



Supplementary submission from the Association of Independent Schools of NSW

Review of Section 83C of the *Education Act 1990* (NSW)

15 April 2024

Supplementary submission from the Association of Independent Schools of New South Wales (AISNSW)

This supplementary submission has been prepared by the Association of Independent Schools of NSW (AISNSW) in response to recent action taken by the NSW Department of Education (the Department) to publish a new regulation in the Education Regulation 2017 (NSW) on 1 March 2024; Regulation **10B School providing certain education and care services does not operate for profit** ([see Appendix A](#)). This new regulation is accompanied by revisions to the Not-For-Profit Guidelines for Non-Government Schools (June 2019) soon to be gazetted.

The Independent schools sector supports ongoing and comprehensive engagement with NSW school regulators to enable effective, transparent and proportionate regulation of non-government schools.

We trust our recommendations will be given serious consideration by this review and by the Minister.

We would be pleased to elaborate on any aspects of this supplementary submission as required.

Yours sincerely,

Margery Evans

Chief Executive, AISNSW

For further enquiries or additional information relating to this submission, please contact AISNSW Office of the Chief Executive.

Supplementary submission

Recommendation 9 in our [main submission](#) seeks regulatory amendments to account for further exceptions akin to r10 and r10A.

The first example of such an exception provided the following suggested wording for a new regulation about schools that choose to operate centre based early childhood services;

“that a school is not taken to operate for profit because of a funding contribution made as part of the school’s operation of a centre-based Early Childhood Services (such as a Long Day Care service, a Preschool or Outside School Hours Care service); or, a class delivered to students in the year before Kindergarten (using a learning framework primarily based on the outcomes of the NES Early Stage One syllabus); or, a playgroup servicing the school community, if the school demonstrates, to the Minister’s satisfaction, that the funding contribution does not comprise any money provided by the Minister as financial assistance in respect of the school”

The newly created regulation 10B ([see Appendix A](#)) does clarify that schools may use private income for the operation of early childhood programs and still be compliant with section 83C of the *Education Act* 1990 (NSW). This is positive and provides the clarity for schools on this matter.

However, regulation 10B also introduces unnecessary restrictions on which children can attend an early childhood service operated by a non government school. These restrictions are soon to be published in a newly gazetted version of the [Not-For-Profit Guidelines for Non-Government Schools \(June 2019\)](#). The detail of these guidelines – the last draft received from the Department – is included at [Appendix B](#). The Guidelines are just over 1200 words and unfortunately do not provide sufficient clarity for schools to understand what equates to non compliance. As well as being overly prescriptive and restrictive, they are also overly complicated and unnecessary, creating uncertainty about how to comply.

AISNSW made our objections to the detail of the newly published regulation clear to the Department on multiple occasions from December 2023 to March 2024. Yet the regulation was published on 1 March 2024 while AISNSW and CSNSW were still actively engaged in consultation with the Department about the content of the regulation. We were advised by a telephone call that the regulation had already been provided to the Minister, approved and would be shortly published only hours after a meeting with the Department where the sectors had not yet resolved concerns over the wording of the draft regulation.

Since the publication of regulation 10B, AISNSW has been attempting to work in good faith with the Department in the development of useful guidelines that seek to support the regulation. However, despite multiple meetings, calls and email exchanges our key feedback

has been repeatedly rejected on the basis that it “is inconsistent with the public policy intent”. Despite asking for a plain explanation of what the public policy intent is and exactly what the Department is trying to prevent through the attendance restrictions they have introduced, the responses we have received have been unclear.

The regulation introduces a rigid criteria of children that can attend early learning operated by non-government schools. The criteria, soon to be published in the [Not-For-Profit Guidelines for Non-Government Schools \(June 2019\)](#), clearly seeks to restrict parents and children from accessing early childhood education services operated by non government schools.

The effect of the draft guidelines are that if a non government school’s early learning centre accepts any children that are not likely to attend the school, then the school will be found operating for profit. The only exceptions to this are for reasons of gender or if there is no equivalent service in the geographic vicinity.

While it is important to ensure that schools operating these services are doing so mainly for current and or future students, a key point to acknowledge is that this should be their **primary purpose**, but may **not be their exclusive purpose**.

Financial viability of early childhood services

Where a school provides a National Quality Framework (NQF) approved early childhood service to current or future students (preschool, long day care or outside school hours care) a condition of service approval is that the service is financially viable. Like a small school, a small early childhood service is more expensive to operate, yet there is no additional government funding for small early childhood services like there is for small schools in recognition of the additional expense. In order to ensure financial viability of an early childhood service, minimum enrolment numbers must be met each year – they can’t just operate with vacant places. Where enrolments can’t be fully met by children who do or will attend the school in future (these numbers may fluctuate year on year), they are offered to members of the community – to families who need care for their children, but who may not be planning to have their children attend the school in the future (or who’s children already attend another school, in the case of OSHC or Vacation Care). Regulation 10B and the accompanying guidelines mean that non government schools could no longer offer these additional places to the wider community. This would reduce the number of childcare places available to NSW families.

The NSW Premier and Deputy Premier have publicly committed the NSW Government to increasing access to high-quality early childhood education for NSW parents and children. In conflicting government policy, the introduction of this regulation and accompanying guidelines limits access for families in an environment where there is already a shortage of places available. This will disadvantage families who need childcare but who don’t intend their child to attend a non government school.

Some schools will not be able to increase the private income to subsidise the operation of existing early childhood services in order to make them financially viable (where the service may have previously been covering its own costs by providing some childcare places to families in the community). If these schools are forced to close their services then the families who do intend to send their children to the school will now also need to find childcare elsewhere. Which will only serve to exacerbate the current shortage of high-quality early childhood education.

Disincentive to establish early childhood services

In addition, the NSW government has pledged \$60 million dollars to support the development of new preschools on non government school sites (or the expansion of existing preschools). This new policy that restricts parents and children from accessing early childhood education services operated by non government schools is a disincentive for any school to invest in building or expanding a preschool on a school site.

Enforcement of the new requirements

Through unofficial channels we have heard that schools need not worry about these new restrictions because the Committee intend to take a 'light touch' approach to the regulation of this matter. Unfortunately, the non-government school sector's current and past experiences with the Department's oversight of s83C regulation provide limited assurance or confidence. The significant financial and reputational implications for schools of being found 'for-profit' or 'non-compliant' will lead to increased hesitation by schools to continue longstanding early childhood programs and enhanced administrative red tape for schools to prove compliance. This is yet another example of how the NSW Department of Education's approach to regulation of section 83C is compromised and lacking transparency, further substantiating our case that an independent regulator needs to be appointed.

Definition of 'recognised education and care program'

The final confusion is that regulation 10B defines a "a recognised education and care program" as only those centre based education and care services regulated under the NQF; Preschool, Long Day Care, Outside School Hours Care. Whereas the guidelines expand that definition by saying *'The definition of "recognised education and care program" in clause 10B is not exhaustive. The Minister is of the view that play groups and transition to school programs are types of recognised education and care programs for the purposes of clause 10B'*. AISNSW provided feedback to the department in January 2024 that a more expansive definition should be included in the regulation. This feedback was rejected at the time. We believe the regulation should be amended to provide much needed clarity.

Recommendation 13: That regulation 10B be amended to provide necessary clarity for schools operating early childhood programs and remove the requirement for a specified attendance criteria to be in the guidelines.

Regulation 10B(1) should be amended to; “For the Act, section 83C(3), a non-government school does not operate for profit if the proprietor’s assets or income, as far as they relate to the school, are used by the proprietor to provide a recognised education and care program **primarily for - children who attend the school or children who, in the Minister’s opinion, are likely to attend the school**”.

The definition of “recognised education and care program” in r10B(3) should be amended to say;

“**recognised education and care program** **is not exhaustive and** includes -

- (a) a preschool program,
- (b) long day care,
- (c) outside school hours care
- (d) play group**
- (e) Creche or Occasional Care service**
- (f) transition to school program**
- (g) a class delivered to students in the year before Kindergarten (using a learning framework primarily based on the outcomes of the NESA Early Stage One syllabus)”**

Appendix A

10B School providing certain education and care services does not operate for profit

- (1) For the Act, section 83C(3), a non-government school does not operate for profit if the proprietor's assets or income, as far as they relate to the school, are used by the proprietor to provide a **recognised education and care program** for—
- (a) children who attend the school, **and**
 - (b) children who meet criteria specified in guidelines approved by the Minister under the Act, section 83L.
- (2) Despite subclause (1), a non-government school operates for profit if—
- (a) financial assistance provided by the Minister under the Act, Part 7, Division 3 is used for a recognised education and care program, or
 - (b) a payment is made by the school to a related entity or other person or body for property, goods or services—
 - (i) at more than reasonable market value, or
 - (ii) that are not required for the operation of the school or a recognised education and care program, or
 - (iii) in circumstances the Minister considers to be unreasonable, having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister, or
 - (c) income received by the proprietor arising from the operation of a recognised education and care program is used for a purpose other than—
 - (i) the operation of a recognised education and care program, or
 - (ii) the operation of the school.
- (3) In this clause—
- long day care** means a service providing care, including a preschool program, for children less than 6 years of age.
- out of school hours care** means care, play and learning for school children delivered before and after school, during school holidays and on pupil free days.
- preschool program** has the same meaning as in the *Children (Education and Care Services) National Law (NSW)*.
- recognised education and care program** includes the following—
- (a) a preschool program,
 - (b) long day care,
 - (c) out of school hours care.

Appendix B

Education and Care Program – Preschool, long day care, out of school hours care (Clause 10B)

Non-government schools may wish to use school assets and/or income to provide an education and care program. Such programs are designed to invest in the learners of the school, or ‘future learners’ of the school. Clause 10B of the Regulation prescribes the circumstances in which the use of school assets or income, by a school’s proprietor, to provide a “recognised education and care program” will constitute operating for profit.

In clause 10B of the Regulation, a “recognised education and care program” includes:

- ‘out of school hours care’ – meaning care, play and learning for school children delivered before and after school, during school holidays and on pupil free days;
- ‘long day care’ – meaning a service providing care, including a pre-school program, for children less than 6 years of age; and
- a ‘preschool program’ – meaning an early childhood educational program delivered by a qualified early childhood teacher to children in the year that is 2 years before grade 1 of school (“grade 1” in this context is a reference to the first year of compulsory full-time schooling).

The definition of “recognised education and care program” in clause 10B is not exhaustive. The Minister is of the view that play groups and transition to school programs are types of recognised education and care programs for the purposes of clause 10B.

Pursuant to clause 10B(1), the use by a proprietor of school income (other than financial assistance provided by the Minister under Part 7 Division 3 of the Act) and/or school assets to operate a recognised education and care program for children who attend the school or children who meet criteria specified in these Guidelines, does not constitute operating for profit. This is subject to clause 10B(2).

Pursuant to clause 10B(2), a school will nonetheless operate for profit if:

- the school uses financial assistance provided under Part 7 Division 3 of the Act for the purpose of providing a recognised education and care program; or
- a payment is made by the school for property, goods or services:
- at more than reasonable market value;
- that are not required for the operation of the school or a recognised education and care program; or
- in circumstances the Minister considers to be unreasonable having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister; or
- income received by the proprietor arising from the operation of a recognised education and care program is used for a purpose other than the operation of a recognised education and care program, or the operation of the school.

Clause 10B(1)(b) – children who meet criteria specified by the Minister

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

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

The criteria "children who are likely to attend the school" recognises that there will be children who, at the time of enrolment in a recognised education and care program, are likely to attend the school, who will not, in fact, go on to attend the school. This criteria ensures that a school will not operate for profit solely because of the fact that these children did not ultimately go on to attend the school.

The Minister may further specify children in other similar circumstances from time to time, as published in these Guidelines.

In determining whether a recognised education and care program is for children who are likely to attend the school or for children who meet the specified criteria, the Minister may have regard to the following matters:

- documents outlining the nature of the education and care program (e.g. preschool, long day care) and its connection to the school;
- any connection between the education and care program and the school (for instance, the education and care program may be delivered on or near school grounds or with regular connection to the school as a means to familiarise future learners with the school and school community); and
- the eligibility requirements for the education and care program, and the eligibility requirements for the school.

Clause 10B(2)(b) – payments for property, goods or services

The Minister will consider all the circumstances of a particular transaction in this context to determine whether a school has operated for profit.

For guidance on ‘reasonable market value’, refer to section 8.2 above.

In determining whether property, goods or services are required for the operation of a recognised education and care program, the Minister may have regard to the following matters:

- policies or relevant records outlining the nature of the long day care or preschool program (see below for examples of relevant records), and the nature of the out of school hours care (for instance, the times at which it is provided (e.g. before or after school));
- development consents and/or appropriate zoning permitting the provision of the recognised education and care program on the relevant site. Where such provision is not permitted, that could indicate the payment is not required for the operation of the recognised education and care program; and
- any evidence demonstrating that the payment is required for the operation of the recognised education and care program.

Clause 10B(2)(c) – income received by the proprietor arising from the operation of a recognised education and care program.

A non-government school will operate for profit if income received by the proprietor arising from the operation of a recognised education and care program is used for a purpose other than the operation of a recognised education and care program, or the operation of the school.

Limits to clause 10B

Clause 10B deals only with the use of school assets and income for the provision of recognised education and care programs by the proprietor of the school. Where an education and care program is provided by a third party or related entity, any use of the school's assets or income (and any payments by the school) will be assessed under section 83C(2) of the Act. In addition to section 8.2, schools should have regard to section 9.3 ('Leasing School-Owned Property and Assets'), and section 9.1 ('Shared or Joint Use of Assets').

Examples of records or policies that may be kept

- local government planning documentation (e.g. development consent) confirming the site is approved for the provision of the recognised education and care program;
- business records documenting arrangements for the provision of the out of school hours care, long day care or a preschool program, including the details of the operator of the service; and
- business records (including decisions and rationale) that clearly explain how the school has determined that a transaction is at no more than reasonable market value (noting the guidance on 'Reasonable Market Value' above at section 8.2).