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Submission in respect of the 2023 Review of section 83C of the Education Act 1990 (NSW)

Introduction & Context

1. The Australian Council of Jewish Schools (ACJS) is the peak representative body of Jewish schools in Australia.
2. The ACJS expresses gratitude to NSW Department of Education for the opportunity of making this submission.
3. Each of the registered schools that are members of the ACJS are also members of their respective Association of Independent Schools (AIS) and each school generally supports the submission of their AIS and the Independent Schools Australia (ISA).
4. The ACJS represents 19 Jewish schools throughout Australia. Each of our schools also operate an early learning centre. These schools accommodate 10,000 students in the Year K to 12 programs with a further 3,000 students in the early learning activity associated with each school.
5. Five of these schools are in New South Wales. Those five (5) schools accommodate 3,500 students in the Year K to 12 programs with a further 600 students enrolled in the schools' respective early learning centres.
6. Generally, the interests of the NSW Jewish schools are represented by the NSW AIS on matters that are common to the non-government sector. Most interests affecting the operation of schools are common to the sector.
7. The ACJS Schools and the associated Early Learning Centres, are academically non-selective and vary in average socio-economic status considerably. Their Capacity to Contribute scores (CtC) range from 134 at the high end to 79 at the low end. The average school's CtC score is 109, the median is 107.
8. Each of our schools is an independent faith-based school in its own right. Each school is individually registered and responsible for its own structure, management and compliance. Our schools are non-systemic.

9. Each of these schools are represented by the ACJS to federal, state and local Governments and regulatory authorities, within the AIS community and generally. Their interests are significantly different in some areas, and these interests are generally considered and catered for by Governments, regulatory bodies, Government departments, agencies, and the community generally.
10. Judaism (and Jewish culture, if that be different) has developed, or has always taught policies which would, today, be classified as multiculturalism. The Jewish community view is that members of the Jewish community should be productive respected members of the Australian way of life, integrate into general Australian life, while adhering to Jewish values: integration, but not assimilation.
11. Judaism is not merely a set of religious rituals confined to sacred spaces or specific times. It is a comprehensive way of life that intricately interlaces religious practice and/or culture into everyday existence. In Judaism, one's spiritual journey is inextricably linked to one's ordinary everyday activities and form a part of the integrated holistic education provided by each of our schools.
12. Our schools conduct programs to achieve these outcomes through different structures and different methods that integrate the teaching of secular studies with religious study and Jewish and cultural values. The primary objective of any particular activity is often difficult to define. There is considerable intersectionality. Education is achieved through a variety of avenues and is understood to be holistic. Education includes the teaching through both formal and informal methods of core designated curriculum as defined by ACARA (or NESA), as well as the teaching of moral values, civics, citizenship as well as religion, religious teaching, and cultural identity.
13. Enrolment at our schools occurs at a young age (i.e., well before mandatory admission). Enrolment into the school program is accepted generally, without regard to the capacity to afford fees. If, on admission of a child, a family is unable to afford education at a particular school, several different methods are used to subsidise that education and to allow the child or children to continue at the school. That methodology varies from State to State and from school to school. Each school has developed a business model, often in conjunction with the community and related parties that accommodate the extent of assistance it provides. Each school has extensive policies and practices to address and assess the needs.
14. As a matter of principle there is no academic selectivity in the enrolment process at our schools, except to the extent that a young child may be classified as not yet ready for school (on the same basis that would occur in, say, government schools). All children are accepted, without regard to academic performance.
15. Our NSW schools early learning centres form an integral part of the schools' business models. The year K enrolment, on average, in the period 2012 to 2023, showed that 90% of the enrolment into year K, year on year was sourced from the respective schools' early learning program graduating year. It is an activity vital to the sustainability of each school.
16. In our schools, parent and community engagement is not only desirable but a fundamental necessity for the holistic education and development of our students. The engagement which is present in each school is achieved in different ways. Each school actively interacts and works in a form of partnership with both the parents, local and related community entities.

17. Additionally, the infrastructure, grounds, gardens, and capital works at each school, is largely if not totally provided through privately sourced funds. BGA Government funding is very limited. On the occasion it is available, it is considered “top up funding” only. At some schools the day-to-day operations are also supplemented by or reliant upon community donations. It is unconditional support, but it is support that requires nurturing and a support that requires expressions of appreciation and, on occasion, requires the use of school facilities and supports from within the school to facilitate and encourage on-going and new financial support.
18. In the period 2018-2022 inclusively our schools undertook capital infrastructure projects. The direct Government funding represented only 0.8% of the funds expended on capital works.
19. In the 5-year period referred, the funding of capital works was derived from:
 - Capital Infrastructure grants 1%
 - community capital directed donations 31%
 - parent fees specifically directed to capital works 27%
 - borrowings 20% and
 - other sources, including reserves 21%The 5-year period quoted is typical of longer-term outcomes. The borrowing principal and the interest cost in the main is repaid from fund raising.
20. This submission considers the various requirements in section 83c, and the way they are both phrased and have been interpreted. The submission will interchange the reference to this submission between the Act and to the related guidelines derived from the Act, as the Act at Section 83c (3) provides the force of the regulation within the Act. It is the regulations which the Department of Education use to assess compliance. If in review of the Act, the Department becomes aware of interpretation of the guidelines that were not what was intended based on examples of content of this submission, then clarification within the Act is required.
21. The ACJS lodged a submission in respect of the review undertaken last year on the development of the revised not-for-profit draft guidelines for non-government schools. Those guidelines related to the compliance practice emanating from the Section 83c legislation. That submission was dated 24th November 2023. For the purpose of example, sections of that submission have been incorporated into this document.

Section 83C legislation

Section 83c (1)

22. The section reads that “The Minister must not provide financial assistance (whether under this Division or otherwise) to, or for, the benefit of a school that operates for profit.
23. The ACJS concurs with the core requirement. The ACJS however has concern as to how the guidelines from that section have been interpreted and implemented in respect to the activity or activities that define how the term not-for-profit is to be understood.
24. The ACJS is of the view that the guidelines based on the Act have taken on a transactional perspective rather than a practical perspective in order that the regulator could monitor compliance and have a set of identifiable test points. In so doing the unique independence of school offering, particularly in relation to ethos mission and purpose has been not only significantly curtailed but in some cases worked against the school.

25. A possible reason for this situation, is that the Act refers without definition or guidance to activity which are for the operation of the school and the benefit of the school. The understanding of what constitutes each of those terms is determined and assessed by the regulator. The width and extent of the benefit or the need as a part of the operation of the school is also subjective and left to the regulator to determine. ACJS is of the view that many of the provisions of the regulations that are advised to be a breach of the not-for-profit status do not adequately consider the benefit of the event.
26. The not-for-profit sector, as well as definitions by regulators within the not-for-profit sector, accounting bodies and the legal profession generally, do not consider nor understand that an entity can be operating “for profit” based on a single transaction, as is potentially the outcome of determined breach of the proposed draft guidelines that interpret this legislation. The accepted general legal, professional and community understanding of “operating for profit” is determined by the distribution of surpluses to directors and or members. It is not understood and nor should it be understood to reflect a single operational transaction.

Section 83c (2)

27. The section has series of parts for which without limitation as to the extent of circumstance that might relate, the minister can determine, a school is operating for-profit based on a single breach. The regulation to that Section is interpreted in its simplest form as noting that, If any part of the school’s assets or its income from any source is used (or permitted to be used even if temporarily) for any purpose other than for the operation of the school, a breach could occur based on a single transaction. Of note section 83c (2) (a) only refers to the operation of the school. There is no consideration in the regulation based on the Act for the transaction to be of benefit to the school, be that benefit long or short term, or be it direct or indirect.
28. The ACJS acknowledges and supports the concept that public funds should not be applied to a school that operates for profit. ACJS however is not comfortable with the restricted definition used for what defines a school: that being the operation limited to the direct conduct of current students in years K to 12 exclusively and the extent in which the guidelines that emanate from this legislation have been and are interpreted. That interpretation impacts on school’s independence, the school’s business models, the manner in which the school operates and is structured, and the way in which a school can deliver education.
29. The operation of the school based on the section of the Act, has been interpreted as activities that relate strictly and directly to the school and as noted restricted to the conduct of the students in year K through year 12. Our introduction noted the education of a student is holistic. It relies on relationships and activities that involve the community, other entities and a range of activities. The operation of our schools includes the operation of an early learning centre activity, as a part of the school operation. It is as the primary source of enrolments. The educational program at the early learning centre is scoped and sequenced to year K transition. In the case of our schools it is an integral part of the school educational program. It could be argued that students who enrol in year K without having attended the school’s respective early learning centre are at a disadvantage.
30. It is acknowledged that the guidelines were amended to accommodate early learning centres and be an exception to the definition of the school as initially interpreted. It

however only came about after considerable advocacy. The initial interpretation of the Act did not permit the activity. Further when the guidelines were first introduced, any assistance by school officers to the early learning centre was considered an act of operating for profit. The current version of the revised not-for-profit guidelines has withheld advice and comment on the activity of an early learning centre as a part of the school activity pending further review. Additionally, if it is considered as it has been of recent years to be an exception and permitted, the conditions which that can occur are yet to be defined.

31. It is imperative the Act be amended to ensure that the operation of an early learning centre that acts as a feeder activity to year K enrolment be considered an activity of benefit to the school and form a part of school operations.
32. The early learning centre is only one exception that has been permitted and allowed as an amendment to the not-for-profit guidelines based on the legislation. The logic that allowed that exception to be introduced should be extended to relationships and activities that have a benefit to the school and either directly or indirectly contribute to the holistic education and facilities of the school.
33. A further extension of the permitted activities which should be incorporated into the Act, is to allow a school entity to allocate resources to an entity which over time (even a relatively short period of time) that provides a direct benefit to the school. An Example is to the allocation time, from existing school employees, to assist with general short period tasks, to facilitate a related entity to the school, whose primary objective is dedicated to raising funds solely for the school. Examples are a school-based foundation and or building fund. Perhaps even an alumni and parents and friends' association, which under the present interpretation of the Act within the regulations are strictly considered a breach. It does not only fail to take into account the benefits to the school, it diminishes the benefit.
34. When discussing the expenditure stipulations with school boards and potential donors or discussing why a commercial charge needs to be levied to allow a related entity to use an asset or resource of the school, even when not in use by the school, for the school to seek to explain the restriction and need as operating for profit is inconsistent with general legal and accounting terms. It causes most donors or users confusion. The reference to operating for profit will not be their understanding and such explanation will leave them with an impression that the school does not understand the basics of a charitable institution. It can potentially adversely impact future donations and the overall reputation of the school not only from that person or group, but from the community and parents generally.
35. The above circumstance is even more highlighted when consideration is given to the fact that in most cases the full cost of the facility was obtained through community donations. When public funding even to 1% is obtained the materiality does not warrant such restriction. ACJS propose buildings and assets, that are not required for school use, can be accessed and used by community organisations that support or otherwise benefit the school, at no charge on a time by time basis. A condition could clearly be applied that the community body cannot be conducting a for profit enterprise with the school facility.
36. ACJS proposes a change in name of the requirement. A suggestion may be "Guidelines Determining the Financial Obligations Applying to Non-Government Schools" and a potential breach being referred to as a guideline breach in lieu of determining that the school operates for-profit.
37. The Act states that all assets and income derived by the school must be applied and or used solely for the operation of the school. The Act however does not define how that is interpreted. That has been left to the developers of the guidelines. The guidelines then

interpret the definition of what constitutes the operation of the school to generally encompass

- i. The delivery of education at the school; and
- ii. The administration of the school

What is not defined within that determination and left to subjective determination, is what is considered the width breadth and extent of “education” or “administration”. Given the general prescriptive detailed nature of the guideline and the severe impact of a breach such an omission is problematic.

38. Additionally, the guideline based on the interpretation of the Act uses two terms periodically that appear to be used within the guidelines interchangeably. One term is “for the operation of the school” the other is “for the benefit of the school”. The ACJS contends that these two terms are not the same. “The operation of the school” within the guidelines has been defined specifically as being tied to the education of the students. A school and the students can benefit in ways beyond the direct delivery of education to the students, and the greater benefit to the entity resulting in overall improved educational outcomes.
39. ACJS propose the phrase on assessment of meeting the guidelines criteria be determined as for the benefit of the school, and the school be the entity fulfilling the ethos mission and purpose. The ACJS propose the Act provide and allow a wide understanding of what is for the benefit of the school and that it be linked to the ethos mission and purpose of the school.
40. One example will suffice. Our schools are required to expend extraordinary amounts on security. Some of those costs are the subject of Government grant. The need is advised by law enforcement authorities and expert consultants; it is well-recognised and well-understood. Yet such expenditure does not seem to fit neatly within either terms, “education” or “administration”.

Ethos mission and purpose – The benefit of the school

41. The ACJS is of the opinion the guidelines based on the interpretation of the Act capturing and restricting the use and application of assets, and income derived from private sources where those sources are informed of, and accepted by the donors, or parents, to be acceptable use or application of that event. The ACJS understands the background to the requirement but think greater flexibility with increased transparency to assist parents and donors make informed decisions with a less prescriptive guideline is a preferable approach.
42. ACJS understands that an intent of the legislation at section 83c (3) (a) is to ameliorate the full force of the current provisions in the Act and withdraw and reclaim financial assistance on a breach that involves a single transaction, where the not-for-profit advisory committee determined the transaction to be outside the guidelines. However, neither the Act or the guidelines give any indication that is not to be the case and neither the guidelines or the Act provide a remedy in the event that scenario occurs.
43. The guidelines do note in the section headed key concepts and context that the termination of financial assistance is not justified because of the “minor nature” of the relevant conduct. The understanding and limits of what determines “minor” is not defined and may be understood differently by different people in different circumstances. There is no reference in the guidelines to materiality of the transaction compared to other factors and there is no

process to remedy the not-for profit activity should the not-for-profit advisory committee determine the transaction is in breach of the guidelines and was not considered “minor”.

44. In each section of the guidelines, the relevant documents that can be considered in order to justify or support and or determine the compliance of the conduct are detailed. It is unclear if the documents listed are examples of documents that could be provided to support a school’s use of funds or an asset, or if the list of documents is an exclusive list of documents and no other explanation, or document can be considered.
45. ACJS is concerned that in any review of an impugned transaction, a regulating authority may consider the list of relevant records to be exclusive and not consider other information. ACJS proposes that the relevant documents be treated as examples only, and that any other evidence can be provided by the school and will be considered.

Guideline interpretation - Leasing of School-Owned Property and Assets 4.5

46. ACJS is concerned about the limitation placed on school leasing an asset that restricts the lease to circumstances that relate solely to the operation of the school, where the operation of the school is defined as education and administration. Any involvement of a third party that may use that asset for profit making purposes could be considered as the school is operating for profit.
47. A circumstance may arise whereby an asset of the school becomes surplus to the school needs at the present time, but the school is unable, perhaps as it is a section of accompanying land or building, to dispose of the asset commercially, or where the school perceives the asset may again be required in the future, but wishes for a period of time to lease the asset to a third party. The third party may have no relationship to the school and in fact may use the asset for the party’s profit-making activity. It is that use which under the guidelines would trigger the school to be deemed operating for profit. Surely, it is sufficient, if there be such an asset, for the rent, payable for the lease of the asset, to be used for the school and the ultimate use of the asset by the third party to be irrelevant.
48. To determine that the lease of an asset is a breach of the requirements as it is not for the “operation of the school”, as defined, is detrimental to the school and inconsistent with the need for future planning. Where a new area is opened and a school purchases land on which it builds, knowing that there will be future needs for more land, it is permissible to lease land that may be excess to current needs in order to optimise its income and not leave an asset unutilised. That which is required is a stipulation that the proceeds of the lease or rental agreement be applied for the benefit of the school and applied as per any other private income derived by the school. It is not appropriate to determine if the school can lease or rent an asset.

Further, for example, if the school has a swimming pool, used by its students during school hours, why should government prevent its use, outside school hours, by the community through leasing to a learn to swim school?

Guideline interpretation - Credit/Monetary Loans

49. The section acknowledges that monies or credit can be extended to other schools or entities but must be for the operation of the school. This allowance should be extended to the benefit of the school.

50. ACJS would also propose that in circumstances where there is a benefit flowing to the school or potentially flowing to the school the matter of commercial interest rate or in fact the need to charge an interest rate be considered as waivable where the entity is a related or associated party to the school.
51. Additionally, ACJS would contend that in special circumstances the advance of monies or loans be extended to a long-standing qualifying employees and not be prohibited as a blanket breach under any circumstance.
52. An employee who has come under extreme financial hardship unexpectedly, through a family medical matter or other unique unexpected circumstance should be considered an exception. The staff member in such a circumstance will generally be less productive and preoccupied taking additional leave and perhaps taking secondary employment. An advance in limited circumstances could relieve the immediate pressure allow a better involved productive staff member and in both the shorter and longer term be of benefit to the school through increased participation by not only the staff member in question, but the overall morale of all staff and contribute more toward the operation of the school and be of benefit to the school. This is so given the community expectation of increased flexibility, increased work life balance and increased mental support for employees.
53. ACJS proposes an expansion of limited guidelines to allow and address emergency needs of the type outlined above with perhaps a limit to the extent of the advance in relation to the remuneration and or period of employment. The Act should be clear that business operational terms that are made in good faith for the long or short term benefit of the school are a part of school operations and cannot result in a breach of the section.

Guideline interpretation - relating to debtors

54. ACJS is comfortable, noting the reservation regarding relevant records with this requirement. However, when pursuing a debt ACJS proposes a need to consider a range of factors that not only includes the financial cost but also the individual family circumstances and the possible damage to the school's reputation within the school's community. The risk of being determined as operating for profit based an informed credit management policy is inappropriate and overly intrusive into the school business model. The Act should be clear that business operational terms that are made in good faith for the long or short term benefit of the school are a part of school operations and cannot result in a breach of the section.

Guideline interpretation relating Salaries

55. ACJS is not comfortable with the unilateral interpretation of reasonable remuneration and perhaps the provision of commercially acceptable bonus and reward payments to employees, which can come under scrutiny and determine a school is operating for profit. Schools desire to engage personnel that meet their ethos and religious codes. The market for qualified personnel is very competitive especially the market for personnel that have the

school's ethos and practising religious outlook. Also, as our schools often recruit suitable qualified personnel from overseas, salaries and employment contracts generally need to be competitive with labour market conditions in their respective countries.

56. Not only does the above apply generally to teachers, but it applies to school principals and other senior leadership positions where greater flexibility and consideration is required. Also, it applies to positions where role modelling is more evident and fundamental to the underlying ethos, purpose and mission of the school. The Act should be clear that business operational terms that are made in good faith for the long or short term benefit of the school are a part of school operations and cannot result in a breach of the section.

Guideline interpretation - relating School Related Travel

57. Within this section a specific restriction states "personal travel must not be paid for using school funds." In reference to our paragraph 54 wherein it is noted that personnel are engaged from overseas sources it is considered essential that in such circumstances an element of personal travel be permitted.
58. Employees engaged from overseas are generally on fixed term contracts. On occasion, those terms particularly for senior employees are if possible extended. It is not practical to enter such contracts if the employee's family is not also accommodated. It is also not feasible to enter into such contracts and not permit return travel or returning the family after the contract period of the employee.
59. Similarly bringing an overseas family to Australia and not supporting a return visit to the home country on extended Australian based contracts, in periods of annual leave perhaps no more than once a year, or not to support a family member's emergency return to the home country on the passing or serious illness of a family member is not realistic, and it is considered an obligation of the school to support such entitlement.
60. ACJS proposes consideration of expenses by a school for overseas employees and their families to be a permitted travel expenses as a benefit to the school. The Act should be clear that business operational terms that are made in good faith for the long or short term benefit of the school are a part of school operations and cannot result in a breach of the section.

Guideline interpretation - relating Compensation, settlements and other one-off payments

61. ACJS is generally comfortable, noting the reservation regarding relevant records (our paragraphs 43 and 44) with this requirement. However, in respect of student fee concessions, discounts or remissions, it should be acknowledged that this is a highly sensitive area, and as noted above is a component of the general school business model and addressed differently by each school.
62. As stated above, we operate community schools. The ethos of the schools includes that, to the extent possible, no Jewish student should be denied a Jewish education, if they desire it, on account of inability to afford. Yet the Jewish community is small in number and very close-knit. Consequently, financial assistance is determined on a robust but highly confidential basis.
63. The criteria by which concessions, discounts or remissions of fees are awarded are generally outlined in school policies and delegated to a sub committee to review and to apply. The subcommittee through the sensitive nature of the task will not generally report

back on specific determinations to the School Board or committee. These decisions remain in confidential files.

64. The practices involved in determining concessions, discounts or remissions involve the presentation of personal family matters including very often income taxation returns and relevant medical information. This is provided by the family to specific named officers of the school on a no further disclosure basis. The school delegated officer is empowered with guidelines but also given discretion.
65. ACJS is of the view that the detailed reasoning and logic applied to the decision to grant concessions, discounts or fee remissions cannot always be documented for recall or audit. The data is provided under strict no further disclosure conditions. The requirement to disclose the information even on audit, would deter parents from providing the information. The consequence of not providing the information would be no financial assistance and ultimate withdrawal of the student to the detriment of the school and the student contrary to the school ethos and practice. It could well result in the undermining of the school business model.
66. ACJS is of the view that the matter of concessions, discounts or remissions relates directly to the school business model, is a matter of high sensitivity and often also relates to practices that need to incorporate factors that are outside the control of the family in question. Such factors include gender equity in the class, the extent of influence of the parent on other parents, (a factor that can work both for and against the parent), and often the enrolment levels at a particular year level, that is, marginal costing objectives.
67. ACJS contends the requirement in the guideline that reads "each circumstance" that is interpreted as each student decision should be assessed in relation to the relevant records is not appropriate and needs to be reconsidered. Further, it is difficult to understand how the offering of discounts, or remissions can be considered an event that triggers a determination of operating for profit.

Conclusion

68. The overall intent and purpose of the Section 83c is appropriate and necessary. ACJS reservation is with the absence of definitional intent which has been demonstrated to be intrusive and applied based on individual transactions without appropriate reference to the ethos, mission, purpose and history of the schools.
69. ACJS recommends the Act should be clear that business operational terms that are made in good faith for the long or short term benefit of the school are a part of school operations and cannot result in a breach of the section.

The ACJS expresses its gratitude for the opportunity to have engaged directly with the committee and notes that ACJS and its representatives or schools are comfortable to elaborate on, explain and or assist further in the development of the Act.

Please do not hesitate to call me directly on 03 9525-8589 for any elaboration required.

Yours Sincerely,

Leonard Hain CPA
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