

Independent Education Union of Australia NSW/ACT Branch

Submission to the Review of section 83C of the Education Act 1990 (NSW)

Introduction

The IEU strongly support the principles and objects of the *Education Act 1990 (NSW)* (the Act). Specifically, the IEU stands behind the longstanding requirement imposed by section 83C of the Act in ensuring that schools in receipt of funding from the NSW Government do not operate for profit. As a key stakeholder within the non-government school sector, the IEU welcomes the opportunity to be consulted on the review.

In this submission, we will seek to address those issues arising from the Terms of Reference and the *Draft Not-for-Profit Guidelines for Non-Government Schools (Exposure Draft)* which are most relevant to us.

About the IEU

The Independent Education Union of Australia NSW/ACT Branch (IEU) is part of a federal union with coverage of principals, teachers and support staff in non-government educational institutions in all states and territories. In NSW, our branch has over 30,000 members employed predominantly in Catholic and independent schools. However, we also represent employees in early childhood education and care centres (ECECs) and post-secondary settings such as private vocational colleges and English language colleges for overseas students.

IEU Organisers regularly visit schools and meet with members across the state. We have members in almost all schools in NSW.

Non-Government Schools Not-for Profit Advisory Committee

The IEU endorses the functions of the Advisory Committee as outlined in subsection (2) of s83K of the Act.

The existing composition of the Committee consists of an independent Chairperson, a nominee of the AIS, a nominee of Catholic Schools NSW, a nominee of NESAs and a nominee of the Department of Education and “any other person who, in the opinion of the Minister, will be of assistance to the [Advisory Committee](#)”.

Some of the considerations of the Committee will impact on employees, either directly (for example in relation to the rules about payments to employees or former employees) or indirectly, in the sense that monies that are used for profit are not available for the operation of the school, including resources and staffing.

Because the diversity of the union's membership, including for example business managers, principals, head office staff, teachers, administrative staff and teacher aides, we are well placed to identify potential issues of which other members of the Committee may not be aware. We may also be aware of the implications on teaching and learning and the practical consequences of Committee deliberations.

The IEU requests that, as a key stakeholder, we be granted the right to nominate a representative to the Advisory Committee. An IEU nominee would be of assistance to the Committee.

The IEU also notes that many of these matters have a relationship to school registration. Section 47 permits NESAs to set rules in relation to school registration and requirements for school registration including policies, financial viability of the school and matters relating to governance. We consider that it would be appropriate that NESAs play a key role in oversight and enforcement of section 83C.

Section 83C (2) (a) "Operation of the School"

IEU agrees that the guidelines should spell out in more detail than the current guidelines the meaning of "operation of the school".

However, there needs to be more guidance about how this definition applies in relation to systems of schools. IEU does not oppose the principle that "a school" could include other schools operated by the proprietor as part of a system of schools.

The union prefers the term "system" rather than the expression "shared services" as in some cases the shared services model is used to refer to services shared by a school system and non-school agencies.

Section 83C (2)(b)(i) "Reasonable Market Value"

The IEU supports the guideline that defines reasonable market value. Specifically, that a school is operating for profit when the price of goods or services is more than "a knowledgeable and willing third party would pay for property, goods or services in an arm's length transaction from the seller".

However, reasonable market value is difficult to measure in practice for a system or a stand-alone school, where the proprietor is not the head of the school or the system but the head of a broader organisation that also operates the school. In this case, the person who is the head of the school or system may not have autonomy in respect to the purchasing policy. Where the proprietor can direct a school to purchase goods or services from it, a related party or from an external third party, it is hard to see how "reasonable market value" can be independently assessed or audited. The presence of a potential conflict of interest is evident in such cases, making it difficult to ensure a genuinely impartial evaluation or audit process.

In recent times, the IEU has been approached by members who have expressed concerns about the operation of a particular employer in this regard.

IEU is not aware whether the Committee has power to subpoena documents or what protection exists for a person who makes a complaint to the Committee.

The expression "reasonable market value" also appears in section 4.18 of the Exposure Draft. The section outlines that engagement of a consultancy or professional services required for the operation of school must be no more than market value. It further states that particular care must be taken if a payment is proposed to be made to a related entity. The Exposure Draft however fails to explain how that "reasonable market value" would be assessed, monitored or enforced.

The IEU recommends that a register should be created of all schools or system of schools which do not operate independently and solely for the provision of education (with the exception of the operation of early learning centres). Documents should be required to be provided to substantiate that goods and services were provided at reasonable market value. These records should be regularly reported to the Advisory Committee for compliance checks and be subject to freedom of information requests to ensure accountability. A non-school entity which runs the school or system should also be subject to freedom of information in relation to any part of its operation funded by school funds. See also the discussion below in the section on shared services.

Section 83C (2)(b)(iii) “in any other way unreasonable in the circumstances”

The IEU recognises that the Exposure Draft is not intended to prescribe every circumstance that may be captured in s83C(2)(b)(iii) “*for property, goods or services that is in any other way unreasonable in the circumstances having regard...*” However, the IEU submits that guidance is necessary to identify the types or examples of the type of payments that would be regarded as unreasonable.

An example where the IEU deems payments as unreasonable is where schools have been operated by a church organisation over a long period. Frequently, the school does not own the land on which the school operates, as it is typically owned by the church.

The union is aware of instances where the church organisation suddenly starts charging the school rent (or has threatened to charge rent) notwithstanding the fact that the school has operated for decades on the property, that the school has paid for the operation of the school and its upkeep and improvements for decades and that no rates are payable. In some cases, rent is charged for the whole of the property, in others for a part of the property such as the school car park.

In effect, the church organisation is now seeking a commercial arrangement, whereas previously the school operated solely for philanthropic, educational, or religious purposes.

If such a trend were to become widespread, this would amount to a significant transfer of funds intended to support non-government education to church organisations.

It is also the case that “market value” may be unreasonable where a profit margin is built in and compared to other for-profit quotes. For example, it may cost a school \$150,000, say, to employ a school counsellor directly, but if the counsellor (either the person or the function) is transferred to a related entity, then the related entity may charge more on a for-profit basis than the previous cost. However, the entity may claim it is reasonable market value by comparison with the costs of other for-profit providers.

This issue is not theoretical. IEU members have complained in the past that some Catholic dioceses use a Catholic social welfare organisation, CatholicCare, to provide counselling services at a cost higher than the cost to CatholicCare and higher than if the service was provided inhouse by the school. Another example is that IEU members have recently advised that one diocese has transferred IT staff from the school organisation to a non-school entity which then charges the school system for the IT service. However, the employees remain in situ at schools. This would seem to create the possibility that the change in structure permits profit-making from the provision of the service.

IEU considers that policy should be developed on this issue and that the guidelines should include examples of conduct that would infringe this section.

Ethos, purpose and mission

Ethos is of course an important part of all schools. However, the IEU perceives there is a need for clarification as to how to determine whether an activity funded by the school is related to its broader religious ethos or to the operation of the school.

The union is aware of instances where school activities paid for out of recurrent school funds may not appear to be directly related to the operation of the school.

For example, staff may be employed in roles that arguably support the church mission in relation to the broader community, rather being directed to current or prospective students at the school. Another example is where the school hosts events for school students which support the purpose and mission of the church but are not directly related to the delivery of education and the curriculum. In an environment of teacher shortages and increasing workloads, it is the IEU's view that public funds intended for teaching and support staff and teaching and learning resources should not be diverted to the evangelising and catechising missions of religious schools.

Additionally, the IEU recommends that clear guidelines be developed to outline when expenditure on overseas travel (particularly when employees are not accompanying students) should be considered as supporting the operation of the school.

Preschools and early learning centres

IEU welcomes clarification of the use of assets for early learning centres (long day care centres) and preschools.

IEU considers there is a clear distinction between not-for-profit services and for-profit services. However, if a not-for-profit service is operated by an entity that is not directly controlled by the school or system but is part of a larger not-for-profit organisation (such as a church, diocese or early childhood organisation), then it should be subject to the same approach as a for-profit service.

The IEU welcomes the opportunity for continued consultation regarding the development or revision of the Exposure Draft following the finalisation of the new regulation.

Leasing/rent by a school (land)

See above section on 'Section 83C (2)(b)(iii) "in any other way unreasonable in the circumstances"'.

Shared services

The IEU endorses the intention to provide clear guidelines with respect to compliance with section 83C requirements in relation to shared services.

As noted above, we think there should be a distinction between the type of shared services, depending on whether there is an agreement under which a group of schools jointly purchase services (for example a system of schools) or whether such agreement also includes non-school entities.

IEU submits that the Exposure Draft would benefit by incorporating more practical guidelines on how schools that operate within shared services can adhere to section 83C requirements.

In instances where a system of schools relies on centrally provided services (such as IT, curriculum support, payroll and human resources), decisions on the provision of services will be made centrally.

This leaves schools with no option to opt in or out of receipt of such services. As one example, the union negotiates enterprise agreements and staffing arrangements with dioceses on behalf of the schools in that diocese. As another example, it would be difficult for the provision of curriculum support to be itemised by school.

A different approach should apply if the school or system is conducted by a non-school entity, such as a church or diocese, because of the potential for conflict of interest and cross-subsidisation of non-school related services. In that case, the IEU recommends that documentation showing the amount of school funds that are charged for services across the system of schools and the breakdown of the services should be made publicly available. For example, services such as catering, IT, payroll, human relations and governance should be separately listed. Payments to a related entity should also be separately recorded. These charges should also be shown on a per school basis for each type of service.

Such charges should also be reviewed over time and in comparison with those in like school organisations to ensure such services are being provided on a genuine not-for-profit basis.

School related travel

See our comments above in relation to school ethos.

Compensation, settlements and other one-off payments

The IEU agrees with the position put in the Exposure Draft acknowledging that payments associated with resolving an employment dispute stemming from breaches of an employer's obligations under contract, statute or common law should be considered as being in the operation of the school.

Unfortunately, the reference in the Exposure Draft to 'pending or actual litigation' may be narrowly interpreted by some employers. In this narrow interpretation of the guidelines, the employer may require the commencement of actual litigation before a payment can be made towards settlement of a dispute.

In circumstances where the employer acknowledges a breach of relevant obligations in relation to an employee (such as payroll error), initiating proceedings would be both costly and futile. The IEU contends that the Exposure Draft should clearly state that litigation is not necessary.

In other cases, an employee may consider an employer has acted unfairly or in a way that is not compatible with the continuation of the employment relationship, and the employer may acknowledge the employee's concern. Both parties may mutually agree to terminate the employment arrangement and the employer is frequently prepared to make a payment to the employee, without admitting liability.

In consideration of these circumstances, the IEU recommends that for the avoidance of doubt, the words "it is not necessary that litigation has been initiated" be added to the Exposure Draft.

Other issues

Often the persons most likely to know of practices that breach not-for-profit guidelines are employees of the school organisation. At present, there is no protection for any such employee who makes an allegation or releases confidential information. IEU requests the Minister consider how such protection can be provided.

Conclusion

In conclusion, the IEU unequivocally affirms its support for the principles and objectives outlined in the *Education Act 1990 (NSW)*. We particularly endorse the enduring mandate set by section 83C of the Act, emphasising the imperative that schools receiving funding from the NSW Government operate should not be operating for-profit.

As a pivotal stakeholder in the non-government school sector, the IEU appreciates the opportunity to contribute valuable insights through consultation on the review. We look forward to actively participating in the ongoing dialogue to ensure the continued integrity and effectiveness of the education system.

Carol Matthews
Secretary
23 February 2024