

19 February 2024

Mr Tom Alegounarias
Chair
Review of Section 83C of the Education Act 1990 (NSW)

Emailed to: section83review@nesa.nsw.edu.au

Dear Mr Alegounarias,

Review of Section 83C of the Education Act 1990 (NSW)

Introduction

The Association of Heads of Independent Schools of Australia (NSW/ACT Branch) values the opportunity to contribute to the Review of Section 83C of the Education Act 1990 (NSW). This legislation has very significant implications for the current and future operations of independent schools in NSW. In our submission to the Review, we identify a series of problems with the current legislation, particularly its ambiguity of wording and the application of 'Not-for-Profit' to all aspects of the school's income and assets, not just to the provision of NSW Government financial assistance. (ToR 1). We argue that the compliance regime of the Non-Government Schools Advisory Committee be shifted to the NSW Education Standards Authority (NESA) as a better institutional fit, integrated into the *NESA Registered and Accredited (Individual) Non-Government Schools (NSW) Manual*. (ToR 2). We further observe that diligent attempts to review and improve the NFP Guidelines have not overcome the inherent ambiguity in the Act (ToR 3). We make key recommendations to overcome the problems in the legislation consistent with these observations. (ToR 4).

In the development of this submission consultations were held with Dr Chris Duncan, Chief Executive Officer of AHISA. In his previous role as Head of Governance at the NSW Association of Independent Schools (AISNSW), Dr Duncan was able to inform our submission with key data and observations relating to advice AISNSW provided to hundreds of member schools about the operation, reach and effect of s83C.

Problems with the current legislation

In 2018 AISNSW formed a s83C Advisory Committee to provide guidance to member schools on how particular aspects of a school's operations intersect with s83C. The Committee has since provided 326 separate pieces of written advice to schools indicating whether a particular school practice, initiative or some other activity might be in breach of the Act. Prior to the formation of the Committee, AISNSW fielded 297 other requests for s83C advice since the Act was amended in October 2014. Of the many hundreds of governance workshops AISNSW conducted for individual school boards since the legislation was introduced, questions about the application and impact of s83C has been the dominant issue related to the governance of independent schools.

Requests for advice about s83C were marked by their volume and novelty. They range from the hiring of facilities to outside groups, acquisition of land and property, domestic and overseas service-learning experiences, mission-related professional development, student-led charitable work in developing countries, starting a new school or campus, ex-gratia payments to avoid escalated industrial disputes, director indemnity and liability insurance, payments for shared services, employment of auxiliary staff, purchase/lease of school vehicles and a host of other infinitely varied school operations.

AISNSW data indicates that of the 326 written pieces of advice to schools, 185 (57 %) could not provide the school with assurance that their current or proposed practice might not be susceptible to a breach of s83C. These schools were advised to exercise caution, given the limitations of the Guidelines to anticipate the breadth and particularity of school operations.

Two key propositions in the Act

The advice to schools to exercise caution was underwritten by the difficulty of interpreting two key propositions embedded in the Act. All the school's income and assets must be:

- required for the operation of the school, and,
- at reasonable market value.

Many aspects of a school's operations may not be 'required' but they would be regarded as normal, everyday educational and administrative practices. For example, all staff could potentially be remunerated under the Modern Award, but most schools choose to employ staff under more generous Multi-Enterprise Agreements, which strictly, are not required for the operation of the school, and are arguably above 'market value'. Co-curricular programs may not strictly be required for the operation of the school, but they are ubiquitous and desirable educational experiences for students. Examples of these literal breaches abound given that the term 'required' and 'reasonable market value' cannot be defined with sufficient clarity. Moreover, independent, mission-based schools engage in community-building activities that strictly are not required for the operation of the school, but they are essential in promulgating the ethos which underpins its pedagogy.

The concept of 'reasonable market value' is especially problematic given the highly varied markets in which schools operate. The concept of the 'market' entailed in the Act is a technical construct that does not appropriate the actual conditions or 'markets' in which schools engage in procurement. Likewise, the concept of 'reasonable' is also highly contextual. Conjoined, 'reasonable market' value is a tautology - the qualification 'reasonable' implies that a market value transaction could be 'unreasonable' - no doubt an unintended and perverse, but logical interpretation of the Act. The experience of NSW AHISA Heads suggests they have little appetite for paying more for goods, services and property than is strictly necessary. This market-focused disposition is galvanized by the NSW Education Standards Authority (NESA) which imposes governance standards on independent schools as a requirement of their registration. These standards were put in place to ensure all school resources, including financial assistance from the NSW Government, are provided for the education of students, and not for any other purpose. Sections 3.9.3. & 3.9.4 of the NESA Registered and Accredited (Individual) Non-Government Schools (NSW) Manual, in particular, require schools to develop elaborated policies, procedures, disclosures and registers in relation to conflicts of interest and related-party transactions.

Three conclusions

Three conclusions can be drawn from the extensive advice AISNSW has provided since the amendments to the Act in October 2014:

1. Heads strongly support the purpose and intention of the Act to ensure financial assistance to non-government schools provided by the NSW government is appropriated for the education of students, and not used for any other purpose.
2. Heads and Boards have an acute awareness of the Act and how deeply it reaches into the normal operations of the school, with the attendant risk of breaching the Act that a school's particular modus operandi might trigger.
3. The volume of schools seeking advice, and the marked diversity and scope of their operations, provide strong evidence that the attempt to codify the 'operations' of the school via the development of Guidelines, has not reduced the ambiguity rooted in the Act. This is despite diligent attempts by the Department and the Ministerial Advisory Committee to review and improve the Guidelines over several iterations. The Guidelines, for all their merit, have not overcome the weaknesses in the Act. In other words, the clarity schools seek to comply with the purpose and intention of the Act is most likely unattainable until the Act is amended.

Wide support for the intention of s83C

Ensuring that financial assistance to non-government schools provided by the NSW Government is used for the operations of the school, and for no other purpose, is unambiguously supported by NSW AHISA Heads. This requirement is again foregrounded in the Minister's press statement announcing the Review, and in the Terms of Reference for the Review. To ensure compliance with this requirement, the Act invokes the concept of operating 'for profit'. However, the 'for profit' construct is extended to how schools appropriate all income and assets to the operation of the school. In other words, if a school applies any part of its income and assets not derived from recurrent funding to non-school operations, notwithstanding the deep ambiguity attached to 'school operations', it will be deemed to operate 'for profit', and therefore 'non-compliant'.

Two-pronged concept of 'for profit'

This dual meaning of 'for-profit' could imply that a school not in receipt of NSW recurrent funding could still be deemed to operate 'for-profit' if it applied any of its assets and income to purposes other than the operation of school. Does the second condition - all income and assets – depend upon the first – government assistance - or do the conditions operate independently? If the latter, those schools not in receipt of NSW government funding could be logically in breach of s83C. Such a conclusion is absurd, but until the Act makes these dependencies more explicit, these logical inferences will continue to be drawn.

'For' profit vs 'at' a profit

The way 'for-profit' is defined in the Act confuses the distinction between operating 'for' profit and operating 'at' a profit. While schools in receipt of NSW recurrent funding must not operate 'for profit', they are also required to operate 'at' a profit. The Corporations Act and the Australian Charities & Not-for-Profit Commission (ACNC) place significant obligations on directors to ensure the entity remains solvent. Demonstrated financial viability is also a NESA registration governance requirement. Volunteer directors of school boards face significant

penalties for insolvent trading. This means the financial governance and management of independent schools must be structured to achieve viable operating surpluses, mitigating the risk of insolvency, a serious offence under the Corporations Act.

Application

Applying the two-pronged concept of 'for-profit' as a proxy to ensure schools make appropriate use of all their income and assets, has resulted in a compliance regime that has stymied and crimped the everyday and typical operations of independent schools. The impact on community, charitable and service-learning programs, for example, has been keenly felt. Heads of Schools are hesitant and cautious, concerned that program innovations linked to the school's community could be deemed an inappropriate use of the school's income and assets.

A case in point

A school should be able to support its community. A Parents' and Friends' organisation, for example, provides service to the parents of the school, helping parents to make connections with each other, assisting them with the difficult tasks of parenting and arranging advice and important on topics relevant to the education of their children. A school will thrive if there is an active and supportive P&F. In Independent Schools, many P&Fs are separately incorporated associations. Yet it appears that if an employee of the school has, as part of their job description, to support the work of the P&F - for example by taking minutes of meetings, organising refreshments for meetings, setting up of meeting rooms, organising speakers and the like – this appears to contravene the requirements of s83C. The same could be said for Alumni Associations too. Staff of the school should be able to support the work of the Alumni, helping them with functions and staying in touch with classmates and involving Alumni in the life of the school to provide services for current students (careers advice and Work Experience, for example). It is likely, however, that these activities will breach s83C given many school community activities are conducted by entities which do not fall within the auspices of the schools' 'operations'.

The application of the 'for profit' mechanism in the Act has rendered many schools susceptible to a breach of the Act where there has been no intention to operate in ways other than in the interests of students, and their learning and development. The Corporations Act, the ACNC, Commonwealth Funding Agreements and the NESA governance requirements for the management and operation of the school already exist to ensure that all school resources must only be applied to the education of students.

Section 83C, 'proper' governance and responsible persons

Governance standards for the registration of non-government were introduced almost a decade ago. These requirements were elaborated in the NESA *Registered and Accredited (Individual) Non-Government Schools (NSW) Manual*. Schools had to develop and maintain policies, procedures and detailed records of a range of areas relating to the proper governance of the school. Conflicts of Interest, Related-party Transactions, Director Training and Induction and Financial Viability were key areas of governance foregrounded in the requirements. These standards were all directed to ensuring that independent schools were applying all their financial resources to the operations of the school, and not for any other purpose.

Given the way NESA has developed and elaborated these governance standards, and the way they have been widely adopted by schools in the sector, it is not clear why the NSW Department of Education established, and continues to maintain, the Non-Government Schools Advisory Committee, and the compliance and audit regime

attached to that body, to provide oversight that is effectively done by NESA. This looks like a case of double handling and a less than efficient mechanism of appropriate public oversight. As a statutory authority, NESA is the appropriate body with the institutional independence and gravitas to ensure schools use publicly funded assistance only for the education of students. The most robust way to enact this is for NESA to develop a mechanism whereby schools can demonstrate that all recurrent funding, both state and commonwealth, is applied to school staff salaries, an unambiguous, market value determinant of school operations.

The use of the construct 'Not-for-profit' and 'For-profit' to determine if schools are appropriating financial resources correctly, should be abandoned. The construct is a proxy unfit to make such a determination given its entangled ambiguities, and its peculiar application to the independent school sector.

Conclusion and recommendations

AHISA (NSW Branch) strongly supports the core intention of Section 83C of the Education Act 1990 to ensure that schools in receipt of NSW financial assistance only apply that funding to the operation of the school, and not apply it to any other purpose. Therefore, we recommend that:

1. The construct of 'for profit' be limited to how schools use government recurrent funding to support their operations. In other words, a not-for-profit school applies all of its public recurrent funding to the operations of the school. This could be demonstrated by schools allocating all government recurrent funding to staff salaries. Staff salaries are unambiguously required for the operation of the school.
2. The construct of 'for profit' not apply to how schools use income and assets derived from other (non-government) sources.
3. Recommendations 1 and 2 remove the deep ambiguity in the Act attached to the concepts of 'required for the operation of the school' and at 'reasonable market value'.
4. That adherence with Recommendation 1 become a new domain of compliance in *The NESA Registered and Accredited (Individual) Non-Government Schools (NSW) Manual*, removing the duplication of compliance regimes entailed in the Non-Government Schools Advisory Committee

Dr

Chair of AHISA NSW/ACT Branch

02 4572 3633

About AHISA

AHISA Ltd is a professional association for Heads of independent schools.

The primary object of AHISA is to optimise the opportunity for the education and welfare of Australia's young people through the maintenance of collegiality and high standards of professional practice and conduct amongst its members.

AHISA's 470 members lead schools that collectively account for over 450,000 students, representing 70 per cent of Australia's independent sector enrolments and over 11 per cent of total Australian school enrolments. AHISA members' schools also educate a significant proportion of senior secondary students: 20 per cent of Australia's Year 12 students attend AHISA members' schools.

AHISA's members lead a workforce of over 44,000 teaching staff and almost 30,000 support staff.

The socio-economic profile of AHISA members' schools is diverse. Over 20 per cent of members lead schools serving low-to very low-SES communities. The geographic spread of members' schools is also diverse, with schools located in major cities, inner regional, outer regional, remote and very remote areas. School size varies from less than 200 students to over 3,000 students, with most members' schools falling within the range 600 to 1400 students.

AHISA believes that a high-quality schooling system in Australia depends on:

- Parents having the freedom to exercise their rights and responsibilities regarding the education of their children.
- Students and their families having the freedom to choose among diverse schooling options.
- Schools having the autonomy to exercise educational leadership as they respond to the emerging needs of their communities in a rapidly changing society.