



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

# Delegated Legislation Monitor No. 3 of 2024

8 May 2024



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Regulation Committee

# **Delegated Legislation Monitor No. 3 of 2024**

Ordered to be printed Wednesday 8 May 2024

**New South Wales. Parliament. Legislative Council. Regulation Committee.**

Delegated Legislation Monitor No. 3 of 2024

'May 2024'

Chair: Hon Natasha Maclaren-Jones MLC

ISSN: 2982-0111

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## Committee details

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### Committee members

<b>Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	<i>Chair</i>
<b>Ms Abigail Boyd MLC</b>	The Greens	<i>Deputy Chair</i>
<b>Hon Susan Carter MLC</b>	Liberal Party	
<b>Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Hon Dr Sarah Kaine MLC</b>	Australian Labor Party	
<b>Hon Tania Mihailuk MLC</b>	Pauline Hanson's One Nation	
<b>Hon Cameron Murphy MLC</b>	Australian Labor Party	
<b>Hon Bob Nanva MLC</b>	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.<sup>1</sup> The committee was reappointed in the 57th Parliament on 8 May 2019 and in the 58th Parliament on 10 May 2023.<sup>2</sup>
- 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.<sup>3</sup>
- 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

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<sup>1</sup> *Minutes*, NSW Legislative Council 23 November 2017, pp 2327-2329.

<sup>2</sup> *Minutes*, NSW Legislative Council 10 May 2023, pp 37-39.

<sup>3</sup> *Minutes*, NSW Legislative Council 19 October 2023, pp 639-640.



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- (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.<sup>4</sup>

**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. 3 of 2024**

**1.10** In this Monitor, the committee has reviewed 14 instruments notified on the NSW Legislation Website or in the Government Gazette between 15 March 2024 and 26 April 2024. The committee has:

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

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<sup>4</sup> *Legislation Review Act 1987*, section 9(1)(b).

- raised scrutiny concerns for the information of the Minister in respect of one instrument and concluded its review in respect of two instruments, as set out in Chapter 2, and
- concluded that eleven instruments raise no scrutiny concerns, as set out in the list of instruments in Appendix 1.

**1.11** For those instruments referred to in Chapter 1, the committee will set out its conclusions as a result of engagement with the responsible Minister or Department in a future Monitor. That may include, if necessary, any recommendations that an instrument, or a part of an instrument, ought to be disallowed.

**1.12** There is one instrument where engagement with the Minister is ongoing and a further instrument remains under review, for consideration in a future Monitor.

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# 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.

## Water Industry Competition (General) Regulation 2024

S.I Number	2024 No 51
Notified on Legislation Website (LW)	1/3/24
Tabled in Legislative Council (L.C)	12/3/24
Last date of notice for disallowance motion	18/06/24

### Overview

- 1.1 The *Water Industry Competition (General) Regulation 2024* (the regulation) repeals and remakes the *Water Industry Competition (General) Regulation 2021*.
- 1.2 The regulation was made under the *Water Industry Competition Act 2006* (the Act) and commenced on 1 March 2024, the same time as significant portions of the *Water Industry Competition Amendment Act 2021*.

### Scrutiny concerns

#### *Form or intention of the regulation calls for elucidation*

- 1.3 The Committee's view is that the form and intention of the regulation calls for elucidation in two respects, namely:
  - the purpose and intended effect of duplicating section 3A(a) of the Act in section 6(a), and
  - the intended meaning of the term 'water source' which does not appear to be defined in the Act or the regulation.

#### *Regulation trespasses unduly on personal rights and liberties*

- 1.4 The Committee is required to scrutinise each regulation to consider whether it trespasses unduly on personal rights and liberties. When exercising its scrutiny function, the Committee may take into account provisions affecting rights, freedoms and privileges recognised by the common law, and presumptions applicable to the making of legislation.

1.5 The Committee has determined there is need for further information to resolve scrutiny concerns that the discretion afforded to the Independent Pricing and Regulatory Tribunal (IPART) in Part 4 may trespass unduly on a person's right to natural justice. Specifically, the Committee seeks clarification on the rationale for the breadth of IPART's discretion to determine:

- the timing and conduct of investigations, and
- the matters appropriate for inclusion in issues papers, draft reports and final reports.

### Committee conclusion

1.6 In light of the above, the Committee requests the advice of the Minister for Water regarding the scrutiny concerns identified under sections 9(1)(b)(i) and (vii) of the *Legislation Review Act 1987*.

## Marine Pollution Regulation 2024

S.I Number	2024 No 56
Notified on LW	8/3/24
Tabled in LC	12/3/24
Last date of notice for disallowance motion	18/06/24

### Overview

1.7 The *Marine Pollution Regulation 2024* (the regulation), which commenced on 25 March 2024, repeals and remakes the *Marine Pollution Regulation 2014*, which would otherwise be repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2).

1.8 The explanatory note provides that the regulation is made under the *Marine Pollution Act 2012*, including section 243, the general regulation-making power.

### Scrutiny concerns

#### *Form or intention of the regulation calls for elucidation*

1.9 The Committee's view is that the form and intention of the regulation calls for elucidation in two respects:

- the creation of criminal offences in section 5(2) and (3) and the intended interaction of those offences with subsection (4), and
- the application of the Act, Part 13 to certain ships listed in section 173(a) of the Act in light of section 8(1) of the regulation.

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***Regulation may not have been within the general objects of the Marine Pollution Act 2012***

- 1.10** Under this ground, the Committee is required to consider the objects and intended effects of the *Marine Pollution Act 2012* and how those objects appear to be implemented by the regulation. In the context of this scrutiny principle, the Committee will consider whether each provision of the regulation is authorised by a regulation-making power in the Act.
- 1.11** The Committee has identified that additional information is needed from the Minister for Transport to clarify whether the Act, sections 87 and 90 provide the requisite regulation-making powers for sections 46 and 47 of the regulation.

**Committee conclusion**

- 1.12** In light of the above, the committee requests the advice of the Minister for Transport regarding to the scrutiny concerns identified under section 9(1)(b)(iii) and (vii) of the *Legislation Review Act 1987*.

**Marine Safety Amendment (Penalty Notice Offences) Regulation 2024**

S.I Number	2024 No 57
Notified on LW	8/3/24
Tabled in LC	12/3/24
Last date of notice for disallowance motion	18/06/24

**Overview**

- 1.13** The *Marine Safety Amendment (Penalty Notice Offences) Regulation 2024* (the amending regulation) amends the *Marine Safety Regulation 2016* to update the list of offences under the *Marine Pollution Act 2012* that are penalty notice offences.
- 1.14** The explanatory note provides that the amending regulation is made under the *Marine Safety Act 1998*, sections 126 and 137, the general regulation-making power.

**Scrutiny concerns**

***Regulation may not accord with the spirit of the legislation under which it was made***

- 1.15** Under this ground, the Committee is required to consider whether a regulation, although legally made, accords with the spirit of the legislation under which it was made. When exercising its scrutiny function, the Committee may consider whether the regulation makes unusual or unexpected use of a regulation-making power, including the use of powers in a manner that, although lawful, might detract from the operation of a scheme Parliament has provided for in the Act.

**1.16** The Committee has identified that additional information is needed to resolve the following two issues which appear to make unexpected use of the regulation-making powers under the *Marine Safety Act 1998*:

- the rationale for the disparity between the penalty amount prescribed by the regulation and the maximum penalty applicable on conviction for certain offences under the *Marine Pollution Act 2012*, and
- the rationale for the prescribed penalty amounts being greater than 45 percent of the maximum penalty applicable on conviction for certain offences.

#### **Committee conclusion**

**1.17** In light of the above, the committee requests the advice of the Minister for Transport regarding to the scrutiny concerns identified under section 9(1)(b)(iv) of the *Legislation Review Act 1987*.

### **Report and determination pursuant to section 14(2) of the Statutory and Other Offices Remuneration Act 1975 – President, Vice-President, Deputy Presidents and Acting Judge of Industrial Relations Commission**

Gazette Number	n2024-0470
Notified on LW	26/4/24
Tabled in LC	7/5/24
Last date of notice for disallowance motion	16/8/24

#### **Overview**

**1.18** This determination of the Statutory and Other Offices Remuneration Tribunal fixes remuneration packages for judicial members of the Industrial Relations Commission that will apply upon the commencement by proclamation of amendments to the *Industrial Relations Act 1996* to re-establish that Commission.

**1.19** The determination is made under the *Statutory and Other Offices Remuneration Act 1975*, section 14, following a direction from the Premier and is disallowable by virtue of section 19A(2) of that Act.

#### **Scrutiny concerns**

##### ***Form or intention of the regulation calls for elucidation***

**1.20** The Committee is required to consider whether the form or intention of a rule calls for elucidation. In considering the determination in the context of this scrutiny principle, the Committee has identified a number of matters that may require elucidation.

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**1.21** Specifically, the Committee has identified that additional information or clarification is needed from the Statutory and Other Offices Remuneration Tribunal to resolve the following scrutiny concerns:

- clarity regarding references to sections of the *Industrial Relations Act 1996* (as prospectively amended), and
- the rationale for amending the 2023 determination for the Public Office Holders Group, rather than the determination for the Judges and Magistrates Group.

**Committee conclusion**

**1.22** In light of the above, the committee requests the advice of the Statutory and Other Offices Remuneration Tribunal regarding to the scrutiny concerns identified under section 9(1)(b)(vii) of the *Legislation Review Act 1987*.





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## Chapter 2 Concluded scrutiny matters

This chapter details the committee's concluding comments on statutory instruments which raise scrutiny concerns relating to the grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).

### Legal Profession Admission Board Second and Third Amendment Rules

S.I Numbers	2024 No 22 2024 No 23
Notified on Legislation Website (LW)	13/3/24
Tabled in Legislative Council (LC)	19/3/24
Last date of notice for disallowance motion	6/8/24

#### Overview

- 2.1** The Committee raised scrutiny concerns regarding these two instruments in Monitor No. 1 of 2024 under the *Legislation Review Act 1987*, section 9(1)(b)(vii).
- 2.2** The Committee's concerns related to rules 59, 61 and 97 which the two amending rules substituted in the *NSW Admission Board Rules 2015* and, in particular:
- consistency of use of terms, including defined terms, in rules 59 and 61,
  - the purpose and effect of the inclusion of a reference to undefined non-legislative publication in rule 61,
  - the relationship between rule 61, as inserted by the NSW Admission Board Second Amendment Rule, and rule 46,
  - potential issues with cross-references and repetition in rule 97,
  - uncertainty regarding the relationship between rule 97 and the Legal Profession Uniform Admission Rules 2015 in one respect, and
  - clarity regarding the effect of rule 97(4)-(6) after the amendments.
- 2.3** These scrutiny concerns were conveyed to the Board in correspondence dated 15 March 2024 (see Appendix 4).
- 2.4** In a response letter dated 8 April 2024 (see Appendix 4), the Board acknowledged and accepted the concerns raised by the Committee and undertook to make a further amending rule at the earliest opportunity to address those issues.

### Committee conclusion

- 2.5** The Committee thanks the Board for its engagement with the scrutiny concerns identified in Monitor No. 1 of 2024 and acknowledges the Board's commitment to make an amending rule addressing the issues identified by the Committee.
- 2.6** Based on the response provided by the Board, the Committee is of the view that the scrutiny concerns identified under section 9(1)(b)(vii) of the *Legislation Review Act 1987*, being that the form or intention of each rule called for elucidation, have been appropriately addressed.
- 2.7** Therefore, the Committee concludes its scrutiny of both amending rules on the basis that the identified issues will be resolved in an amending rule. The Committee will review the further amending rule following its tabling in the Legislative Council.

## Liquor Amendment (License Fees) Regulation 2024

S.I Number	2024 No 66
Notified on LW	13/3/24
Tabled in LC	19/3/24
Last date of notice for disallowance motion	6/8/24

### Overview

- 2.8** The *Liquor Amendment (License Fees) Regulation 2024* (the amending regulation) amends the *Liquor Regulation 2018*. The explanatory note provides the object of the amending regulation is to increase certain fees payable under the *Liquor Act 2007*. The amending regulation, which commenced on 15 March 2024, was made under that Act.

### Scrutiny concerns

#### *Potential adverse impact on the business community*

- 2.9** The Committee has identified concerns relating to the scrutiny principles set out in sections 9(1)(b)(ii) of the *Legislation Review Act 1987*, concerning potential adverse impacts on a sector of the business community, namely licensees under the *Liquor Act 2007*.
- 2.10** The *Liquor Regulation 2018*, Schedule 1, Part 4 defines "fee unit" for the purposes of the regulation and provides for the annual adjustment of fee units in accordance with inflation. Clause 9 of that regulation provides for the calculation of periodic licensing fees as the sum of various "fee elements" that are expressed in fee units.
- 2.11** The amending regulation increases the base number of fee units payable for various license fees significantly. Those changes are in addition to the inflation-adjustment that occurs by the operation of Schedule 1. For "base fee elements", for example, the increase for a hotel, general bar or club license is 63%. For packaged liquor licenses, the increase is 20%.

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### **Committee conclusion**

- 2.12** The Committee notes these are significant proportional increases likely to have adverse impacts on a sector of the business community, namely liquor licensees, but recognises this is ultimately a matter of policy. It does not consider that this issue warrants further engagement with the responsible Minister, and therefore, concludes its scrutiny of the instrument.



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## Appendix 1 Instruments with no scrutiny concerns

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

<b>Instrument</b>	<b>SI Number/ Government Gazette</b>
Environmental Planning and Assessment Amendment (Schools) Regulation 2024	2024 No 97
Point to Point Transport (Taxis and Hire Vehicles) Amendment (Penalty Notice Offences) Regulation 2024	2024 No 112
Inclosed Lands Protection Amendment Regulation 2024	2024 No 118
Local Government (General) Amendment (Rates) Regulation 2024	2024 No 119
Property and Stock Agents Amendment Regulation 2024	2024 No 120
Referable Debt Order 2024	2024 No 121
Heavy Vehicle National Legislation Amendment Regulation 2024	2024 No 126
The Bar Association of Queensland Professional Standards Scheme	GG n2024-0477
The Law Society of Western Australia Professional Standards Scheme	GG n2024-0485
Supreme Court Practice Note SC GEN 22 – Pronunciation of Names and Forms of Address	GG n2024-0697
Specialist Family Violence List Pilot Practice Note	GG n2024-0698

## Appendix 2 Instruments where engagement is ongoing

The Committee is engaging with the Minister responsible for the making of the *Education Amendment (Non-Government School Assets and Income) Regulation 2024* (S.I. 2024 No 45). The Committee set out its initial concerns regarding this instrument in Monitor No. 2 of 2024 and will set out a concluding view relating to those concerns in a future monitor, having regard to that engagement.

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## Appendix 3 Minutes

### Draft minutes no. 7

Monday 2 May 2024

Regulation Committee

Room 1136, Parliament House, Sydney, 10.05 am

#### 1. Members present

Mrs Maclaren-Jones, *Chair*

Mrs Carter

Mr Donnelly

Mr Nanva (*via videoconference*)

#### 2. Apologies

Mr Murphy

#### 3. Briefing from NSW Parliamentary Counsel's Office

The Committee was joined by:

- Ms Annette O'Callaghan, Parliamentary Counsel, NSW Parliamentary Counsel's Office,
- Mr Mark Cowan, Deputy Parliamentary Counsel, NSW Parliamentary Counsel's Office, and
- Ms Shakira Harrison, Assistant Parliamentary Counsel, NSW Parliamentary Counsel's Office.

The Committee received a briefing regarding the role of the Parliamentary Counsel's Office (PCO) in the preparation and drafting of delegated legislation.

Discussion ensued regarding the Committee's overarching considerations in scrutinising delegated legislation. The discussion had a specific focus on the appropriate use of regulation-making powers and issues relating to sub-delegation and the incorporation of non or quasi-legislative instruments into delegated legislation.

#### 4. Previous minutes

Resolved, on the motion of Mrs Carter: That draft minutes no. 6 be confirmed.

#### 5. Updated schedule of meetings and timings of distribution of papers

Resolved on the motion Mr Donnelly: That the Committee hold deliberative meetings to adopt the Delegated Legislation Monitor on the Monday of each sitting week at 11.00 am, unless otherwise agreed.

Resolved on the motion Mr Donnelly: That the draft Delegated Legislation Monitor be circulated to the Committee on the Friday before the Monday meeting of each sitting week.

#### 6. Adjournment

The Committee adjourned at 10.47 am.

#### 7. Next Meeting

Monday 6 May 2024, 11.00 am, Room 1136 (consideration of the Committee report entitled 'Scrutiny of Delegated Legislation Monitor No. 3 of 2024').

Madeleine Dowd

**Committee Clerk**

**Draft minutes no. 8**

Monday 6 May 2024

Regulation Committee

Room 1136, Parliament House, Sydney, 11.04 am

**8. Members present**

Mrs Maclaren-Jones, *Chair*

Mrs Carter

Mr Donnelly

Dr Kaine (*via videoconference*)

Ms Mihailuk

Mr Murphy

Mr Nanva (*via videoconference*)

**9. Apologies**

Ms Boyd, *Deputy Chair*

**10. Previous minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 7 be confirmed.

**11. Correspondence**

The Committee noted the following items of correspondence:

***Sent:***

- 22 March 2024 – Letter from Chair to the Minister for Education and Early Learning, the Hon Prue Car MP, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 2 of 2024.

***Received:***

- 8 April 2024 – Letter from the Hon. A R Emmett AO KC, Presiding Member, Legal Profession Admission Board, responding to scrutiny concerns identified in Delegated Legislation Monitor No. 1 of 2024.
- 12 April 2024 – Letter from the Minister for Education and Early Learning, the Hon Prue Car MP regarding scrutiny concerns identified in Delegated Legislation Monitor No. 2 of 2024.

**12. Update regarding new Regulation Committee website**

Secretariat provided a demonstration of the new Regulation Committee webpage which can be found on the [Parliament of New South Wales website](#).

**13. Consideration of Chair's draft report**

The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 3 of 2024*, which having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Donnelly: That paragraphs 2.8-2.31, including headings, be omitted:

**'Overview**

The Committee raised scrutiny concerns regarding this instrument in Monitor No. 2 of 2024, under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (vii). The Committee's concerns related to:

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

These scrutiny concerns were conveyed to the Minister in correspondence dated 22 March 2024 (see Appendix 2).

### **Scrutiny concerns**

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

The first three issues set out above can be taken together as each relates to the interaction between clause 10B and guidelines published under the Act, section 83L. Clause 10B(1) provides:

- (1) For the Act, section 83C(3), a non-government school does not operate for profit if the proprietor's assets or income, as far as they relate to the school, are used by the proprietor to provide a recognised education and care program for—
  - (a) children who attend the school, and
  - (b) children who meet criteria specified in guidelines approved by the Minister under the Act, section 83L.

The Committee raised concerns that clause 10B(1)(b) impermissibly sub-delegates legislative power to guidelines published by the Minister from time to time and queried whether section 83L empowers the guidelines to deal with this matter.

In response to the concerns raised by the Committee, the Minister for Education and Early Learning, in a letter dated 12 April 2024 (see Appendix 2) stated that:

Consistently with section 83C(3) of the Act, clause 10B(1) specifies that a school does not operate for profit if a school's proprietor uses school assets or income to provide a recognised education and care program for certain children.

Clause 10B(1)(b) permits the Minister to specify criteria for some of these children in guidelines published under section 83L of the Act.

The relevant section of the guidelines will relate to the exercise of the Minister's function of providing financial assistance to non-government schools that do not operate for profit.

The revised guidelines were published in the Gazette on 22 April 2024 and specify various circumstances in which a program must be provided to certain children in order to avoid classification as operating for profit.

The Committee acknowledges these matters relate generally to the Minister's functions under the Act, section 83C(1). However, the Act requires, in section 83C(3), the specification of whether or not a school operates for profit to be provided for in regulations rather than in guidelines, made under section 83L, relating to those regulations.

The Committee's concerns about the sub-delegation of legislative power from the Governor to the Minister remain. The details that have subsequently been supplied by way of the administrative Ministerial guidelines for the purposes of clause 10B(1)(b) are, in the Committee's view, legislative rather than administrative in character.

The specification of "children who meet the criteria" as set out in the guidelines is an essential element of determining what a relevant care and education program is for the purposes of clause 10B(1) and subsequently, establishing a circumstance where a non-government school does not operate for profit. The criteria do not offer guidance on the application of the terms of clause 10B(1) in a given case, but instead are of general application: the criteria are matters to be applied in every case.

The Committee's view is that the Minister is being empowered to supply the content of the rule (albeit only one element of it), rather than providing guidance on the administration of its application. The legislative character of the delegation is further indicated by the fact that clause 10B(1) cannot operate without the detail supplied by the guidelines.

As the relevant guidelines had not been published in the Gazette at the time of the making of the regulation, it fell to the Minister to complete the exercise of the power in the Act, section 83C(3). This is distinct from the Governor, in making the instrument, incorporating or adopting the content of an existing publication into the regulation at the time the instrument was made.

Clause 10B(1)(b) also enables the Minister to, in future, alter the effect and application of clause 10B(1) without a further amendment to the regulation. While revised guidelines must be published in the Gazette, they are not subject to the same level of scrutiny as an amending regulation, which would be required to be made by the Governor and be disallowable by Parliament. Given a regulation made under section 83C(3) already involves the exercise of a power that permits the position established in the Act to be varied by delegated legislation, the Committee is particularly alert to any further delegations in this context.

The Committee also asked the Minister for clarification regarding the inclusive definition of "**recognised education and care program**" in clause 10B(3). In response the Minister noted the amended guidelines:

"express the Minister's view that play groups and transition to school programs are types of recognised education and care programs for the purposes of cl.10B(3)"

The Minister's response confirms the definition is intended to be non-exhaustive, noting the guidelines supplement the definition to include the views of the Minister as to what other programs are properly characterised as a "recognised education and care program". The guidelines published on 22 April 2024 include the Minister's views set out above.

The Committee's preference is for such detail to appear on the face of the regulation or that the general features of a "recognised education and care program" be defined. The Minister could then, in guidelines, provide a view on the application of the definition to certain programs.

However, if the "recognised" in "recognised education and care program" is intended to be read as "recognised by the Minister in guidelines published under the Act, section 83L", the Committee's concerns about sub-delegation, set out above, apply equally to the definition of this term, given it is central to application of the clause.

#### ***Form or intention of the regulation calls for elucidation***

The Committee also raised a question regarding the intended operation of clause 10B(2)(a) which provides that, despite clause 10B(1), a non-government school operates for profit if financial assistance provided by the Minister under the Act, Part 7 Division 3 is used for a recognised education and care program. The Minister noted, by reference to the definition of the income in the Act, that:

The combined effect of clause 10B(1) and (2)(a) is that a school will operate for profit if its proprietor uses financial assistance provided by the Minister under Pt 7, Div. 3 of the Act to provided a recognised education and care program for relevant children, however a school will not operate for profit if its proprietor uses other school income to provide such a program.

The Committee thanks the Minister for this clarification and has no further concerns on this point.

Finally, the Committee's view is that the explanatory note to the instrument should have identified that the instrument was made in the exercise of a Henry VIII power. Although clause 10B does not directly amend the Act, it alters its application. The Minister noted the Committee's concerns in this regard.

#### **Committee conclusion**

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The Committee thanks the Minister for engaging with the scrutiny concerns identified in Monitor No. 2 of 2024. Although the Committee acknowledges the contrary view of the Minister, the Committee retains its concerns regarding clause 10B(1)(b) and clause 10B(3).

With regard to clause 10B(1)(b), as set out above, this provision commits to guidelines the criteria relating to the children for whom a recognised education and care program must be provided. The Committee reiterates its view that this may involve an impermissible sub-delegation of legislative power. However, on balance, as this issue is only one element of the rule created by clause 10B, in this instance the Committee has not recommended disallowance.

Having said this, the Committee will remain particularly alert to the sub-delegation of legislative power to quasi-legislative documents produced by a Minister or Department. Scrutiny concerns of this nature will continue to be identified by the Committee when reviewing statutory instruments and, in appropriate cases, the Committee may set out its opinion that an instrument under scrutiny, or part of it, should be disallowed.

Similarly, the Committee is of the view that the non-exhaustive definition of "recognised education and care program" in clause 10B(3) raises concerns regarding sub-delegation of legislative power, where the intention is for the Minister to supplement that definition with additional programs specified in the guidelines. It would be preferable for definitional criteria to be contained in the regulation, leaving the guidelines to clarify the Minister's view of the definition's application.

The Committee draws this instrument to the attention of the House as, in two respects, it may not have been made within the general objects of the legislation under which it was made. While the Committee is not recommending disallowance on this occasion, the Committee does reiterate its power to do so should scrutiny concerns of this nature continue to be identified. [FOOTNOTE: *Legislation Review Act 1987*, s 9(1)(b)(iii).]

Resolved, on the motion of Mr Donnelly: That the Chair write to the Minister for Education to afford the Minister a further opportunity to provide any additional detail regarding issues previously raised by the Committee relating to the *Education Amendment (Non-Government School Asset and Income) Regulation 2024*.

Resolved, on the motion of Mr Murphy: That:

The draft report as amended 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;

Correspondence sent to, and received from, relevant Ministers or bodies that is referred to in the Monitor, will be published as an appendix to the Monitor;

The report be tabled in the House on Wednesday 8 May 2024.

#### **14. 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 two weeks after the correspondence is sent.

#### **15. Adjournment**

The Committee adjourned at 11.36 am.

#### **16. Next Meeting**

Monday 13 May 2024, 11.00 am, Room 1136 (consideration of the Committee report entitled 'Scrutiny of Delegated Legislation Monitor No. 4 of 2024').

Madeleine Dowd  
**Committee Clerk**

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## Appendix 4 Correspondence

Appendix 4 contains the following items of correspondence sent to, and received from, Ministers or bodies regarding instruments referred to in this Monitor:

1. Sent 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.
2. Received 8 April 2024 – Letter from the Hon. A R Emmett AO KC, Presiding Member, Legal Profession Admission Board to the Chair, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 1 of 2024.



15 March 2024

The Hon. A R Emmett AO KC  
Presiding Member  
Legal Profession Admission Board

D24/013261

By email:

Dear Judge,

### NSW Admission Board Second and Third Amendment Rules 2024

As you may be aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*.

The committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instruments tabled in Parliament on 12 March 2024:

- NSW Admission Board Second Amendment Rule 2024 (2024-22), and
- NSW Admission Board Third Amendment Rule 2024 (2024-23).

These instruments have been made under section 21A of the *Legal Profession Uniform Law Application Act 2014* and are therefore subject to disallowance as per section 21A(6) of that Act.

The committee has identified issues under section 9(1)(b)(vii) of the *Legislation Review Act 1987*, which are set out in the committee's Delegated Legislation Monitor No.1 of 2024, as attached for convenience. Noting the conclusions set out in the Monitor, the committee has subsequently resolved to write to the Legal Profession Admission Board to seek clarification on a number of the issues which are set out below.

#### Second Amendment Rule

The committee is of the view that the form or intention of this rule calls for elucidation for two reasons, set out in the table below:

	Provision	Request for clarification
1	Rule 59(1)	Subrule (1) refers to multiple 'examinations'. In its second occurrence, the word 'examination' appears in the singular, which does not correspond with the context and construction of the subrule.
2	Rule 61(1)	The committee requests clarification regarding the reference to the 'Course Information Handbook'. A definition relating to this non-legislative publication does not appear in the <i>NSW Admission Board Rules 2015</i> nor has one been inserted by the <i>NSW Admission Board Second Amendment Rule 2024</i> . We also seek clarification on the relationship between rule 61(1) and rule 46. Given that rule 46

		<p>provides that the Board determines the places and times for the Board's examinations, if the Course Information Handbook is the means by which the Board does so, could that be made express, and the Handbook defined?</p> <p>Contrary to the relevant definition in rule 4 of the NSW Admission Board Rules 2015, an apostrophe has been omitted in the term 'Board's examinations'.</p>
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### Third Amendment Rule

The Committee is of the view is that the form or intention of this rule calls for elucidation for several reasons, set out in the table below.

	Provision	Issue
3	Rule 97(1)	Subrule (1) is expressed as being subject to subrule (9), but after the renumbering of rule 97 in the amending instrument, the correct cross-reference appears to be subrule (7).
4	Rule 97(1) and (4)	The committee requests-clarification regarding the circumstances in which a person "is not eligible to apply for a direction" under the Uniform Rules, rule 11, but nonetheless has obtained the academic qualifications in another jurisdiction relevant to the matters to which the Academic Exemptions Sub-Committee must have regard under rule 97(4). Rule 11(1) appears to enable any person who has "wholly or partially completed the academic qualifications for admission" in another jurisdiction to apply for a direction from the Board.
5	Rule 97(4)-(6)	<p>Subrules (5) and (6) substantially replicate subrules (7B) and (8) as they stood immediately before these amendments. The amended subrules, however, empower the Executive Officer, in addition to the Academic Exemptions Sub-Committee, to grant exemptions, including exemptions subject to conditions, on application or request under rule 97 or the Uniform Rules. No equivalent amendment relating to the Executive Officer is made to subrule (4), which:</p> <ol style="list-style-type: none"> <li>a. requires the Academic Exemptions Sub-Committee to be satisfied, having regard to certain matters and before granting an exemption, that a person ought not be required to undertake an examination, and</li> <li>b. permits that Committee to set tasks for an applicant for an exemption as part of its consideration of the application for an exemption.</li> </ol> <p>The committee requests clarification regarding whether it is intended that Executive Officer should also be required to be satisfied of the matters set out in subrule (4) before granting an exemption and be able to set tasks to an applicant for an exemption. Alternatively, if the intention is to only permit the Executive Officer to grant permissions under subrule (2), as suggested by the Explanatory Note, should subrules (5) and (6), insofar as they relate to the Executive Officer refer not to exemptions and instead to the granting of permission?</p>
6	Rule 97(7)	Subrule (7) imposes a limitation on the circumstances in which a student-at-law may apply for an exemption under rule 97. The rule is expressed as being "notwithstanding sub-rule (1) and sub-rule (2)", however subrule (2) concerns the Executive Officer permitting a person, in receipt of a direction under the

		Uniform Rules, rule 11, to sit certain examinations. Under subrule (3), a person with the Executive Officer's permission is deemed by law to be exempt from examinations in the balance of subjects. Given a person seeks <i>permission</i> from the Executive Officer to sit certain examinations under subrule (2) and is subsequently deemed exempt from others under subrule (3), it is not clear what the intended effect of the reference to notwithstanding subrule (2) in subrule (7) is.
7	Rule 97(8)	Subrule (8) contains an errant repetition of the phrase "shall be in".

Please provide a response to the issues identified as numbers 2, 4, 5 and 6 by **Wednesday 3 April 2024**.

The committee draws your attention to the issues identified as numbers 1, 3 and 7 for potential revision in a future amendment to the NSW Admission Board Rules 2015.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on \_\_\_\_\_ or \_\_\_\_\_.

Kind regards

Hon Natasha Maclaren-Jones MLC  
Committee Chair

CC: The Hon Michael Daley MP, Attorney-General  
Via email -





# LEGAL PROFESSION ADMISSION BOARD

The Hon Natasha Maclaren-Jones MLC  
Chair of the Regulation Committee  
Legislative Council  
Parliament of New South Wales

Your ref: D24/013261

By email:

8 April 2024

Dear Ms Maclaren-Jones

**Re: Legal Profession Admission Board  
NSW Admission Board Second and Third Amendment Rules 2024**

I refer to your letter dated 15 March 2024.

I note that that the Regulation Committee of the Legislative Council has sought clarification of a number of issues in relation to made by the Legal Profession Admission Board (**the Board**) pursuant to section 21 of the *Legal Profession Uniform Law Application Act 2014*.

You requested a response to issues 2, 4, 5 and 6 identified in your letter by Wednesday 3 April 2024 but understand that, following the LPAB's Legal Officer, Ms Plater, contacting Ms Dowd, Director of the Regulation Committee, an extension has been granted for the Board to respond until Wednesday 10 April 2024. Consideration has now been given to all of the issues identified in your letter and I expect that the Board will accept the substance of all the concerns raised by the Committee. In the circumstances, an amending Rule intended to address all of those concerns will be considered by the Board at its next meeting on Tuesday 23 April 2024 with a view to lodgement of the amending Rule with Parliamentary Counsel's Office for Notification by early May 2024.

If you have any queries regarding the Board's response, I would be grateful if you could first please contact \_\_\_\_\_, the Board's Legal Officer, on \_\_\_\_\_.

Yours sincerely

The Honourable Arthur R Emmett AO KC





