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23 February 2024

Mr Thomas Alegounarias  
Review of Section 83C of the *Education Act 1990* (NSW)  
NSW Education Standards Authority

**Emailed to: [section83review@nesa.nsw.edu.au](mailto:section83review@nesa.nsw.edu.au)**

Dear Mr Alegounarias

**REVIEW OF SECTION 83C OF THE *EDUCATION ACT 1990* (NSW) (EDUCATION ACT) RESPONSE TO REQUEST FOR SUBMISSIONS**

Carroll & O'Dea Lawyers (**Firm**) welcomes the opportunity to respond to your request for submissions in relation to the Review of Section 83C of the Education Act (Review).

We commend the State Government for taking steps to examine the operation of the not-for-profit requirements (particularly section 83C) in the Education Act and the effectiveness of these requirements. We encourage the Review to make recommendations to the Minister that are focused on providing greater clarity on the requirement under the Education Act for non-government schools to operate 'not-for-profit' to be eligible to receive financial assistance from the State Government.

We note that the Department requested submissions in relation to the exposure draft of the updated Not-for-Profit Guidelines for Non-Government Schools (**Guidelines**) and the Regulatory Framework by 24 November 2023. The Firm made submissions in response to the Department's request by way of letter dated 24 November 2023 (**Our 24 November 2023 Letter**), which we **attach** with this letter for your reference and consideration.

The Guidelines do and will, and the proposed Regulatory Framework will, significantly inform the Department's interpretation of Education Act section 83C.

As the Terms of Reference for this Review (**Terms of Reference**) (paragraphs 3a) and 3b)) also require you to consider the Guidelines and the Regulatory Framework, we resubmit the comments made in Our 24 November 2023 Letter for consideration by the Review. We acknowledge that the Guidelines and the Regulatory Framework are still being reviewed by the Department, following the public consultation.

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We note that the Terms of Reference (paragraph 1) require you to “[*examine*] the effectiveness and wording of [Education Act section 83C] and the associated sections – in the context of the Part 7 Division 3 – to determine if there is sufficient clarity for: a) the Minister to regulate financial assistance to non-government schools b) non-government schools to comply with the legislation.”

By way of example, we suggest that the Minister clarify its regulatory approach to the phrase “for the operation of the school” (used in various forms in Education Act sections 83C(2)(a), 83C(2)(b)(ii) and 83C(2)(c)). Relevantly:

1. In our view, a holistic approach should be adopted in determining whether assets are used or payments are made for the operation of a school. The New South Wales non-government school sector is diverse, and non-government schools achieve educational goals for their students through a similarly diverse range of activities.

In determining whether a use of assets or a payment is made for the operation of a school, a focus on whether such a use or payment is consistent with **broad educational purposes**, rather than whether such a use or payment is directly tied to individual educational activities, is:

- (a) likely to better reflect the dynamic nature of education, including non-government school education;
- (b) likely to give proprietors of schools greater clarity (through greater flexibility) to help them comply with section 83C on the basis that a wider range of activities can be consistent with not-for-profit requirements provided they fall within a school’s broad educational purposes; and
- (c) reflective of the approach taken in characterising whether an entity is ‘charitable’ or has ‘charitable purposes’.

We suggest that the Minister, the Department and the Non-Government Schools Not-for-profit Advisory Committee adopt this holistic approach in considering whether a use of assets or a payment is for the operation of a school. In the first instance, we submit that the school board/governing body and each school principal are best placed to determine what is required ‘for the operation’ of their school, or will otherwise benefit, support or extend their students (even where such an activity may not be *strictly necessary*), so students are better positioned to meet educational outcomes.

Further, the draft Guidelines state (at section 3.1) that “*The expression ‘operation of the school’ is necessarily broad, recognising that each school is unique in its context and operations.*” We agree with this statement; however, in our view and based on our experience the decisions of the Minister and the recommendations of the Non-Government Schools Not-for-profit Advisory Committee are overly narrow and too restrictive. We suggest that our holistic approach is consistent with the interpretation in the Guidelines and suggest that the Minister act consistently with this in the regulatory approach.

By extension, we consider that proprietors of schools (which should all be registered charities) should not be restricted from using other sources of income other than government funding (e.g., school fees or parent contributions) to support any non-

educational charitable purposes, particularly where this is consistent with its religious ethos or mission. In this regard, we note that international human rights law guarantees the right to education of everyone on the basis of the principles of equality and non-discrimination, and specifically provides parents with the liberty of selecting a non-state school (that meets minimum requirements), which will ensure the religious and moral education of their children in conformity with their own convictions.

We note that section 3.4 of the draft Guidelines addresses these matters and suggest that the Minister should not just “*take into consideration*” these other purposes but expressly permit the use of other sources of income in accordance with these other purposes.

This is especially relevant as many non-government schools have purposes additional to their main educational purposes – the diverse non-government school sector includes many schools with either or both of:

- (a) religious purposes – from the many faith-based (Catholic, independent, other) non-government schools that are part of the sector; and
- (b) social welfare / benevolent purposes – from the many non-government schools that serve disadvantaged students.

Such purposes generally support the ‘advancing education’ purpose of non-government schools, by providing further opportunities for students to engage in religious learning and activities, or initiatives that will support the welfare of the broader school community. Schools should not be faced with a risk to their funding (through a potential breach of section 83C) where using other sources of funds for such charitable purposes or that are reflective of socially responsible, good corporate citizens.

2. The draft Guidelines (at section 3.1) state that in determining whether a use of assets or income or a payment is for the operation of a school, it “*will be a matter of fact and degree, depending on all the circumstances of a particular case and the evidence before the Minister when considering that question.*”

Further to Our 24 November 2023 Letter, we suggest that this test should not be adopted, as:

- (a) the focus on a ‘case by case’ approach and the ‘particular circumstances of each school’ lacks certainty for a school in entering into any transactions; and
- (b) the use of such a test increases regulatory burdens on schools, and does not give non-government schools clarity regarding complying with section 83C.

This test should be replaced with the holistic approach that the Minister should adopt in determining whether a use of assets or income or a payment is for the operation of a school.

3. The draft Guidelines (at section 3.1) state that (emphasis added):

*In some circumstances, a use may be for the purpose of the operation of the school because it is linked to the education of students or the administration of the school in an indirect manner. **This may be the case, for example, if a proprietor permits a school asset to be used by a third party for a fee, for the purpose of generating revenue that the school then uses for the education of students or the administration of the school.***

We agree with this (compare sections 9.2 and 9.3 of the current Guidelines), and would additionally submit (contrary to section 4.5 of the draft Guidelines and compare section 4.10 of the draft Guidelines) that proprietors of non-government schools should be able to let:

- (a) charities and not-for-profit community groups use school facilities free of charge, or for a very minimal cost (that is limited to any expenses actually incurred by the school). There are strong policy considerations that support schools partnering with community organisations and not-for-profit entities. Schools should be able to support such organisations (particularly where the mission or activity reflects the schools' own ethos or Objects) without risking government funding. The Minister's regulatory approach should be that, provided a school sees some benefit to the school (financial or non-financial, including reputational) or to its students (and the broader school community) in such a partnership, this will not breach section 83C; and
  - (b) for-profit ancillary services (that support the school, its students or their parents) use school facilities, provided that other non-financial benefits and advantages are forthcoming. If there are non-financial benefits that flow to a school from providing facilities to a 'for-profit' entity (such as a service provider (e.g. music teacher, speech pathologist) who provides services to students or their parents), we consider that a school should also be able to take this into account in determining whether such use is for the operation of the school. We note that the Guidelines need to deal with this (although we note we are still waiting further material relating to onsite use following the new draft Regulation being finalised).
4. In addition, either section 83C should be amended, or the Minister should change the regulatory approach, to let entities that are proprietors of more than one non-government school use surplus funds (except government funding) from one school to support less-resourced schools (particularly other schools operated by the same proprietor).

This would help support a broad equity objective for reducing inequality amongst schools, to help reduce or potentially eliminate differences in outcomes across students with different backgrounds, experiences and needs. In addition, this would encourage schools to provide financial support to less-resourced schools (including those in remote areas or serving disadvantaged students) – to the benefit of all students and educational outcomes in New South Wales.

Please let us know if you wish to discuss any of the matters raised in this letter.

Yours faithfully  
**Carroll & O'Dea Lawyers**



**David Ford**  
**Partner**



**Stephanie McLuckie**  
**Associate**



**Samuel Chu**  
**Lawyer**

**Enclosed**

Our 24 November 2023 Letter



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24 November 2023

NSW Department of Education

**Emailed to:** [NonGovSchools.RegulatoryFramework@det.nsw.edu.au](mailto:NonGovSchools.RegulatoryFramework@det.nsw.edu.au)

Dear Colleagues

**EXPOSURE DRAFT REGULATORY FRAMEWORK AND EXPOSURE DRAFT NOT-FOR-PROFIT GUIDELINES  
RESPONSE TO PUBLIC CONSULTATION**

We thank the Department for the opportunity to provide feedback on the exposure draft of the Regulatory Framework for the Oversight of Financial Assistance Provided to NSW Non-Government Schools (**Draft Framework**) and the exposure draft of the Not-for-Profit Guidelines for Non-Government Schools (**Draft Guidelines**).

Carroll & O'Dea Lawyers' Education Law team is one of the few specialist education law practices in Australia. We act for a large number of registered non-government schools in New South Wales across a range of matters affecting the operation of non-government schools. We regularly advise schools and their registered proprietors in relation to not-for-profit requirements for non-government schools under the *Education Act 1990* (NSW) and the *Australian Education Act 2013* (Cth).

In our day-to-day work with non-government schools across all faiths, and none (including high fee and low-fee paying schools), we see the incredible contributions these schools make in our communities and to the advancement of education for our students. In this respect, our submissions are focused on ensuring policy setting and consideration is geared towards supporting our non-government schools to continue in this work.

We are encouraged by the Department's commitment to reviewing section 83C, its wording and effectiveness, and the broader regulatory framework that surround this. We strongly recommend that the Department continue with this work in light of the public consultation.

Our comments on the Draft Framework and the Draft Guidelines focus on a number of key issues that the Department should address in its final version of the Guidelines.

***Question 1: Does the Regulatory Framework provide you with a transparent and sufficient understanding of the outcomes and risk-based approach to the oversight of financial assistance provided to or for the benefit of non-government schools under the Education Act 1990?***

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- (a) In summary, no. The Draft Framework does not to us add anything further to the current understanding of the not-profit requirements, and the process for investigations and regulation. We appreciate that the Department has taken steps through the Draft Framework to set out the purpose and intention behind the Department's current approach to the not-for-profit requirements, and confirms that the focus will be on cases of serious misconduct and material breaches of the requirements.
- (b) The Draft Framework does provide some more clarity in certain aspects. However, we find it disappointing that the Draft Framework does not provide a formal mechanism for obtaining feedback in relation to a proposed transaction, nor does it clarify what means are available for discussing specific matters or transactions with the Department. Given the emphasis on education and other such initiatives, it is disappointing to see that there is no suggested mechanism for a pre-approval process, or for the Minister to provide a school with a private ruling in regard to a proposed transaction.
- (c) In our experience, the regulatory uncertainty surrounding not for profit requirements have constrained non-government schools and their activities, such that they have foregone opportunities to enter into transactions that would provide significant benefits to schools and their students. For example, Schools have refrained from entering into large transactions (involving a number of documents and smaller agreements) that is overall well under market value, because one small aspect of the overall transaction *may* be considered to breach section 83C.
- (d) On this basis, there should be a mechanism for a school to have large transactions submitted for consideration by the Minister (in a similar manner to which the ATO will provide private rulings, or failing that, administratively binding advice). Failing this, the Draft Guidelines need to go to more detail around large transactions that involve multiple elements and stages – if each individual element or stage of such a transaction is considered on its own (and will not take into account the benefit of the overall transaction) this needs to be clarified.
- (e) It would also be helpful if the Framework clarified the approach for auditing and investigating Approved System Authorities (ASA), and if the Minister will be concerned with how an ASA allocates funding based on need. In this regard, we note neither the Draft Framework or the Draft Guidelines provide any commentary or guidance on the interaction between the Needs Based Funding arrangements under the *Australian Education Act 2013* and the not for profit requirements under the *Education Act 1990*.
- (f) Finally, the Draft Framework should include as part of the education initiatives a means for the Department to comment on any relevant decisions. There has been a number of decisions in the Courts and in the NSW Civil and Administrative Tribunal relation to section 83C and it would be helpful for the Department to publish Decision Impact Statements (or similar) that comment on how (or if) the Department will change its approach after a relevant decision.

**Question 2:** *Do the revised Not-For-Profit Guidelines assist non-government schools in understanding their obligations in relation to financial assistance provided to or for the benefit of non-government schools under the Education Act 1990?*

- (g) In summary, no. We see that there are a number of issues with the Draft Guidelines and consider that, in some respects, the Draft Guidelines may provide **less guidance** to registered non-government schools and their administrators than the current Guidelines. In particular, the focus on a 'case by case' approach and the 'particular circumstances of each school' lacks certainty for a school in entering into any transactions and increases regulatory burdens on schools.
- (h) For this approach to assist non-government schools, it needs to be supported by specific circumstances and examples of conduct that will be considered to comply with the requirements and conduct that does not, similar to how NSW Revenue Rulings (including, for example, Revenue Ruling DUT034 for charitable exemptions from transfer duty) will provide practical examples for the public to compare against their own circumstances. We note that the Department's Non-Government Schools Not-For-Profit Good Governance Principles provide case studies to assist schools in interpretation – we suggest that the Draft Guidelines be amended throughout to include similar case studies and practical examples.
- (i) In our view, the Draft Guidelines contains conflicting messaging relating to encouraging a school to make their facilities available for use to the community (when not required by the School). We see that there are strong policy considerations that support schools partnering with community organisations and not-for-profit entities. The Draft Guidelines should clearly state that, provided a school sees some benefit (financial or non-financial) to its students (or the broader school community) in such a partnership, this will not breach section 83C.
- (j) Further, if there are non-financial benefits that flow to a school from providing facilities to a 'for-profit' entity (such as a service provider which may provide services to students or their parents), we consider that a school should also be able to take this into account – the Guidelines need to deal with this (although we note we are still waiting further material relating to onsite following the new draft Regulation being finalised).
- (k) Further, and especially given the need to hire and retain talented individuals to teach and administer in the non-government sector, schools should be able to determine as is appropriate in their unique circumstances how to reward and remunerate staff (including by providing bonuses to staff) without being constrained by non-compliance concerns.
- (l) It should be for a school to determine what is 'for the operation of the school', and what will benefit or educate its students. This expression 'for the operation of the school' is found in section 83C(2)(a) and in section 83C(2)(b)(ii). Understanding its meaning is crucial to understanding when the Minister might find that a school operates for profit. It is therefore regrettable that the Draft Guidelines provide no practical guidance about how the Minister will interpret this expression. It does not assist schools to be told that the determination of the question as to whether something is for the operation of the school "will be a matter of fact and degree, depending on all the circumstances of a particular case and the evidence before the Minister when considering that question."
- (m) Our recent experience in acting for non-government schools in New South Wales is that the Minister, based on the findings and recommendations of Department auditors, is deciding what is required for the operation of a school as if the Minister was the school principal. With respect, the Minister and those in the Department administering this legislation will rarely have had experience as a school principal and therefore ought not



to be deciding subjectively what the purpose of some expenditure is or what is required for the operation of the school. The test must be objective and the Draft Guidelines should provide practical examples of what are and are not considered by the Minister to be purpose of operating a school and/or required for the operation of a school.

- (n) In our submission, matters which are for the purpose of operating a school and/or required for the operation of a school include:
- a. employing staff including decisions about how many, their experience and qualifications;
  - b. determining class sizes and staff to student ratios;
  - c. facilities and buildings including decisions about size, type and use (for example, the use of an off-campus storage facility to store school equipment is for the operation of a school and it is not up to the Minister to say that the School ought to find an on-campus place to store the equipment, or as another example, the hiring of a church hall or mosque as a facility in which to provide religious services for staff and students);
  - d. curriculum including off-campus learning experiences (for example, a high school excursion to Arnhem Land is for the purposes of a school's operations even if there are ancillary benefits to the people living in that part of Arnhem Land);
  - e. building and maintaining relationships with those in the school community such as parents and former students (for example, allowing these people to use school facilities when not in use by students is for the operations of a school because these people in turn support the school in practical ways, by giving and making requests, and by sending their children to the school).

More examples could be given. Doing so would make the Draft Guidelines a more useful document. At the moment, the Draft Guidelines are not useful or helpful for those running schools.

- (o) There also appears to be an implication in parts of the Draft Guidelines that the use of a school's assets or income where there is no legal liability or obligation is not for the operation of the school; for example, the section headed One-off payments to individuals. The Draft Guidelines should make it clear that this is not the case. Schools pay for many things which are for their operations even though there is no legal obligation to do so. For example, it is clearly for the operations of a school to maintain and enhance staff job satisfaction and loyalty to the school. Little things go a long way in this area (such as provision of comfortable staff facilities, a bunch of flowers or comparable gift to a departing member of staff, and so on) even though there is no legal obligation to provide these things.
- (p) With respect, without evidence as to intentional wrongdoing, we see that it is a matter for the school to decide what is for its operation, in its context and circumstances, taking into account its ethos and mission, and in accordance with its objects and purpose.

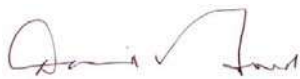
- (q) Schools often engage with and support other groups in the community, as part of their overall purpose. In particular, schools often support alumni associations and parent associations through various means, which in turn will see the school receive significant support and benefits flowing from these ongoing relationships. We consider supporting an alumni network as part and parcel of the broader operation of a school. Unfortunately, there is nothing in the Draft Guidelines that assists with a determination as to whether this activity would breach the requirements.
- (r) The Draft Guidelines should provide more clarity on how non-government schools can support related or associated organisations. For example, where the school has established a 'foundation' for fundraising for various School activities, how can the school support the operation of the foundation (if at all)? Can the school provide services or facilities?
- (s) We encourage the Department to make a more holistic and expansive view of what 'for the operation of the school' means, and submit this should ultimately be for the School, its leaders and the Board to determine. While the proposed test in the Draft Guidelines may appear broad, going forward it needs to take into account the whole-of-enterprise approach to school operations (including direct, indirect and broader / downstream benefits from school activities). If the Department is not inclined to adopt a holistic or expansive view, it needs to adopt a more fulsome test in the Draft Guidelines for what 'the operation of the school' means. In considering what this encompasses, consideration should also be given to including overall student, parent and staff wellbeing, and other factors that may indirectly support education at the school.

We would welcome the opportunity to discuss this further with you, and provide our further feedback in relation to any amended drafts and the additional material relating to ancillary services.

Please contact us if you have any questions or comments.

Yours faithfully

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