

Submission to the
Minister for Education's review of
SECT83C of the
Education Act 1990 (NSW)



Submitted on behalf of the
New South Wales Council of Churches

16 February 2024



Congregational Churches



The below submission pertains to the Minister for Education review of SECT83C of the Education Act 1990 (NSW) which is being conducted by Tom Alegounarias.

We have had the opportunity of reviewing a number of significant submissions from educationally focused organisations (such as the Association of Independent Schools) together with impacted schools. Our focus is on the wording and interpretation of said Act together with recommendations.

Background:

The New South Wales Council of Churches (NSWCC) has served as a 'mouthpiece' for major Protestant churches on matters of public interest since its inception in 1925. Its areas of interest, concern and expertise include Education. The NSWCC comprises their "Heads of Churches" plus representatives of the eight evangelical Christian denominations: Anglican, Baptist, Reformed, Churches of Christ, Congregational, Presbyterian, Salvation Army, Missionary Alliance of Australian Churches. NSWCC member denominations have strong connections with many non-government Christian schools at a governance, advisory or local church level.

The NSWCC supports the review of SECT83C of the Education Act and understands a separate review has been commissioned by the NSW Department of Education which is focused on the "Exposure Draft" of the regulatory framework.

The NSWCC is committed to the declaration that in school education everyone has a right "to manifest his (her) religion or belief in teaching, practice, worship, and observance." (Article 18(b), Universal Declaration of Human Rights, Paris, 10 December 1948.) It is suggested that a review of SECT83C is timely to assess whether that provision of the said Act allows non-government school education to properly flourish ("manifest").

SECT83C Key Issues relating to the wording and interpretation of the said Section:

1. "Operation"

Of concern are SECT83C(2)(a), (b)(ii) and (c):

- (2) A school operates for profit (without limiting the circumstances in which it does so) if the Minister is satisfied that
 - (a) any part of its proprietor's assets (in so far as they relate to the school) or its proprietor's income (in so far as it arises from the operation of the school) is used for any purpose other than for the operation of the school,
 - (b)(ii) for property, goods or services that are not required for the operation of the school,
 - (c) any payment is made by the school to a person in connection with the person's activities as a member of the governing body of the school unless it is in reimbursement for a payment made by the person in connection with the operation of the school.

The phrases "*operation of the school*", "*is used for purposes other than for the operation of the school*", and "*payment made by the person in connection with the operation of the school*" are problematic (italics mine). It is suggested that the word "operation" in these clauses is too narrow for the functionality of a school and should be replaced with words such as "advances the educative purposes of the school" and/or "is consistent and aligned with its educative values". This recommended amendment is consistent with the submissions referred to above.

2. "Regulations"

SECT83C (3) –

- (3) The regulations may specify whether or not a school operates for profit because of any particular use of assets or income, any particular payment in relation to the school or any other matter. Any such regulation has effect despite anything to the contrary in subsection (2).

Such a broad scope for "regulations" that may determine if a school operates for profit causes an unnecessary risk factor for Christian non-government schools. The first sentence requires wording such as "that is not consistent with the educative purposes of the school".

3. “Payment” for Services (Cross-School Support)

SECT83C (2)(b) and (2)(b)(i) are also problematic.

(b) any payment is made by the school to a related entity or other person or body—

The reassessment of how education best ministers in today’s landscape is being creatively explored, especially in Tertiary education. Post Covid this has gained further momentum. Cross-School support is not a “risk” to education but is an enhancement. This also applies to a school financing a collaborative education commission or network. It is inappropriate for such educational creativity to be viewed as moving a schools/s to the status of “that operate for profit.”

4. “Market Value”

(b)(i) for property, goods or services at more than reasonable market value,

“Market value” is too narrow a term. For example, the “market value” of a property near an independent school will for a vendor be robustly negotiated. The property needs of a school could be put at risk. Surely this is appropriately left to good governance with a ‘Board” putting a “value” beyond “vested interest” that has been reached through commercial negotiations. An audit, investigation of this clause would require an expertise beyond most school audits.

5. Proportionality:

A further issue relates to the failure to give recognition to the proportionality of State funding. In the case of many Christian non-government schools, the funding provided by the state may be as low as 5-20% of annual recurrent revenue. It is questionable this level of state funding justifies the extensive oversight provisions of SECT83C.

6. Oversight / Conflict of Interest:

The current oversight of SECT83C is conducted by the NSW Education Department. The current oversight of the Bill should be acknowledged as a conflict of interest as it applies to Christian non-government schools.

Some Shared Areas of Concern:

The NSWCC is not at liberty to disclose case studies we have been made aware of but we understand the said schools will make their own submissions. However, certain ramifications of SECT83C, as it now stands, have been explained or are self-evident.

The wording and interpretation of the said section as outlined above can adversely impact non-government schools in their advancement of Christian education. For example, this can relate to students / staff benefiting from, assisting and interconnecting with other schools (perhaps overseas) when said endeavours are consistent with their values. It can legally hinder the creation, financing and development of constructive denominational school education commissions or such a commission of likeminded schools. It can lead to unnecessarily prolonged audit reviews.

The wording of SECT83C puts at risk the everyday function of a school as it seeks to avoid the category of a “school that operates for profit” and thereby impacts its State funding.

Recommendations:

1. Address the use of the word/term “operation” throughout SECT83C. Alternative wording along the lines of “advances educative purposes of the school” and/or “is consistent and aligned with its educative values” should at least be included in the definition section (5). The preference is for the changing of the actual word itself.
2. To ensure SECT83C does what it seeks and should do – advances the educative purposes of non-government schools, consistent with the alignment of their values.
3. Reassess audits to ensure they are time restricted (say, 6 months) as they are costly for a school legally and operationally.
4. Encourage, not discourage, the ability and freedom of non-government schools to “cross-school” support in management, governance and teaching.
5. Support non-government schools, if they desire, to appropriately recompense Board members to ensure best governance. (Governance requires special skill mixes and it brings its own personal Board member liabilities.)
6. Legislate/regulate in SECT83C(4) that any audit of a Christian non-government school, or advice to the Minister, at least includes peer assessment so the response provided comes from a person (or organisation) who has renowned experience in that educational model. (We are aware that the Minister normally avails himself of similar advice.)
7. Reassess regulator’s oversight, including potential intervention, of all the income and assets of the Christian non-government school. To ensure freedom of religion and education by restricting such “deep” auditing / oversight to the actual level of state funding.

In conclusion it would be fair to say that on the whole, Christian non-government schools perform well in academic excellence, research, teaching skills, salary reviews, benchmarking and wellbeing. Their governance Boards are aware of their responsibilities and are diligent. We anticipate the review of SECT83C will further assist, not unnecessarily restrict this school movement.

The writer can be contacted via email – ross.clifford@nswchs.au, or via phone – 0417 685 201 and would welcome the opportunity to discuss any of the above (or other matters arising) with Mr Alegounarius to ensure the best outcomes for all parties.

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