

M. Hobbs

22 February 2024

Tom Alegounarias

Review Chair

Email: section83@nesa.nsw.edu.au

Dear Mr. Alegounarias,

Re: Submissions into review of section 83C of the Education Act 1990 (NSW)

Please accept my submissions regarding your review into this important piece of legislation.

Each of my submissions are made under the relevant Terms of Reference (TOR) of your review.

1. TOR - Examine the effectiveness of the wording of s.83C to determine there is sufficient clarity.
- ❖ Proposed amendments to the existing wording (if any) should not diminish the strength or enforceability of the existing provisions.
- ❖ To provide clarity to both the Minister in terms of her obligations to not provide funding to schools that operate for-profit (under s.83C(1)), as well to non-government schools regarding the likely consequences of engaging in for-profit/ non-compliant activity the following amendments should be made:
 - s.83C(4)(a) should be amended to read "*termination of financial assistance is not justified because of the minor nature of the relevant conduct, **and***" (i.e. to replace "or")
 - s.83E(3)(a) should also be amended to be consistent with this proposed amendment.

2. TOR - Examine the role of the Non-Government Schools Not-for-profit Advisory Committee established under s.83K, including its role and membership.
- ❖ The current composition of this committee is not independent enough and relies too heavily on representatives (and allies) from the non-government school sector.
 - ❖ The tenure of the committee members should be limited to a reasonable term. The current committee member representing the AIS has held that membership since 2014 (10 years). Additional or consecutive terms should be prohibited.
 - ❖ The process to obtain committee membership is flawed. For example, one of the existing members (supposedly independent) was nominated to the position by the committee member representing the AIS. That member is also employed as a consultant by schools in the non-government sector.
 - ❖ Candidates/ existing members who are barred from providing full and frank disclosure of information (refer to s.83K(2)(a)) to the Minister because of professional duties/ obligations to other organisations/ their employers, should be disqualified from being a member of the committee. The current committee member representing Catholic Schools NSW is also the Senior Legal Counsel for that organisation and bound by issues associated with client confidentiality.
 - ❖ The existing laws governing committee members' pecuniary interests and participation in committee decisions are inadequate and should be strengthened and broadened to address the following issues which have occurred in the past:
 - conflicts of interests (non-pecuniary)
 - sanctions should be imposed/ strengthened where the committee member has been the subject of, or implicated in, allegations of corrupt conduct, improper use of their position as a committee member, or a failure to adhere to laws/ legal obligations (breaches of confidentiality, failure to disclose pecuniary or other conflicts of interest, political lobbying).
 - committee members should be barred from participating in decision-making/ attending meetings where the subject of those decisions/ meetings is a school who is a financial member of the organisation being represented by that committee member (e.g. AIS) or there is some

other pecuniary or conflict of interest present. Additionally, similar prohibitions should occur where action has arisen from a complaint received from an organisation represented by a committee member.

- ❖ The membership of the committee should be expanded to include a person suitably qualified to represent the interests of the public and public policy in the field of education. This person should be independent of the institutions of government and the non-government school sector.
 - ❖ The role and function of the committee should be restricted to functioning as an advisory body to the Minister under s.83K. Due to its lack of independence from the non-government school sector, its functions should not be expanded to include matters of government policy, or matters relating to the administration of the Act. To that end the following amendments should be made:
 - s.83K(2)(c) should be amended to read “... *to exercise any other function (not inconsistent with this Act) relating to financial assistance to schools conferred by this section.*”
 - s.83K(3) should be amended to read “*The regulations may make provisions for or with respect to membership and procedure of the Advisory Committee*”
 - ❖ Members of the committee who are remunerated should be classified as a Government Sector Employee for the purposes of the *Government Sector Employment Act 2013*.
 - ❖ Decisions made by the committee should be published and open to public scrutiny.
3. TOR -The examination of the operation of s.83C should also consider: (a) the outcomes and risk-based regulatory framework, (b) the Minister’s not-for-profit guidelines, (c) other guidance material published on the department’s website.
- ❖ The latest published guidelines contain inconsistencies with the Act and should be amended.
 - ❖ The guidelines should also include information relating the to exercise of the Advisory Committee’s functions including timeframes for decision-making.

4. TOR - Having regard to the above Terms of Reference, make recommendations to improve the regulation of financial assistance to non-government schools.
- ❖ This review should consider the findings of the recent Productivity Commission's report titled "Future foundation for giving". In particular, the finding that *"There are also some charitable activities where the reasons for DGR status have lessened over time. School building funds – which are widely, but not exclusively, used by non-government schools – are a case in point. School building funds were given DGR status in 1954 when government support for non-government schools was very limited. Since then, government support for non-government schools has expanded considerably. Providing indirect government support through school building funds means government funding is not prioritised according to a systemic assessment of the infrastructure needs of different schools."*
 - ❖ Following the finalisation of the above recommendations, amendments should be made to make the existing legislation include DGR structures within the scope of the government's regulation. From a policy perspective, non-government schools in receipt/ or benefitting from large amounts of money from philanthropic sources should be disqualified from receiving government capital grants and possibly have their recurrent funding reduced.
 - ❖ Under the current provisions of the Act, the proprietor of a school must be a "legal entity" (s.3 - definition of 'proprietor'). However, since the introduction of the federal charities legislation there has been a proliferation in the registration of trusts as registered charities with the ACNC. Trusts are not legal entities. This has facilitated the establishment of trusts by various non-government school bodies. These trusts have then been used to siphon funds and property from their related proprietors/ school organisations to these trusts with diminished, little or no benefit towards the education of children within the care of the school. In some cases this has had the effect of creating additional liabilities for the proprietor/ school (e.g. *Christian Community Ministries Ltd. v Minister for Education & Early Learning [2024] NSWCA1*). Such business structures are contrary to the intent of the existing legislation and have the effect of putting funding and educational assets beyond the scrutiny or reach of the Minister, leading to a bleeding of money/ educational assets outside of the educational system. Amendments should be made to the regulations specifically deeming the use of trust structures as being for-profit activity (with the exception of historical statutory trusts established to give legal status to various religious organisations).

- ❖ As a major funder of the non-government school sector, the NSW Department of Education should maintain its existing powers and functions relating to the regulation of non-government school sector funding. Any view that it should not have the right to do this or is conflicted because of its administration of the public school system is a proposition based in ignorance and designed to benefit those with a vested interest in changing the playing field!

Thank you for the opportunity to provide these submissions.

Sincerely yours,

M. Hobs