



Submission from the Association of Independent Schools of NSW

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

23 February 2024

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

This submission has been prepared by the Association of Independent Schools of NSW (AISNSW) and reflects the views of a diverse range of independent schools.

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

We would be pleased to elaborate on any aspects of this 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, oce@aisnsw.edu.au

Contents

Introduction.....	4
Executive Summary	5
Legislation must be clear	9
Composition of the Non-Government Schools Not-for-profit Advisory Committee.....	11
Need for an independent regulator.....	12
An alternative to appointing an independent regulator.....	14
Not For Profit Concept	15
Regulatory Approach	17
Scope of Regulation.....	17
Investigations	21
Salaries	22
Appendix A.....	23

Introduction

The Association of Independent Schools of New South Wales (AISNSW), as the peak body representing the Independent schools' sector in New South Wales, welcomes this opportunity to provide feedback on Review of Section 83C of the *Education Act 1990* (NSW).

The NSW Independent school sector is vibrant and diverse, providing the community with choice, fostering competition, and improving standards in education. There are 516 Independent schools and campuses in NSW, educating almost 237,000 students and accounting for 18.9% of NSW school enrolments.

Many Independent schools provide a religious or values-based education. Others promote a particular educational philosophy or educate specific cohorts of students such as those with disabilities or students at risk of disengaging from education. Independent schools include:

- Schools of educational philosophies, such as Montessori and Rudolf Steiner schools.
- Schools constituted under specific Acts of Parliament, such as Grammar schools.
- Boarding schools, and schools that enrol significant numbers of international students
- Schools representing over 20 different religious beliefs, including Islamic, Buddhist, Jewish, and Christian schools, and schools of Christian denominations, such as Anglican, Catholic, Greek Orthodox, Lutheran, Presbyterian, Seventh-day Adventist, and Uniting Church schools.
- Community schools, including those in Aboriginal communities.
- Schools that specialise in meeting the needs of students at risk of disengaging from education or students with disabilities
- German, French, Japanese, Turkish and Armenian schools

Independent schools in NSW are registered with NESAs. Most are established and governed independently on an individual school basis. Some Independent schools with common aims and educational philosophies are governed and administered as systems, like those within the Anglican Schools Corporation and Seventh-day Adventist system.

Since 2000, NSW Independent school enrolments have grown by 93,000 students, accounting for 60 per cent of NSW's student growth in that time. Enrolment growth in the NSW Independent schools' sector has been consistently strong, largely due to the significant increase in the number of low-fee Independent schools. In addition to having low fees, many Independent schools are small, with almost half educating fewer than 200 students. Thirty-seven per cent of NSW Independent schools are located outside metropolitan Sydney.

Many parents who choose an Independent school do so because they expect the school to operate differently to government schools and to provide particular services and educational offerings. Independent schools provide important choice for parents who have the right to decide on the best education options for their children.

Executive Summary

Purpose of regulation

AISNSW continues to strongly support appropriate regulatory oversight of government funding expenditure by non-government schools, aimed at ensuring the community's confidence in such expenditure. The vast majority of schools conscientiously seeks to comply with their legal obligations; applying punitive action should not be the routine aim of regulatory enforcement. Where a misunderstanding has occurred by schools able and willing to comply, the focus should be on education and action to remediate, and to deter inadvertent non-compliance. Regulation of Section 83C of the *Education Act 1990* (NSW) should only seek to penalise schools that fail to put in place frameworks to meet their obligations or deliberately choose not to comply. This would encompass wilful attempts to profit from government funding and/or careless/irresponsible actions that result in non-compliance.

Independent regulator

We also strongly contend that there is a need to move responsibility for regulating Section 83C to an independent regulator to overcome the inherent conflict of interest in having the operator of government schools decide what is fair and acceptable expenditure by non-government schools. Transferring responsibility to an independent regulator would send an important message to the public and to regulated entities (non-government schools) about the Government's commitment to transparent and objective regulation and oversight of financial assistance to non-government schools.

Alternatively, AISNSW urges the NSW Government to consider repealing Section 83C altogether and either:

- allow the Australian Government to regulate non-government schools' spending of recurrent government funding (as in other jurisdictions) or
- replace s83C with a regulatory framework consistent with that of the Commonwealth, the majority provider of public funding to non-government schools.

Clarity of legislation

While it is necessary to improve clarity on particular matters in support documents such as the NFP Guidelines, there are also aspects of the existing legislation that need correcting to remove unreasonable restrictions on the current ability of Independent schools to meet the expectations of their school communities, and to reduce the disproportionate regulatory burden imposed on schools through the current application of Section 83C.

The regulatory approach should be guided by the intent articulated at the time the legislation was introduced, as well as best practice responsive regulation principles. It has become evident that in order to be guided by the original intent of the legislation, the legislation first needs to be amended to provide clarity about the purpose of Section 83C, and include scope for non-

government schools to operate in accordance with their mission, purpose and educational philosophy to meet the expectations of their school communities. Once this has been realised, producing more useful support documents for schools should be achievable.

We have provided feedback and recommendations for consideration in this review. We also refer you to [our recent submission to the NSW Department of Education's Regulatory Framework development and Not-for-Profit Guidelines review](#). We trust our recommendations will be given serious consideration by this review and by the Minister.

Recommendations

Recommendation 1: That the Minister undertakes to progress the necessary legislative and regulatory amendments to ensure that schools can understand their compliance obligations, so that s83C regulation can be undertaken fairly and efficiently.

Recommendation 2: Legislative amendment – composition of Non-Government Schools Not-for-profit Advisory Committee.

That Section 83K(1)(e) be repealed, and

That Sections 83K(1)(b) and 83K(1)(c) be amended to increase each organisation's representative numbers from one to two.

Recommendation 3: That the Minister appoint an independent regulator who understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality.

An independent regulator (possibly NESAs) needs to have the necessary legislative powers to regulate non-government schools' expenditure of NSW Government funds provided for school operations.

This might be accomplished by amending the *Education Standards Authority Act 2013* to give NESAs responsibility for regulating compliance with Section 83C of the *Education Act 1990* (NSW), by incorporating a requirement that non-government schools comply with expenditure requirements for NSW recurrent school funding as part of the existing Non-Government School Registration process.

Recommendation 3.1: That the Minister repeal Section 83C and;

(Alternative to Recommendation 3)

a) rely upon the Commonwealth's existing risk-based regulatory approach to ensure government funding is spent appropriately by non-government schools, OR

b) replacing it with a regulatory framework consistent with existing Commonwealth approach, given that the Commonwealth is the majority provider of public funding to non-government schools in every state and territory.

Recommendation 4: Legislative amendment to introduce Objects of Division 6 of the Education Act 1990 (NSW).

That a new section (Section 83C1) be added to the Education Act 1990 (NSW) as suggested below, specifying the Objects of the Division;

83C1 Objects of this Division

(1) The objects of this Division are:

(a) to maintain, protect and enhance public trust and confidence in the non-government school sector, by ensuring that government funds are only used to promote and support the ethos, mission and purpose of the school, for the benefit of students and to meet the expectations of the school community, and

(b) to support and sustain robust, vibrant, independent and innovative non-government schools whose autonomy is respected and whose educational programs are diverse and provide genuine choice for parents, and

(c) to provide a framework under which a proportionate administrative response is available when there are breaches or alleged breaches of a non-government school's obligations under this Division.

Recommendation 5: Legislative amendment – remove “operates for profit”.

That Section 83C be amended to remove references to a school which “operates for profit” and refer instead to a school “which has breached its conditions of funding” (which could be simply defined for drafting purposes as “Funding Conditions”).

Recommendation 6: Legislative amendment to improve clarity about school income and funding.

That 83C(5) be amended to limit the definition of income in this context to government funds only.

Recommendation 7: Legislative amendment – Section 83C(2)(b)(ii).

That Section 83C(2)(b)(ii) be amended to replace the word “required” with “used”, reading as “for property, goods or services that are not used for the operation of the school”.

Recommendation 8: Legislative amendment – Section 83C(5).

That Section 83C(5) be amended to include a definition of “for the operation of the school”, specifying that what is for the operation of the school will be considered in the context of the ethos, mission, educational philosophy and purpose of the school and encompass:

- delivery of school educational and related programs,
 - ancillary activities which are reasonably expected by the school community and
 - administration of the school.
-

Recommendation 9: Regulatory amendment – further exceptions akin to r10 and r10A.

That the following additional exceptions be specified through regulatory amendment “that a school is not taken to be in breach of its funding conditions 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 NESA 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.
 - to student alumni associations to support student alumni events and work (such as providing use of meeting/gathering spaces on school premises so far as the work conducted by the association supports the operation of the school), 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.
 - and any other appropriate exceptions.
-

Recommendation 10: Legislative or Regulatory amendment – include detail of investigation processes in the Act or in the Regulations.

That Legislative or Regulatory amendments include:

- the timeframe in which an investigation should be completed, the circumstances under which this timeframe may be extended and by how long,
-

- how schools will be kept informed and provided the opportunity to respond to any proposed finding and/or recommendation of the Advisory Committee, and the procedure to follow after an investigation is concluded.

Recommendation 11: Legislative or Regulatory amendment - include detail of post investigation processes in the Act or in the Regulations.

That legislative or Regulatory amendments include;

- the timeframe for the Advisory Committee to make a recommendation, and the circumstances under which this timeframe may be extended and by how long,
 - how the school will be kept informed,
 - the school's right to seek an internal review of the Advisory Committee's recommendation, when it can be accessed, under what circumstances, who will conduct the review, how the review will be conducted, how long the review will take, and how such a review fits into the Minister's process for deciding whether to make a non-compliance declaration or a for-profit declaration in relation to the school.
-

Recommendation 12: Legislative or regulatory amendment - exclude market value of salaries from the scope of Section 83C investigations.

That Section 83C be amended to exclude assessing market value of salaries from the scope of Section 83C investigations, given the subjective nature of executive remuneration and the difficulty in comparing leadership roles across different school types, sizes and locations.

Terms of Reference

1. **The effectiveness and wording of s.83C of the Act and the associated sections (in the context of the Part 7 Division 3) in providing sufficient clarity for:**
 - a) **the Minister to regulate financial assistance to non-government schools**
 - b) **non-government schools to comply with the legislation.**

Legislation must be clear

Legislative and regulatory amendments are required to provide sufficient clarity to enable schools to comply. The Australian rule of law¹ promotes the view that legislation should be easy to understand, so that everyone (governments and citizens) can follow the law. While the principle of the rule of law is not enshrined in the New South Wales Constitution or other legislation, it is often referred to as being fundamental to this State's system of government. Making legislation as clear as possible:

- helps parties comply with their legal obligations and know their rights,
- helps regulators make fair and consistent judgments about what practice is and is not lawful, and
- protects those required to comply with the law from potentially unlawful judgements caused by lack of clarity in legislation and inconsistent statutory interpretation.

The legislation as currently drafted lacks clarity. By seeking to use Guidelines to provide clarity on the application of the legislation, the Department's interpretation of the legislation has strayed from its original intent and purpose. We believe that in the past, the regulator has ignored or discounted the legislative intent which has been contained in extrinsic materials such as the Second Reading Speech.

Sections 33 and 34 of the *Interpretation Act 1987* (NSW) sets out that:

- the interpretation of a provision of an Act *“that would promote the purpose or object underlying the Act... (whether that purpose or object is expressly stated in the Act...) shall be preferred to a construction that would not promote that purpose or object (s33),* and
- the extrinsic material that may be considered in the interpretation of a provision of an Act can include *“any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made”(s34(e)),* and *“the speech made to a*

¹ The Rule of Law establishes the principle that arbitrary exercise of power should be restrained by subordinating it to well defined and established law.

House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House”(s34(f)) (ie the second reading speech).

We agree that useful support resources such as Guidelines can help educate schools about how to comply with Section 83C of the *Education Act* 1990 (NSW) but contend that this would be best accomplished by first seeking to achieve as much clarity as possible through changes to the legislation itself (including the Education Regulations 2017 (NSW)). This means ensuring that the legislation reflects the original intent and purpose for which it was introduced.

The outcomes of the Section 83C Review are likely to significantly impact the content of the Guidelines and Regulatory Framework documents, requiring further changes. Change introduces increased regulatory and administrative burden on those expected to comply. Frequent change exacerbates this burden and creates confusion about currency of requirements. If the purpose of the Guidelines and proposed Regulatory Framework is to aid understanding of Section 83C, it would be best achieved by waiting for the outcome of the Section 83C review, so that changes are informed by improvements in the legislation.

Recommendation 1: That the Minister undertake to progress the necessary legislative and regulatory amendments to ensure schools can understand their compliance obligations and so the regulation of s83C can be undertaken fairly and efficiently.

The specific legislative and regulatory amendments necessary are detailed at [Section 4](#).

Terms of Reference

2. The role of the Non-Government Schools Not-for-profit Advisory Committee established under s.83K, including its role and membership.

Composition of the Non-Government Schools Not-for-profit Advisory Committee

Should the Minister choose to adopt Recommendation 3 and move responsibility for regulation of section 83C to an independent body, there may no longer be a need for a Non-Government Schools Not-for-profit Advisory Committee (the Committee). For example, if NESA was to take over the regulatory function, it would presumably use its existing consultation mechanisms to ensure both non-government school sectors are kept up to date and are appropriately consulted.

However, if the regulation of section 83C remains with the NSW Department of Education then the composition of the Committee must be reconsidered. Since the regulatory function is managed by the Department of Education and the NSW Education Minister, and departmental schools are not subject to the regulation, there is no justification for the Department to be represented on the Committee and hold Secretariat responsibilities.

Further, to ensure continuity, the representation of AISNSW and Catholic Schools NSW should be increased from one member each to two members each.

Recommendation 2: Legislative amendment – composition of Non-Government Schools Not-for-profit Advisory Committee.

That Section 83K(1)(e) be repealed, and

That Sections 83K(1)(b) and 83K(1)(c) be amended to increase each organisation's representative numbers from one to two.

Terms of Reference

3. Examination of the operation of s.83C:

- a) the outcomes and risk-based regulatory framework (exposure draft released)
- b) the Minister's not-for-profit guidelines published under s.83L of the Act (exposure draft released)
- c) other guidance material published on the department's website, including the Regulatory Topic Index.

Need for an independent regulator

AISNSW supports fair and proportionate regulation of non-government schools to demonstrate responsible expenditure of recurrent government funds provided for the operation of schools.

We remain concerned about the way the NSW Department of Education, as the current regulator of the non-government school sector's compliance with Section 83C, continues to interpret the legislation. Despite some outward improvement in attitude towards Independent schools from the Non-Government Schools Unit over the last 12 months, the expectation that non-government schools should operate like government schools continues to be the pervasive attitude in many conversations, investigations, and lines of inquiry.

It is our view that there is an inherent conflict of interest in having the operator of government schools decide what is fair and acceptable expenditure by non-government schools. Non-government schools provide important choice for parents in education options for their children. In October 2023, the current Education Minister declared in her Plan for NSW Public Schools that she wants NSW Public Schools to be the first choice for parents. This statement clearly established the Department of Education as a competitor to non-government schools. We believe that a strong public education system benefits society as a whole, and we support full funding of public schools.

Regulators perform an important role in society, by safeguarding sections of the community and, as in the case of Section 83C regulation, protecting government revenue. However, a regulator can fail to deliver this important public service if its activities are influenced by conflicts of interest or there is a perception of a conflict. Both can impact a regulator's ability to maintain regulatory neutrality. According to the 2012 OECD Recommendation of the Council on Regulatory Policy and Governance, the use of independent regulatory agencies should be considered where:

1. there is a need for the regulator to be seen as independent from politicians, government and regulated entities, to maintain public confidence in the objectivity and impartiality of decisions and effective operation for trust in the market;
2. both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
3. the decisions of the regulator can have significant impact on particular interests and there is a need to protect its impartiality.

We believe each of these factors are relevant to the regulation of non-government schools.

Appointing an independent regulator would send an important message to the public and to regulated entities (non-government schools) about this Government's commitment to transparent and objective regulation and oversight of financial assistance to non-government schools. Other benefits of an independent regulator include more consistent and predictable regulatory decision making as a result of the increased distance from undue influences (including political influence), and enhanced trust in the regulator and its decisions.

It would certainly be viewed as inappropriate to give a non-government school system the authority to regulate government school spending, just as it would be inappropriate to allow one commercial Bank to regulate its competitors. Such a conflict of interest exists already under the current regulation of Section 83C. As such, an independent regulator is needed who understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality.

When Section 83C of the *Education Act 1990* (NSW) was introduced in 2014, the then Board of Studies, Teaching and Educational Standards (BOSTES) concurrently introduced standards for the 'proper' governance of Independent schools. Eleven domains of compliance and the duties of 'Responsible Persons' were specified (and continue to be required in NESA's current [Registered and Accredited \(Individual\) Non-Government Schools \(NSW\) Manual](#)). Schools must provide detailed evidence in the form of policies, procedures, disclosures, registers and notifications to show that they have complied with these requirements.

NESA governance standards aim to ensure schools in receipt of recurrent funding use those funds for the intended and authorised purposes. The compliance domains of Conflicts of Interest and Related-Party Transactions make this clear. Given these requirements, a question remains about why the Department of Education duplicates regulatory oversight at additional cost to the taxpayer with its own not-for-profit compliance regime, when these matters are effectively regulated by NESA. NESA is institutionally well-placed to oversee how independent schools expend recurrent funding and use income and assets for the operation of the school.

Recommendation 3: That the Minister appoint an independent regulator who understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality.

An independent regulator (possibly NESA) should be given the necessary legislative powers to regulate non-government schools' expenditure of NSW Government funds provided for the operation of schools-- Legislative amendments.

This might be accomplished by amending the *Education Standards Authority Act 2013* to give NESA responsibility for regulating compliance with Section 83C of the *Education Act 1990* (NSW), by incorporating a requirement non-government schools comply with expenditure requirements for NSW recurrent school funding as part of the existing Non-Government School Registration process.

An alternative to appointing an independent regulator

Non-government schools in NSW are already highly accountable to their parents for the expenditure of private income (provided largely by parents through fees) and are also subject to extensive financial regulation and scrutiny of all spending by multiple Federal and State Government agencies including NESAs, ACARA, the ACNC, ASIC, the Department of Fair Trading and the Australian and NSW Departments of Education. There is currently a clear restriction on the ability of Independent schools to meet the expectations of their school communities and a disproportionate regulatory burden imposed on schools through the current application of Section 83C.

It would be in the interests of governments (and taxpayers) providing funding to schools to seek more opportunities to harmonise requirements where possible, rather than seek to create distinctions that disproportionately increase the regulatory burden for non-government schools (which increases schools' costs and expenditure in order to comply). With this in mind, and as an alternative to appointing an independent Regulator, the Minister should consider repealing Section 83C and replacing it with a regulatory framework consistent with that of the Commonwealth, the majority provider of public funding to non-government schools in every state and territory.

The Commonwealth's risk assurance framework, set out in the *Australian Education Act 2013* (Cth) and the *Australian Education Regulations 2023*, has been refined over time to provide confidence that its school funding is being spent in accordance with legislative requirements. The framework prioritises working with school sectors to support Approved Authorities to become and remain compliant while undertaking the assurance activities necessary to identify and address any non-compliance. Its longstanding procedures have assured the Australian Government's investment in schools is effective. It reviews and updates these measures to support a school funding model that is transparent, consistent and needs-based.

Most state and territory governments are content to rely upon the Commonwealth's risk-based regulatory approach to ensure all government funding is spent appropriately by non-government schools. If the NSW Government is intent on maintaining an additional layer of regulation, it should consider adopting or bringing into line its legislation and accompanying architecture - the Not-for-Profit Guidelines for Non Government Schools and Regulatory Framework - with the Commonwealth's risk assurance framework in the interests of achieving a cohesive and nationally consistent regulatory environment.

Recommendation 3.1: That the Minister consider repealing Section 83C and;

a) allow the Commonwealth's risk-based approach regulatory approach to ensure government funding is spent appropriately by non-government schools, OR

b) replacing it with a regulatory regime consistent with that of the Commonwealth, the majority provider of public funding to non-government schools in every state and territory.

Terms of Reference

4. **recommendations to improve the regulation of financial assistance to non-government schools, including:**
 - a) **suggested amendments to the legislation, including to the regulations, to bring about further clarity for non-government schools and the Minister**
 - b) **suggested changes to regulatory practices in place for the regulation of financial assistance to non-government schools.**

Not For Profit Concept

Use of “for profit” and “not for profit” in the *Education Act 1990 (NSW)* is inconsistent with Commonwealth Not For Profit legislation

The not-for-profit concept is taken from the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (the ACNC Act), which provides for registration of not-for-profit entities.

The ACNC Act sets out the various actions which the ACNC Commissioner can take if they find, among other things, that an entity has contravened the provisions of the Act or not complied with a relevant governance or conduct standard. This includes giving warnings and directions or, in the worst case, revoking registration.

The Objects of the ACNC Act are set out at section 15-5 (1) and are:

- a) *to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and*
- b) *to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and*
- c) *to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.*

Although the concept of not-for-profit in Section 83C clearly comes from the ACNC Act, it is used in a totally different way in the *Education Act 1990 (NSW)*. The sole object of Section 83C is to govern how a school may spend its funds, regardless of whether those funds come from the NSW Government.

We note Justice Rothman’s comments² that the Principal Objects of the *Education Act 1990 (NSW)* contain no reference to issues associated with the funding of non-government schools. This makes interpretation of the legislation more difficult because it requires consideration of extrinsic material to confirm or determine whether the meaning of certain provisions are consistent with (and promote) the purpose or object underlying the Act. To remedy this omission, and aid interpretation, we are of the view that it would be appropriate to include

² *Malek Fahd Islamic School Limited v Minister for Education and Early Childhood Learning* [2022] NSWSC 1176.

Objects of Division 3 in the *Education Act 1990* (NSW), which relates to funding of non-government schools. As the not-for-profit concept comes from the ACNC we propose an adaptation of the objects in the ACNC Act. Appropriate inclusions would reference public trust, supporting robust independent non-government schools' sectors and promoting the reduction of unnecessary regulatory obligations as well as ensuring government funds are only used for school operations aligned to the mission, ethos and genuine purpose of the school, for the benefit of students and to meet the expectations of the school community.

Recommendation 4: Legislative amendment to introduce Objects of Division 6 of the *Education Act 1990* (NSW).

That a new section (Section 83C1) be added to the *Education Act 1990* (NSW) as suggested below, specifying the Objects of the Division;

83C1 Objects of this Division

(1) The objects of this Division are:

(a) to maintain, protect and enhance public trust and confidence in the non-government school sector by ensuring that government funds are only used to promote and support the ethos, mission and purpose of the school, for the benefit of students and to meet the expectations of the school community, and

(b) to support and sustain robust, vibrant, independent and innovative non-government schools whose autonomy is respected and whose educational programs are diverse and provide genuine choice for parents, and

(c) to provide a framework under which a proportionate administrative response is available when there are breaches or alleged breaches of a non-government school's obligations under this Division.

Problematic use of “for profit” in the context of Section 83C

The ACNC Act does not provide that a not-for-profit charity which breaches the requirements of the Act is to be declared to be operating for profit. Under Commonwealth law, a school which fails to meet the requirements set out in Section 83C will still be considered a not-for-profit entity by public standards provided it has the purpose of “advancement of education” or other charitable purpose.

The concept of declaring an entity to be “for profit” under Section 83C of the *Education Act 1990* (NSW) purely because it has used funds in an unsanctioned manner is at odds with the ACNC Act. This is confusing and misleading for those parents, students and the general public who are not aware of the legislative environment in which such a declaration is made. There is an axiomatic understanding by the general public of what it means to be ‘operating for profit’ that is considerably at odds with the way the term is used in Section 83C. One of the purposes of the Section 83C is to strengthen public confidence that government funds are being used responsibly by non-government schools. The Independent schools’ sector supports this

intention; however, the use of the term 'operating for profit' to describe schools that have breached a funding condition leads people to the mistaken assumption that government money is being used to pay profits or dividends to shareholders, employees or owners. 'Operating for profit' terminology perpetuates inaccurate beliefs about non-government schools and only serves to undermine public confidence about the use of government funds.

Recommendation 5: Legislative amendment – remove “operates for profit”.

That Section 83C be amended to remove references to a school which “operates for profit” and refer instead to a school “which has breached its conditions of funding” (which could be simply defined for drafting purposes as “Funding Conditions”).

Regulatory Approach

We support reasonable regulatory oversight of government funding expenditure by non-government schools. However, as the vast majority of schools conscientiously seek to comply with their legal obligations, punitive action should not be the routine aim of a regulator. For schools able and willing to comply, the focus should be on education and, where required, taking action to direct and deter inadvertent non-compliance. Regulation of Section 83C of the *Education Act 1990* (NSW) should only seek to punish those that are unwilling to comply. This would encompass deliberate, deceitful attempts to profit from government funding and careless/irresponsible actions resulting in non-compliance. It should not be used to interrogate administrative transactions and functions that are conducted openly and properly reported.

The fair and responsible exercise of power is a responsibility of all regulators. The regulatory approach should be guided by the intent articulated at the time the legislation was introduced (as well as best practice responsive regulation principles). There is a concerning lack of transparency about the detail of the Department's 'risk based' approach to regulation of non-government schools. While we don't seek to limit the Department's ability to make reasonable enquiries or investigate legitimate allegations of potential non-compliance, the current approach is highly subjective and opaque. The publication of any documents the regulator uses to guide its 'risk based' approach would improve transparency and promote trust in the process.

Scope of Regulation

Since the introduction of Section 83C in 2014, audits and investigations by the NSW Department of Education have expanded well beyond the legislation's original intended objective and scope. Introducing the Bill into Parliament, the then Minister said in his second reading speech that Section 83C would not be a licence for unnecessary interference into a non-government school's operations and that if the requirements of the new Act were met, decisions on employment and other spending belonged solely to the school. He also said that Section 83C would not restrict the capacity of non-government schools to meet the needs and expectations of their communities, and to follow their particular mission, ethos and philosophy.

Despite this assurance, the audits and investigations undertaken by the NSW Department of Education under Section 83C, have created an environment where the legitimacy of non-government schools' spending decisions, including on longstanding practices fundamental to their educational philosophy and the expectations of their school communities, are uncertain and the operations of schools negatively and unnecessarily impacted. It is highly problematic that the question of what the Department may consider "required for the operation of the school" remains unclear, or where it is clear whether it is objectively appropriate. This causes great confusion for schools on a daily basis, with AISNSW receiving more than 200 Section 83C-related enquiries from schools over the last three years ([Appendix A](#)).

Section 83C was never intended to make non-government schools operate as though they were public schools. It has become evident that in order for schools and regulators to be guided by the original intent of the legislation, the legislation first needs to be amended to clearly reflect that original intent and purpose. For example, we contend that the words "used" and "required" in Section 83C(2) of the legislation creates confusion in interpretation of intent. As such, amending section 83C(2)(b)(ii) from "not required for the operation of the school" to "not used for the operation of the school" will provide greater clarity to all parties.

Parents have a right to choose the school that meets their needs and expectations. Many parents who choose an Independent school expect the school to provide different services and educational offerings to government schools; this is why many parents elect to supplement public funding by paying fees to non-government schools. Where parents provide income to a school through fees and/or donations, they expect it will be used to provide the services and education they have paid for. This means that whether the use of school income is "for the operation of the school" will depend on the school context, its educational philosophy, purpose and the expectations of the school community. The autonomy of non-government schools must be respected so that they are able to determine appropriateness for themselves based on their contextual factors including consideration of what is necessary for promulgating the school's ethos/educational philosophy, mission and purpose and meeting the needs and expectations of the school community.

The existing definition of "income" is problematic and inconsistent with the purpose of regulating spending of government funds

In section 83C(5), income is defined as "money or other forms of consideration received periodically from the provision of property, goods or services, investments, gifts, donations, grants, financial assistance or any other gain obtained from the use of a school's assets or its proprietor's assets".

Other NFP entities in receipt of government funding (including preschools, childcare centres, aged care providers, disability support and foster care organisations) are not accountable to the government for their expenditure of private income like non-government schools are under Section 83C. NFP organisations play an essential role in the planning, management and delivery of services in NSW, including non-government schooling which provides parents with genuine educational choice.

If the purpose of s83C is to ensure the responsible spending of government funds provided for the operation of non-government schools, then the income in scope of regulation should be restricted to government funding.

The other problematic wording in the legislation is “having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister”. This statement seems to be used to establish a basis for the department to make a judgement about whether a non-government school really needs its recurrent government funding if the school is able to spend private income on what the department considers unnecessary expenditure. However, it is not up to the NSW Government to determine whether any school needs (or deserves) the recurrent funding it receives. This is determined by the Australian Department of Education in the calculation of SRS, legislated loadings and Capacity to Contribute scores.

Recommendation 6: Legislative amendment to improve clarity about school income and funding.

That 83C(5) be amended to limit the definition of income in this context to government funds only.

Scrutiny of private income

Since its introduction, many of the Independent schools that have undergone a Section 83C investigation by the NSW Department of Education have described their experience as disproportionate to the amount of funding provided by the NSW Government. In many cases, State government funding makes up less than 10% of a school’s annual income (in some, as little as 2%). Many Section 83C investigations have also extended well over two years - at considerable cost to schools as well as taxpayers, who fund the private sector auditors undertaking the work on behalf of the Department. The current legislation enables the Department to scrutinise spending of income that does not come from government. We contend that so long as a school can demonstrate that it has expended its government funds on expenses used for the operation of the school, decisions on spending of income from other sources belong solely to the school. Schools are accountable to parents and benefactors for how their private income is spent and this provides sufficient oversight.

The Education Regulation 2017 (NSW) already provides exceptions specifying that a school does not operate for profit because of specific types of payments or funding contributions (r10 and r10A). To provide further clarity for regulated entities and for the regulator in complying with and applying the legislation, additional exceptions should be expressly specified through regulatory amendments. These further exceptions should cover:

- **Operation of early learning, preschool, prep/K minus 1, Outside School Hours Care (OSHC) or playgroup**

The Australian Government Department of Education already publishes clear advice that recurrent government funding provided to schools cannot be used to operate early

education and care services. It is therefore helpful to make it clear that this expectation aligns with expenditure requirements for NSW recurrent government funding.

- **Funding contributions to student alumni associations and support for student alumni events** (such as providing use of meeting/gathering spaces on school premises so far as the work conducted by the association supports the operation of the school)

Student alumni associations (as well as being a quintessential part of a school community because of the school's mission, purpose and/or educational philosophy), contribute to a school's ongoing viability by maintaining or increasing future student enrolments. These associations also nurture strong intergenerational connections that provide current students with access to mentors, career guidance and support to transition to post school destinations, as well as a resource for private financial support for student bursaries and funding of initiatives that support student education such as library resource regeneration. Student alumni associations are not exclusive to non-government schools but also operate at a number of NSW Public Schools.

- Any other appropriate exception as specified by regulation.

Recommendation 7: Legislative amendment – Section 83C(2)(b)(ii).

That Section 83C(2)(b)(ii) be amended to replace the word “required” with “used”, reading as *“for property, goods or services that are not used for the operation of the school”*.

Recommendation 8: Legislative amendment – Section 83C(5).

That Section 83C(5) be amended to include a definition of “**for the operation of the school**”, specifying that what is for the operation of the school will be considered in the context of the ethos, mission, educational philosophy and purpose of the school and encompass:

- delivery of school educational and related programs,
- ancillary activities which are reasonably expected by the school community and
- administration of the school.

Recommendation 9: Regulatory amendment – further exceptions akin to r10 and r10A.

That the following additional exceptions be specified through regulatory amendment “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 NESA 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.

- to student alumni associations to support student alumni events and work (such as providing use of meeting/gathering spaces on school premises so far as the work conducted by the association supports the operation of the school), 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.
- and any other appropriate exceptions.

Investigations

It would provide more clarity and certainty for schools to have the detail of investigation and post investigation processes stipulated in the legislation or in the regulations that includes expectations of procedural fairness.

For example, the time an investigation may take should be clearly stated. This might be 6 months or a similar period. The circumstances under which this timeframe may be extended should also be included. Appropriate wording might include "the period referred to in subsection XX may be extended by up to 30 days with the agreement of both parties" or "the period referred to in subsection XX may be extended for a period of not more than 3 months at the discretion of the Minister or by agreement of both parties".

Further, the requirement that a school be given the opportunity to respond to a recommendation of the Advisory Committee before it goes to the Minister should be included in the legislation (or the Regulations). Along with the amount of time a school has to respond (we suggest 30 days or similar), what happens once they have provided the response? For example, when can the school expect the Minister's decision? Will the Advisory Committee consider it, or will the response be sent to the Minister with the Advisory Committee's original recommendation?

Recommendation 10: Legislative or Regulatory amendment - include detail of investigation processes in the Act or in the Regulations.

That Legislative or Regulatory amendment include:

- the timeframe in which an investigation should be completed, the circumstances under which this timeframe may be extended and by how long,
- how schools will be kept informed and provided the opportunity to respond to any proposed recommendation of the Advisory Committee, and what happens once an investigation is concluded.

Recommendation 11: Legislative or Regulatory amendment - include detail of post investigation processes in the Act or in the Regulations.

That legislative or Regulatory amendment include;

- the timeframe for the Advisory Committee to make a recommendation, and the circumstances under which this timeframe may be extended and by how long,

- how the school will be kept informed,
- the school's right to seek an internal review of the Advisory Committee's recommendation, when they can access it, under what circumstances, who will conduct the review, how the review will be conducted, how long the review will take, and how such a review fits into the Minister's process for making a decision about whether to make a non-compliance declaration or a for-profit declaration in relation to the school.

Salaries

Non-government schools determine salaries based on the value and complexity of the role, the sum of its legal and financial responsibilities, the qualifications and expertise required by the employee, and other contextual factors including the labour market. While many assume that there is a common cross sectoral labour market and role definition for school employees such as teachers, business managers or principals, this assumption is not accurate. In fact, the labour market for employees of most Independent schools cannot be benchmarked against other school systems.

Salary packaging is customary and expected in the wider Australian labour market, as is typically available to Independent school employees. These benefits may include things such as housing (particularly where an employee is required to live on campus), meals, a vehicle, mobile phone or laptop, additional leave, school fees, additional superannuation, or other benefit. Salary packaging is therefore appropriate, with the Australian Taxation Office overseeing requirements for employees and/or employers to pay Fringe Benefits Tax on the benefits packaged.

As we have consistently stated, we remain concerned that salaries are considered within scope of Section 83C investigations. Salary levels were explicitly excluded from the scope of Section 83C as highlighted in the second reading speech at its introduction in 2014.

"The Government will not be taking a heavy-handed approach to determining what is market value. For example, the Government will not be determining salaries within a school. It is up to the school governing body to determine the market in which the school operates and to set salaries according to that assessment. As with all other goods and services, salaries will only be considered as a for-profit issue if they are clearly beyond a reasonable level."

The Hon. Adrian Piccoli, Second Reading Speech, 15 October 2014

The market value of salaries should therefore not be within the scope of Section 83C investigations. This should be confirmed through legislative or regulatory amendments.

Recommendation 12: Legislative or regulatory amendment - exclude market value of salaries from the scope of Section 83C investigations.

That Section 83C be amended to exclude market value of salaries from the scope of Section 83C investigations.

Appendix A

“We have a primary school and an Early Years Program. If the Early Years program makes a loss, can we use any of the funds from the Primary School to cover the shortfall?”

“Can the school use funds to provide a lunch (a sandwich platter and a fruit platter) for the staff that attend a planning meeting?”

“The University of Sydney has proposed a Scholarship Grant Agreement, where the school would make a grant to the University in relation to the practical placement of a high achieving teaching student in their final year at University. Despite the potential benefit to the school, we are reluctant to accept because we are worried the Department would consider this a s83C breach”.

A Special Assistance School has a significant percentage of teen mothers or mothers to be. The school is proposing to operate a creche on school premises so the students can put their babies into the creche and be able to attend school more regularly. The school will staff the creche with a nurse and qualified childcare workers. They also want to partner with the Benevolent Society to provide the girls with training in childcare, budgeting, baby health, cooking etc and they will come to the creche site to deliver these education sessions. School is concerned that this may not be considered necessary for the operating of the school and might therefore breach Section 83C.

“Our parent company provides shared services to schools which are hard to assess in terms of market value. How can reasonable market value be assessed in these circumstances so we are compliant with s83C?”

A school for Indigenous students would like to provide a fuel voucher to support a student’s regular attendance but is worried this could be viewed as a breach of Section 83C. They want to support the student’s attendance but are worried they could lose

their funding if using school income for this purpose means they are declared to be operating for profit.

A school discovered that it had underpaid an ex-employee during their employment. *“Is it a s83C breach to provide the payment now they are no longer an employee?”*

“a staff member’s windscreen has been damaged by another school employee while parked on school grounds. Can the school pay for the repairs, or will this breach s83C?”

“School staff member lives on campus with their family in a dedicated residence. This residence was destroyed by recent floods and the staff member and their family lost all of their possessions. Can the school provide a payment to assist the family to reestablish themselves in temporary accommodation?”

“Staff park in surrounding streets and residents are not happy as pick up time is a nightmare for them, as there is no available parking for parents to pick up their kids, so there is double parking, parking in driveways etc. We want staff to use public transport but they won’t do so without a major incentive. Can the School pay public transport costs to the College through an Opal card? This would only be used for travel to and from the College. This would also be monitored to ensure it is only used for this purpose otherwise they would lose the card. Are we allowed to use school income to pay for these Opal cards or will this breach s83C?”

“To alleviate the teacher shortage, can the school contribute towards the university fees of teacher’s aides currently employed at the school who wish to retrain as teachers?”

“Can the school rent a school building to allied health professionals who will service the needs of students and the broader community?”

