

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

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We are business academics, with expertise in education, accountability and not-for-profit organisations, and law; and motivated and committed to strengthening the education system.

We believe the review of this section of the act, and indeed all education legislative and policy reviews, should be driven by commitment to educational 'equity and excellence', the foremost educational goal laid out in the Mparntwe declaration. To meet this goal schools need to be funded on a fair, equitable, needs-based and transparent bases. We provide suggestions to help address the terms of reference:

- clarity to non-government schools that receive financial assistance from the NSW Government on the obligation to not operate for profit
- any process improvements
- strong oversight of government funding.

1. Wording and clarity

The Act, and guidelines, need to be **revised and written in plain English**. For an exemplar see [NSW Industrial Relations act 1996](#).

The Act

There is a lot of scope to **clarify and strengthen the wording of 83C and associated sections within Part 7 Division 3 of the Act**. Current ambiguities in the wording hinder both the Minister's ability to effectively regulate financial assistance and non-government schools' ability to comply with the legislation.

Our suggestions:

- a. The terms **reasonable (2bi) and unreasonable (2biii) need clarification** this could be achieved using a **public value framework**. See figure 1 below and point 2.
- b. Clause 2aiiic reference to **"payment" should be amended to include "benefit"** to governing body members, and extended to also cover school staff. This consideration may also require proper reference to conflict of interest and anti-corruption frameworks related to "school operations" or "public value" considerations.

- c. The “particular use of **assets or income....or any other matter**” **needs clarification**, and again should be primarily informed by the concept of ‘public value’ in relation to school operations.
- d. Section 83B (2) “*The **amount may exceed any amount that the State is so obliged to contribute in respect of non-government school children***” **needs to be clarified** as to when, and to what degree, amounts can exceed; and under what circumstances.
- e. Section 83B (3b) “*The Minister may increase the amount of that financial assistance from time to time to take account of the costs of schooling*” allows the Minister to provide **ad-hoc adjustments to funding**. Utilisation of this provision would suggest that the current funding model arrangements have failed in some respect. The wording is vague and would benefit from clarification of the types of costs, time frames, frequency of ad-hoc funding using this provision. This clause should also require the minister to document the special circumstances which necessitate such arrangements. Alternatively, this clause could be removed.
- f. Section 83K (1) “*There is to be a Non-Government Schools **Not-for-profit Advisory Committee** comprised of the following members appointed by the Minister*” For full transparency and effective scrutiny, we suggest **amendments to the membership of this committee**, and inclusion of Government School representatives (parents, school leaders) and an expert on tests of public value.
- g. Beyond 83C the distinction between **non-compliant school (83F) and for-profit school (83D) seems unhelpful and could be reconsidered**. Ministerial discretion is available in relation to both of these, but ultimately schools should be either ‘not for profit’ and funded, or ‘for profit’ and not publicly funded. Compliance is needed to determine NFP status.

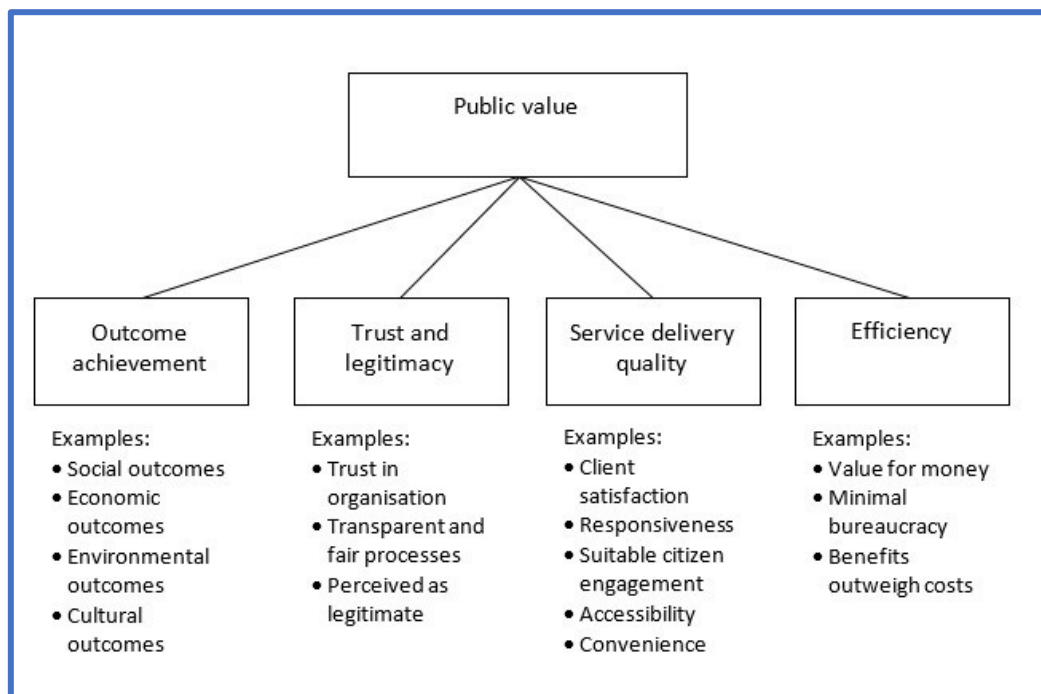


Figure 1: Key dimensions of public value, as summarised by Faulkner and Kaufman (2017)

School guidelines

Non-government **schools require clearer guidelines and instructions** within the legislation to ensure understanding of, and compliance with, their obligations.

For example, Section 4.17 Salaries of DRAFT Not-for-Profit Guidelines for Non-Government Schools states

“In order for a school not to operate for profit, the payment of each and every salary or remuneration package must be required for the operation of the school, be at no more than reasonable market value, and not be in any other way unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school”

Reasonable market value above is then referred to Section 3.2 “reasonable market value’ which applies to goods and services in the form of property. As per Section 3.2, “*reasonable market value means the price that a knowledgeable and willing third party would pay for property, goods or services in an arm’s length transaction from the seller*”. This guideline is vague given that salaries and remuneration is paid for human capital and the test for reasonableness for the profit and not-for-profit sectors may be different. For example, there is mounting evidence of principals in non-government schools earning in excess of \$700,000. Note that this salary exceeds that of Australia’s current prime minister of \$587,000 (PEA, 2023).

Our suggestion(s):

- a. Adopt a process similar to that employed by the Commonwealth Remuneration Tribunal which determines the salary ranges of members of parliament and parliamentary office holders could be employed. We recommend the establishment of a small, **independent statutory body** (or the allocation of this task to an existing statutory body) enabling the **oversight of remuneration of staff in non-government schools**.
- b. An alternative approach is establishing an **enforceable salary cap** for senior employees of non-government schools. It is important to ensure that the cap covers any expanded monetary and non-monetary benefits as well as account for size of non-government schools.

Another example relates to Section 4.18 Consultancy and Professional Services of DRAFT Not-for-Profit Guidelines for Non-Government Schools, which states that “Schools may engage consultants and other professionals from time to time to provide specialist advice and/or services for school projects or operations. Engagements must be required for the operation of the school, be at no more than reasonable market value, and not be unreasonable having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister”. While reasonable market value is more relevant here than in relation to salaries, market value is not equal to public value. We suggest:

- c. given that non-government schools receive financial assistance for the operation of schools, any **procurement of consultancy and professional services by external parties must pass the public value test approach** (see Moore, 1995;2013 and Faulkner and Kaufman, 2017).

2. Process improvements

We believe application of a **public value test approach** would provide a clearer assessment for evaluation of appropriate “school operations” and strengthen the act and guidelines. We suggest:

- a. Provide a public value toolkit that non-government schools can refer to before procuring such services. An example of a Public Value Tool Kit can be found and

adapted, e.g. <https://www.cityleadership.harvard.edu/resources/collection/public-value-tool-kit/>

- b. An alternative that could also be considered is utilising the current Australian Government Department of Finance's Value for Money Framework of Procuring Services: <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money>
- c. The outcomes and risk-based regulatory framework, as outlined in the draft guidelines, should be carefully evaluated to **ensure alignment** with the objectives of s.83C and to mitigate any potential risks associated with the regulation of financial assistance to non-government schools.

3. Strong oversight of funding

It goes almost without saying, that the Act and Guidelines are in desperate need of revision and clarification. A series of media and research exposés suggest that current arrangements are inadequate and have resulted in expenditure of school funding that cannot meet a public value test. **Strong oversight of NSW school funding would require review beyond the terms of reference is this current review.**

We conclude that the system would be strengthened by:

- **rebuilding of the Act and Guidelines around a “public value” framework**, with required ‘testing’ of public value
- **plain English** legislation and guidelines
- **revamp of the definition of not-for profit schools**, to include ‘public value’ considerations
- requirements for **public documentation in cases where discretionary/ad-hoc funding is given**
- **new salary and contracting regulation**
- careful **alignment between the Act and guidelines**
- consideration of further actions to **ensure public transparency** on school funding.