



## FROM THE OFFICE OF THE HEADMASTER

9 February 2024

### To whom it may concern:

1. This submission pertains to the Minister for Education's review of the operation of s.83C of the *Education Act 1990* (NSW) which is being conducted by Tom Alegounarias according to the Terms of Reference published by the Minister. Trinity Grammar School supports this review and is very appreciative of the opportunity to provide input through this consultation process.

### Comment on process

2. Before moving to specific input, it is noted that a related but separate review is already underway, being commissioned by the NSW Department of Education and focused on the Exposure Draft of the Regulatory Framework for the oversight of financial assistance provided to NSW Non-Government Schools and the Exposure Draft of the Not-for-Profit Guidelines for Non-Government Schools. It is very strange to have these overlapping and related reviews taking place concurrently. Given that the Framework and the Guidelines emerge from the legislation and interpret the intent of the legislation, the inefficiencies entailed by the existing processes seem significant.

### The wording of the legislation

3. In summary form, the terms of reference include an examination of the effectiveness and wording of s.83C to determine if there is sufficient clarity for regulation and compliance.
4. The heading of s.83C and the wording of Clause (1) is entirely appropriate and clear. *The Minister must not provide financial assistance ... to or for the benefit of a school that operates for profit.* Trinity Grammar School supports the intent of s.83C, in that school education in Australia ought to be not-for-profit, and that individuals and organisations ought not benefit through the malign diversion of funds intended to support the education of students.
5. However, Clause (2), which defines the phrase 'operates for profit' in this context, contains two problematic formulations or terms. In combination, these formulations and terms – along with the Regulatory Framework and Guidelines – provide an unfortunate basis for overreach that is functioning to stultify the legitimate activities and initiatives of non-government schools. In many cases, these activities and initiatives are highly valued by the particular non-government school's community and are a distinctive expression of that community's educational vision.
6. The first is seen in Clause 2(a), which stipulates that a school operates for profit if *any part of the proprietor's assets ... or its proprietor's income ... is used for any purpose other than for the operation of the school.* (Emphasis added.) This formulation brings all the activity of a non-government school under the scrutiny of s.83C. The State already (appropriately) regulates many aspects of non-government schools through the NESA Registration and Accreditation process and non-government schools are accountable to various other State and Commonwealth authorities and legislation, not to mention the accountability to fee-paying parents. Clause 2(a) of s.93C goes further, not just by adding an additional layer of possible scrutiny, but also by potentially enabling *de facto* government control of non-government schools through interventions targeting distinctive aspects of these schools' operation.

7. The second is seen in Clause 2(b)(ii), which uses the phrase **'required for the operation of the school'**. The language of 'requirement' or 'necessity' is problematic; a school could be operated without any or most of its constituent elements. A non-government school may consider a particular expenditure of funds to be a 'good idea' or an 'important priority' or a 'valuable distinctive of our school' but would have difficulty asserting that the expenditure was 'required for the operation of the school'. The inclusion of this phrase in the legislation causes non-government schools to be constantly second-guessing the legitimacy of decisions. Furthermore, the language of 'requirement' is invariably considered with caution in legal advice to schools in these matters, effectively operating as a constraint on initiatives and practices otherwise deemed valuable to a particular school community.

### **Regulatory Framework (Exposure draft)**

8. With reference to the Roles and Responsibilities within the Framework, it is inappropriate for the NSW Department of Education to have regulatory functions of these sorts for non-government schools. Within the educational landscape in NSW, for all its oddities, the NSW Department of Education is in direct competition with non-government schools. There are perceived, potential and actual conflicts of interest in the current Framework. The Roles and Responsibilities assigned to the NSW Department of Education in the Framework should properly be assigned to NESA. It follows that NESA should be resourced adequately for these responsibilities.
9. The Regulatory Purpose should be re-drafted, in accordance with re-drafted legislation. At present the Regulatory Purpose is 'to ensure non-government schools in receipt of NSW Government financial assistance use all of their income and assets for the purpose of the operation of the school ...' (emphasis inserted). A more appropriate phrasing could be "... to ensure that non-government schools in receipt of NSW government financial assistance use that financial assistance to support the education of students."
10. Furthermore, neither the wording of the legislation, nor the Regulatory Framework and Guidelines, gives consideration to the proportionality of the funding provided by the State. In the case of Trinity Grammar School, the State provides approximately one dollar in every twenty of our annual recurrent revenue. It is unclear why this quantum of funding should provide a basis for a regulator's oversight of, and potential intervention regarding, **all** the income and assets of the school.
11. With reference to monitoring compliance, the explicit inclusion of media and social media reports among the sources of information is troubling. Everyone who has led a school, whether government or non-government, knows that there will be disgruntled stakeholders. It takes very little effort to act maliciously by making allegations through media and social media challenges, but the effort required to respond to inquiries and investigations can be massive. Furthermore, the mainstream media in Sydney is noteworthy for the disproportionate attention that it pays to the higher tiers of non-government schools, which further increases the likelihood of unfounded challenges. Recognising that reports of non-compliance could arise in a wide range of contexts, it would be better not to explicitly name 'media and/or social media reports' in the Framework.
12. There is no reference to a requirement for confidentiality in Section 8. A school's reputation can be significantly traduced through a lack of confidentiality on the part of the Department. It would be helpful for the Framework to include an explicit articulation of what might be expected from the various stakeholders and entities with reference to confidentiality.
13. Some of the Key Performance Indicators are ambiguous with reference to intent. For example, should the number of audits undertaken be high or low? Does the Framework value lots of audits, or few audits?

### **Not-for-Profit Guidelines (Exposure draft)**

14. The framing of 'reasonable market value' for real property needs to include the capacity to pay a premium to motivate an unwilling vendor. It is not uncommon for schools, seeking to expand their footprint, to pay a premium in order to persuade someone to sell. While ideally a school would only be looking to acquire a property once the owner decides to sell, timing does not always work this way. It may also be the case that the value of the property to the school is significantly higher than the property would be valued in a market appraisal; this may lead the school to pay a premium in order to secure the asset.
15. Given that investigations into possible breaches of s.83C will be commissioned and carried out by NSW Department of Education employees, there are valid concerns that staff who are familiar with public school system will not have an adequate appreciation of the distinctive ecosystem of an independent school, and therefore form their judgment as to what is 'required' for the operation of the school on misunderstanding. Anecdotal evidence suggests that this is not an uncommon experience.

### **Non-provision of examples**

16. In making this submission, I have decided not to include examples of initiatives that have been second-guessed at Trinity Grammar School because they may not be 'required for the operation of the School.' Given the possibility that this submission may be made public, and the associated risk that identifying these issues may lead to an investigation under the current regime, it seems best not to volunteer the examples. I am, however, more than happy to provide examples to illustrate the points made above.

Thank you for the opportunity to make a submission.

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Headmaster



