has expressly declared it to apply. Victoria has applied Part 4 National Law, with the AIP Process to commence on 1 October 2024. Other jurisdictions are required to enact legislation to expressly apply Part 4 National Law and section 49A (where appropriate), and to define new terms used.

The AIP Process allows persons to apply to the Regulatory Authority for approval in principle of proposed centre-based service premises in a Part 4 building. Any application for AIP must be made before a certain date as declared by a participating jurisdiction. In the ACT, AIP applications must be made before application for development approval is made or, if no development approval is required, before application for building approval is made.

The AIP Process may operate on a voluntary or mandatory basis. A mandatory AIP Process means that a current AIP is a statutory precondition to service approval of centre-based education and care service premises in a Part 4 building.

This Bill applies Part 4 National Law in the ACT, with a mandatory AIP Process to commence three months from notification, with a transitional provision.

Minor and Technical Amendments

As currently drafted, the tabling provisions in section 6 of the Adopting Act provide a framework for disallowance of amendments to the National Law, requiring tabling within six sitting days of any amendment being passed by Victoria's Parliament. Should that time frame not be met, there is no remedy to amend the ACT National Law. There have been occasions where consequential or technical amendments have been made outside usual national legislative processes.

The Bill removes the six-sitting-day time limit for tabling amendments to the National Law. In conjunction with section 6(4) of the Adopting Act, this results in any amendments to the National Law not applying in the ACT until they are presented to the Legislative Assembly and remain subject to disallowance (but not amendment).

The Bill also:

- (a) amends the Adopting Act to expressly adopt historical consequential and technical amendments not previously tabled;
- (b) clarifies the extent of exclusion of the *Legislation Act 2001*;
- (c) provides clarification of results if a regulation (or provision of a regulation) is

disallowed by the Legislative Assembly, given the exclusion of section 303(4).

(d) updates terminology in other legislation to align with the National Law as applied in the ACT.

CONSULTATION ON THE PROPOSED APPROACH

The most recent NQF review cycle commenced in 2019, to ensure that the NQF remains current and fit for purpose, with recommended changes framed by principles of best practice regulation.

The 2019 NQF Review involved extensive national and jurisdiction-specific consultation, commencing in early 2019 to inform an issues paper for the Consultation Regulation Impact Statement. This was followed by three rounds of consultation during March and April 2021, to inform the recommendations in the [Decision Regulation Impact Statement \(DRIS\)](#), which was published by the statutory national authority, Australian Childrens Education and Care Quality Authority (ACECQA), on 8 June 2022.

Safety of children in multi-storey buildings was the highest rated issue during consultation, with 67% of respondents rating it as 'significant' to 'very significant'.

In April 2021 and June 2022, the Education Directorate undertook targeted consultation sessions to inform development of the AIP Process. Participating stakeholders included architects, property developers, builders, town planners, approved providers of early childhood education and care services, and relevant ACT Government agencies, including Emergency Services Agency, Environment, Planning and Sustainable Development Directorate, and Justice and Community Safety.

Feedback indicated that ACT stakeholders would like as much guidance and certainty as possible prior to construction to ensure education and care service premises meet legislative requirements.

Feedback informed the drafting of Part 4 National Law, including allowing for simple amendment processes, extension, and reinstatement, and to retain sufficient flexibility to accommodate delays in construction, as well as design amendments (where premises remain compliant).

Regarding the technical and tabling provision amendments, the only necessary consultation was internal to ACT Government, with Parliamentary Counsel's Office.

Costs and Benefits

A full Cost and Benefit analysis formed part of the DRIS noted by ACT Cabinet on 9 December 2021.

The AIP Process carries multiple benefits. It provides an opportunity for the Regulatory Authority to identify non-compliant proposals well before construction,

and ensure that plans are adequate to meet prescribed regulatory requirements. This protects the safety, health and wellbeing of young children, including during emergency evacuations. The AIP Process enables the approved provider to reduce the risk of refusal of a service approval application and avoid the cost of making alterations to comply with regulatory requirements.

User costs include an application fee for the AIP. Small additional fees will apply for some Regulatory Authority actions such as amendments or reinstatement. Regulatory Authority actions with low burden attract no fee. All AIP Process fees align with existing fees for similar applications under the National Law.

CLIMATE IMPACT

The Bill has no adverse impact on climate change. The AIP Process supports the Regulatory Authority to ensure provision of genuine outdoor space with vegetation and other natural elements. This avoids urban heat island effect and allows children to connect with, and learn to respect and care for, nature from an early age.

Additionally, the requirement to consider direct egress to an assembly area to allow for safe evacuation of children is relevant to increased bushfire risk.

CONSISTENCY WITH HUMAN RIGHTS

The *Human Rights Act 2004* (HR Act) applies to the ACT National Law. Factors justifying any limits on the human right to a fair trial are addressed below, as required by section 28 of the HR Act.

A transitional provision ensures that no provisions operate retrospectively, and the AIP Process reflects an informal process undertaken by the ACT Regulatory Authority for many years.

In the process of enacting Part 4 National Law in Victoria, the Bill was scrutinised for human rights compliance under Victorian law. Additionally, all human rights issues were addressed in the explanatory statement tabled in the ACT on 8 February 2024, summarised below.

Rights engaged

The Bill engages with the following rights under the HR Act:

- section 11 (Protection of the family and children)
- section 21 (Fair trial)

Rights Promoted

Section 11(2) (Protection of the family and children)

Core objectives of the ACT National Law are to ensure the health, safety and wellbeing of children attending education and care services and to improve their educational and developmental outcomes.

The AIP Process improves the safety of children attending centre-based services in Part 4 Buildings by ensuring that increased risks during emergency evacuations are adequately considered and addressed before construction. The AIP Process will also ensure that prescribed physical premises requirements, as well as suitability of site, premises, and location, are adequately considered and addressed prior to construction. Ensuring proposed premises meet regulatory requirements promotes children's health, safety and wellbeing, as well as improving educational and developmental outcomes by access to appropriate physical environments.

Rights Limited

Section 21 – Fair Trial

1. Nature of the right and the limitation (s28(a) and (c))

Section 21(a) of the HR Act provides that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent, and impartial court of tribunal after a fair and public hearing.

Section 120 of the National Law permits the Regulatory Authority to cancel an AIP if satisfied that the proposed early childhood education and care service premises, or site or location of those premises, is no longer suitable, or that the proposed premises will not be constructed, altered, or repaired in compliance with the AIP.

However, the power to cancel may only be exercised after a show cause process, and written notice and reasons must be provided.

Additionally, all Regulatory Authority decisions regarding refusal, amendment, refusal to amend, transfer, cancellation, or refusal to extend or reinstate an AIP are internally reviewable under section 190 of the ACT National Law. All internally reviewed decisions (except the issuing of low-level statutory compliance actions) are externally reviewable under section 192 of the ACT National Law.

2. Legitimate purpose (s28(b))

Children attending early childhood education and care services in multi-storey buildings are at higher risk during emergency evacuations. In particular, non-ambulatory children require careful consideration to ensure safe evacuation.

Requirements for centre-based services to be in suitable sites, locations, and premises and meet prescribed regulations are to ensure children's health, safety, and wellbeing.

The ability to cancel an AIP is required to protect children's safety, health and wellbeing.

3. *Rational connection between the limitation and the purpose (s28(d))*

The AIP Process provides for early decision making on prescribed matters within an existing regulatory framework for education and care service premises.

AIP may only be cancelled in the limited circumstances in section 120(a) and (b) of the National Law. If proposed premises do not meet suitability requirements or regulations for physical design, the Regulatory Authority would refuse service approval. A show cause for cancellation of AIP provides early notice and an opportunity to rectify. Cancellation of the AIP provides an opportunity for the holder to pursue alternative uses for the premises.

4. *Proportionality (s28 (e))*

Cancellation is only available in limited circumstances, where regulatory requirements will not be met at service approval, resulting in likely refusal. The show cause notice provides opportunity to rectify and mitigate risk of refusal of service approval.

Cancellation after show cause process is the least restrictive means to ensure centre-based service premises in Part 4 Buildings meet suitability and other prescribed regulatory requirements.

Education and Care Services National Law (ACT) Amendment Bill 2024

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Education and Care Services National Law (ACT) Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 — Name of Act

This clause provides that the name of the Act is the *Education and Care Services National Law (ACT) Amendment Act 2024*.

Clause 2 — Commencement

This clause provides for commencement of all provisions (other than those in subsection (2)) on the day after notification day.

New sections 5, 7, 8, and 13 will commence three months after notification day. A transitional provision is included at Clause 50.

Clause 3 — Legislation amended

This clause provides that the Act amends the *Education and Care Services National Law (ACT) Act 2011* and other legislation in Schedule 1.

Clause 4 — Adoption of Education and Care Services National Law — New section 6(1A)

New clause 6(1A) declares that the ACT is a participating jurisdiction for the purposes of Part 4 National Law, and that Part 4 National Law applies as a territory law.

Clause 5 — New section 6(1B)

New clause 5 applies section 49A of the National Law as a territory law, three months after commencement of the Act. Section 49A mandates refusal of an application for service approval if:

- (a) a proposed education and care service (other than family day care service) is in a Part 4 building (see section 5 of the ACT National Law); and
- (b) approval was required for construction, alteration or repair of the premises or development of the land; and
- (c) either the approved provider is not the holder of approval in principle for the premises, or the premises are not constructed, altered or repaired in accordance with the plans, drawings or specifications attached to, or described in, the approval in principle.

A transitional provision is included in clause 13 of the Bill.

Under section 106 of the National Law, the AIP Process applies only to proposed centre-based service premises, to be located in Part 4 Buildings, for which development or building approval is required.

Clause 6 —Section 6(2)

Clause 6 amends section 6(2) to remove the six sitting day time requirement to table amendments to the National Law. Amendments to the National Law still require tabling in the ACT Legislative Assembly and, by reason of section 6(4) of the Adopting Act, amendments to the National Law will not apply in the ACT until they are tabled.

Clause 7 — Section 6(5)

Clause 7 amends section 6(5) to excludes the application of section 340 National Law in the ACT. Section 340 is a transitional provision for a mandatory AIP Process. The replacement transitional provision in clause 13 aligns with the time frames in clause 12 (new section 17B).

Clause 8 — Section 6(5)

Clause 8 makes a grammatical amendment to section 6(5) as a result of Clause 7.

Clause 9 — New section 6(6) and (7)

Clause 9 creates new section 6(6), which clarifies the effect of disallowance of a national regulation (or provision of a national regulation).

By the exclusion of section 303(4) National Law from the ACT National Law, the ACT Legislative Assembly may unilaterally disallow a national regulation and it will not apply in the ACT.

New section 6(6) clarifies that section 303(5) of the ACT National Law still applies as a Territory law, meaning that, if the majority of jurisdictions disallow a national regulation, it will not apply in the ACT. Under section 304 of the ACT National Law, disallowance of a national regulation by a majority of jurisdictions has the same effect as repealing the national regulation.

New section 6(7) expressly applies two historical consequential and technical amendments made to the National Law as if they were tabled within the required six sitting days. Due to the operation of section 6(4) of the Adopting Act, those amendments do not apply in the ACT.

Some of the affected sections of the National Law were further amended, but the historical amendments required tabling to meet the statutory requirement in the Adopting Act.

The historical amendments consist of:

- (a) [*Freedom of Information Amendment \(Office of the Victorian Information Commissioner\) Act 2017 \(Vic\)*](#)

Schedule 1, Item 7 is a change in terminology in section 264(2) of the National Law. Section 264(2) was further amended by the *Regulatory Legislation Reform Act 2022 (Vic)*, section 12 to refer to the “Australian Information Commissioner”.

(b) [Regulatory Legislation Amendment Reform Act 2022 \(Vic\)](#)

Part 4, sections 7 to 14, contain technical amendments to the National Law to correct references to section numbering, typographical errors, and terminology.

New section 6(8) provides that new sections 6(7) and (8) expire on the day they commence.

Clause 10 — Exclusion of territory laws — New section 7(1)(ba)

Clause 10 excludes the *Information Privacy Act 2014* from application to the ACT National Law. Under section 263(1) of the ACT National Law, the *Privacy Act 1988* (Cth) applies as a Territory law for the purposes of the NQF. A reference to the Office of the Privacy Commissioner is taken to be a reference to the Office of the National Education and Care Services Privacy Commissioner.

Under section 264 of the ACT National Law, the *Freedom of Information Act 1982* (Cth) applies as a territory law for the purposes of the NQF. A reference to the Office of the Australian Information Commissioner is taken to be a reference to the Office of the National Education and Care Services Freedom of Information Commissioner.

Although the *Freedom of Information Act 2016* (ACT) is currently excluded from operation to the ACT National Law, the *Information Privacy Act 2014* (ACT) is not.

Clause 10 achieves alignment with all other participating jurisdictions and removes the need to implement two information privacy frameworks.

Clause 11 — New section 7(1A)

New section 7(1A) clarifies the extent of the application of the *Legislation Act 2001*. It is excluded from application to the ACT National Law but still applies to the remainder of the Adopting Act.

Clause 12 — New sections 17A and 17B

Clause 12 contains the definitions required to implement the AIP Process in the ACT.

New section 17A defines the terms, **Part 4 building law** and **Part 4 planning law** for the purposes of section 5 of the ACT National Law.

Part 4 building law is defined as the *Building Act 2004* and **Part 4 planning law** is the *Planning Act 2023*.

New section 17B specifies the timeframe within which application for an approval in principle must be made. Applications must be made to the Regulatory Authority no later than —

- (a) If, under the *Planning Act 2023*, development approval is required for the education and care service premises, the day before the application for development approval is made; or
- (b) in any other case, the day before an application for building approval for the construction, alteration or repair of the proposed service premises is made under the *Building Act 2004*.

Proposed education and care services in multi-storey buildings on land governed by Commonwealth legislation will not be subject to the AIP process and will be managed administratively.

The Regulatory Authority must decide the application for AIP within 60 days (section 110 National Law).

Clause 13 — New Part 10 — Transitional — Applications for service approval

Clause 13 inserts new Part 10, being transitional provisions for a mandatory AIP Process by application of section 49A of the National Law.

New section 50 — Meaning of *commencement day* — pt 10

New section 50 inserts a definition of ***commencement day*** for Part 10, being the date of commencement of new section 5 (three months after notification day).

New section 51 — Application of national law, s 49A to certain applications for approval

New section 51 is in substitution for the transitional provision in section 340 of the National Law.

New section 51 provides that section 49A of the National Law does not apply to applications for service approval made at any time if, before the commencement of new section 5—

- (a) if, under the *Planning Act 2023*, a development approval is required for the education and care service premises—an application for a development approval for the premises is made; or
- (b) if, in any other case—an application for building approval for the education and care service premises is made under the *Building Act 2004*.

The transitional provision provides sufficient time for visibility of the AIP Process ahead of the required time for making application for AIP.

New section 52 — Expiry—pt 10

New section 52 provides for expiry five years after commencement.

Schedule 1 — Other Amendments

Part 1.1 — Children and Young People Act 2008

Item 1.1 — Section 356(3), definition of *mandated reporter*, paragraph (l)

This item updates terminology to align with the ACT National Law to ensure clarity of mandated reporting responsibilities.

Item 1.2 — Section 356(3), new definitions

This item includes definitions of new terms that align with the ACT National Law, to ensure clarity of mandated reporting responsibilities.

Part 1.2 — Crimes Act 1900

Item 1.3 — Section 66A(5) definition of *relevant institution*, examples—par (a)

This item updates terminology to align with the ACT National Law.

Part 1.3— Crimes (Child Sex Offenders) Act 2005

Item 1.4 — Section 124(1)(b)

This item updates terminology to align with the ACT National Law.

Item 1.5 — Section 124(2), new definitions of *childcare centre* and *education and care service*.

This item includes definitions of terms used to align with the ACT National Law.

Item 1.6 — Sections 132B and 132F

This item updates terminology to align with the ACT National Law.

Item 1.7 — Sections 132K and 132R

This item updates terminology to align with the ACT National Law.

Part 1.4 — Domestic Animals Act 2000

Item 1.8 — Section 42(1)(a)

This item updates terminology to align with the ACT National Law.

Item 1.9 — Section 42(5), new definition of *childcare centre* and *education and care service*

This item includes definitions of terms used to align with the ACT National Law. The definition of ‘education and care service’ excludes family day care services.

Part 1.5 — Emergencies Act 2004

Item 1.10 — Section 34(1)(m), examples

This item updates terminology to align with the ACT National Law.

Part 1.6 — Leases (Commercial and Retail) Act 2001

Item 1.11 — Section 12(1)(g)

This item updates terminology to align with the ACT National Law.

Item 1.12 — Section 12(7), new definition of *childcare centre* and *education and care service*

This item includes definitions of terms used to align with the ACT National Law. The definition of ‘education and care service’ excludes family day care services.

Part 1.7 — Spent Convictions Act 2000

Item 1.13 — Section 19(1)(a)

This item inserts ‘educator’ after ‘childcare worker’ to ensure coverage and update terminology to align with the ACT National Law.

Item 1.14 — Section 19(1)(b)(ii)

This item updates terminology to align with the ACT National Law.

Item 1.15 — New section 19(12)

This item includes definitions of terms used to align with the ACT National Law.

Part 1.8 — Working with Vulnerable People (Background Checking) Act 2011

Item 1.16 — Schedule 1, section 1.3 heading

This item amends the heading to align with the ACT National Law.

Item 1.17 — Schedule 1, new item 1.3(1)(aa)

This item updates terminology to align with the ACT National Law.

Item 1.18 — Schedule 1, section 1.3(2), new definition of *education and care service*.

This item inserts a signpost definition to section 5 of the ACT National Law.