



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Delegated Legislation Monitor No. 13 of 2024



13 November 2024

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Regulation Committee

Delegated Legislation Monitor No. 13 of 2024

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Delegated Legislation Monitor No. 13 of 2024

'November 2024'

Chair: Hon Natasha Maclaren-Jones MLC

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Table of contents

	Committee details	iv
	Overview of the Delegated Legislation Monitor	v
	Operation of the Committee's technical scrutiny function	v
	Conclusions and structure of Monitor No. 13 of 2024	vi
Chapter 1	Concluded scrutiny matters	1
	Children (Protection and Parental Responsibility) Regulation 2024	1
	Overview	1
	Scrutiny concerns	1
	Committee conclusion	3
	Teaching Service Regulation 2024	4
	Overview	4
	Scrutiny concerns	4
	Committee conclusion	6
	Centennial Park and Moore Park Trust Regulation 2024	8
	Overview	8
	Scrutiny concerns	8
	Committee conclusion	13
Chapter 2	Instruments with no scrutiny concerns	17
Chapter 3	Instruments raising scrutiny concerns	19
Appendix 1	Minutes	21
Appendix 2	Correspondence	24

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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 the 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 within 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 eight 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
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made

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.

- (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.

- 1.7** The Committee has published guidelines on its webpage that provide an overview of its intended approach to its technical scrutiny function and specific guidance in respect of each of these eight grounds.
- 1.8** Each sitting week, the Committee will publish a Delegated Legislation Monitor setting out its progress and conclusions relating to the technical scrutiny of disallowable instruments. The monitor will set out matters where the Committee has sought further information from the responsible minister, department or other body, the Committee's conclusions in relation to instruments where concerns have been raised and a list of those instruments 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 into 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. 13 of 2024

- 1.10** For this monitor, the Committee has reviewed 26 instruments published on the NSW legislation website or in the NSW Government Gazette between 12 August 2024 and 18 October 2024. The Committee has:
- concluded its scrutiny of three instruments, as set out in Chapter 1,
 - concluded that 21 instruments raise no scrutiny concerns, as set out in Chapter 2, and
 - raised scrutiny concerns in relation to two instruments, for consideration in a future monitor, as set out in Chapter 3.
- 1.11** A further nine instruments notified between 30 September 2024 and 25 October 2024 remain under review, for consideration in a future monitor.

Chapter 1 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).

Children (Protection and Parental Responsibility) Regulation 2024

SI number / GG reference	2024 No 375
Published on legislation website (LW)	16/08/2024
Tabled in Legislative Council (LC)	17/09/2024
Last date of notice for disallowance motion	19/11/2024

Overview

- 1.1 The [Children \(Protection and Parental Responsibility\) Regulation 2024](#) (the regulation) repeals and remakes, without substantial changes, the *Children (Protection and Parental Responsibility) Regulation 2019*, which would otherwise have been repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2). The regulation commenced on 16 August 2024.
- 1.2 The regulation is made under the *Children (Protection and Parental Responsibility) Act 1997* (the Act), including sections 26(2) and 46, the general regulation-making power.
- 1.3 As stated in the explanatory note, and as relevant to the Committee, the regulation provides for matters relating to counselling services.
- 1.4 The Committee wrote to the Attorney General on 27 September 2024 to raise scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv) in relation to the regulation. The Attorney General responded to this correspondence on 22 October 2024. This correspondence is included in Appendix 2.

Scrutiny concerns

The regulation may not have been within the general objects of, or may not accord with the spirit of, the legislation under which it was made

- 1.5 Under these grounds, the Committee is required to consider the consistency of a regulation with the objects and intended effects of the parent Act, including whether a provision appears to be beyond the scope of the delegated legislation-making powers in the parent Act.
- 1.6 The Act, section 10 provides that a court may require a child that it finds guilty of an offence and the child's parent or parents to undergo such specified counselling as the court considers would be beneficial in assisting the progress of the child.

- 1.7** The Act, section 11(1) makes it an offence for a parent to, by wilful default, contribute directly or in a material respect to the commission of an offence of which their child has been found guilty. Section 11(2) provides that the court may require a parent convicted of that offence to undergo counselling or do such other things that would in the opinion of the court advance the welfare and best interests of the children instead of, or in addition to, imposing a penalty.
- 1.8** The regulation, section 7(2) provides that a court must not require a person to undergo counselling if, in the court's opinion, the person would suffer undue financial hardship as a result of undergoing the counselling.
- 1.9** The Committee notes that the section appears to be made under section 46(1), the general regulation-making power, which provides that the Governor may make regulations, not inconsistent with the Act, for or with respect to any matter that is 'necessary or convenient' to be prescribed for carrying out or giving effect to the Act.
- 1.10** The Committee expressed concern that section 7(2) may be inconsistent with the Act, sections 10 and 11(2), or potentially beyond power, considering these provisions do not impose a limitation on the court's ability to make counselling orders or expressly provide that the regulations may do so.
- 1.11** However, the Committee also noted the Act, section 6, which provides guiding principles for courts in considering how a child should be dealt with under the Act, Part 2 (Parental responsibility):

6 Guiding principles for courts

- (1) In considering *how a child should be dealt with* under this Part, a court is to have regard to whether the taking of the action under consideration is in the best interests of the child.
- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), the court is to consider—
- (a) the nature of the relationship of the child with the child's parent or parents, and
 - (b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by the child's parent or parents, and
 - (c) *the welfare, status and circumstances of the child and of the child's parent or parents.*

[Emphasis added.]

- 1.12** In response to the Committee's concerns about section 7(2), the Attorney General submitted that:

Clause 7(2) of the Regulation is identical to that under its predecessor provision under *Children (Protection and Parental Responsibility) Regulation 2019*.

Clause 7(2) of the Regulation provides that a court must not require a person to undergo counselling if, in the court's opinion, the person would suffer undue financial hardship as a result. It is consistent with the requirement in section 6 of the Act that the Court is to consider the best interests of the child in making a decision about a child under the Act, including consideration of the welfare and circumstances of the child and their parent(s). This would extend to consideration of their financial circumstances.

Committee conclusion

- 1.13** The Committee appreciates the Attorney General's engagement with the scrutiny concerns raised by the Committee.
- 1.14** The Committee notes that even if a provision of a new principal regulation is identical to that in the previous regulation repealed by the principal regulation, that provision, for appearing in a new instrument that is disallowable under the *Interpretation Act 1987*, section 41, is within the purview of the Committee's scrutiny function.⁴
- 1.15** The Committee acknowledges the Attorney General's justification that the guiding principles under the Act, section 6 extend to considering a person's financial circumstances in deciding whether to require that person to undergo counselling.
- 1.16** However, the Committee remains critical of the regulation, section 7(2) for restricting the court's discretion to require a person to undergo counselling under the Act, sections 10 and 11(2) where neither provision provides that the regulations may impose such a limitation.
- 1.17** The Committee proposes that this restriction may go beyond, or may not be in the spirit of, the general regulation-making power to prescribe matters that are 'necessary or convenient' to give effect to the Act.
- 1.18** Further, it is arguable that the Act, section 6, insofar as it is prefaced as relating to decisions about how a *child* should be dealt with, does not lend the same support for a provision restricting the power of the court to order that the child's parent or parents undergo counselling, particularly in relation to the Act, section 11(2).
- 1.19** The Committee considers it would be preferable to amend the Act to put beyond doubt the power for the regulations to prevent the court from making counselling orders under the Act, section 10 or 11(2) unless satisfied the person would not suffer undue financial hardship as a result.
- 1.20** Subject to the above suggestion, the Committee is of the view that the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv) have been appropriately addressed. On this basis, the Committee concludes its scrutiny of the regulation.

⁴ See further discussion of this point at 1.38–1.40.

Teaching Service Regulation 2024

SI number / GG reference	2024 No 386
Published on Legislation Website (LW)	16/08/2024
Tabled in Legislative Council (L.C)	17/09/2024
Last date of notice for disallowance motion	19/11/2024

Overview

- 1.21** The [Teaching Service Regulation 2024](#) (the regulation) repeals and remakes, with minor changes, the *Teaching Service Regulation 2017*, which would have otherwise been repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2). The regulation commenced on 16 August 2024.
- 1.22** The regulation is made under the *Teaching Service Act 1980* (the Act), including section 100(1)(b), (g), (h) and (i).
- 1.23** The regulation provides for, among other matters, compliance by members of the Teaching Service with statutory conditions of service, as well as the general duties of members. The regulation, section 4 defines ***statutory conditions of service*** as the provisions of the Act, the regulation or determinations made under the Act, section 13 that impose duties on members of the Teaching Service.
- 1.24** The Committee wrote to the Minister for Education and Early Learning on 27 September 2024 to raise scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(vii) in relation to the regulation. The Minister responded to this correspondence on 16 October 2024.
- 1.25** The Committee wrote back to the Minister, requesting further information, on 21 October 2024. The Minister responded to this further correspondence on 25 October 2024.
- 1.26** The abovementioned correspondence is included in Appendix 2.

Scrutiny concerns

The form or intention of the regulation calls for elucidation

- 1.27** Under this ground, the Committee is generally concerned with ambiguity and uncertainty, including the imposition of uncertain obligations.
- 1.28** The Act, section 100(1)(b) provides that regulations may be made for or with respect to the appointment, powers, duties and responsibilities of officers and temporary employees of the Teaching Service.

1.29 The Act, Part 4A deals with the management of the conduct and performance of officers in the Teaching Service. The Act, section 93C defines *misconduct*, for the part, as including a contravention of any provision of the Act or the regulations.

1.30 The regulation, section 6 reads as follows:

6 General duties—the Act, s 100(1)(b)

A member of the Teaching Service must, in addition to discharging the duties of the position in which the member is employed—

(a) participate actively in all the corporate interests of—

(i) the Department, and

(ii) the school in which the member is employed, and

(b) undertake other duties assigned to the member by—

(i) the person in charge of the school, or

(ii) another person with authority to assign duties.

1.31 The Committee sought clarification from the Minister as to the intended meaning of the duty imposed by section 6(a), in particular the meaning of 'corporate interests'. The Committee considered the duty to be vague, particularly given 'corporate interests' is not defined in the regulation or the Act and does not appear to be used elsewhere in the statute book.

1.32 The Committee also sought clarification as to the intended meaning of the term 'official duties' as used in sections 7 and 9(g), querying whether the term is intended to refer to those general duties of the position in which a member of the Teaching Service is employed.

1.33 In the Minister's initial response received 16 October 2024, the Minister confirmed the term 'official duties' has the meaning proposed by the Committee.

1.34 With regard to section 6(a), the Minister simply noted that:

The Regulation has been in place in some form since 1982 and the expression "corporate interests" has formed part of the text of section 6 (or the equivalent section) since 1994.

It was not considered necessary to amend the section in the remake of the Regulation and I am not aware of any operational issues that have arisen due to this terminology.

1.35 The Committee considered further information was required to address the Committee's concerns about the duty sought to be imposed by section 6(a) and wrote back to the Minister on 21 October 2024. That letter stated that:

The Committee is concerned by the possibility that disciplinary or remedial action could be taken in relation to a member of the Teaching Service who fails to 'participate actively in the corporate interests of the Department and the school in which the member is employed', given the broad definition of misconduct in the *Teaching Service Act 1980*, Part 4A, which includes a contravention of any provision of the regulations.

In the circumstances, the Committee considers it important to seek clarity regarding the obligation on teachers, and requests further information regarding what section 6(a) is

taken to mean, including how the provision is implemented in practice and the circumstances in which a teacher may be found to have contravened the provision.

1.36 In the Minister's second response of 25 October 2024, the Minister added that:

The term “corporate interests” was retained as it accounts for both the interests of the school itself rather than those of individuals, such as the principal, as well as the interests of the department as a single entity.

In terms of implementation, section 6(a) reflects the scale and diversity of the 2,200 schools which make up the NSW government school system. The core interests of these schools and the department are the delivery of high-quality education in environments which are safe for students, staff, and visitors. To achieve this outcome the department is responsible for putting in place policies and procedures that schools are expected to follow, implement, and enforce. By doing so the collective corporate interests of both schools and the department are advanced.

For example, consistent with the Controversial Issues in Schools Policy and the Code of Conduct, staff are not to express political opinions in the course of performing their duties. Section 6(a)(i) provides the means for the department to take action in response to breaches of this requirement, which is in the collective interest of the school and the department.

As members of the Teaching Service are not employees of the department, if section 6(a)(i) were to be removed, it would bring into question whether a member of the Teaching Service was required, as part of their duties, to comply with the policies and procedures set by the department for all government schools. I trust this provides the clarity the Committee is seeking.

Committee conclusion

- 1.37** The Committee appreciates the Minister's engagement with the scrutiny concerns raised by the Committee, including confirmation regarding what the 'official duties' of a member of the Teaching Service constitutes.
- 1.38** At the outset, the Committee notes that, in several recent responses to correspondence from the Committee, ministers have sought to justify a provision of a regulation called into question by the Committee on the basis the provision is a continuation of the same, or a similar, provision of a regulation that has been remade as part of the staged repeal process.
- 1.39** The Committee understands that regulations may be remade in substantially the same form during the staged repeal process triggered by the *Subordinate Legislation Act 1989*, however the Committee is required to scrutinise all disallowable instruments against the same scrutiny principles and cannot disregard a scrutiny concern for being the continuation of an existing state of affairs. As a new principal regulation, the Committee is required to scrutinise the regulation in accordance with its establishing resolution.
- 1.40** The Committee does not consider responses justifying a provision on the basis the provision is historical to be adequate, and requires a substantive response to the specific questions raised by the Committee in order to appropriately report on particular instruments and general trends or issues relating to delegated legislation.

- 1.41** That matter aside, the Committee remains concerned that a duty to 'participate actively in the corporate interests of the Department and the school in which the member is employed' is ambiguous, both for the meaning of 'corporate interests', which could conceivably be quite broad in scope, and the fact the duty is a positive obligation to 'participate actively', rather than a prohibition against engaging in certain conduct.
- 1.42** If, as appears to be suggested by the Minister, the duty simply entails complying with departmental policies and procedures, the Committee considers it would be clearer and more appropriate for the provision to require this instead, provided the matter is not already covered by determinations of conditions of employment made, or agreements relating to industrial matters entered into, by the Secretary of the Department of Education under the Act, sections 13 and 14, respectively.⁵
- 1.43** If that is not the case, and given the stated importance of section 6(a)(i) as the purported mechanism requiring members of the Teaching Service to comply with departmental policies and procedures, the Committee considers there is all the more reason to amend section 6(a) to clarify the scope of the duty imposed, particularly given the potentially adverse consequences for members of the Teaching Service alleged to have failed to comply.
- 1.44** The Committee therefore draws the regulation to the attention of the House, pursuant to the *Legislation Review Act 1987*, section 9(1)(b)(vii), on the basis that the regulation, section 6(a) calls for elucidation.
- 1.45** While the Committee will not be recommending that the relevant part of the regulation be disallowed on this occasion, the Committee has outstanding concerns about section 6(a) and recommends that the Minister consider amending the provision to provide greater certainty regarding the duty imposed.
- 1.46** The Committee concludes its scrutiny of the regulation subject to the above comments.

⁵ The Committee notes it is generally concerned with duplication and redundancy for the confusion and uncertainty this potentially creates. The Committee considers it crucial for persons to be able to easily discern, understand and comply with legislative obligations imposed on them.

Centennial Park and Moore Park Trust Regulation 2024

SI number / GG reference	2024 No 436
Published on Legislation Website (LW)	30/08/2024
Tabled in Legislative Council (LC)	17/09/2024
Last date of notice for disallowance motion	19/11/2024

Overview

- 1.47 The [Centennial Park and Moore Park Trust Regulation 2024](#) (the regulation) remakes, with amendments, the *Centennial Park and Moore Park Trust Regulation 2014*, which was repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2). The regulation commenced the same day.
- 1.48 The regulation is made under the *Centennial Park and Moore Park Trust Act 1983* (the Act), including sections 16(b), 17(b), 18C, 20A and 22, the general regulation-making power.
- 1.49 As stated in the explanatory note, the regulation deals with the management, use and regulation of the land vested in the Centennial Park and Moore Park Trust (the ***Trust lands***), including the entry of persons onto the Trust lands, commercial, public and recreational activities, and offences for which penalty notices may be issued.
- 1.50 The Committee wrote to the Minister for Planning and Public Spaces on 18 October 2024 to raise scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(i), (iv)⁶ and (vii) in relation to the regulation. The Minister responded by letter dated 30 October 2024. This correspondence is included in Appendix 2.

Scrutiny concerns

The regulation trespasses unduly on personal rights and liberties

- 1.51 Under this ground, the Committee will scrutinise provisions affecting rights, freedoms and privileges recognised by the common law or designated by statute, as well as international conventions ratified by Australia and presumptions that apply to the making of legislation.
- 1.52 Such scrutiny extends to provisions that could unduly interfere with the implied freedom of political communication, or the right of peaceful assembly or to freedom of expression.

⁶ The Committee neglected to list this provision in its letter to the Minister, but considers the engagement of this ground of scrutiny to be plain from the content of the letter and previous monitors.

- 1.53 The Committee will consider whether the trespass is provided for using clear and express language and may inquire into the justification for the trespass.
- 1.54 The regulation, section 22 makes it an offence for a person to carry out, or arrange the carrying out of, a prohibited activity on the Trust lands, unless carried out with the written permission of the Trust or the Chief Executive of the Trust.
- 1.55 Section 22(3), definition of *prohibited activity* prohibits a person from collecting a petition or conducting a survey (paragraph (e)), distributing or displaying advertising material (paragraph (f)), and organising or participating in a public meeting, function, demonstration, gathering or other public activity (paragraph (j)).
- 1.56 The regulation, section 22 is expressed to be made under the Act, section 22(2)(a) and (b), which enable regulations to be made for or with respect to the use and enjoyment, and the care, control and management, of the Trust lands.
- 1.57 The Trust has, subject to the Act and the regulations, the control and management of all property vested in the Trust.⁷ The Act, section 8 provides that the objects of the Trust are:
- (a) to maintain and improve the Trust lands,
 - (b) to encourage the use and enjoyment of the Trust lands by the public by promoting and increasing the recreational, historical, scientific, educational, cultural and environmental value of those lands,
 - (c) to maintain the right of the public to the use of the Trust lands,
 - (d) to ensure the protection of the environment within the Trust lands, and
 - (e) such other objects, consistent with the functions of the Trust in relation to the Trust lands, as the Trust considers appropriate.
- 1.58 On 18 October 2024, the Committee wrote to the Minister. Though noting the countervailing objects to be balanced by the Trust, the Committee put forward its concern that section 22(3), definition of *prohibited activity*, paragraphs (e), (f) and (j), insofar as the paragraphs may capture forms of political communication, could unjustly infringe the implied freedom of political communication.
- 1.59 In its letter, the Committee stated that:

To the Committee, the offence provisions appear to effectively burden the implied freedom, necessitating consideration of whether the purpose of the provisions and the means adopted are legitimate, and in turn whether the provisions are reasonably appropriate and adapted to advance that legitimate purpose.

Given the importance of the implied freedom to our system of responsible and representative government, the Committee recognises that any interference with the implied freedom should be carefully considered and narrowly drafted to ensure that interference is for a legitimate aim and generally proportionate to that aim.

The Committee would appreciate clarification on the following:

⁷ See the Act, section 9(2).

1. Section 22(3), definition of *prohibited activity*, paragraph (j) seems capable of capturing a 'demonstration' in large numbers, and a small 'gathering' of a few. What kinds of 'public activity' are, and are not, intended to be captured by this paragraph?

2. Is it intended that paragraphs (e), (f) and (j) would capture activities of a political nature, meaning that written permission must be sought in advance for those activities?

3. In what circumstances would written permission be refused, and what considerations would be taken into account in the exercise of that discretion?

4. Was consideration given to whether an alternative or less intrusive legislative mechanism could have adequately addressed the legitimate objects of maintaining and protecting Trust lands and public use and enjoyment of those lands?

1.60 The Committee received a response from the Minister on 30 October 2024.

1.61 Regarding the kinds of 'public activity' that are, and are not, intended to be captured by paragraph (j), the Minister advised that the paragraph:

... has been drafted to make sure [the Trust] has a robust gateway for the approval of a wide range of activities that may be perceived to adversely impact on the safety, amenity, equitable use and public order across the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

Permission is not required for other public activities, such as picnicking, exercising, playing a musical instrument, climbing a tree or more broadly utilising and enjoying the parklands' facilities.⁸

1.62 The Minister confirmed that paragraphs (e), (f) and (j) 'would capture activities of a political nature, meaning that written permission should be sought in advance for those activities'.

1.63 The Minister added:

Seeking written permission from the Trust or the Chief Executive of the Trust allows certain activities of a political nature to be undertaken on the parklands with sufficient notice so the activity may be carried out in a safe and responsible manner that does not adversely impact on the use and enjoyment of the parklands by the wider community.

For example, these particular activities allow the Trust and the event organiser to work collaboratively to make sure permission is requested and granted in advance – as well as any other relevant approvals that may be required to be obtained by the event organiser, such as an approval from the NSW Police Force to hold a public assembly⁹ – so those activities are conducted in a safe and orderly manner.

⁸ The Committee considers that most of these examples of activities that are not prohibited are more appropriately described as activities that might take place in public, as opposed to 'public activities' in the same vein as a public meeting, function, demonstration, or gathering that paragraph (j) seeks to prohibit.

⁹ The Committee notes a public assembly that is not an authorised public assembly under the *Summary Offences Act 1988*, Part 4 is not illegal because authorisation is not required to participate in a peaceful assembly. See T Gotsis and R Johns, [Protest law in New South Wales](#), NSW Parliamentary Research Service, March 2024.

[Regarding paragraph (e)], [t]he Act's objectives are met by deterring the unauthorised collection of a petition or conduct of a survey from causing a public disturbance that would adversely affect the public use and enjoyment of the Trust lands, which, in turn, disrupts the proper care, control and management of the Trust lands.

1.64 The Minister advised that written permission may be refused for an activity referred to in paragraphs (e), (f) and (j):

... [F]ollowing a review of the relevant risk assessment and associated safety plans, including consultation with the NSW Police Force or any relevant matters of public order or safety.

Such refusal is likely to occur where it is considered that permitting the activity would adversely impact on the safety, amenity, equitable use and public order across the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

1.65 Finally, the Minister confirmed that:

Consideration was given to whether an alternative or less intrusive legislative mechanism could have adequately addressed the legitimate objects of maintaining and protecting Trust lands and the public use and enjoyment of those lands. However, the CPMPT Regulation is consistent with, and aligned to, other parklands legislation and contemporary parklands management.

Enforcement of the CPMPT Regulation is the final step in driving behavioural change within the parklands and it is not the preference. The preference is using an educative approach to align and drive positive change to meet the objectives of the Act.

The regulation may not accord with the spirit of the legislation under which it was made

1.66 Under this ground, the Committee will consider whether a regulation makes unusual or unexpected use of regulation-making powers and otherwise accords with the general objects and intention of the enabling Act.

1.67 The regulation, Schedule 1, pursuant to the Act, section 18C, lists offences for which penalty notices may be issued and the respective penalty notice amounts to be paid.

1.68 Several amounts exceed 25 per cent of the maximum penalty applicable to a prosecution for the relevant offence under the regulation, as follows:

- the amount payable for a penalty notice issued for the offence created by section 40(3), being \$350, is 31.8 per cent of the maximum penalty for the offence,
- the amount payable for a penalty notice issued for the offences created by sections 22(1) (in relation to section 22(3), definition of *prohibited activity*, paragraphs (a)–(c) and (e)–(l)), 24(1), 28(3) (except for contravening a verbal direction), 31(1)(a) and (c), 32(1)(a)–(f), (j) and (l)(iii), 37(1), 41(1) and 42(1)(d), being \$500, is 45.4 per cent of the maximum penalty for each offence, and

- the amount payable for a penalty notice issued for the offences created by sections 22(1) (in relation to section 22(3), definition of ***prohibited activity***, paragraph (d)), 25(2) and 44(4), being \$1,100, is 100 per cent of the maximum penalty for each offence.

1.69 The Committee generally considers that penalty notice amounts in excess of 20–25 per cent of the maximum penalty for the offence are inadvisable and, for this reason, the Committee sought information on the rationale behind, and justification for, the chosen penalty notice amounts, in particular the \$1,100 amounts equal to the maximum penalty the court may impose when dealing with the relevant offences.

1.70 The Minister replied that:

It is necessary that these offences – including those offences that have been given a maximum penalty of 10 penalty units and a penalty notice amount of \$1,100 – are attributed their maximum penalties and penalty notice amounts, to deter persons or commercial operators from carrying out or engaging in unlawful or unauthorised actions that would adversely affect the public use and enjoyment of the Trust lands, which, in turn, disrupts the proper care, control and management of the Trust lands.

In particular, the chosen amounts are expected to deter commercial operators who would see lower values as insignificant and merely a part of 'doing business'. I note that section 23(3) of the *Fines Act 1996* allows a penalty notice amount that does not exceed the maximum penalty that could be imposed by a court for the offence to which the penalty notice relates.

On balance, mandating these higher penalty notice amounts works towards the safe and orderly use of the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

The form or intention of the regulation calls for elucidation

1.71 Under this ground, the Committee is generally concerned with ambiguity and uncertainty, including the imposition of uncertain obligations, especially where the conduct concerned is the subject of a criminal offence.

1.72 The regulation, section 34(1) enables the Trust to prohibit a person from entering the Trust lands if the person is in possession of a specified thing (a ***prohibited thing***). Section 34(3) makes it an offence for a person to enter, or remain on, the Trust lands while in possession of a prohibited thing in contravention of a sign displayed on or adjacent to the Trust lands.

1.73 The Committee sought clarification regarding the kinds of things intended, and not intended, to be captured by the section.

1.74 The Minister explained that:

This section intends to enable a level of agility and flexibility when managing competing community needs across an urban parkland and is consistent with Part 2, section 8(2) of the repealed Regulation.

For example, section 34 of the CPMPT Regulation enables the Trust to set up exclusion zones to support the NSW Police Force with its operations; create safety zones to separate kids play from general park users; support our commitment to community

safety surrounding large scale music events; and create an order of management that is scalable for the planned and unplanned, and that of emerging trends.

... It is necessary that an offence and penalty units are attributed against section 34 of the CPMPT Regulation to deter unauthorised activities by visitors to the parklands and commercial operators who may behave contrary to the CPMPT Regulation and, more importantly, visitor safety.

Additionally, I note that section 34 of the *Royal Botanic Gardens and Domain Trust Regulation 2020*, which was one of the benchmarking regulations for the review and remake of the CPMPT Regulation, aligns with section 34 of the CPMPT Regulation, including in relation to both the offence and penalty amount. This achieves a broader objective of consistency and alignment between parklands legislation.

Committee conclusion

- 1.75** The Committee appreciates the Minister's prompt and considered engagement with the scrutiny concerns raised by the Committee.
- 1.76** The Committee considers the scope of public activity captured by the regulation, section 22(3), definition of *prohibited activity*, paragraph (j), and the things intended to be prohibited under section 34, could benefit from further explanation and legislative refinement, however the Committee appreciates the need for flexibility in both cases.
- 1.77** In the Committee's view, the Minister's response appears to indicate agreement that section 22(3), definition of *prohibited activity*, paragraphs (e), (f) and (j) effectively burden the implied freedom of political communication.
- 1.78** To the Committee, the purpose of, and means adopted by, these offence provisions appear legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of responsible and representative government, particularly in light of the objects of the Trust.
- 1.79** The final question to be answered in considering whether the offence provisions, especially paragraph (j), unjustly infringe the implied freedom of political communication is whether the provisions are reasonably appropriate and adapted to advance their legitimate object, which involves a proportionality test that considers whether there is a rational connection between the provisions and that object, whether the object can be achieved by obvious and compelling alternatives that are less restrictive, and whether there is an adequate balance between the purpose of the provisions and the restriction on the implied freedom.
- 1.80** The Committee does not consider it necessary to undertake this theoretical exercise given the Minister's response, particularly regarding the matters taken into account before refusing permission for the activities, and notes the question of validity is ultimately one for the courts.
- 1.81** Finally, the Committee acknowledges the Minister's explanation as to the rationale for the prescribed penalty notice amounts in Schedule 1, but remains concerned that the amounts equal to 100 per cent, and to a lesser extent 45.4 and 31.8 per cent, of the maximum penalty for the relevant offence are inappropriate.

- 1.82** The Committee reiterates its view that it is generally advisable that a penalty notice amount not exceed 20–25 per cent of the maximum penalty for the relevant offence, endorsing the following recommendations of the New South Wales Law Reform Commission and consistent with advice of the Parliamentary Counsel's Office:
- 4.4 The proposed guidelines on penalty notice amounts should provide that penalty notice amounts should be set at a level designed to deter offending, but be considerably lower than a court might generally be expected to impose for the offence.
- 4.5 The proposed guidelines on penalty notice amounts should provide that
- (a) a penalty notice amount should not exceed 25% of the maximum court fine for that offence
 - (b) only in exceptional circumstances involving demonstrated public interest may a penalty notice amount be up to 50% of the maximum court fine, for example where
 - (i) the harm caused by the offence is likely to be particularly severe
 - (ii) there is a need to provide effective deterrence because the offender stands to make a profit from the activity, or
 - (iii) the great majority of offences are dealt with by way of penalty notices, so that the maximum court penalty is less significant as a comparator.¹⁰
- 1.83** In relation to the 100 per cent penalty notice amounts, the Committee queries whether these amounts are proportional to the nature and seriousness of the relevant offences, which involve using audio-visual and broadcasting equipment without permission, conducting a wedding or organised ceremony outside designated areas or without permission, and contravening a condition of a permission granted by the Trust.
- 1.84** Prescribing a 100 per cent penalty notice amount for at least the first two of these offences seems less targeted at mitigating adverse impacts on the use and enjoyment, and the care, control and management, of the Trust lands, and more about deterring 'commercial operators', particularly when compared against the 45.4 per cent penalty notice amount for offences that include using a device to emit sound at a volume likely to unreasonably interfere with the amenity of the Trust lands, damaging or interfering with vegetation or part of the Trust lands, lighting fires, carrying firearms and harming animals or animal habitats.
- 1.85** The Committee notes differential penalty notice amounts are not set for corporations compared to individuals, which might be more easily defensible given the stated intention of deterring 'commercial operators' from contravening the relevant offence provisions.
- 1.86** The Committee acknowledges there are no strict or rigid rules regarding the setting of penalty notice amounts, given the need for flexibility and responsiveness across various regulatory regimes, but a 100 per cent penalty notice amount is unusual and normally requires strong and justifiable public interest grounds. The Committee therefore strongly suggests that the Minister consider revising the penalty notice amounts in excess of the 20–25 per cent range.

¹⁰ See [Report 132: Penalty notices](#), New South Wales Law Reform Commission, February 2012.

- 1.87** Subject to the above comments, the Committee is satisfied the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(i), (iv) and (vii) have been appropriately addressed. The Committee concludes its scrutiny of the regulation.

Chapter 2 Instruments with no scrutiny concerns

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

Instrument	SI number/ GG reference
Fisheries Management (Aquaculture) Regulation 2024	2024 No 406
Hunter Water Regulation 2024	2024 No 408
Parliamentary Contributory Superannuation Regulation 2024	2024 No 411
Agricultural Industry Services Regulation 2024	2024 No 434
Explosives Regulation 2024	2024 No 439
Paintball Regulation 2024	2024 No 442
Children's Guardian Amendment (Code of Practice) Regulation 2024	2024 No 486
Government Sector Employment Amendment (Public Service Employees) Regulation 2024	2024 No 485
Crimes Amendment (Major Facilities) Regulation 2024	2024 No 496
Information Sharing Amendment (Corrective Services NSW) Regulation 2024	2024 No 508
Music Festivals Amendment Regulation 2024	2024 No 509
Superannuation Administration (Vision Super Transitional Provisions) Regulation 2024	2024 No 512
Uniform Civil Procedure (Amendment No 103) Rule 2024	2024 No 517
Electoral Funding Amendment (Administration Fund) Regulation 2024	2024 No 526
State Debt Recovery Act—Referable Debt Order	2024 No 528
Industrial Relations Act 1996—Industrial Court Criminal Practice Note No. 1	NSWGG-2024-380-5
Industrial Relations Act 1996—Industrial Relations Commission of New South Wales Usual Directions	NSWGG-2024-380-5
Industrial Relations Act 1996 and Civil Procedure Act 2005—Industrial Relations Commission of New South Wales Practice Note No. 32	NSWGG-2024-380-5
Professional Standards Act 1994—The Law Society of New South Wales Professional Standards Scheme	NSWGG-2024-383-1
Fisheries Management Act 1994—Fisheries Management (Recreational Fishing Gemfish Possession) Order 2024	NSWGG-2024-391-2

Instrument	SI number/ GG reference
Legal Profession Uniform Law Application Act 2014—NSW Admission Board (withdraw without penalty) Amendment Rule 2024	NSWGG-2024-392-2

Chapter 3 Instruments raising scrutiny concerns

The Committee has identified scrutiny concerns, and is engaging with the responsible minister or body, in relation to the instruments set out in the table below. The Committee will set out its conclusion on those scrutiny concerns in a future monitor, having regard to that engagement.

Responsible minister or body	Instrument	SI number / GG reference
Attorney General	Crimes (Sentencing Procedure) Regulation 2024	2024 No 379
Minister for Water	Water Management (General) Amendment (Miscellaneous) Regulation 2024	2024 No 488

Appendix 1 Minutes

Draft minutes no. 18

Monday 11 November 2024

Regulation Committee

Room 814, Parliament House, Sydney, 1.01 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Ms Boyd, *Deputy Chair (via teleconference)*

Mr Donnelly

Dr Kaine *(via teleconference)*

Ms Mihailuk *(via teleconference)*

Mr Nanva *(via teleconference)*

Mr Murphy

2. Apologies

Mrs Carter

3. Previous minutes

Resolved, on the motion of Mr Murphy: That draft minutes no. 17 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Sent:

- 18 October 2024 – Letter from Chair to Minister for Planning and Public Spaces, the Hon Paul Scully MP regarding scrutiny concerns identified in the *Centennial Park and Moore Park Trust Regulation 2024*.
- 21 October 2024 – Follow up letter from Chair to Minister for Education and Early Learning, the Hon Prue Car MP regarding scrutiny concerns identified in the *Teaching Service Regulation 2024*.
- 25 October 2024 – Letter from Chair to Minister for the Arts regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 12 of 2024.
- 25 October 2024 – Letter from Chair to Minister for Energy regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 12 of 2024.
- 25 October 2024 – Letter from Chair to Minister for Local Government regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 12 of 2024.
- 28 October 2024 – Letter from Chair to Minister for Water, the Hon Rose Jackson MLC regarding scrutiny concerns identified in the *Water Management (General) Amendment (Miscellaneous) Regulation 2024*.
- 28 October 2024 – Letter from Chair to the Clerk of the Scottish Parliament, Mr Black, regarding the Scottish Parliament's Delegated Powers and Law Reform Committee's consultation on framework legislation and Henry VIII powers.

Received:

- 22 October 2024 – Letter from Attorney General, the Hon Michael Daley MP regarding the *Children (Protection and Parental Responsibility) Regulation 2024*.
- 25 October 2024 – Letter from Minister for Education and Early Learning, the Hon Prue Car MP, regarding the *Teaching Service Regulation 2024*.
- 5 November 2024 – Letter from Attorney General, the Hon Michael Daley MP regarding the *Crimes (Sentencing Procedure) Regulation 2024*.

5. **Australia-New Zealand Scrutiny of Legislation Conference**

Committee noted that on 28 October 2024, the Chair submitted a paper entitled 'Breaking New Ground: Expanding the scrutiny function of the New South Wales Legislative Council's Regulation Committee', to be presented at the Australia-New Zealand Scrutiny of Legislation Conference taking place on 3-5 December 2024 in Melbourne. Committee also noted the submission of a jurisdictional report to the conference.

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

The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 13 of 2024*, which having been previously circulated, was taken as being read.

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 13 November 2024.

7. **Correspondence arising from Monitor No. 13 of 2024**

Resolved, on the motion of Mr Donnelly: That the Chair write to relevant ministers or bodies reflecting the conclusions of the Committee set out in Monitor No. 13 of 2024.

8. **Follow-up of outstanding undertakings**

Committee noted its resolution of 3 June 2024 that the secretariat conduct a 6-monthly review of the undertakings made by a minister or body in response to concerns raised by the Committee and, where necessary, write to the minister or body seeking an update regarding implementation.

Committee further noted that the secretariat has now undertaken a review and identified the following undertakings that remain outstanding (noting that this does not include undertakings made in the last three months):

Relevant minister/body	Instrument	Monitor No.	Date made
Legal Profession Admission Board	NSW Admission Board Second Amendment Rule 2024	1 and 3	08/04/2024
Legal Profession Admission Board	NSW Admission Board Third Amendment Rule 2024	1 and 3	08/04/2024
Transport for NSW	Marine Pollution Regulation 2024	3 and 5	22/05/2024

Minister for Energy	Electricity Infrastructure Investment Amendment (Consumer Trustee and Infrastructure Planner) Regulation 2024	4 and 6	28/05/2024
Minister for Roads	Road Transport Amendment (Automated Seatbelt Enforcement) Rule 2024	7	3/07/2024
Minister for Industrial Relations	Industrial Relations (General) Amendment (Fees) Regulation 2024	7 and 8	30/07/2024

Resolved, on the motion of Mr Murphy: That the template letter proposed by the secretariat be adopted as the template for future correspondence being sent to a minister or body to follow up on undertakings made in response to the Committee's scrutiny concerns.

9. **Adjournment**

The Committee adjourned at 1.12 pm.

10. **Next Meeting**

Monday 19 November 2024, 11.00 am, Room 1136 (consideration of the Committee report entitled 'Scrutiny of Delegated Legislation Monitor No. 14 of 2024').

Madeleine Dowd
Committee Clerk

Appendix 2 Correspondence

Appendix 2 contains the following items of correspondence sent to, and received from, ministers or bodies regarding instruments referred to in this monitor:

- Sent 27 September 2024 – Letter from Chair to Attorney General, the Hon Michael Daley regarding scrutiny concerns identified in the *Children (Protection and Parental Responsibility) Regulation 2024*
- Sent 27 September 2024 – Letter from Chair to Minister for Education and Early Learning, the Hon Prue Car regarding scrutiny concerns identified in the *Teaching Service Regulation 2024*
- Received 16 October 2024 – Letter from Minister for Education and Early Learning, the Hon Prue Car regarding scrutiny concerns identified in the *Teaching Service Regulation 2024*
- Sent 18 October 2024 – Letter from Chair to Minister for Planning and Public Spaces, the Hon Paul Scully regarding scrutiny concerns identified in the *Centennial Park and Moore Park Trust Regulation 2024*
- Sent 21 October 2024 – Letter from Chair to Minister for Education and Early Learning, the Hon Prue Car regarding scrutiny concerns identified in the *Teaching Service Regulation 2024*
- Received 22 October 2024 – Letter from Attorney General, the Hon Michael Daley regarding scrutiny concerns identified in the *Children (Protection and Parental Responsibility) Regulation 2024*
- Received 25 October 2024 – Letter from Minister for Education and Early Learning, the Hon Prue Car regarding scrutiny concerns identified in the *Teaching Service Regulation 2024*
- Received 30 October 2024 – Letter from Minister for Planning and Public Spaces, the Hon Paul Scully regarding scrutiny concerns identified in the *Centennial Park and Moore Park Trust Regulation 2024*.



27 September 2024

The Hon. Michael Daley MP
Attorney General

D24/048425

By email: office@daley.minister.nsw.gov.au

Dear Attorney General

Children (Protection and Parental Responsibility) Regulation 2024

As you are 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 the *Legislation Review Act 1987*, section 9(1)(b).

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 17 September 2024.

- *Children (Protection and Parental Responsibility) Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv). I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function*, on the [NSW Parliament website](#).

Scrutiny concerns

	Provision	Issue
1	Section 7(2)	<p>The <i>Children (Protection and Parental Responsibility) Act 1997</i> (the Act), section 10 provides that a court may require a child that it finds guilty of an offence and the child's parent or parents to undergo such specified counselling as the court considers would be beneficial in assisting the progress of the child. The Act, section 11(1) makes it an offence for a parent to, by wilful deceit, contribute directly or in a material respect to the commission of an offence of which their child is found guilty. Section 11(2) enables the court to require a parent convicted of that offence to undergo counselling or do such other things that would in the opinion of the court advance the welfare and best interests of the child instead of, or in addition to, imposing a penalty.</p> <p>The <i>Children (Protection and Parental Responsibility) Regulation 2024</i>, section 7(2) provides that a court must not require a person to undergo counselling if, in the court's opinion, the person would suffer undue financial hardship as a result of undergoing the counselling.</p> <p>The subsection appears to be made under the general 'necessary or convenient' regulation-making power in the Act, section 46(1). The Committee is concerned the subsection may be inconsistent with the Act, sections 10 and 11(2) or potentially beyond power, in circumstances where those provisions do not impose a limitation on the court's ability to make such an order or expressly provide that the regulations may do so. However, the Committee notes the Act, section 6, which requires the court to, in considering how a child should be dealt with under the Act, Part 2, have regard to whether the taking of the action under consideration is in the best interests of the child, including considering the welfare, status and circumstances of the child and their parent or parents.</p> <p>The Committee seeks information regarding the rationale behind and justification for the subsection in light of the concern outlined above.</p>

Please provide a response to the issue identified as no 1 by **11 October 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on 9230 3050 or Regulation.Committee@parliament.nsw.gov.au.

Kind regards



The Hon Natasha Maclaren-Jones MLC
Committee Chair



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

27 September 2024

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

D24/048427

By email: office@deputypremier.nsw.gov.au

Dear Minister

Teaching Service Regulation 2024

As you are 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 the *Legislation Review Act 1987*, section 9(1)(b).

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 17 September 2024.

- *Teaching Service Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(vii) on the basis that the form or intention of the regulation calls for elucidation. I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function*, on the [NSW Parliament website](#).

Scrutiny concerns

	Provision	Issue
1	Section 6	<p>The <i>Teaching Service Regulation 2024 (the regulation)</i>, section 6 provides that:</p> <p>'A member of the Teaching Service must, in addition to discharging the duties of the position in which the member is employed—</p> <ul style="list-style-type: none">(a) participate actively in all the <i>corporate interests</i> of—<ul style="list-style-type: none">(i) the Department, and(ii) the school in which the member is employed, and(b) undertake other duties assigned to the member by—<ul style="list-style-type: none">(i) the person in charge of the school, or(ii) another person with authority to assign duties.' <p>It is unclear to the Committee what the requirement for members of the Teaching Service to 'participate actively in all the corporate interests' means, noting that the term 'corporate interests' does not appear to be defined in the regulation or the <i>Teaching Service Act 1980</i>, or used elsewhere in the statute book. The Committee seeks clarification from the Minister as to the intended meaning and interpretation of the obligation in section 6(a), specifically the meaning of the term 'corporate interests'.</p>
2	Sections 7 and 9(g)	<p>The Committee also seeks clarification as to the meaning of the term 'official duties' and whether it refers to those general duties of the position in which the member of the Teaching Service is employed.</p>

Please provide a response to the issue identified as nos 1 and 2 by **11 October 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on 9230 3050 or Regulation.Committee@parliament.nsw.gov.au.

Kind regards



The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Natasha Maclaren-Jones MLC
Chair
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

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

Dear Ms Maclaren-Jones

Thank you for your correspondence of 27 September 2024, regarding the *Teaching Service Regulation 2024* ("the Regulation").

I have responded to scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b), in the below table:

	Provision	Response
1.	Section 6	The Regulation has been in place in some form since 1982 and the expression "corporate interests" has formed part of the text of section 6 (or the equivalent section) since 1994. It was not considered necessary to amend the section in the remake of the Regulation and I am not aware of any operational issues that have arisen due to this terminology.
2.	Section 7 and 9(g)	The Committee is correct in that the term "official duties" refers to the general duties of the position in which the member of the Teaching Service is employed.

Sincerely



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

15 October 2024



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

18 October 2024

The Hon. Paul Scully
Minister for Planning and Public Spaces

D24/052745

By email: office@scully.minister.nsw.gov.au

Dear Minister

Centennial Park and Moore Park Trust Regulation 2024

As you are 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 the *Legislation Review Act 1987*, section 9(1)(b).

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 17 September 2024.

- *Centennial Park and Moore Park Trust Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(i) and (vii). I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function*, on the [NSW Parliament website](#).

Scrutiny concerns

	Provision	Issue
1	Section 22	<p>The regulation, section 22(1) makes it an offence for a person to carry out, or arrange the carrying out of, a prohibited activity on land vested in the Centennial Park and Moore Park Trust (<i>the Trust</i>). Subsection (3), definition of <i>prohibited activity</i> provides a list of activities that are prohibited. Subsection (2) provides that a person does not commit an offence if the prohibited activity is carried out with the written permission of the Trust or the Chief Executive.</p> <p>Among the list of prohibited activities is collecting a petition or conducting a survey (paragraph (e)), distributing or displaying advertising material (paragraph (f)), and organising or participating in a public meeting, function, demonstration, gathering or other public activity (paragraph (j)).</p> <p>The Committee appreciates that the objects of the Trust include, on one hand, maintaining the right of the public to the use of the Trust lands, and, on the other, maintaining the lands and encouraging their use and enjoyment by promoting their recreational, scientific, environmental and other values.</p> <p>However, insofar as the activities captured by paragraphs (e), (f) and (j) may capture forms of political communication, the Committee is concerned these provisions may infringe the implied freedom of political communication. To the Committee, the offence provisions appear to effectively burden the implied freedom, necessitating consideration of whether the purpose of the provisions and the means adopted are legitimate, and in turn whether the provisions are reasonably appropriate and adapted to advance that legitimate purpose.</p> <p>Given the importance of the implied freedom to our system of responsible and representative government, the Committee recognises that any interference with the implied freedom should be carefully considered and narrowly drafted to ensure that interference is for a legitimate aim and generally proportionate to that aim.</p> <p>The Committee would appreciate clarification on the following:</p> <ol style="list-style-type: none"> 1. Section 22(3), definition of <i>prohibited activity</i>, paragraph (j) seems capable of capturing a 'demonstration' in large numbers, and a small 'gathering' of a few. What kinds of 'public activity' are, and are not, intended to be captured by this paragraph? 2. Is it intended that paragraphs (e), (f) and (j) would capture activities of a political nature, meaning that written permission must be sought in advance for those activities? 3. In what circumstances would written permission be refused, and what considerations would be taken into account in the exercise of that discretion? 4. Was consideration given to whether an alternative or less intrusive legislative mechanism could have adequately addressed the legitimate objects of maintaining and protecting Trust lands and public use and enjoyment of those lands?

	Section 34	<p>The regulation, section 34 enables the Trust to prohibit a person from entering the Trust lands if the person is in possession of a specified thing (a <i>prohibited thing</i>), and makes it an offence for a person to be in possession of a prohibited thing on the Trust lands in contravention of a sign prohibiting that thing from being brought onto the lands.</p> <p>Given the section does not contain any criteria, considerations or examples as to what things may be prohibited, the Committee requests clarification regarding the kinds of things intended, and not intended, to be captured.</p>
	Schedule 1	<p>The regulation, Schedule 1 specifies offences for which a penalty notice may be issued, and the respective penalty notice amounts payable.</p> <p>The \$350, \$500 and \$1,100 penalty notice amounts specified for offences against the following provisions of the regulation represent an amount that is greater than 25 per cent of the maximum penalty applicable to a criminal prosecution for the offence:</p> <ul style="list-style-type: none"> • Section 40(3) (\$350), • Sections 22(1), in relation to section 22(3), definition of <i>prohibited activity</i>, paragraphs (a)–(c) and (e)–(l), 24(1), 28(3), except for contravening a verbal direction, 31(1)(a) and (c), 32(1)(a)–(f), (j) and (l)(iii), 37(1), 41(1) and 42(1)(d) (\$500), and • Sections 22(1), in relation to section 22(3), definition of <i>prohibited activity</i>, paragraph (d), 25(2) and 44(4) (\$1,100). <p>Specifically, a penalty notice amount of \$350 is 31.8 per cent of the maximum penalty for the relevant offence, \$500 is 45.4 per cent of the maximum penalty and \$1,100 is 100 per cent of the maximum penalty.</p> <p>The Committee generally considers that penalty notice amounts in excess of 20–25 per cent of the maximum penalty for the offence are inadvisable. The Committee requests information regarding the rationale behind, and justification for, the chosen amounts, in particular the \$1,100 amounts that are equal to the maximum penalty for the offence.</p>

Please provide a response to the issue identified as nos 1–3 by **1 November 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on 9230 3050 or Regulation.Committee@parliament.nsw.gov.au.

Kind regards



The Hon Natasha Maclaren-Jones MLC
Committee Chair



21 October 2024

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

D24/052816

By email: office@deputypremier.nsw.gov.au

Dear Minister

Teaching Service Regulation 2024

Thank you for your letter received on 16 October 2024 responding to the scrutiny concerns the Regulation Committee raised with respect to the *Teaching Service Regulation 2024* (the regulation).

While the Committee appreciates this response, it does, however, consider that additional information is required in order to report on one of the issues identified by the Committee. This includes reaching a conclusion on whether the Committee should recommend that a portion of the regulation ought to be disallowed, should the Committee have outstanding concerns.

To reiterate, issue no 1 relates to the regulation, section 6. In its initial correspondence dated 27 September 2024, the Committee noted:

[S]ection 6 provides that:

'A member of the Teaching Service must, in addition to discharging the duties of the position in which the member is employed—

(a) participate actively in all the corporate interests of—

(i) the Department, and

(ii) the school in which the member is employed, and

(b) undertake other duties assigned to the member by—

(i) the person in charge of the school, or

(ii) another person with authority to assign duties.'

It is unclear to the Committee what the requirement for members of the Teaching Service to 'participate actively in all the corporate interests' means, noting that the term 'corporate interests' does not appear to be defined in the regulation or the *Teaching Service Act 1980*, or used elsewhere in the statute book. The Committee seeks clarification from the Minister as

to the intended meaning and interpretation of the obligation in section 6(a), specifically the meaning of the term 'corporate interests'.

The Committee notes your response that:

The Regulation has been in place in some form since 1982 and the expression "corporate interests" has formed part of the text of section 6 (or the equivalent section) since 1994.

It was not considered necessary to amend the section in the remake of the Regulation and I am not aware of any operational issues that have arisen due to this terminology.

The Committee understands that, as part of the staged repeal process, regulations are often remade in substantially the same form. However, the Committee maintains that the obligation imposed on members of the Teaching Service by section 6(a), as continued by a new principal regulation, calls for elucidation.

The Committee is concerned by the possibility that disciplinary or remedial action could be taken in relation to a member of the Teaching Service who fails to 'participate actively in the corporate interests of the Department and the school in which the member is employed', given the broad definition of misconduct in the *Teaching Service Act 1980*, Part 4A, which includes a contravention of any provision of the regulations.

In the circumstances, the Committee considers it important to seek clarity regarding the obligation on teachers, and requests further information regarding what section 6(a) is taken to mean, including how the provision is implemented in practice and the circumstances in which a teacher may be found to have contravened the provision.

Please provide a response to the issue outlined above by **25 October 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on 9230 3050 or Regulation.Committee@parliament.nsw.gov.au.

Kind regards



The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Michael Daley MP
Attorney General



Ref: D24/048425
EAP24/16191

Ms Natasha Maclaren-Jones
Committee Chair of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: Regulation.Committee@parliament.nsw.gov.au

Dear Ms Maclaren-Jones, *Natasha*

Scrutiny concerns identified by Regulation Committee

Thank you for your letter of 27 September 2024 about clause 7(2) of the *Children (Protection and Parental Responsibility) Regulation 2024* (the Regulation).

Clause 7(2) of the Regulation is identical to that under its predecessor provision under *Children (Protection and Parental Responsibility) Regulation 2019*.

Clause 7(2) of the Regulation provides that a court must not require a person to undergo counselling if, in the court's opinion, the person would suffer undue financial hardship as a result. It is consistent with the requirement in section 6 of the Act that the Court is to consider the best interests of the child in making a decision about a child under the Act, including consideration of the welfare and circumstances of the child and their parent(s). This would extend to consideration of their financial circumstances.

If you would like more information, please contact Julie MacKenzie, A/Director, Civil Justice, Vulnerable Communities and Inclusion, Department of Communities and Justice at Julie.MacKenzie@dcj.nsw.gov.au.

Sincerely,

Michael Daley
Michael Daley MP
Attorney General

22.10.24

The Hon Prue Car MP

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



Ref: RML24/3701

The Hon Natasha Maclaren-Jones MLC
Chair, Regulation Committee
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Macquarie Street
SYDNEY NSW 2000

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

Dear Ms Maclaren-Jones

Thank you for your further correspondence of 21 October 2024, regarding the *Teaching Service Regulation 2024* (the regulation).

I acknowledge the Committee's request for further clarification regarding section 6(a) of the regulation.

The Department of Education (department) with the Parliamentary Counsel's Office worked on the regulation to update it as part of the staged repeal process. The term "corporate interests" was retained as it accounts for both the interests of the school itself rather than those of individuals, such as the principal, as well as the interests of the department as a single entity.

In terms of implementation, section 6(a) reflects the scale and diversity of the 2,200 schools which make up the NSW government school system. The core interests of these schools and the department are the delivery of high-quality education in environments which are safe for students, staff, and visitors. To achieve this outcome the department is responsible for putting in place policies and procedures that schools are expected to follow, implement, and enforce. By doing so the collective corporate interests of both schools and the department are advanced.

For example, consistent with the Controversial Issues in Schools Policy and the Code of Conduct, staff are not to express political opinions in the course of performing their duties. Section 6(a)(i) provides the means for the department to take action in response to breaches of this requirement, which is in the collective interest of the school and the department.

As members of the Teaching Service are not employees of the department, if section 6(a)(i) were to be removed, it would bring into question whether a member of the Teaching Service was required, as part of their duties, to comply with the policies and procedures set by the department for all government schools. I trust this provides the clarity the Committee is seeking.

Sincerely

A handwritten signature in black ink, appearing to read "Prue Car".

Prue Car MP

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

25 October 2024

The Hon Natasha Maclaren-Jones MLC
Chair, Regulation Committee
Parliament House
Macquarie Street
Sydney NSW 2000
Regulation.Committee@parliament.nsw.gov.au

Dear Ms Maclaren-Jones *Natasha*

Thank you for your correspondence requesting further information about the repeal and remake of the *Centennial Park and Moore Park Trust Regulation 2024* (the **CPMPT Regulation**).

I have consulted with officers from the Department of Planning, Housing and Infrastructure and consideration of the issues raised by the Regulation Committee is detailed below.

Section 22

1. Section 22(3), definition of **prohibited activity**, paragraph (j) of the CPMPT Regulation has been drafted to make sure the Centennial Park and Moore Park Trust (the **Trust**) has a robust gateway for the approval of a wide range of activities that may be perceived to adversely impact on the safety, amenity, equitable use and public order across the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

The provision is consistent with Part 2, section 13(1)(f) of the repealed *Centennial Park and Moore Park Trust Regulation 2014* (the **repealed Regulation**). There have been no material changes in policy between the repealed Regulation and the CPMPT Regulation, but rather a maturing of the structure of the provision.

2. It is intended that section 22(3), definition of **prohibited activity**, paragraphs (e), (f) and (j) of the CPMPT Regulation would capture activities of a political nature, meaning that written permission should be sought in advance for those activities.

Seeking written permission from the Trust or the Chief Executive of the Trust allows certain activities of a political nature to be undertaken on the parklands with sufficient notice so the activity may be carried out in a safe and responsible manner that does not adversely impact on the use and enjoyment of the parklands by the wider community.

For example, these particular activities allow the Trust and the event organiser to work collaboratively to make sure permission is requested and granted in advance – as well as any other relevant approvals that may be required to be obtained by the event organiser, such as an approval from the NSW Police Force to hold a public assembly – so those activities are conducted in a safe and orderly manner. Permission is not required for other public activities, such as picnicking, exercising, playing a musical instrument, climbing a tree and more broadly utilising and enjoying the parklands’ facilities.

Section 22(3), definition of **prohibited activity**, paragraph (e) of the CPMPT Regulation meets the following objectives in section 22 of the *Centennial Park and Moore Park Trust Act 1983* (the **Act**):

- Subsection (2)(a): “the use and enjoyment of the Trust lands”
- Subsection (2)(b): “the care, control and management of the Trust lands”.

The Act’s objectives are met by deterring the unauthorised collection of a petition or conduct of a survey from causing a public disturbance that would adversely affect the public use and enjoyment of the Trust lands, which, in turn, disrupts the proper care, control and management of the Trust lands.

In addition, section 22(3), definition of **prohibited activity**, paragraph (e) of the CPMPT Regulation is now consistent and aligned with other parklands legislation, such as Part 4, section 18(d) of the *Royal Botanic Gardens and Domain Trust Regulation 2020*, which was one of the benchmarking regulations for the review and remake of the CPMPT Regulation.

Section 22(3), definition of **prohibited activity**, paragraphs (f) and (j) of the CPMPT Regulation are consistent with Part 2, section 13(1)(f), (h) and (i) of the repealed Regulation. There have been no material changes in policy, but rather a maturing of the structure and language of the provision.

3. In relation to section 22(3), definition of prohibited activity, paragraphs (e), (f) and (j) of the CPMPT Regulation, written permission may be refused in circumstances following a review of the relevant risk assessment and associated safety plans, including consultation with the NSW Police Force on any relevant matters of public order and safety.

Such refusal is likely to occur where it is considered that permitting the activity would adversely impact on the safety, amenity, equitable use and public order across the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

4. Consideration was given to whether an alternative or less intrusive legislative mechanism could have adequately addressed the legitimate objects of maintaining and protecting Trust lands and the public use and enjoyment of those lands. However, the CPMPT Regulation is consistent with, and aligned to, other parklands legislation and contemporary parklands management.

Enforcement of the CPMPT Regulation is the final step in driving behavioural change within the parklands and it is not the preference. The preference is using an educative approach to align and drive positive change to meet the objectives of the Act.

I note this legislative mechanism is consistent with, and aligned to, the repealed Regulation or other current parklands legislation.

Section 34

Section 34 of the CPMPT Regulation enables the Trust to prohibit a person from entering the Trust lands if the person is in possession of a specified thing (a **prohibited thing**). It also makes it an offence for a person to be in possession of a prohibited thing on the Trust lands in contravention of a sign prohibiting that thing from being brought onto the lands.

This section intends to enable a level of agility and flexibility when managing competing community needs across an urban parkland and is consistent with Part 2, section 8(2) of the repealed Regulation.

For example, section 34 of the CPMPT Regulation enables the Trust to set up exclusion zones to support the NSW Police Force with its operations; create safety zones to separate kids play from general park users; support our commitment to community safety surrounding large scale music events; and create an order of management that is scalable for the planned and unplanned, and that of emerging trends.

Section 34 of the CPMPT Regulation also meets the following objectives in section 22 of the Act:

- Subsection (2)(a): “the use and enjoyment of the Trust lands”, and
- Subsection (2)(b): “the care, control and management of the Trust lands”.

It is necessary that an offence and penalty units are attributed against section 34 of the CPMPT Regulation to deter unauthorised activities by visitors to the parklands and commercial operators who may behave contrary to the CPMPT Regulation and, more importantly, visitor safety.

Additionally, I note that section 34 of the *Royal Botanic Gardens and Domain Trust Regulation 2020*, which was one of the benchmarking regulations for the review and remake of the CPMPT Regulation, aligns with section 34 of the CPMPT Regulation, including in relation to both the offence and penalty amount. This achieves a broader objective of consistency and alignment between parklands legislation.

Schedule 1

Offences against various sections of the CPMPT Regulation, as specified in your letter, carry penalty notice amounts that represent amounts greater than 25 per cent of the maximum penalty applicable to a criminal prosecution for the offence.

I understand the Regulation Committee generally considers penalty notice amounts in excess of 20–25 per cent of the maximum penalty for the offence to be inadvisable and has sought the rationale and justification for those amounts, particularly in relation to the specified \$1,100 amounts.

It is necessary that these offences – including those offences that have been given a maximum penalty of 10 penalty units and a penalty notice amount of \$1,100 – are attributed their maximum penalties and penalty notice amounts, to deter persons or commercial operators from carrying out or engaging in unlawful or unauthorised actions that would adversely affect the public use and enjoyment of the Trust lands, which, in turn, disrupts the proper care, control and management of the Trust lands.

In particular, the chosen amounts are expected to deter commercial operators who would see lower values as insignificant and merely a part of ‘doing business’. I note that section 23(3) of the *Fines Act 1996* allows a penalty notice amount that does not exceed the maximum penalty that could be imposed by a court for the offence to which the penalty notice relates.

On balance, mandating these higher penalty notice amounts works towards the safe and orderly use of the parklands in the interests of all park users, stakeholders and businesses operating within the parklands.

Thank you for bringing this to my attention. I hope this information is of assistance and will resolve the issues raised to the satisfaction of the Regulation Committee.

If you have any further queries in relation to this matter, please do not hesitate to have your staff contact my office.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Paul Scully".

Paul Scully MP
Minister for Planning and Public Spaces

30/10/24

