LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Delegated Legislation Monitor No. 14 of 2024

19 November 2024

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Regulation Committee

Delegated Legislation Monitor No. 14 of 2024

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Delegated Legislation Monitor No. 14 of 2024

'November 2024'

Chair: Hon Natasha Maclaren-Jones MLC

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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. 14 of 2024

1.10 For this monitor, the Committee has reviewed 10 instruments published on the NSW legislation website or in the NSW Government Gazette between 12 August 2024 and 1 November 2024. The Committee has:

- concluded its scrutiny of two instruments, as set out in Chapter 1, and
- concluded that eight instruments raise no scrutiny concerns, as set out in Chapter 2,

1.11 A further seven instruments notified between 30 September 2024 and 8 November 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).

Crimes (Sentencing Procedure) Regulation 2024

SI number / GG reference	2024 No 379
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 *Crimes (Sentencing Procedure) Regulation 2024* (the regulation) remakes, with minor amendments, the *Crimes (Sentencing Procedure) Regulation 2017,* which was repealed on 1 September 2024 by the *Subordinate Legislation Act 1989,* section 10(2). The regulation commenced the same day.

1.2 The regulation is made under the *Crimes (Sentencing Procedure) Act 1999*, including sections 17B(4), 29(1)(b), 30(4), 30M(2), 30N(5), 32(4)(c), 35A(3), 73A(2)(d) and (5), 89(2)(b) and (4C) and 103 (the general regulation-making power).

1.3 As provided for in the explanatory note, the regulation makes provision in relation to sentencing procedures generally, procedures relating to victim impact statements and sentencing procedures for community-based orders.

1.4 The Committee raised scrutiny concerns under the *Legislation Review Act 1987,* section 9(1)(b)(iii),[4] (iv) and (vii) in relation to the regulation by letter sent to the Attorney General on 16 October 2024. The Attorney General responded to this correspondence on 5 November 2024. This correspondence is included in Appendix 2.

[4] 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.

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 may identify provisions of a regulation that appear to be beyond the scope of the delegated legislation-making powers in the parent Act, or to make unusual or unexpected use of such powers, including in a way that may not accord with the policy and intention of the parent Act.

1.6 The Act, section 17B(4) enables the regulations to 'make provision for or with respect to matters to be addressed in, and the preparation and furnishing of, an assessment report', being a report made by a community corrections officer or a juvenile justice officer for the purpose of assisting a sentencing court to determine the appropriate sentence options and conditions to impose on the offender during sentencing proceedings.

1.7 The regulation, section 13 deals with assessment reports in relation to a home detention condition. Section 13(1) lists matters to be addressed in the assessment report, while subsection (2) states:

> (2) If the offender does not have accommodation suitable for home detention, the assessment report must not be finalised until reasonable efforts have been made by a community corrections officer, in consultation with the offender, to find suitable accommodation.

1.8 With the Act, section 17B(4) referenced as the relevant regulation-making power for the regulation, section 13, the Committee conveyed a concern to the Attorney General that subsection (2) appears to go beyond, or may not be in the spirit of, providing for a matter to be addressed in, or the preparation and furnishing of, an assessment report insofar as it impliedly imposes such an obligation on community corrections officers.

1.9 The Committee sought clarification as to the relevant provision of the Act or regulation that otherwise imposes this obligation on community corrections officers, or, in lieu of such a provision, the power being relied on to impose this obligation in connection with the preparation and furnishing of an assessment report.

1.10 In response, the Attorney General briefly stated that:

> I note the Regulation Committee's queries around whether this section goes beyond the regulation-making power in section 17B(4) of the *Crimes (Sentencing Procedure) Act 1999* (the Act). The Regulation was approved by the Parliamentary Counsel, which had no concerns about this regulation-making power or other heads of power issues.

The form or intention of the regulation calls for elucidation

1.11 Under this ground, the Committee is generally concerned with ambiguity and uncertainty, including the imposition of uncertain obligations and the inclusion of inert provisions.

I.

1.12 The regulation, section 20 relates to hearing dates for certain applications listed in section 18:

20 Hearing dates for applications

(1) The court must set a date for hearing the application (the ***hearing date***).

(2) The hearing date must be—

(a) not earlier than 14 days after the date the application is filed, and

(b) not later than 3 months after the date the application is filed.

(3) If the court decides to deal with the matter under section 22 without the offender being present, the court may waive the requirement under subsection (1) to set a hearing date for the application. [5]

(4) If the court sets a hearing date for the application, the court may vary or waive any requirement under subsection (2) relating to the hearing date.

1.13 The Committee queried whether it is intended that subsection (4) apply only in relation to the scenario described in subsection (3) i.e., if the court has decided to deal with the matter without the offender being present *and* to set a hearing date, the hearing date does not need to be set within the timeframe specified in subsection (2).

1.14 The Committee considered that, if that is not the intention, and subsection (4) instead seeks to permit the court to hear any application outside the designated timeframe whenever and for whatever reason, broad discretion is conferred in a way that seems to undermine subsection (2) if not expressed to be limited, for example, to special circumstances only, potentially calling into question whether subsection (2) has any effect at all.

1.15 The Committee sought information as to the circumstances in which the court may decide to set a hearing date outside the timeframe prescribed by subsection (2).

1.16 In relation to this matter, the Attorney General only noted that:

> I can confirm that section 20(3) of the Regulation relates to the court's ability to waive the requirement for setting a hearing date, where the application is to be dealt with under section 22 without the offender being present. Further, section 20(4) relates to the court's ability to waive or vary requirements relating to setting a hearing date.

II.

1.17 The regulation, section 23(1) provides as follows:

(1) If the court imposes or varies an additional or further condition on or of a community correction order or conditional release order, the court must take reasonable steps to explain to the offender, in language the offender can readily understand—

(a) the offender's obligations under the condition, and

(b) the consequences that may follow if the offender fails to comply with the offender's obligations.

1.18 Subsection (2) provides that the court may waive or vary a requirement under subsection (1).

[5] The regulation, section 22 provides that the court may deal with the application with or without parties being present, and in open court or in the absence of the public.

1.19 The Committee noted subsection (2) appears to provide the court with broad discretion as to whether to comply with subsection (1), and requested clarification as to the circumstances in which the court may vary or not comply with the requirement to explain the effect of additional or further conditions to an offender.

1.20 Noting that subsection (3) provides that an order of the court is not invalidated by a failure to comply with subsection (1), the Committee was wary that the lack of parameters on how the court may exercise its discretion under subsection (2) may have the effect of unduly diluting the purported 'requirement' in subsection (1) to a point that renders the section inert.

1.21 The Attorney General responded to this request for clarification, and the Committee's related, but separate, query regarding the regulation, section 24, jointly.

1.22 Section 24(1)(a) provides that the court must give the offender notice of the outcome of an application to which the regulation, Part 3, Division 1 applies as soon as practicable after dealing with the application. Section 24(2) provides that the court may vary or waive the requirement under subsection (1)(a). The Committee requested information as to the circumstances in which the court may vary or waive the requirement.

1.23 In response to the Committee's queries regarding sections 23 and 24, the Attorney General stated:

> Sections 23 and 24 do not represent any change or departure from the existing process that was set out in clause 13(10) of the previous Regulation, in force since 2017, wherein both these requirements could be varied or not complied with. Clause 13 of the previous Regulation has not been changed substantively, however the language and structure has been redrafted and modernised to reflect current drafting practice and enhance clarity.

III.

1.24 The regulation, section 28 provides for the following transitional matter:

> The Act, Part 3, as in force before its amendment by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (the ***amendment Act***), continues to apply to the determination of the sentence for an indictable offence to which the offender pleaded guilty if the committal proceedings for the offence—
>
> (a) dealt with one or more offences and the proceedings for any of the offences commenced before the commencement of the amendment Act, Schedule 1, and
>
> (b) were conducted in accordance with the provisions that were applicable to committal proceedings before the commencement of the amendment Act, Schedule 1.

1.25 Noting the application to proceedings commenced before 30 April 2018 in relation to an indictable offence for which a sentence is yet to be determined, the Committee sought confirmation as to whether section 28 is spent.

1.26 In response, the Attorney General explained that:

> The Department of Communities and Justice is making inquiries as to whether there are still outstanding criminal matters to be finalised under section 28. If those inquiries confirm that there are no such matters, section 28 could be considered for repeal but I am advised that its repeal before that time could risk creating a lack of legislative

authority for the finalisation of matters that outweighs the risks of it remaining part of the Regulation at this time.

Committee conclusion

1.27 The Committee acknowledges the Attorney General's response to the scrutiny concerns raised in its correspondence. However, the Committee considers that the response does not meaningfully engage with most of the Committee's precise queries. Without a substantive response to the specific questions asked, it is difficult for the Committee to determine if its scrutiny concerns have been appropriately addressed, particularly given the need for the Committee to conclude its examination while the regulation remains subject to disallowance.

1.28 On the basis of the information provided by the Attorney General, the Committee maintains that the regulation, section 13, in implicitly imposing an obligation on community corrections officers to make reasonable efforts to find suitable accommodation for offenders, in circumstances where the Committee has not been pointed to any other provision addressing this matter, would appear to potentially go beyond the regulation-making power conferred by the Act, section 17B(4), or may not be in the spirit of the relevant provisions of the Act more broadly.

1.29 The Committee suggests that, for certainty, the Act be amended to affirm the power for the regulations to impose this obligation on community corrections officers, and to establish a clear link between that obligation, and any other antecedent actions or steps, and the preparation and furnishing of an assessment report.

1.30 The Committee acknowledges the Attorney General's response in relation to the regulation, section 20, however, without further explanation, it is unclear to the Committee whether it was intended that subsection (4) apply *only* in relation to the circumstance described in subsection (3) i.e., where the court decides to set a hearing date but will be dealing with the matter without the offender being present, the hearing date does not need to be set within the timeframe specified in subsection (2).

1.31 If that is not the intention, the Committee remains concerned that it is unclear in what circumstances the court may choose to 'vary or waive' the requirement to set a hearing date within the prescribed timeframe generally, and that there would appear to be no real force to subsection (2). The Committee considers that a lack of parameters around the exercise of the discretion conferred by subsection (4) undermines the express requirement in subsection (2), and as a consequence, could render that provision inert.

1.32 To that end, the Committee suggests that consideration be given to amending the regulation to clarify when, or for what reasons, the court may exercise this discretion, presuming it is intended that subsection (2) not be routinely disregarded.

1.33 As stated in Delegated Legislation Monitor No. 13 of 2024, the Committee does not accept that a provision may be justified and scrutiny concerns rejected simply because 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.[6]

6 See Delegated Legislation Monitor No. 13, p 6.

1.34 That matter aside, on the information provided by the Attorney General, it is unclear to the Committee the circumstances in which the court may 'vary or waive' the requirements under the regulation, sections 23(1) and 24(1)(a). The Committee remains concerned that, worded so broadly, the power to vary or waive could render these requirements meaningless.

1.35 Similar to the Committee's advice in relation to section 20, the Committee suggests the regulation be amended to clarify the parameters on the court's discretion under sections 23(2) and 24(2) to avoid potentially undue dilution of the requirements otherwise sought to be imposed on the court.

1.36 The Committee appreciates the assurance by the Attorney General that the Department of Communities and Justice will inquire as to whether there are any outstanding sentences to be determined under the regulation, section 28. The Committee considers that the staged repeal process generally provides an opportunity for a minister, or the department in which an Act is administered, to assess whether the provisions of a regulation remain fit for purpose or are obsolete, and whether any changes are required as part of the remake. This assessment would presumably extend to whether any savings and transitional provisions are spent.

1.37 While the Committee will not be recommending that the regulation, or part of the regulation, be disallowed on this occasion, the Committee has outstanding concerns about the provisions referred to above and strongly suggests that the Minister consider amending the Act and regulation, as suggested or otherwise, to address the scrutiny concerns identified.

1.38 The Committee concludes its scrutiny of the regulation subject to the above comments.

Water Management (General) Amendment (Miscellaneous) Regulation 2024

SI number / GG reference	2024 No 488
Published on Legislation Website (LW)	20/09/2024
Tabled in Legislative Council (LC)	24/09/2024
Last date of notice for disallowance motion	26/11/2024[7]

Overview

1.39 The *Water Management (General) Amendment (Miscellaneous) Regulation 2024* (the amending regulation) amends the *Water Management (General) Regulation 2018* to, as stated in the explanatory note—

(a) replace the methodology that must be used to determine the value of water taken from a water source in contravention of [the] *Water Management Act 2000*, Chapter 3, Part 2, Division 1A, and

(b) increase the amounts payable for penalty notices issued for certain offences against the Act.

1.40 The amending regulation is made under the *Water Management Act 2000* (the Act), sections 60G(1)(a), 170(4)(a), 365(2) and (4) and 400 (the general regulation-making power). The amending regulation commenced on 20 September 2024.

1.41 The amending regulation, Schedule 1[5] increases the penalty notice amounts payable for certain offences under the Act for which a penalty notice may be issued by an authorised officer.

1.42 The offences include:

- taking water from a water source without an access licence, or by means of a metered work while its metering equipment is not operating or operating properly,
- contravening a term or condition of an access licence or an approval mentioned below,
- using water from a water source without, or otherwise than as authorised by, a water use approval,
- constructing or using a water supply work, drainage work or flood work without, or otherwise than as authorised by, the relevant approval for the work,
- carrying out a controlled activity or aquifer interference activity without, or otherwise than as authorised by, the relevant approval for the activity,
- failing to install or use required metering equipment in connection with a water management work,

[7] If the House does not sit in the reserve sitting week, the last date notice of a disallowance motion may be given will be the first sitting day of 2025.

- failing to maintain, or comply with a regulation setting out standards or requirements relating to, metering equipment,
- failing to report metering equipment that is not operating or operating properly,
- failing to keep metering records,
- interfering with, damaging, destroying or disconnecting metering equipment,
- constructing a building, fence or structure in, on, or adjacent to, a levee bank, or constructing a flood work on a floodplain, without the consent of the Minister,
- failing to comply with directions and requirements under Chapter 7,
- harming an aquifer or waterfront land, and
- constructing a water bore otherwise than as authorised by a bore driller's licence.

1.43 Under the Act, the maximum penalty for each of the offences is $2,002,000 for corporations, plus $132,000 for each day the offence continues if a continuing offence, and $500,500 for other persons, plus $66,000 for each day the offence continues if a continuing offence.

1.44 The penalty notice amounts of $6,000 and $15,400 for corporations, and $3,000 and $7,700 for other persons, as substituted by the amending regulation, equate to, respectively, 0.30 and 0.77 per cent, and 0.60 and 1.54 per cent, of the maximum penalty applicable to a prosecution for the relevant offence.

1.45 The Committee raised scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(iv)[8] and (vii) in relation to the amending regulation by letter sent to the Minister for Water on 28 October 2024. The Minister responded on 6 November 2024. This correspondence is included in Appendix 2.

Scrutiny concerns

The regulation may not accord with the spirit of the legislation under which it was made and its form or intention calls for elucidation

1.46 Under these grounds, the Committee will consider whether a regulation makes unusual or unexpected use of regulation-making powers, including the use of powers in a manner that, though technically lawful, significantly detracts from the operation of the scheme set out in the parent Act, and may seek elucidation about matters that appear ambiguous or uncertain.

1.47 Having noted the disparity between the penalty notice amounts and the maximum penalties, and the nature of certain offences, the Committee wrote to the Minister for Water to seek information in relation to three points.

1.48 Firstly, the Committee sought confirmation that penalty notices are intended to be issued for the offences in limited circumstances only and asked for clarification regarding the kind of

[8] 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.

conduct that would be dealt with by way of penalty notice and how authorised officers exercise their discretion to issue penalty notices.

1.49 To the Committee, the comparatively low penalty notice amounts suggested penalty notices are intended to be issued for instances of minor offending on the scale of objective seriousness, given the broad range of conduct captured by the offence provisions. For example, the offence of taking water from a water source without an access licence could be made out by taking a small quantity of water for personal use, for which it might be more appropriate to issue a penalty notice, or taking water on a much larger scale for commercial purposes, for which it could arguably be inappropriate to issue a penalty notice as an alternative to commencing proceedings where a much higher maximum penalty applies.

1.50 Secondly, the Committee sought further information regarding the circumstances in which penalty notices are intended to be issued for certain offences, and the rationale and justification for this, where the scale of objective seriousness appears more narrow and it is less apparent that issuing a penalty notice would be more appropriate than prosecution because of the nature of the offence.

1.51 For example, the Committee found it more difficult to foresee how a person without an aquifer interference approval could penetrate, interfere with or obstruct an aquifer, or how a person could construct a flood work on a floodplain, a building, fence or structure in, on, or adjacent to, a levee bank, or a water bore, without the relevant consent or licence, in a more 'minor' way warranting issue of a penalty notice.

1.52 In response to these first two points, the Minister advised:

> [I]t is not possible to address the circumstances in which a PIN might be issued under each of the offences listed in Schedule 7. The sheer magnitude of different circumstances to be covered would make this impractical. Further, the anticipation that PINs will only be issued in relation to instances of minor offending on the "scale of objective seriousness" overlooks, with respect, the different factors that may be at play in any given instance.
>
> Taking s 91F, *Water Management Act 2000*, as an example, it is important to appreciate that it is not only the alleged conduct itself (i.e. interfering or obstructing an aquifer) but also the surrounding circumstances and those of the alleged offender that may all be engaged in a particular case. While the conduct itself, therefore, may or may not be "minor" there may be other circumstances, as the Committee can appreciate, either mitigating or otherwise that play a part in determining whether the issuance of a PIN might be appropriate where an aquifer has, on available evidence, been interfered with. Such circumstances might include:
>
> i. whether on the available evidence, the alleged offending was carried out intentionally, recklessly or without any awareness of it at all;
>
> ii. the attitude of the person (or persons) involved to the alleged offending (i.e. their contrition or remorse);
>
> iii. the antecedents of the person involved (i.e. age, any mitigating circumstances, whether they have any criminal history of the kind alleged or have been previously warned about the alleged offending);

> iv. the seriousness, scale, harm or effect of the alleged offending; and
>
> v. the staleness or otherwise of the alleged offending.
>
> The above list of factors is not exhaustive and different factors may be engaged differently in a single case. It is therefore not possible, addressing the [first point], to confirm that PINs will only be issued in limited circumstances. Where a given case involving circumstances such as those detailed above is weighed and evaluated in accordance with procedure, it may be that the guidelines suggest a PIN is in fact an appropriate sanction to resolve the investigation.

1.53 Finally, the Committee queried whether suitable guidelines, procedures and safeguards are in place in relation to issuing a penalty notice for offences for which a defence is available, and whether the availability of these defences is easy for authorised officers to assess on the spot.

1.54 The Committee noted the countervailing views that penalty notice offences should generally not extend beyond strict and absolute liability offences to offences requiring the exercise of discretion and judgment by an officer, but that certain offences with a fault element, defence or other exception, proviso or qualification may make an appropriate penalty notice offence in some cases, including where the availability of a defence is straightforward to assess.[9]

1.55 The Committee pointed to certain provisions of the Act providing defences to some of the offences listed in the amending regulation, Schedule 1[5] as penalty notice offences. For example, it is a defence to the offence of failing to comply with a regulation setting out standards or requirements relating to metering equipment if that failure was caused by work done by a duly qualified person, and it is not an offence to harm an aquifer or waterfront land if essential to carry out certain development, activities or projects, or as authorised by certain other Acts.

1.56 In relation to this final point, the Minister responded as follows:

> I am advised that where an investigator with [the Natural Resources Access Regulator] considers the issuance of a PIN in a particular case, there are strict protocols that ensure the decision to do so is robust and defensible. These protocols are expressed in NRARs Investigations Manual. The Manual specifies that:
>
> i. NRAR's Manager(s) of Investigations has the delegated authority to issue PINs; and
>
> ii. the Manager must be satisfied there is sufficient evidence to prove the commission of the offence beyond all reasonable doubt, and that a defence is not engaged; and
>
> iii. NRAR may, in certain circumstances, issue a letter inviting a person of interest to provide their views on the allegation and whether enforcement action should be taken; and
>
> iv. An individual or company issued a PIN may request a formal review by a suitable qualified and experienced NRAR officer not involved in the original decision.
>
> NRAR's publicly available Regulatory Policy stipulates the criteria used by NRAR officers to guide the exercise of discretion when evaluating the appropriate sanction to

[9] See *Report 132: Penalty notices*, New South Wales Law Reform Commission, February 2012 at paras 3.38–3.54.

> impose. Similarly, NRARs Prosecution Guidelines set criteria for what matters will be recommended to the Board for prosecution.
>
> NRAR staff must be Authorised Officers to levy sanctions and are required to undertake regular training to maintain this accreditation. Training is led by qualified personnel who deliver courses aligned to the national training unit of competency PSPREG033 'Apply Regulatory Powers'.
>
> There is also a robust internal peer review process in place that requires the evaluation of concluded investigations. This assurance ensures the requirements of the Investigations Manual are met and the outcome consistent with similar matters. Learnings from these reviews are embedded into ongoing practice.
>
> NRAR maintains a Quality Management System (QMS) that is certified to ISO 9001:2018 standards. This certification process commits the agency to continuously review and improve the processes and policies outlined above. NRAR is externally audited against this standard to retain its ISO certification of the QMS.

Committee conclusion

1.57 The Committee appreciates the Minister's prompt and considered engagement with the scrutiny concerns raised, and in particular thanks the Minister for drawing the Committee's attention to the considerations, documents and procedures supporting the issue of penalty notices under the Act.

1.58 Regarding the suggestion that penalty notices will be issued only in limited circumstances, the Committee simply sought to clarify when an offence will be dealt with in this way, as opposed to being prosecuted, given the broad scope of the offence provisions, which otherwise carry significant maximum penalties, and the recognition, including by the courts,[10] that penalty notices should be issued for minor offences.

1.59 This is consistent with the recommendation of the New South Wales Law Reform Commission that 'The proposed guidelines on penalty notice offences should provide that penalty notices are suitable for minor offences'[11], following on from its conclusion that:

> 3.70 The first question to consider is whether the term 'minor offence' should be included as a guideline. Our view is that the term 'minor offence' should be included. On its own, the expression 'minor offence' may not provide much assistance. However, it adds meaning in the context of a list of criteria as to what constitutes a penalty notice offence by conveying the message that penalty notices are unsuitable for serious offences. It makes it clear that they have been selected as suitable for penalty notices by reason of an acceptance that they do not require the same legal and procedural safeguards as are required for the more serious offences that must be determined by the courts. We are supported in this view by the fact that most submissions considered that

[10] See, for example, Biscoe J's remark in *Environment Protection Authority v Djura* [2012] NSWLEC 122 at [70]: 'The purpose of penalty notice provisions, judging by the relatively small amounts that they require to be paid, is to provide a simple, administrative procedure for punishing offences which are perceived to be of low objective seriousness, as an alternative to launching a prosecution.'

[11] See *Report 132: Penalty notices*, New South Wales Law Reform Commission, February 2012, Recommendations 3.1 and 3.6.

> the criterion of 'minor offence' should be one criterion among others in any list of principles or guidelines.
>
> 3.71 There was no consistency in submissions as to what a definition of 'minor offence' should be. We accept that the expression 'minor offence' is not capable of exhaustive definition and that any judgments about whether to include a given offence as a penalty notice offence should be made taking into account the context of the particular type of offending behaviour and its potential consequences.

1.60 While it would have been beneficial to have had further detail provided in relation to when a penalty notice will be issued for each offence under a graduated enforcement approach, including how the availability of certain defences is determined, the Committee appreciates it may be quite onerous or impractical to provide such specifics, and that such decisions are largely made on a case-by-case basis, thus necessitating a high-level response.

1.61 The Committee anticipates data is collected by the NRAR, or the department in which the Act is administered, regarding decisions to issue penalty notices or to commence proceedings, and that transparency concerning this would be valuable, including to strengthen public confidence that the law is applied to everyone equally (i.e. the same rules or consequences apply in that proceedings are unlikely to be commenced where, in a previous similar situation, a penalty notice was issued instead, given the material consequences of selecting one of these options over the other).

1.62 However, the Committee expects such consistency in decision-making is effected, as far as possible, and monitored by the NRAR or the department, particularly in light of the training, operational guidelines and processes referred to by the Minister that suggest suitable safeguards are in place to support certainty in how the law is applied and discretionary powers exercised.

1.63 The Committee notes, as also reflected in previous monitors, that while there are general principles and guidelines relating to the issue of penalty notices and appropriate penalty notice amounts, there are no clearly promulgated, or strict or rigid, rules in New South Wales. Nonetheless, the Committee considers the matter to be one worth raising with ministers and bodies in cases such as this, to engage in a fruitful dialogue as part of the technical scrutiny functions reposed in the Committee. To that end, the Committee reiterates its appreciation for the Minister's forthcoming letter.

1.64 The Committee recognises the important role penalty notices serve as an enforcement power and compliance strategy under the Act and considers that, if reserved for minor offences, so that objectively more serious offences are dealt with by way of prosecution, where significantly higher maximum penalties apply, the appropriate balance can be struck in dealing appropriately and consistently, and in keeping with the spirit of the Act, with the range of possible conduct contravening the offence provisions.

1.65 Subject to the above comments, the Committee is satisfied the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(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
NSW Reconstruction Authority Amendment (Resilience NSW) Regulation 2024	2024 No 527
Statutory and Other Offices Remuneration Amendment Regulation 2024	2024 No 535
Strata Schemes Management Amendment (Strata Bond) Regulation 2024	2024 No 536
Community Land Management Amendment (Pets) Regulation 2024	2024 No 543
Surveillance Devices Amendment (Delegation) Regulation 2024	2024 No 546
Professional Standards Act 1994—The Australian Computer Society Incorporated Professional Standards Scheme	NSWGG-2024-404-2
Legal Profession Uniform Law Application Act 2014—NSW Admission Board Eighth Amendment Rule 2024	NSWGG-2024-421-9
Local Court Act 2007—Practice Note—Bail Proceedings (Centralised Bail Courts)	NSWGG-2024-422-2

Appendix 1 Minutes

Draft minutes no. 19
Monday 18 November 2024
Regulation Committee
Room 1136, Parliament House, Sydney, 11.04 pm

1. Members present
Mrs Maclaren-Jones, *Chair*
Ms Boyd, *Deputy Chair (via teleconference)*
Mrs Carter
Mr Donnelly
Dr Kaine
Ms Mihailuk *(via teleconference)*
Mr Nanva *(via teleconference)*
Mr Murphy

2. Apologies

3. Previous minutes
Resolved, on the motion of Mr Donnelly: That draft minutes no. 18 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence:

Sent:

- 11 November 2024 – Letter from Chair to Leader of the Government in the Legislative Council, the Hon Penny Sharpe MLC regarding work practices and ministerial engagement of the Committee.
- 14 November 2024 – Letter from Chair to Attorney General, the Hon Michael Daley MP regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 13 of 2024.
- 14 November 2024 – Letter from Chair to Minister for Education and Early Learning, the Hon Prue Car MP regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 13 of 2024.
- 14 November 2024 – Letter from Chair to Minister for Planning and Public Spaces, the Hon Paul Scully MP regarding scrutiny concerns concluded in Delegated Legislation Monitor No. 13 of 2024.

Received:

- 6 November 2024 – Letter from Minister for Water, the Hon Rose Jackson MLC regarding scrutiny concerns identified in the *Water Management (General) Amendment (Miscellaneous) Regulation 2024*.

5. Consideration of Chair's draft report
The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 14 of 2024*, which having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Murphy: 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 Tuesday 19 November 2024.

6. Correspondence arising from Monitor No. 14 of 2024

Resolved, on the motion of Mr Murphy: That the Chair write to relevant ministers or bodies reflecting the conclusions of the Committee set out in Monitor No. 14 of 2024.

7. Evaluation report of the Committee's additional technical scrutiny function

7.1 Draft report outline

Resolved on the motion of Mrs Carter: That the Committee authorise the secretariat to prepare a report evaluating the Committee's technical scrutiny function in accordance with the report outline circulated by the secretariat.

7.2 Correspondence to stakeholders seeking feedback

Resolved on the motion of Mr Murphy: That the Chair, on behalf of the Committee, write to the following stakeholders seeking any feedback regarding the operation of the Committee's technical scrutiny function by 13 December 2024:

- The Cabinet Office
- The Hon Penny Sharpe MLC, Leader of the Government in the Legislative Council
- NSW Parliamentary Counsel's Office
- Dr Ellen Rock, Independent legal adviser to the Regulation Committee
- Mr David Blunt AM, Clerk of the Parliaments.

7.3 Additional input from Committee members

Resolved on the motion of Mrs Carter: That the secretariat canvass dates for a meeting to be held in late January 2025 to allow Committee members to discuss the content of the evaluation report regarding the Committee's technical scrutiny function.

8. Adjournment

The Committee adjourned at 11.20 am.

9. Next Meeting

Sine die.

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 16 October 2024 – Letter from Chair to Attorney General, the Hon Michael Daley regarding scrutiny concerns identified in the *Crimes (Sentencing Procedure) Regulation 2024*
- Sent 28 October 2024 – Letter from Chair to Minister for Water, the Hon Rose Jackson regarding scrutiny concerns identified in the *Water Management (General) Amendment (Miscellaneous) Regulation 2024*
- Received 5 November 2024 – Letter from Attorney General, the Hon Michael Daley regarding scrutiny concerns identified in the *Crimes (Sentencing Procedure) Regulation 2024*
- Received 6 November 2024 – Letter from Minister for Water, the Hon Rose Jackson regarding scrutiny concerns identified in the *Water Management (General) Amendment (Miscellaneous) Regulation 2024*.

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

16 October 2024

The Hon Michael Daley MP
Attorney General

D24/051958

By email

Dear Attorney General

Crimes (Sentencing Procedure) 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.

- *Crimes (Sentencing Procedure) Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987,* section 9(1)(b)(iv) 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.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Scrutiny concerns

	Provision	Issue
1	Section 13	The *Crimes (Sentencing Procedure) Regulation 2024* (***the regulation***), section 13(2) provides that an assessment report in relation to a home detention condition must not be finalised if the offender does not have accommodation suitable for home detention until reasonable efforts have been made by a community corrections officer, in consultation with the offender, to find suitable accommodation.' While the *Crimes (Sentencing Procedure) Act 1999 (**the Act**)*, section 17B(4) is referenced as the relevant regulation-making power, the Committee considers that imposing this obligation on community corrections officers appears to go beyond, or may not be in the spirit of, the power to 'make provision for or with respect to matters to be addressed in, and the preparation and furnishing of, an assessment report.' The Committee seeks clarification as the relevant provision of the Act or regulation that otherwise imposes this obligation on a community corrections officer. In the alternate, the Committee queries the power being relied on to impose this obligation in connection with the preparation and furnishing of the assessment report.
2	Section 15	The Committee considers that the regulation, section 15 may be redundant, noting that the Act, section 30N(4) provides that 'the court is required to give a copy of the victim impact statement to the Mental Health Review Tribunal… as soon as practicable after the court makes a decision that results in the accused person becoming a forensic patient within the meaning of the *Mental Health Act 2007*.'
3	Section 20	Section 20(1) requires the court to set a date for hearing an application to which the regulation, Part 3, Division 1 applies (the ***hearing date***). Subsection (2) provides that the hearing date must not be earlier than 14 days, or later than 3 months, after the date the application is filed. Subsection (3) enables the court to waive the requirement to set a hearing date if the court decides to deal with the matter under section 22 without the offender being present. Subsection (4) provides that if the court sets a hearing date, the court may vary or waive any requirement under subsection (2) relating to the hearing date. The Committee queries whether subsection (4) applies only in relation to the scenario described in subsection (3) i.e. if the court *does* decide to set a hearing date but will be dealing with the matter without the offender being present, the hearing date does not need to be set within the timeframe specified by subsection (2). If that is not the intention, and subsection (4) seeks to permit the court to hear an application outside the designated timeframe whenever and for whatever reason, the Committee notes broad discretion is conferred in a way that potentially undermines subsection (2) if not expressed to be limited, for example, to special circumstances only.

		The Committee requests clarification as to the circumstances in which the court may decide to set a date for hearing the application outside the timeframe prescribed in subsection (2).
4	Section 23	Section 23(1) provides that the court must explain the effect of additional or further conditions of a community correction order or conditional release order to an offender in language the offender can readily understand. Subsection (2) provides that the court may waive or vary a requirement under subsection (1). Moreso than for section 20(4), described in issue 3 above, the Committee notes that subsection (2) appears to provide the court with broad discretion as to whether to comply with the requirement in subsection (1). The Committee requests clarification as to the circumstances in which the court may vary or not comply with the requirement to explain the effect of additional or further conditions to the offender. Noting that subsection (3) provides that an order of the court is not invalidated by a failure to comply with subsection (1), the Committee considers that the lack of parameters on how the court may exercise its discretion under subsection (2) may have the effect of unduly diluting the purported 'requirement' in subsection (1) to the point that renders the section inert i.e. if there is nothing preventing the court giving this explanation to offenders if it considers it appropriate, but it is not required to in any circumstances, does the section have any real legal effect?
5	Section 24	Section 24(1)(a) provides that the court must give the offender notice of the outcome of an application to which the regulation, Part 3, Division 1 applies as soon as practicable after dealing with the application. Section 24(2) provides that the court may vary or waive the requirement under subsection (1)(a). The Committee requests further information as to the circumstances in which the court may vary or choose not to comply with the requirement.
6	Section 28	The Committee seeks confirmation that section 28 is not spent as there are still sentences to be determined in the circumstances described.

Please provide a response to the issue identified as nos 1 and 3-6 by **30 October 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no 2 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 Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

28 October 2024

The Hon. Rose Jackson
Minister for Water
Minister for Housing
Minister for Homelessness
Minister for Mental Health
Minister for Youth
Minister for the North Coast

D24/053868

By email

Dear Minister

Water Management (General) Amendment (Miscellaneous) 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 24 September 2024.

- *Water Management (General) Amendment (Miscellaneous) Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(viii) 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	Schedule 1[5]	Schedule 1[5] substitutes the penalty notice amounts for various penalty notice offences listed in the *Water Management (General) Regulation 2018*, Schedule 7. The offences are tier 2 penalty offences under the *Water Management Act 2000* (***the Act***), section 363B(b) carrying a maximum penalty of, for corporations, $2,002,000, plus $132,000 for each day the offence continues if a continuing offence, and, for individuals, a maximum penalty of $500,500, plus $66,000 for each day the offence continues, if a continuing offence. The Committee notes that the penalty notice amounts specified in item 5, ranging from $3,000 to $15,400, fall within a range of 0.3% to 1.5% of the relevant maximum penalty for the offence. The Committee anticipates that the penalty notice amounts are so low relative to the maximum penalty as notices are intended to be issued only for instances of minor offending on the scale of objective seriousness, given the broad range of conduct captured by the wording of the relevant offence provisions. For example, section 60A(2) makes it an offence for a person who does not hold an access licence for a water source to which the Act, Part 2 applies to take water from the water source. This could conceivably capture a broad range of conduct, from a person taking a bucketload of water for personal use, for which it may be deemed more appropriate to issue a penalty notice, to the taking of water on a much larger scale for commercial or other purposes, for which it would arguably be inappropriate to issue a penalty notice. The Committee therefore seeks confirmation that penalty notices are intended to be issued for the listed offences in limited circumstances only, and requests elucidation regarding the kind of conduct that would constitute a 'minor' contravention of each offence provision and how authorised officers exercise their discretion to issue penalty notices for these offences. Further, the Committee notes there are certain offences for which it is less apparent that issuing a penalty notice is more appropriate than pursuing prosecution in a court because of the more limited 'range' of objective seriousness arising from the nature of the offence and the high maximum penalty attached to it. The Act, section 91F(1) is one such provision. It makes it an offence for a person to carry out an aquifer interference activity without holding an aquifer interference approval for that activity. The Committee finds it more difficult to foresee a set of circumstances in which a person without the necessary approval could penetrate, interfere with or obstruct an aquifer in only a minor way. Sections 256(1) and 346 are other examples of offence provisions for which the Committee finds it more difficult to discern what a more minor infraction, warranting the issue of a penalty notice with a much lower penalty, would constitute. Section 256(1) makes it an offence for a person to construct a flood work on a floodplain, or a building, fence or structure in,

		on, or adjacent to, a levee bank, without the consent of the Minister, while section 346 makes it an offence for a person to construct a water bore without the necessary licence and authority to do so. The Committee therefore seeks further elucidation of the circumstances in which penalty notices are intended to be issued for these offences, and the rationale and justification for this. The Committee also queries whether suitable guidelines, procedures and safeguards are in place in relation to issuing a penalty notice for offences for which a defence is available. For example, the Act, section 91H(3) makes it an offence for a person to fail to comply with any regulation setting out a standard or requirement relating to metering equipment used in connection with a water management work. Section 91H(4), however, offers a defence where the failure to comply with the regulation was caused by work done to the metering equipment by a duly qualified person. Moreover, it is an offence under section 340A(1) for a person to, without lawful excuse, neglect or fail to comply with a requirement under the Act, Part 2, and an offence under section 352(2) for a person to harm an aquifer or waterfront land, except if essential to carry out certain development, activities or projects, or as authorised by certain Acts. The Committee notes caution should be exercised when making an offence with a defence a penalty notice offence, given the view that these should not generally extend beyond strict and absolute liability offences to offences requiring the exercise of discretion or judgment by the officer. However, it is also accepted that certain offences with a fault element, defence or other exception, proviso or qualification may make appropriate penalty notice offences in certain circumstances, including where the availability of a defence is straightforward to assess. The Committee therefore requests information regarding whether the availability of the defences outlined above is easy for officers to assess on the spot, and the guidelines, procedures and safeguards that apply in making such a determination.
2	Schedule 1[3] and [4]	Schedule 1[1] and [2] omit clause 20 and replace it with new clause 20A. The clause provides for how the value of water illegally taken from a water source is to be determined for the Act, section 60G (Minister may charge for water illegally taken). Schedule 1[3] and [4] amend clause 66 to provide that private water corporations may also impose a charge for illegally taken water, but by reference to the value of the water determined in accordance with former clause 20. Noting there are some 80 private water corporations for whom clause 66 may be relevant, and in relation to which former clause 20 continues to apply, the Committee considers it would have been preferable to retain and relocate former clause 20, so that the method for determining value for private water corporations is more readily available. The Committee also notes that, by referring to clause 20 as in force immediately before its repeal, the clause is effectively 'frozen' from the day the regulation commenced, meaning that if any aspect of the method of calculation previously provided for is to be amended, a new provision would presumably need to be inserted into the *Water Management (General) Regulation 20218* to address this. Though the Committee does not raise a

		scrutiny concern in relation to this matter, the Committee considered it a matter worth noting.

Please provide a response to the issue identified as no 1 by **9 November 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no 2 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 Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Michael Daley MP
Attorney General

Ref: EAP24/16962

The Hon Natasha Maclaren-Jones MLC
Member of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email

Dear Ms Maclaren-Jones,

Thank you for your letter of 16 October 2024 seeking clarification on scrutiny concerns and issues identified with the Crimes (Sentencing Procedure) Regulation 2024 (**the Regulation**), which commenced on 1 September 2024 replacing the Crimes (Sentencing Procedure) Regulation 2017 (**the former Regulation**).

Issue 1 – Section 13

I note the Regulation Committee's queries around whether this section goes beyond the regulation-making power in section 17B(4) of the *Crimes (Sentencing Procedure) Act 1999* (**the Act**). The Regulation was approved by the Parliamentary Counsel, which had no concerns about this regulation-making power or other heads of power issues.

Issue 2 – Section 15

I have noted the issue raised, and note that this does not require a response.

Issue 3 – Section 20

I can confirm that section 20(3) of the Regulation relates to the court's ability to waive the requirement for setting a hearing date, where the application is to be dealt with under section 22 without the offender being present. Further, section 20(4) relates to the court's ability to waive or vary requirements relating to setting a hearing date.

Issues 4 and 5 – Sections 23 and 24

Sections 23 and 24 do not represent any change or departure from the existing process that was set out in clause 13(10) of the previous Regulation, in force since 2017, wherein both these requirements could be varied or not complied with. Clause 13 of the previous Regulation has not been changed substantively, however the language and structure has been redrafted and modernised to reflect current drafting practice and enhance clarity.

Issue 6 – Section 28

The Department of Communities and Justice is making inquiries as to whether there are still outstanding criminal matters to be finalised under section 28. If those inquiries confirm that there are no such matters, section 28 could be considered for repeal but I am advised that its repeal before that time could risk creating a lack of legislative authority for the finalisation of matters that outweighs the risks of it remaining part of the Regulation at this time.

Thank you for taking the time to write.

Sincerely,

Michael Daley MP
Attorney General

5 November 2024

The Hon Rose Jackson MLC
Minister for Water, Minister for Housing,
Minister for Homelessness
Minister for Mental Health, Minister for Youth
Minister for the North Coast

NSW GOVERNMENT

Our Ref: MF24/2768
Your Ref: D24/053868

The Hon. Natasha Maclaren-Jones MLC
Member of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email

Dear Mrs Maclaren-Jones Natasha

Water Management (General) Amendment (Miscellaneous) Regulation 2024

Thank you for your correspondence dated 28 October 2024 concerning the above-named proposed regulatory amendment. I have sought advice from the Natural Resources Access Regulator (NRAR), NSWs independent water law enforcement agency to inform my response.

I am a strong supporter of NRAR and its work to restore the public's confidence in water regulation. Since taking up the role of Water Minister I have encouraged NRAR to advise me of options to strengthen its enforcement powers and close loopholes. This amendment represents the first phase of a program of reform that enables NRAR to build upon its impressive enforcement record, to stay ahead of the small number of water users whose criminal behavior undermines the integrity of water management systems, and to protect this precious, scare resource for the benefit of all.

Broadly, I understand from your correspondence that you are seeking:

(a) confirmation that a Penalty Infringement Notice (PINs) will only be issued in "limited circumstances only" for the offences that are set out in Schedule 7 of the *Water Management (General) Regulation 2018*;

(b) elucidation of the circumstances in which a PIN might be issued in relation to an offence that is listed in Schedule 7 and the rationale and justification for this; and

(c) details as to whether there are procedures in place to ensure that PINs are only issued in appropriate circumstances.

Dealing with the points above in reverse order, I am advised that where an investigator with NRAR considers the issuance of a PIN in a particular case, there are strict protocols that ensure the decision to do so is robust and defensible. These protocols are expressed in NRARs Investigations Manual. The Manual specifies that:

i. NRAR's Manager(s) of Investigations has the delegated authority to issue PINs; and

ii. the Manager must be satisfied there is sufficient evidence to prove the commission of the offence beyond all reasonable doubt, and that a defence is not engaged; and

iii. NRAR may, in certain circumstances, issue a letter inviting a person of interest to provide their views on the allegation and whether enforcement action should be taken; and

iv. An individual or company issued a PIN may request a formal review by a suitable qualified and experienced NRAR officer not involved in the original decision.

NRAR's publicly available Regulatory Policy stipulates the criteria used by NRAR officers to guide the exercise of discretion when evaluating the appropriate sanction to impose. Similarly, NRARs Prosecution Guidelines set criteria for what matters will be recommended to the Board for prosecution.

NRAR staff must be Authorised Officers to levy sanctions and are required to undertake regular training to maintain this accreditation. Training is led by qualified personnel who deliver courses aligned to the national training unit of competency PSPREG033 'Apply Regulatory Powers'.

There is also a robust internal peer review process in place that requires the evaluation of concluded investigations. This assurance ensures the requirements of the Investigations Manual are met and the outcome consistent with similar matters. Learnings from these reviews are embedded into ongoing practice.

NRAR maintains a Quality Management System (QMS) that is certified to ISO 9001:2018 standards. This certification process commits the agency to continuously review and improve the processes and policies outlined above. NRAR is externally audited against this standard to retain its ISO certification of the QMS.

In respect to the point at (b), it is not possible to address the circumstances in which a PIN might be issued under each of the offences listed in Schedule 7. The sheer magnitude of different circumstances to be covered would make this impractical. Further, the anticipation that PINs will only be issued in relation to instances of minor offending on the "scale of objective seriousness" overlooks, with respect, the different factors that may be at play in any given instance.

Taking s 91F, *Water Management Act 2000*, as an example, it is important to appreciate that it is not only the alleged conduct itself (i.e. interfering or obstructing an aquifer) but also the surrounding circumstances and those of the alleged offender that may all be engaged in a particular case. While the conduct itself, therefore, may or may not be "minor" there may be other circumstances, as the Committee can appreciate, either mitigating or otherwise that play a part in determining whether the issuance of a PIN might be appropriate where an aquifer has, on available evidence, been interfered with. Such circumstances might include:

i. whether on the available evidence, the alleged offending was carried out intentionally, recklessly or without any awareness of it at all;

ii. the attitude of the person (or persons) involved to the alleged offending (i.e. their contrition or remorse);

iii. the antecedents of the person involved (i.e. age, any mitigating circumstances, whether they have any criminal history of the kind alleged or have been previously warned about the alleged offending);

iv. the seriousness, scale, harm or effect of the alleged offending; and

v. the staleness or otherwise of the alleged offending.

The above list of factors is not exhaustive and different factors may be engaged differently in a single case. It is therefore not possible, addressing the point at (a) above, to confirm that PINs will only be issued in limited circumstances. Where a given case involving circumstances such as those detailed above is weighed and evaluated in accordance with procedure, it may be that the guidelines suggest a PIN is in fact an appropriate sanction to resolve the investigation.

I hope this assists the Committee with its deliberations. If you would like more information, please contact Pamela Murphy in my office on or .

Yours sincerely

Thanks Natasha -
I hope this provides some clarity and we are happy to address further if necessary.
R.

Rose Jackson MLC
Minister for Water, Minister for Housing, Minister for Homelessness,
Minister for Mental Health, Minister for Youth, Minister for the North Coast

Date: 5.11.24