



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Delegated Legislation Monitor No. 4 of 2024



15 May 2024

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Regulation Committee

Delegated Legislation Monitor No. 4 of 2024

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Delegated Legislation Monitor No. 4 of 2024

'May 2024'

Chair: Hon Natasha Maclaren-Jones MLC

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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 Greg Donnelly MLC	Australian Labor Party	
Hon Dr Sarah Kaine MLC	Australian Labor Party	
Hon Tania Mihailuk MLC	Pauline Hanson's One Nation	
Hon Cameron Murphy MLC	Australian Labor Party	
Hon Bob Nanva MLC	Australian Labor Party	

Contact details

Website	www.parliament.nsw.gov.au
Email	Regulation.committee@parliament.nsw.gov.au
Telephone	02 9230 3050



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. 4 of 2024

1.10 In this Monitor, the Committee has reviewed a further three instruments notified on the NSW Legislation Website between 29 April 2024 and 3 May 2024. One instrument remained under review from Monitor No. 3. 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 its review in respect of one instrument, as set out in Chapter 2, and
 - concluded that two instruments raise no scrutiny concerns, as set out in the list of instruments in Appendix 1.

1.11 For the instrument 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 A further instrument remains 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.

Electricity Infrastructure Investment Amendment (Consumer Trustee and Infrastructure Planner) Regulation 2024

S.I Number	2024 No 96
Notified on Legislation Website (LW)	5/04/24
Tabled in Legislative Council (LC)	7/05/24
Last date of notice for disallowance motion	13/08/24

Overview

- 1.1 The [*Electricity Infrastructure Investment Amendment \(Consumer Trustee and Infrastructure Planner\) Regulation 2024*](#) (the amending regulation) amends the *Electricity Infrastructure Investment Regulation 2021* (the 2021 Regulation).
- 1.2 The amending regulation was made under the *Electricity Infrastructure Investment Act 2020* (the Act) and commenced on publication on 5 April 2024, other than Schedule 1[2]-[8] which will commence on 1 July 2024.
- 1.3 The Act and the 2021 Regulation provide, in general terms, for the coordinated investment in new electricity generation, storage, network and related infrastructure in New South Wales. The statutory regime:
 - establishes statutory roles and functions relevant to electricity infrastructure, including the consumer trustee, the regulator, the financial trustee and the infrastructure planner, and
 - provides for the conduct of competitive tenders for long-term energy services (LTES) and the declaration of an access schemes for renewable energy zones (REZ). An access scheme authorises or prohibits access to, and use of, specified network infrastructure in a REZ.
- 1.4 As provided by the explanatory note, the objects of the amending regulation are:
 - to specify actions the consumer trustee is required and not required to do in authorising a network operator to carry out a REZ network infrastructure project, including to

either undertake and consider a cost benefit analysis or consider an infrastructure investment objectives report,

- to restrict certain persons from making a tender bid in a competitive tender for an LTES agreement in relation to an infrastructure project,
- to require the consumer trustee to publish its reasons for determining there are exceptional,
- circumstances to allow persons, otherwise restricted, to make a tender bid in a competitive tender for an LTES agreement for infrastructure,
- to establish a time frame by when the consumer trustee is to conduct a competitive tender requested by the infrastructure planner,
- to require the infrastructure planner to include certain matters in a development agreement between the infrastructure planner and a participant for the grant or increase of access rights, including a right to terminate the access right if the project has not achieved the finance and construction criteria by the nominated date,
- to restrict the infrastructure planner from exercising certain functions until it publishes a standard development agreement,
- to give the infrastructure planner additional access scheme functions, including to carry out an application process without a competitive tender for the grant or increase of access rights and to make recommendations to the scheme financial vehicle in relation to payment deeds with access rights holders, and
- to make other minor and consequential amendments.

Scrutiny concerns

The form or intention of the regulation calls for elucidation

- 1.5** Under this ground, the Committee is required to consider the objects and intended effects of the *Electricity Infrastructure Investment Act 2020* 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.
- 1.6** Schedule 1[12] of the amending regulation inserts clause 42CA into the 2021 Regulation. Clause 42CA concerns the functions of the infrastructure planner, in regard to standard development agreements the planner may enter into with a project participant under an access scheme. Clause 42CA(1) provides for matters that must be included in any such agreement.
- 1.7** The heading to the section provides it is made under the Act, ss 63(4)(d) and 66(5)(a).
- 1.8** Noting that section 66(5)(a) provides that the regulations may make further provision for or with respect to the appointment of persons under the Act, Part 8, the Committee seeks clarification from the Minister regarding the rationale for citing section 66(5)(a) as a relevant regulation-making power in clause 42CA.

Committee conclusion

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

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).

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

S.I Number	2024 No 45
Notified on Legislation Website (LW)	1/3/24
Tabled in Legislative Council (L.C)	12/3/24
Last date of notice for disallowance motion	18/6/24

Overview

- 2.1 As set out in Monitor No. 2 of 2024, the [Education Amendment \(Non-Government School Assets and Income\) Regulation 2024](#) 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.
- 2.2 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).
- 2.3 The amending regulation, which commenced on 1 March 2024, was made under the *Education Act 1990*, section 83C(3). On 22 April 2024 the "Not-For-Profit Guidelines for Non-Government Schools: March 2024" were published in the Government Gazette.
- 2.4 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,
 - 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), and

- the intended operation of clause 10B(2)(a), as read with section 83C(1) of the Act.

- 2.5 These scrutiny concerns were conveyed to the Minister in correspondence dated 22 March 2024. The Committee afforded the Minister a further opportunity to respond to these scrutiny concerns in correspondence dated 6 May 2024.
- 2.6 The Minister provided a response to the Committee's initial correspondence on 12 April 2024 and a further response on 8 May 2024.
- 2.7 This correspondence can be found at Appendix 4 of this Monitor.

Scrutiny concerns

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

- 2.8 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.

- 2.9 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.
- 2.10 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 4), 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.

- 2.11 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 guidelines, at page 28, provide:

For the purposes of clause 10B(1)(b), the Minister specifies children who meet the following criteria:

- children who are likely to attend the school; or
- children who will not attend the school by virtue of the school's eligibility criteria, in circumstances where the recognised education and care program is delivered mainly for children likely to attend the school (for instance, a co-educational preschool provided by a single-sex nongovernment school); or
- children who do not attend the school, in circumstances where the recognised education and care program is delivered mainly for children who attend the school (for instance, vacation care provide for children who attend the school, and also offered to children from other schools); or
- children who will not or do not attend the school in circumstances where there are no other recognised education and care programs of the relevant kind in the geographic vicinity (for instance, delivery of a preschool program or out of school hours care in a regional or rural area).⁵

- 2.12** 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.
- 2.13** 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.
- 2.14** 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.
- 2.15** 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.
- 2.16** 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.
- 2.17** 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

⁵ NSW Department of Education, *Not-For-Profit Guidelines for Non-Government Schools*, March 2024, [NSW Government Gazette, No 146 of 22 April 2024](#), [n2024-0706].

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.

2.18 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).⁶

2.19 The Minister's response confirms the definition is intended to be non-exhaustive. The Minister notes the guidelines supplement the definition to include her views 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.

2.20 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.

2.21 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

2.22 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 provide 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.

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

2.24 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

⁶ Correspondence from the Minister for Education and Early Learning to Chair, 12 April 2024, p 2 (see Appendix 4).

clause 10B does not directly amend the Act, it alters its application. The Minister noted the Committee's concerns in this regard.

Committee conclusion

- 2.25** The Committee thanks the Minister for engaging with the scrutiny concerns identified in Monitor No. 2 of 2024. In further correspondence dated 8 May 2024 (Appendix 4), the Minister reiterated her view that the matters provided for in guidelines are a proper exercise of the power conferred by section 83L of the *Education Act 1990*. Although the Committee acknowledges the contrary view of the Minister, the Committee retains its concerns regarding clause 10B(1)(b) and clause 10B(3).
- 2.26** 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 makes no comment on the policy reflected in clause 10B or the guidelines but is of the view that the means by which the policy has been achieved 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.
- 2.27** Having said this, the Committee will remain alert to the use of legislative power to delegate matters to non or quasi-legislative documents, such as guidelines. This will be particularly so where those documents are produced by a Minister or Department.
- 2.28** Guidelines may, in many circumstances, provide useful and appropriate advice in relation to administrative matters or set out the Government's view or a regulator's view on the application of the law to particular circumstances. However, the Committee's view is that in this case, the guidelines go further than that, in that they are arguably legislative rather administrative in character. Both the accessibility of the law and parliamentary scrutiny are diminished where key elements of the law are provided for in documents that may be altered without a legislative amendment that is disallowable by Parliament.
- 2.29** It is on this basis that 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.
- 2.30** 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.
- 2.31** 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.⁷ While the Committee is not recommending disallowance on this occasion, the Committee

⁷ *Legislation Review Act 1987*, s 9(1)(b)(iii).

does reiterate its power to do so should scrutiny concerns of this nature continue to be identified.

Appendix 1 Instruments with no scrutiny concerns

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

Instrument	SI Number/ Government Gazette
Environmental Planning and Assessment Amendment (Transport Oriented Development) Regulation 2024	2024-134
Criminal Records Amendment (Eligible Homosexual Offences) Regulation 2024	2024-136

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
3	Water Industry Competition (General) Regulation 2024	2024 No. 51
3	Marine Pollution Regulation 2024	2024 No. 56
3	Marine Safety Amendment (Penalty Notice Offences) Regulation 2024	2024 No. 57
3	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 the Industrial Relations Commission	GG n2024-0470

Appendix 3 Minutes

Draft minutes no. 9

Monday 13 May 2024

Regulation Committee

Room 1136, Parliament House, Sydney, 11.00 am

1. Members present

Mrs Maclaren-Jones, *Chair*

Mrs Carter

Mr Donnelly

Ms Mihailuk (*via teleconference*)

Mr Murphy

Mr Nanva

2. Apologies

Ms Boyd, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Mrs Carter: That draft minutes no. 8 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Sent:

- 6 May 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.
- 8 May 2024 – Letter from Chair to the Minister for Transport, the Hon Jo Haylen MP, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 3 of 2024.
- 8 May 2024 – Letter from Chair to the Minister for Water, the Hon Rose Jackson MLC, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 3 of 2024.
- 8 May 2024 – Letter from Chair to the Minister for Gaming and Racing, the Hon. David Harris MP, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 3 of 2024.
- 8 May 2024 – Letter from Chair to the Statutory and Other Offices Remuneration Tribunal, the Hon Greg Pearce, regarding scrutiny concerns identified in Delegated Legislation Monitor No. 3 of 2024.

Received:

- 8 May 2024 – Letter from the Minister for Education Early Learning, the Hon Prue Car regarding scrutiny concerns identified in Delegated Legislation Monitor No. 2 of 2024.

5. Consideration of Chair's draft report

The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 4 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;

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 15 May 2024.

6. Correspondence arising from the adopted report

6.1 Correspondence to the Minister for Education and Early Learning

Resolved, on the motion of Mrs Carter: That the Chair write to the Minister for Education and Early Learning, regarding the Education Amendment (Non-Government School) Assets and Income Regulation noting that:

- the Committee has ongoing scrutiny concerns regarding clause 10B(1)(b) and clause 10(3) of the regulation, as detailed in pages 5-9 of Monitor No 4 of 2024,
- the Committee has concluded its scrutiny of the regulation but will continue to scrutinise delegated legislation and identify issues of this nature, and
- as per the Committee's amended establishing resolution, the Committee can ultimately recommend to the House that an instrument or a portion of an instrument, ought to be disallowed on the basis of concerns relating to the scrutiny principles set out in section (9)(1)(b) of the Legislation Review Act 1987.

6.2 Other correspondence

Resolved, on the motion of Mr Donnelly: 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.

7. Adjournment

The Committee adjourned at 11.14 pm.

8. Next Meeting

Monday 3 June 2024, 11.00 am, Room 1136 (consideration of the Committee report entitled 'Scrutiny of Delegated Legislation Monitor No. 5 of 2024').

Madeleine Dowd
Committee Clerk

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 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.
2. Received 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.
3. Sent 6 May 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.
4. Received 8 May 2024 – Letter from the Minister for Education Early Learning, the Hon Prue Car regarding scrutiny concerns identified in Delegated Legislation Monitor No. 2 of 2024.



22 March 2024

The Hon Prue Car MP
Deputy Premier
Minister for Education and Early Learning
Minister for Western Sydney

D24/014307

By email:

Dear Minister,

Education Amendment (Non-Government School Assets and Income) Regulation 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 instrument, notice of the making of which was tabled in Parliament on 12 March 2024:

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

The Committee has identified issues under section 9(1)(b)(iii), (v) and (vii) of the *Legislation Review Act 1987*, which are set out in Delegated Legislation Monitor No. 2 of 2024, as attached for convenience. Noting the conclusions set out in the Monitor, the Committee has subsequently resolved to write to you as the responsible Minister to seek clarification on a number of the issues.

Scrutiny concerns

The Committee is of the view is that clause 10B, as inserted by Schedule 1 to the regulation may engage the scrutiny grounds set out in section 9(1)(b)(iii), (v), (vii). The issues raised are set out in the table below:

	Provision	Issue
1	Clause 10B(1)(b)	Clause 10B(1) permits a school's proprietor to use assets or income for a "recognised education and care program" without the school operating "for profit" provided that the program is for: <ul style="list-style-type: none">"(a) children who attend the school, and(b) children who meet criteria specified in guidelines approved by the Minister under the Act, section 83L."

		<p>The Committee is concerned the regulation may not have been within the general objects of the legislation under which it was made because:</p> <ul style="list-style-type: none"> • clause 10B(1)(b) may impermissibly sub-delegate legislative power, • the Act, section 83L may not authorise the guidelines to provide for the detail clause 10B(1)(b) defers to guidance, and • clause 10B(1)(b) refers generally to guidelines "approved" by the Minister under section 83L rather than a specific publication that had been gazetted at commencement. <p>In deciding whether the operation of a "recognised education and care program" is exempt from profit-making activities, the identification of children who attend the program is an essential criterion. This is served by paragraphs (a) and (b) of the subclause, which are cumulative requirements. It appears to the Committee that clause 10B(1)(b) purports to transfer the content of this element of the provision from regulations made by the Governor (and disallowable by Parliament) to guidelines made and approved by the Minister from time to time (that are not disallowable).</p> <p>The Committee seeks your advice regarding:</p> <ul style="list-style-type: none"> • What, if any, power in the Act enables the sub-delegation of the legislative power in section 83C(3) to guidance? • The basis on which the criteria referred to in clause 10B(1)(b) is considered to be guidance on the "exercise of functions" under the Act, Part 7, Division 3 (as referred to in section 83L). • While acknowledging that the Minister may exercise the power in section 83L from time to time—what, if any, power in the Act enables the regulations to incorporate the guidelines made under section 83L from time to time rather than a specific publication? <p>Finally, the Committee notes, at the time the amending regulation inserted clause 10B into the <i>Education Regulation 2017</i> and at the time of writing, the relevant guidelines had not been published in the Gazette.</p>
2	Clause 10B(2)(a)	<p>Clause 10B(2)(a) appears to be somewhat circular; the reference to the Act, Part 7, Division 3 leads back to section 83C of the Act, which expressly provides that the Minister must not provide financial assistance to schools that operate for profit.</p> <p>Hence, if a non-government school is provided financial assistance by the Minister which is used for a recognised education and care program, this would categorise the school as one which operates for profit. Clause 10B(1) would then</p>

		<p>appear to serve no practical purpose, and the financial assistance would appear to be a contravention of the Minister's obligations under section 83C of the Act.</p> <p>Assuming this is not the intended operation of clause 10B(2)(a), the Committee seeks additional clarification regarding this subclause. For example, it is possible that this subclause may be intended to refer to financial assistance which was previously provided to a non-government school by the Minister for a purpose other than a recognised education and care program and was subsequently diverted to the operation of a recognised education and care program. If that is the case, the Committee suggests there is a lack of clarity in the drafting of this subclause, in particular the meaning of “<i>provided</i> by the Minister under the Act” and “<i>used for</i> a recognised education and care program”.</p> <p>The Committee would appreciate additional information to elucidate the intended operation of clause 10B(2)(a).</p>
3	Clause 10B(3), definition of <i>recognised education and care program</i>	<p>Clause 10B(1) and (2) turn, in part, on the definition of "recognised education and care program" in subclause (3). The definition includes preschool programs, long day care and out of school hours care which are also defined terms in subclause (3). The definition of "recognised education and care program" is expressly inclusive and non-exhaustive, and this begs the question what, if any, other programs may be properly characterised as a "recognised care and education program". The committee seeks clarification regarding this question and in what sense another program would be "recognised" and by whom?</p>
4	Clause 10B generally	<p>Clause 10B has the effect of amending the operation of the <i>Education Act 1990</i> by detracting from the operation of section 83C(2)(a). This amendment is made way of by a Henry VIII provision and is expressly contemplated by Parliament in section 83C(3). Although the provision does not enable the amending regulation to directly amend the 1990 Act, it makes that Act subordinate to the amending regulation, reversing the ordinary position.</p> <p>The explanatory note to the amending regulation does not identify that the instrument was partially made under a Henry VIII provision. Given the concerns regarding the use of this type of provision,¹ the Committee is of the view that any accompanying explanatory note should clearly state that a regulation has been made under a Henry VIII provision.</p>

¹ Regulation Committee, Making of delegated legislation in New South Wales, Report 7, October 2020, pp 27-29.

Please provide a response to the issues identified as nos 1, 2 and 3 by **16 April 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no. 4 is for information and noting only and does not require a response.

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

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon N Maclaren-Jones MLC
 Chair, Legislation Review Committee
 Legislative Council
 Parliament House
 Macquarie Street
 SYDNEY NSW 2000

Email:

Dear Ms Maclaren-Jones

Thank you for your correspondence of 22 March 2024, regarding the *Education Amendment (Non-Government School Assets and Income) Regulation 2024* (the Regulation). I have responded to the issues raised in your correspondence in the below table, adopting your numbering:

	Provision	Response
1.	Clause 10B(1)(b)	<p>I have relied on the opinion of the Parliamentary Counsel that the Regulation may legally be made.</p> <p>Clause 10B(1)(b) may legally be made because:</p> <ul style="list-style-type: none"> • Section 83C(3) of the <i>Education Act 1990</i> (the Act) expressly permits the regulations to specify whether or not a school operates for profit because of “any particular use of assets or income, any particular payment in relation to the school or any other matter...” • Consistent with s.83C(3) of the Act, cl. 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 s.83L of the Act. • Relevantly, s.83L of the Act expressly permits the Minister to publish guidelines “relating to the exercise of functions under this Division...” • 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. • For the Committee’s information, I note that updated guidelines will shortly be published in the Gazette and will include a section containing the criteria referred to in cl. 10B(1)(b) of the Regulation.

	Provision	Response
2.	Clause 10B(2)(a)	<p>Clause 10B(2)(a) of the Regulation is not circular.</p> <p>Section 83C(2) of the Act provides that a school will operate for profit if the Minister is satisfied (among other things) that school income is used for a purpose other than for the operation of the school.</p> <p>“Income”, within the meaning of the Act, is not restricted to financial assistance provided by the Minister under Pt 7, Div 3 of the Act. Rather, “income” is defined broadly, and includes money received from school fees and donations, among other sources (see s. 83C(5) of the Act).</p> <p>The combined effect of cls. 10B(1) and 10B(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 provide 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.</p>
3.	Clause 10B(3), definition of recognised education and care program	The Minister’s updated guidelines, which will shortly be published in the Gazette under s.83L of the Act, 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) of the Regulation.
4.	Clause 10B generally	That is noted.

Sincerely

Prue Car MP

Deputy Premier of New South Wales
Minister for Education and Early Learning
Minister for Western Sydney

12 April 2024



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

6 May 2024

The Hon Prue Car MP
Deputy Premier
Minister for Education and Early Learning
Minister for Western Sydney

D24/021457

By email

Dear Minister,

Thank you for your letter of 12 April 2024 responding to scrutiny concerns the Regulation Committee (the Committee) raised regarding the *Education Amendment (Non-Government School Assets and Income) Regulation 2024*.

The Committee acknowledges the responses provided but has ongoing concerns in respect of two issues:

- clause 10B(1)(b) which delegates to the Minister the power to specify in guidelines criteria regarding children for whom a relevant program must be provided, and
- the relationship between the inclusive definition of "recognised education and care program" and those guidelines.

The Committee resolved at its meeting on 6 May 2024 to afford you a further opportunity to provide any additional detail regarding these issues.

In order to enable the Committee to consider its conclusions regarding the instrument at its next meeting, we request you provide a response by close of business on **Wednesday 8 May 2024**. I have attached a copy of my initial letter and your reply for information.

If you have any questions about this correspondence or the Monitor, please contact Madeleine Dowd, Director – Regulation Committee, on _____ or _____

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Prue Car MP

Deputy Premier of New South Wales
Minister for Education and Early Learning
Minister for Western Sydney



Ref: RML24/1658

The Hon Natasha Maclaren-Jones MLC
Committee Chair
Regulation Committee
NSW Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Email: Regulation.Committee@parliament.nsw.gov.au

Dear Committee Chair

Thank you for your correspondence of 6 May 2024, on behalf of the Regulation Committee, regarding the opportunity to provide further information in response to the Committee's concerns regarding clause 10B(1)(b) of the *Education Regulation 2017*, inserted under *Education Amendment (Non-Government School Assets and Income) Regulation 2024 (Amending Regulation)*.

I note the Committee has raised concerns about:

- clause 10B(1)(b) which delegates to the Minister the power to specify in guidelines criteria regarding children for whom a relevant program must be provided, and
- the relationship between the inclusive definition of "recognised education and care program" and those guidelines."

I appreciate the Committee's important role under the *Legislative Review Act 1987*. In order to provide more meaningful feedback, I would benefit from an articulation of the reasons for the above concerns, in light of Parliamentary Counsel's reassurance as to the legality of clause 10B(1)(b). Further, I would appreciate advice from the Committee as to whether any of the matters in s. 9(1)(b) apply, so that I may assuage those concerns.

As stated in my letter of 12 April 2024, s.83L of the *Education Act 1990* confers on the Minister power to publish guidelines relating to the exercise of functions [Part 7, Division 3]. I **enclose** for the Committee's convenience a copy of the Not-For-Profit Guidelines for Non-Government Schools (March 2024) (**NFP Guidelines**) and refer the Committee to page 28, which relevantly states:

"For the purposes of clause 10B(1)(b), the Minister specifies children who meet the following criteria:

- children who are likely to attend the school; or
- children who will not attend the school by virtue of the school's eligibility criteria, in circumstances where the recognised education and care program is delivered mainly for children likely to attend the school (for instance, a co-educational preschool provided by a single-sex nongovernment school); or
- children who do not attend the school, in circumstances where the recognised education and care program is delivered mainly for children who attend the school (for instance, vacation care provided for children who attend the school, and also offered to children from other schools); or

- children who will not or do not attend the school in circumstances where there are no other recognised education and care programs of the relevant kind in the geographic vicinity (for instance, delivery of a preschool program or out of school hours care in a regional or rural area).”

I can advise the Committee that both the Amending Regulation and NFP Guidelines were developed in close consultation with the non-government school sector. Read together, clause 10B and the NFP Guidelines provide the sector with regulatory clarity.

I have acted on the advice of Parliamentary Counsel’s Office as to the legality of the Amending Regulation and that clause 10B was legally made and that clause 10B(1)(b) does not involve any impermissible sub delegation of legislative power.

With respect for the Committee’s important role, I am happy to consider the Committee’s concerns as part of the review of s. 83C of the *Education Act*, noting that the drafting of explanatory notes is a matter for Parliamentary Counsel. For the Committee’s convenience, I enclose that review’s Terms of Reference.

Sincerely

✓ Prue Car MP
Deputy Premier of New South Wales
Minister for Education and Early Learning
Minister for Western Sydney

📅 May 2024

