



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Delegated Legislation Monitor No. 2 of 2024



21 March 2024

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Regulation Committee

Delegated Legislation Monitor No. 2 of 2024

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Delegated Legislation Monitor No. 2 of 2024

'March 2024'

Chair: Hon Natasha Maclaren-Jones MLC

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Table of contents

	Committee details	iv
	Overview of the Delegated Legislation Monitor	v
	Operation of the Committee's technical scrutiny function	v
	Conclusions and structure of Monitor No. 2 of 2024	vi
Chapter 1	New scrutiny matters for engagement	1
	Education Amendment (Non-Government School Assets and Income) Regulation 2024	1
	Overview	1
	Scrutiny concerns	1
	Committee conclusion	2
Appendix 1	Instruments with no scrutiny concerns	3
Appendix 2	Instruments where engagement is ongoing	4
Appendix 3	Minutes	5

Committee details

Committee members

Hon Natasha Maclaren-Jones MLC	Liberal Party	<i>Chair</i>
Ms Abigail Boyd MLC	The Greens	<i>Deputy Chair</i>
Hon Susan Carter MLC	Liberal Party	
Hon Tania Mihailuk MLC	Pauline Hanson's One Nation	
Hon Greg Donnelly MLC	Australian Labor Party	
Hon Dr Sarah Kaine MLC	Australian Labor Party	
Hon Cameron Murphy MLC	Australian Labor Party	
Hon Bob Nanva MLC	Australian Labor Party	

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Hon Natasha Maclaren-Jones MLC
Committee Chair

Secretariat

Dom Bowes, Principal Council Officer
Bethanie Patch, Senior Council Officer
Robin Howlett, Administration Officer
Madeleine Dowd, Director

Overview of the Delegated Legislation Monitor

Operation of the Committee's technical scrutiny function

- 1.1 The Regulation Committee was first established on a trial basis on 23 November 2017 in the 56th Parliament.¹ The committee was reappointed in the 57th Parliament on 8 May 2019 and in the 58th Parliament on 10 May 2023.²
- 1.2 On 19 October 2023, the Legislative Council amended the resolution of the House establishing the Regulation Committee to require the Committee to scrutinise delegated legislation that is subject to disallowance.³
- 1.3 Paragraph (3) of amended resolution requires that:
- The committee, from the first sitting day in 2024:
- (a) is to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*,
 - (b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
 - (c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance.
- 1.4 In accordance with paragraph (3), the Committee will consider any instrument that is disallowable, during the period which it may be disallowed. That includes 'statutory rules', within the meaning of the *Interpretation Act 1987*, that are disallowable by virtue of section 41 of that Act. It also includes other instruments to which section 41 applies indirectly, i.e., where the Act under which an instrument is made provides it is to be treated as if it were a statutory rule for the purposes of section 41.
- 1.5 A list of instruments that are subject to disallowance is published on the Parliament's website on the first Tuesday of each month and each Tuesday when the Legislative Council is sitting.
- 1.6 With regard to the scrutiny principles the Committee is required to assess instruments against, the *Legislation Review Act 1987*, section 9(1)(b) sets out 8 grounds of scrutiny as follows:
- (i) that the regulation trespasses unduly on personal rights and liberties
 - (ii) that the regulation may have an adverse impact on the business community

¹ *Minutes*, NSW Legislative Council 23 November 2017, pp 2327-2329.

² *Minutes*, NSW Legislative Council 10 May 2023, pp 37-39.

³ *Minutes*, NSW Legislative Council 19 October 2023, pp 639-640.

- (iii) that the regulation may not have been within the general objects of the legislation under which it was made
- (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made
- (v) that the objective of the regulation could have been achieved by alternative and more effective means
- (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act
- (vii) that the form or intention of the regulation calls for elucidation, or
- (viii) that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.⁴

1.7 The Committee has published guidelines on its webpage which provide an overview of its intended approach to its technical scrutiny functions and specific guidance in respect of each of these eight grounds.

1.8 Each sitting week, the Committee will publish a monitor setting out its progress and conclusions relating to technical scrutiny of regulations. The monitor will set out matters where the Committee has sought further information from the responsible Minister or Department, the Committee's conclusions in relation to instruments where concerns have been raised and a list of those regulations the Committee has reviewed which have not raised scrutiny concerns.

1.9 In addition to the regular publication of monitors the Committee may, from time to time and under paragraph (2) of the resolution establishing it, inquire and report on:

- (a) any instrument of a legislative nature regardless of its form, including the policy or substantive content of the instrument,
- (b) draft delegated legislation, and
- (c) trends or issues in relation to delegated legislation.

Conclusions and structure of Monitor No. 2 of 2024

1.10 In this Monitor, the Committee has reviewed 13 instruments notified on the NSW Legislation Website between 1 March 2024 and 14 March 2024. The Committee has:

- raised scrutiny concerns and sought further information in respect of one instrument, as set out in Chapter 1,

⁴ *Legislation Review Act 1987*, section 9(1)(b).

- concluded that twelve instruments raise no scrutiny concerns, as set out in the list of instruments in Appendix 1, and
- noted that there are two instruments where engagement with the responsible Minister or Department is ongoing, set out in Appendix 2.

1.11 In future editions of the Delegated Legislation Monitor, the Committee will set out its conclusions as a result of engagement with the responsible Minister or Department. That may include, if necessary, any recommendations that an instrument, or a part of an instrument, ought to be disallowed.

1.12 A further three instruments remain under review, for consideration in a future Monitor.

Chapter 1 New scrutiny matters for engagement

This chapter sets out statutory instruments the Committee has reviewed which raise scrutiny concerns relating to the grounds set out in section 9(1)(b) of the *Legislation Review Act 1987*. In this chapter the Committee provides an overview of the instruments in question and identifies the Committee's concerns that require further engagement with the responsible minister or body responsible for making the instrument.

Education Amendment (Non-Government School Assets and Income) Regulation 2024

S.I Number	2024 No 45
Notified on Legislation Website (LW)	01/03/24
Tabled in Legislative Council (LC)	12/03/24
Last date of notice for disallowance motion	18/06/24

Overview

- 1.1 The *Education Amendment (Non-Government School Assets and Income) Regulation 2024* (the amending regulation) amends the *Education Regulation 2017* by inserting clause 10B to, as the explanatory note sets out, clarify when a non-government school providing certain education and care services operate for profit.
- 1.2 Clause 10B(1) of the *Education Regulation 2017* provides certain circumstances in which the use of the proprietor of a non-government school's assets or income for a purpose other than the operation of the school will not render the school 'for profit'. Under the Act, section 83C(1), the Minister must not provide financial assistance to, or for the benefit of, a school that operates for profit. Clause 10B(2) provides circumstances in which a school operates for profit despite subclause (1).
- 1.3 The amending regulation, which commenced on 1 March 2024, was made under the *Education Act 1990*, section 83C(3).

Scrutiny concerns

Regulation may not have been within the general objects of the Education Act 1990

- 1.4 Under this ground, the Committee is required to consider the objects and intended effects of the *Education Act 1990* and how those objects appear to be implemented by the regulation. In considering the amending regulation in the context of this scrutiny principle the Committee identified a number of matters that may not have been within the general objects of the *Education Act 1990*.

1.5 Specifically, the Committee has identified that additional information is needed from the Minister for Education to resolve the following scrutiny concerns in relation to clause 10B(1)(b):

- the purported sub-delegation of legislative power to guidelines published under the Act, section 83L, and
- the inclusion of a reference to the guidelines:
 - which, at the time of the commencement of the amending regulation, had not been published, and
 - which refers to such guidance in general, rather than a specific publication.

Form or intention of the regulation calls for elucidation

1.6 The Committee's view is that the form and intention of clause 10B, as inserted by Schedule 1 to the amending regulation, calls for elucidation in two respects, concerning:

- the intended operation of clause 10B(2)(a), as read with section 83C(1) of the Act, and
- uncertainty regarding the intended meaning of the defined term 'recognised education and care program' in clause 10B(3).

Committee conclusion

1.7 In light of the above, the Committee requests the advice of the Minister for Education in regard to the scrutiny concerns identified under section 9(1)(b) of the *Legislation Review Act 1987*.

Appendix 1 Instruments with no scrutiny concerns

The Committee has reviewed the following instruments and raised no scrutiny concerns:

Instrument	SI Number/ Government Gazette
Drug Court Amendment Regulation 2024	2024 No 44
Local Government (General) Amendment (City of Hawkesbury) Regulation 2024	2024 No 46
Mental Health Amendment Regulation 2024	2024 No 47
Road Transport (Driver Licensing) Amendment (Visiting Drivers) Regulation 2024	2024 No 49
Road Transport (General) Amendment (University Traffic Offences) Regulation 2024	2024 No 50
Water Management Amendment (Private Water Corporations) Order 2024	2024 No 52
Fisheries Management (Eastern Blue Groper Possession Limit) Order 2024	GG n2024-0367
Land and Environment Court Practice Note – Class 3 Valuation Objections	GG n2024-0387
Land and Environment Court Practice Note – Class 3 Compensation Claims	GG n2024-0388
Supreme Court Practice Note SC CL 11 - Bail	GG n2024-0389
Notice of Reservation of a Regional Park	GG n2024-0417
Notice of Reservation of a Regional Park	GG n2024-0418

Appendix 2 Instruments where engagement is ongoing

The Committee is engaging with the Minister or body responsible for the making of the instruments set out in the table below. The committee will set out a further or concluding view relating to these scrutiny concerns in a future monitor, having regard to that engagement.

Monitor No	Title	S.I Number
1	NSW Admission Board Second Amendment Rule	2024 No. 22
1	NSW Admission Board Third Amendment Rule	2024 No. 23

Appendix 3 Minutes

Draft minutes no. 6

Wednesday 20 March 2024

Regulation Committee

Room 1136, Parliament House, Sydney, 12:35 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Mrs Carter

Mr Donnelly

Mr Murphy

Mr Nanva

2. Apologies

Ms Boyd, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 5 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Sent:

- 15 March 2024 - Letter from the Chair to the Attorney-General, the Hon Michael Daley MP, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 1 of 2024.
- 15 March 2024 - Letter from the Chair to the Minister for Water, the Hon Rose Jackson MLC, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 1 of 2024.
- 15 March 2024 – Letter from the Chair to the Hon. A R Emmett AO KC, Presiding Member, Legal Profession Admission Board, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 1 of 2024.
- 15 March 2024 - Letter from the Chair to Ms Kate Boyd A/Secretary, The Cabinet Office, noting publication of Delegated Legislation Monitor No. 1 of 2024 and the committee's guidelines on technical scrutiny.
- 15 March 2024 - Letter from the Chair to Ms Annette O'Callaghan, Parliamentary Counsel, noting publication of Delegated Legislation Monitor No. 1 of 2024 and the committee's guidelines on technical scrutiny.

5. Consideration of Chair's draft report

The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 2 of 2024*, which having been previously circulated, was taken as being read.

Resolved, on the motion of Mrs Carter: That:

The draft report be the report of the committee and that the committee present the report to the House;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update the report where necessary to reflect changes to committee conclusions or new committee conclusions resolved by the committee;

The report be tabled in the House on Thursday 21 March 2024.

Resolved, on the motion of Mrs Carter: That:

All references to the 'committee' in Delegated Legislation Monitor No. 2 of 2024 be capitalised.

All future references to the 'committee' in reports, correspondence and other relevant documents, when referring to the Regulation Committee, be capitalised.

6. Ministerial correspondence arising from the adopted report

Resolved, on the motion of Mrs Carter: That the Chair write to relevant Ministers or bodies reflecting the concerns identified in the monitor and seeking a response, where required, within 2 weeks after the correspondence is sent.

7. Adjournment

The committee adjourned at 12.46 pm.

8. Next Meeting

Sine die.

Madeleine Dowd
Committee Clerk

