

# Submission from AISNSW and AHISA (NSW/ACT)



24 November 2023

Non-Government Schools  
Not-for-Profit Regulatory  
Framework development and  
Not-for-Profit Guidelines review



Gumbaynggirr  
Giingana Freedom  
School



Biala Special School



Inaburra School



Georges River  
Grammar School



Oran Park Anglican  
College



Sydney Japanese  
International School



Calrossy Anglican  
School



Clarence Valley  
Anglican School

## **Submission from the Association of Independent Schools of New South Wales (AISNSW) and NSW/ACT Branch of the Association of Heads of Independent Schools of Australia (AHISA NSW/ACT)**

This submission has been prepared by the Association of Independent Schools of NSW (AISNSW) and NSW/ACT Branch of the Association of Heads of Independent Schools of Australia (AHISA NSW/ACT) and reflects the views of a diverse range of independent member schools from both organisations.

AISNSW and AHISA NSW/ACT sought the views of AISNSW Member Schools, AISNSW Independent Schools Consultative Committee and AHISA NSW/ACT members, all of which include principals from a diverse range of Independent schools and consolidated the key themes from their feedback for consideration through this review.

The Independent school sector supports ongoing and comprehensive engagement with NSW school regulators to enable effective, transparent and proportionate regulation of non-government schools.

We would be pleased to elaborate on any aspects of this submission as required.

Yours sincerely,

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Chief Executive, AISNSW

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## Contents

|  |    |
|--|----|
| Contents.....  | 3  |
| Introduction.....  | 4  |
| Executive Summary .....  | 6  |
| Feedback - Not-for-Profit Guidelines.....                                  | 10 |
| Part 1. Purpose of the guidelines.....                                     | 10 |
| Relevant records .....   | 12 |
| Part 3. Key concepts and context.....                                      | 13 |
| Not For Profit Concept.....  | 13 |
| The operation of the school (section 3.1).....                             | 16 |
| Reasonable Market Value (section 3.2).....                                 | 20 |
| ‘in any other way unreasonable in the circumstances...’ (section 3.3)..... | 23 |
| Ethos, purpose and mission (section 3.4).....                              | 24 |
| Part 4. Common Transactions and Areas of Operation.....                    | 26 |
| Property (section 4.1).....  | 26 |
| Acquisition of land for a future purpose (section 4.2) .....               | 26 |
| Leasing of School-Owned Property and Assets (section 4.5) .....            | 28 |
| Disposal of Assets (section 4.6).....                                      | 29 |
| Shared or Joint Use of Assets (section 4.10).....                          | 30 |
| Preschool, Early Learning and Out of School Hours Care (section 4.11)..... | 32 |
| Investment of School Income (section 4.13).....                            | 33 |
| School fundraising activities for external causes (section 4.15).....      | 34 |
| Salaries (section 4.17) .....  | 35 |
| Shared services (section 4.19).....  | 37 |
| School Related Travel (section 4.21) .....                                 | 38 |
| Compensation, settlements and other one-off payments (section 4.22) .....  | 39 |
| Feedback - Regulatory Framework .....                                      | 41 |
| Part 1. Introduction.....  | 41 |
| Part 5. Regulatory Approach.....   | 44 |
| Part 6. Engagement and Education .....                                     | 45 |
| Part 7. Monitoring compliance.....   | 46 |
| Part 8. Responding to suspected or actual for profit activity .....        | 48 |
| Part 9. Measuring outcomes and assessing impact.....                       | 54 |
| Conclusion .....   | 55 |
| Appendix A.....  | 56 |

# Introduction

The Association of Independent Schools of New South Wales (AISNSW), as the peak body representing the Independent schools' sector in New South Wales, and the NSW/ACT Branch of the Association of Heads of Independent Schools of Australia (AHISA), representing Independent school principals, welcome this opportunity to provide feedback on the Non-Government Schools Not for Profit Regulatory Framework development and Not-for-Profit Guidelines review.


The NSW Independent school sector is vibrant and diverse, providing the community with choice, fostering competition, and improving standards in education. There are more than 500 Independent schools and campuses in NSW, educating over 228,000 students and accounting for 18.4% of NSW school enrolments.

Many Independent schools provide a religious or values-based education. Others promote a particular educational philosophy or educate specific cohorts of students such as those with disabilities or students at risk of disengaging from education. Independent schools include:

- Schools of educational philosophies, such as Montessori and Rudolf Steiner schools.
- Schools constituted under specific Acts of Parliament, such as Grammar schools.
- Boarding schools, and schools that enrol significant numbers of international students
- Schools with religious beliefs, including Islamic, Buddhist, Jewish, and Christian schools, and schools of Christian denominations, such as Anglican, Catholic, Greek Orthodox, Lutheran, Presbyterian, Seventh-day Adventist, and Uniting Church schools.
- Community schools, including those in Aboriginal communities.
- Schools that specialise in meeting the needs of students at risk of disengaging from education or students with disabilities.

Independent schools in NSW are registered with NESAs. Most are established and governed independently on an individual school basis. Some Independent schools with common aims and educational philosophies are governed and administered as systems, like those within the Anglican Schools Corporation and Seventh-day Adventist system.

Since 2012, NSW Independent school enrolments have grown by 47,466 students, accounting for almost half of NSW's student growth in that time. Enrolment growth in the NSW Independent schools' sector has been consistently strong, largely due to the significant increase in the number of low fee Independent schools. In addition to having low fees, many Independent schools are small, with almost half (47%) educating fewer than 200 students. Thirty-seven percent of NSW Independent schools are located outside metropolitan Sydney.



Almost three quarters (70%) of NSW Independent schools serve students from low to medium socio- economic school communities.

Many parents who choose an Independent school expect the school to operate differently to government schools and to provide different services and educational offerings. Independent schools provide important choice for parents who have the right to decide on the best education options for their children.

# Executive Summary

## Non-Government Schools Not for Profit Regulatory Framework development and Not-for-Profit Guidelines review

We acknowledge the work undertaken by the NSW Department of Education's Non Government Schools Unit in this review process, as they seek to improve clarity for schools to understand and comply with Section 83C of the *Education Act 1990* (NSW). While the exposure draft of the Not-for-Profit Guidelines for Non Government Schools (the Guidelines) include some positive amendments and the Non-Government Schools Not for Profit Regulatory Framework (Regulatory Framework), has the potential to be helpful documents, AISNSW, AHISA and NSW Independent schools still hold concerns that the changes do not go far enough to address the confusion about the application of the legislation.

At the same time, we are troubled by the timing of the release and consultation regarding the Guidelines and Regulatory Framework. In October 2022, the Independent schools sector commended the then NSW Minister for Education and the Non-Government Schools Not-for-profit Advisory Committee for undertaking the development of a Regulatory Framework and review of the Guidelines. However, the significant delay in the release of exposure drafts of these documents has now pushed them into the path of the long overdue [Review of Section 83C of the Education Act 1990 \(NSW\)](#) (Section 83C Review), which has just commenced under the current NSW Minister for Education.

Outcomes of the Section 83C Review are likely to significantly impact the content of the Guidelines and Regulatory Framework documents, requiring further changes in a relatively short period of time. If the purpose of the Guidelines and the proposed Regulatory Framework is to aid understanding of Section 83C, the best way to do this would be to wait for the outcome of the Section 83C Review to inform the Guidelines and Regulatory Framework

Any attempt to provide advice through the Guidelines or Regulatory Framework, could only be seen as interim, pending the outcomes of the [Review of Section 83C of the Education Act 1990 \(NSW\)](#).

We continue to strongly support regulatory oversight of government funding expenditure by non-government schools. However, as the vast majority of schools conscientiously seek to comply with the legal obligations to which they are subject, applying punitive action should not be the routine aim of regulatory enforcement. Where a misunderstanding has occurred for schools able and willing to comply, the focus should be on education and action to remediate and deter inadvertent non-compliance. Regulation of Section 83C of the *Education Act 1990* (NSW) should only seek to penalise those who are unwilling or otherwise unable to comply. This would encompass deliberate attempts to profit from government funding and/or careless/irresponsible actions that result in non-compliance.

We also strongly contend that there is a need to move responsibility for regulating Section 83C to an independent regulator, to overcome the inherent conflict of interest in having the operator of government schools decide what is fair and acceptable expenditure by non-government schools. Transferring responsibility to an independent regulator would send an important message to the public and to regulated entities (non-government schools) about this Government's commitment to transparent and objective regulation and oversight of Financial Assistance to Non-Government Schools.

We do not believe the exposure drafts address overriding questions about materiality and reasonableness in a useful way. It is not helpful to say these factors are contextual and will be considered based on the facts of each matter. If schools are expected to operate within the bounds of legislation, and regulators are expected to police those bounds, issues of materiality and reasonableness need to be made clear to all parties, and not left vulnerable to subjective interpretation by individuals.

While improving clarity on particular matters in the Guidelines is necessary, there are also aspects of the existing legislation that need correcting to remove unreasonable restrictions on the current ability of Independent schools to meet the expectations of their school communities, and to reduce the disproportionate regulatory burden imposed on schools through the current application of Section 83C. Key issues raised by Independent schools include the length, scope and cost of the regulatory processes, which are not yet adequately addressed in the draft Regulatory Framework.

While the proposed Regulatory Framework recognises that schools should be afforded natural justice and procedural fairness in the regulatory process, the fair and reasonable exercise of power should be inherent in the Framework. The Department's regulatory approach should be guided by the intent articulated at the time the legislation was introduced, as well as best practice responsive regulation principles. It has become evident that in order to be guided by the original intent of the legislation, the legislation first needs to be amended to provide clarity about the purpose of Section 83C, and scope for non-government schools to operate in accordance with their mission, purpose and educational philosophy to meet the expectations of their school communities. Once this has been realised, producing a more useful Regulatory Framework document should be achievable.

We have provided feedback and recommendations for consideration in this review. Most relate directly to the Guidelines and Regulatory Framework. Some are out of scope but go to the impact necessary changes in legislation will have on the Guidelines and Regulatory Framework. We have included these additional recommendations and the background context in the interests of transparency. We hope to work with the Department to achieve the best outcome through this review and the concurrent and inextricably linked [Review of Section 83C of the Education Act 1990 \(NSW\)](#).

## Recommendations

|                           |   |
|---------------------------|---|
| <b>Recommendation 1:</b>  | Delay release of revised Guidelines and Regulatory Framework until the legislative review is completed  |
| <b>Recommendation 2:</b>  | Revise wording to Guidelines – Required records   |
| <b>Recommendation 3:</b>  | Legislative amendment (out of scope of this review) to introduce Objects of Division 6 of the <i>Education Act</i> 1990 (NSW)                     |
| <b>Recommendation 4:</b>  | Legislative amendment (out of scope of this review) - Remove “operates for profit”  |
| <b>Recommendation 5:</b>  | Legislative amendment (out of scope of this review) - Section 83C(2)(b)(ii)   |
| <b>Recommendation 6:</b>  | Legislative amendment (out of scope of this review) - Section 83C(5)  |
| <b>Recommendation 7:</b>  | Regulatory amendment (out of scope of this review) - Further exceptions akin to r10 and r10A  |
| <b>Recommendation 8:</b>  | Revise wording to Guidelines to support regulatory amendments (Recommendation 7)  |
| <b>Recommendation 9:</b>  | Revise wording in Guidelines to support legislative amendment (Recommendation 5)  |
| <b>Recommendation 10:</b> | Revise wording in Guidelines to support legislative amendment (Recommendation 6)  |
| <b>Recommendation 11:</b> | Revise wording in Guidelines - Purchase of property above independent market valuation  |
| <b>Recommendation 12:</b> | Revise wording in Guidelines - Paying more than market value for goods or services  |
| <b>Recommendation 13:</b> | Revise wording in Guidelines - Published deidentified decision summaries  |
| <b>Recommendation 14:</b> | Revise wording in Guidelines - Mission, purpose and ethos/educational philosophy  |
| <b>Recommendation 15:</b> | Revise wording in Guidelines - Acquisition of land for a future purpose   |
| <b>Recommendation 16:</b> | Revise wording in Guidelines - Leasing of School-Owned Property and Assets  |
| <b>Recommendation 17:</b> | Revise wording in Guidelines - Disposal of Assets   |
| <b>Recommendation 18:</b> | Revise wording in Guidelines - Shared or joint use of Assets  |
| <b>Recommendation 19:</b> | Revise wording in Guidelines - Investment of School Income  |
| <b>Recommendation 20:</b> | Legislative or Regulatory amendment (out of scope of this review) - exclusion of fundraising for external causes from the scope of Section 83C    |
| <b>Recommendation 21:</b> | Legislative or Regulatory amendment (out of scope of this review) - exclude market value of salaries from the scope of Section 83C investigations |
| <b>Recommendation 22:</b> | Revise wording in Guidelines – removal of section 4.17  |
| <b>Recommendation 23:</b> | Revise wording in Guidelines - Shared services  |
| <b>Recommendation 24:</b> | Revise wording in Guidelines - School Related Travel, to reference sections 3.1 and 3.3   |
| <b>Recommendation 25:</b> | Revise wording in Guidelines - School Related Travel, to align with legislative amendment (recommendation 5)                                      |



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|----------------------------------|--|
| <b><u>Recommendation 26:</u></b> | Revise wording in Guidelines to include “threatened litigation”  |
| <b><u>Recommendation 27:</u></b> | Revise wording in Guidelines – one off payments to school employees  |
| <b><u>Recommendation 28:</u></b> | Revise wording in Guidelines - Compensation, settlements and other one-off payments, to align with recommendation 5  |
| <b><u>Recommendation 29:</u></b> | Appointment of an independent regulator that understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality (out of scope of this review) |
| <b><u>Recommendation 30:</u></b> | Revise wording in the Regulatory Framework to include additional “engagement and education initiative” re ‘unreasonable in the circumstances’.   |
| <b><u>Recommendation 31:</u></b> | Revise wording in the Regulatory Framework to include or reference the location of the Risk Framework used by the regulator for monitoring and compliance  |
| <b><u>Recommendation 32:</u></b> | Revise wording in the Regulatory Framework – Monitoring compliance, to include case studies  |
| <b><u>Recommendation 33:</u></b> | Revise wording in the Regulatory Framework to include or reference the location of the Risk Framework used by the regulator for audit identification   |
| <b><u>Recommendation 34:</u></b> | Revise wording in the Regulatory Framework - Audit of Financial Affairs Program, to include case studies that illustrate how the ‘risk based’ approach works in practice                         |
| <b><u>Recommendation 35:</u></b> | Revise wording in the Regulatory Framework to reference the Minister’s powers to give directions in writing to a school or to the proprietor of a school under s83I(1).                          |
| <b><u>Recommendation 36:</u></b> | Revise wording in the Regulatory Framework of “Description” against “Preliminary enquiries” to address ‘materiality’   |
| <b><u>Recommendation 37:</u></b> | Legislative or Regulatory amendment (out of scope of this review) – limiting the application of s83I(3)  |
| <b><u>Recommendation 38:</u></b> | Revise wording in the Regulatory Framework under “Triage and assessment”   |
| <b><u>Recommendation 39:</u></b> | Legislative or Regulatory amendment (out of scope of this review) - include detail of investigation processes in the Act or in the Regulations   |
| <b><u>Recommendation 40:</u></b> | Amend Regulatory Framework to align with legislative/regulatory amendments relating to the inclusion of detail of investigation processes (recommendation 39)                                    |
| <b><u>Recommendation 41:</u></b> | Revise wording in the Regulatory Framework under “Investigations”  |
| <b><u>Recommendation 42:</u></b> | Legislative or Regulatory amendment (out of scope of this review) – include detail of post investigation processes in the Act or in the Regulations  |
| <b><u>Recommendation 43:</u></b> | Amend Regulatory Framework on to align with legislative/regulatory amendments relating to the inclusion of detail if post investigation processes (recommendation 42)                            |
| <b><u>Recommendation 44:</u></b> | Legislative amendment (out of scope of this review) - allowing greater discretion to the Minister to recover funding of other (including lesser) amounts than the Act currently permits          |
| <b><u>Recommendation 45:</u></b> | Revise wording in the Regulatory Framework to specify actual performance measures and “Key performance indicators”   |

# Feedback - Not-for-Profit Guidelines

## Part 1. Purpose of the guidelines

*“The purpose of these Guidelines is to aid understanding of section 83C of the Act, and to outline factors which the Minister considers relevant and which the Minister is likely to take into account in deciding whether a school operates for profit.”*

(Non-Government Schools Not-for-Profit Guidelines - [October 2023], p.4)

Guidance documents that provide clarity for those seeking to comply with legislation can be useful. However, they are most useful when the legislation itself is clear. The Australian rule of law<sup>1</sup> promotes the view that legislation should be easy to understand, so everyone (governments and citizens) can follow the law. While the principle of the rule of law is not enshrined in the New South Wales Constitution or other legislation, it is often referred to as being fundamental to this State’s system of government. Making legislation as clear as possible:

- helps parties comply with their legal obligations and know their rights,
- helps regulators make fair and consistent judgments about what practice is and is not lawful, and
- protects those required to comply with the law from potentially unlawful judgements caused by lack of clarity in legislation and inconsistent statutory interpretation.

By seeking to use the Guidelines to provide clarity about the application of the legislation, the Department’s interpretation of the legislation has strayed from the legislation’s original intent and purpose. We believe that in the past the regulator has ignored or discounted the legislative intent which has been contained in extrinsic materials such as the Second Reading Speech.

Sections 33 and 34 of the *Interpretation Act 1987* (NSW) sets out that:

- the interpretation of a provision of an Act *“that would promote the purpose or object underlying the Act...(whether or not that purpose or object is expressly stated in the Act...) shall be preferred to a construction that would not promote that purpose or object (s33), and*
- the extrinsic material that may be considered in the interpretation of a provision of an Act can include *“any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made”(s34(e)), and “the speech made to a*

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<sup>1</sup> The Rule of Law establishes the principle that arbitrary exercise of power should be restrained by subordinating it to well defined and established law.

*House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House”(s34(f)) (ie the second reading speech).*

We agree that useful guidelines can help educate schools about how to comply with Section 83C of the *Education Act 1990 (NSW)*, but contend that this would be best accomplished by first seeking to achieve as much clarity as possible through changes to the legislation itself (including the *Education Regulations 2017 (NSW)*). This means ensuring that the legislation reflects the original intent and purpose for which it was introduced. Given that a [Review of Section 83C of the Education Act 1990 \(NSW\)](#) has just commenced and will be unlikely to be concluded until mid 2024, we are of the opinion that releasing revised versions of the Guidelines and a new Regulatory Framework document at this stage is premature, and potentially counterproductive.

The outcomes of the Section 83C Review are likely to significantly impact the content of the Guidelines and Regulatory Framework documents, requiring further changes in a relatively short period of time. Change creates work for those expected to comply, increasing regulatory and administrative burden. Frequent change exacerbates this increased burden and further, creates confusion about currency of requirements. If the purpose of the Guidelines and proposed Regulatory Framework is to aid understanding of Section 83C, the best way to do this would be to wait for the outcome of the Section 83C review to then inform any changes to the documents that will result from improvements to the legislation.

Any attempt to provide advice through the Guidelines or Regulatory Framework, could only be seen as interim, pending the outcomes of the [Review of Section 83C of the Education Act 1990 \(NSW\)](#).

Also see recommendation 3 for [Part 3. Key concepts and context \(Not for profit concept\): Legislative amendment to introduce Objects of Division 6 of the Education Act 1990 \(NSW\)](#).

**Recommendation 1:** Delay release of revised Guidelines and Regulatory Framework until the legislative review is completed.

That consultation on these draft documents (Non-Government Schools Not-for-Profit Guidelines and Regulatory Framework) be extended and aligned to match the timing of the [Review of Section 83C of the Education Act 1990 \(NSW\)](#), so they can be updated in 2024 based on the Review’s outcomes and released at a complimentary time to support understanding of any changes to the legislation.

## Relevant records

*“Where these Guidelines list relevant records, the purpose of listing these records is not to impose additional requirements on schools. Rather, the purpose is to provide schools with guidance as to the types of records that may assist them to demonstrate to the Minister that they have not operated for profit, if that is ever called into question”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.4)

Schools currently generate and maintain a wide variety of records for a range of purposes. The draft Guidelines outline several lists of records schools might keep to demonstrate compliance. While the Guidelines state this focus on record keeping is ‘not intended’ to impose additional requirements, having to create and retain additional records in case a school’s compliance is ever questioned at some time in the future, does impose an additional administrative and regulatory burden. The likely consequence is a significant increase in time cost to process, produce and store records.

The inference in the current draft Guidelines is that schools choosing not to create and retain all of the suggested records may be found non-compliant based on the absence of these documents. The message schools take from this is that they must be prepared with significant additional paperwork to defend everyday spending decisions that may never be called into question. If the intention is to not impose additional requirements on schools, then this area needs further development including specifying a financial threshold under which records are not required.

### **Recommendation 2:** Revise wording to Guidelines – Required records

That the Guidelines:

- state clearly what records are required and those which are optional, with required records kept to a minimum so as not to impose unreasonable burden on schools.
- provide specific guidance about retention timeframes for each required record.
- provide a clear statement indicating where schools have not elected to create or retain the optional records they will not be penalised with adverse decisions because of the absence of these records.
- specify a financial threshold under which records are not required.

## Part 3. Key concepts and context

### Not For Profit Concept

*“Section 83C of the Act Financial assistance not to be provided to schools that operate for profit*

- 1) *The Minister must not provide financial assistance (whether under this Division or otherwise) to or for the benefit of a school that operates for profit.*
- 2) *A school operates for profit (without limiting the circumstances in which it does so)*
- 3) *if the Minister is satisfied that...”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], pp.5-6)

### Use of “for profit” and “not for profit” in the *Education Act 1990 (NSW)* is inconsistent with Commonwealth Not For Profit legislation

The not-for-profit concept is taken from the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (the ACNC Act), which provides for registration of not-for-profit entities.

The ACNC Act sets out the various actions which the ACNC Commissioner can take if they find, among other things, that an entity has contravened the provisions of the Act or not complied with a relevant governance or conduct standard. This includes giving warnings and directions or, in the worst case, revoking registration.

The Objects of the ACNC Act are set out at section 15-5 (1) and are:

- a) *to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and*
- b) *to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and*
- c) *to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.*

Although the concept of not-for-profit in Section 83C clearly comes from the ACNC Act, it is used in a totally different way in the *Education Act 1990 (NSW)*. The sole object of Section 83C is to govern how a school may spend its funds, whether those funds come from the NSW Government or not.

We note Justice Rothman’s comments<sup>2</sup> that the Principal Objects of the *Education Act 1990 (NSW)* contain no reference to issues associated with the funding of non-government schools. This makes interpretation of the legislation more difficult because it requires consideration of extrinsic material to confirm or determine whether the meaning of certain provisions are consistent with (promote) the purpose or object underlying the Act. To remedy this omission,

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<sup>2</sup> Malek Fahd Islamic School Limited v Minister for Education and Early Childhood Learning [2022] NSWSC 1176.

and aid in interpretation, we are of the view that it would be appropriate to include Objects of Division 3 in the *Education Act 1990* (NSW), which relates to funding of non-government schools. As the not-for-profit concept comes from the ACNC we propose an adaption of the objects in the ACNC Act. Appropriate inclusions would reference public trust, supporting robust independent non-government schools' sectors and promoting the reduction of unnecessary regulatory obligations as well as ensuring government funds are only used to for school operations aligned to the mission, ethos and genuine purpose of the school, for the benefit of students and to meet the expectations of the school community.

While legislative amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 3:** Legislative amendment (out of scope of this review) to introduce Objects of Division 6 of the *Education Act 1990* (NSW)

That a new section (Section 83C1) be added to the *Education Act 1990* (NSW) as suggested below, specifying the Objects of the Division;

***83C1 Objects of this Division***

*(1) The objects of this Division are:*

*(a) to maintain, protect and enhance public trust and confidence in the non-government school sector, by ensuring that government funds are only used to promote and support the ethos, mission and purpose of the school, for the benefit of students and to meet the expectations of the school community, and*

*(b) to support and sustain robust, vibrant, independent and innovative non-government schools whose autonomy is respected and whose educational programs are diverse and provide genuine choice for parents, and*

*(c) to provide a framework under which a proportionate administrative response is available when there are breaches or alleged breaches of a non-government school's obligations under this Division.*

**Problematic use of “for profit” in the context of Section 83C**

The ACNC Act does not provide that a not-for-profit charity which breaches the requirements of the Act is to be declared to be operating for profit. Under Commonwealth law a school which fails to meet the requirements set out in Section 83C will still be considered a not-for-profit entity by public standards provided it has the purpose of “advancement of education” or other charitable purpose.

The concept of declaring an entity to be “for profit” under Section 83C of the *Education Act 1990* (NSW) purely because it has used funds in an unsanctioned manner is at odds with the ACNC Act. This is confusing and misleading for those parents, students and the general public

who are not aware of the legislative environment in which such declaration is made. There is an axiomatic understanding by the general public of what it means to be 'operating for profit' that is considerably at odds with the way the term is used in Section 83C. One of the purposes of Section 83C is to strengthen public confidence that government funds are being used responsibly by non-government schools. The Independent schools' sector supports this intention, however, the use of the term 'operating for profit' to describe schools that have breached a condition of funding leads people to the assumption that government money is being used to pay profits or dividends to shareholders, employees or owners. 'Operating for profit' terminology perpetuates inaccurate beliefs and only serves to undermine public confidence about the use of government funds by non-government schools.

While legislative amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 4:** Legislative amendment (out of scope of this review) - remove "operates for profit"

That Section 83C be amended to remove references to a school which "operates for profit" and refer instead to a school "which has breached its conditions of funding" (which could be simply defined for drafting purposes as "Funding Conditions").

## The operation of the school (section 3.1)

*“Under section 83C(2)(a) of the Act, a school will operate for profit if ‘any part of the 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’. Under section 83C(2)(b)(ii) of the Act, a school will operate for profit if it makes payments ‘for property, goods or services that are not required for the operation of the school’*

*The expression ‘operation of the school’ is necessarily broad, recognising that each school is unique in its context and operations.*

*Whether a use of assets or income is for the purpose of ‘the operation of the school’ or ‘required for the operation of the school’ will be a matter of fact and degree, depending on all the circumstances of a particular case and the evidence before the Minister when considering that question.”*

**(Non-Government Schools Not-for-Profit Guidelines - [October 2023], p.6)**

Since the introduction of Section 83C in 2014, audits and investigations by the NSW Department of Education have expanded well beyond the legislation’s original intended objective and scope. Introducing the Bill into Parliament, the then Minister said in his second reading speech that Section 83C would not be a licence for unnecessary interference into a non-government school’s operations and that if the requirements of the new Act were met, decisions on employment and other spending belonged solely to the school. He also said that Section 83C would not restrict the capacity of non-government schools to meet the needs and expectations of their communities, and to follow their particular mission, ethos and philosophy.

Despite this assurance, the audits and investigations undertaken by the NSW Department of Education under Section 83C, have created an environment where the legitimacy of non-government schools’ spending decisions, including on longstanding practices fundamental to their educational philosophy and the expectations of school communities, are uncertain and the operations of schools negatively and unnecessarily impacted. It is highly problematic that the question of what the Department may consider “required for the operation of the school” remains unclear. This causes great confusion for schools on a daily basis, with AISNSW receiving more than 200 Section 83C enquiries from schools over the last three years (see [Appendix A](#)).

Section 83C was never intended to make non-government schools operate as though they were public schools. It has become evident that in order for schools and regulators to be guided by the original intent of the legislation, the legislation first needs to be amended to clearly reflect that original intent and purpose. For example, we contend that the words “used” and “required” in Section 83C(2) of the legislation creates confusion in interpretation of intent. As such, amending section 83C(2)(b)(ii) from “not required for the operation of the school” to “not used for the operation of the school” will provide greater clarity to all parties.

Parents have a right to choose the school that meets their needs and expectations. Many parents who choose an Independent school expect the school to operate differently to government schools and to provide different services and educational offerings - this is why



many parents elect to supplement public funding by paying fees to non-government schools. Where parents provide income to a school through fees and/or donations, they expect it will be used to provide the services and education they have paid for. This means that whether the use of school income is “for the operation of the school” will depend on the school context, its educational philosophy, purpose and the expectations of the school community. The autonomy of non-government schools must be respected so they are able to determine appropriateness for themselves based on their contextual factors including consideration of what is necessary for promulgating the school’s ethos/educational philosophy, mission and purpose and meeting the needs and expectations of the school community.

Since its introduction, many of the Independent schools that have undergone a Section 83C investigation by the NSW Department of Education have described their experience as disproportionate to the amount of funding provided by the NSW Government. In many cases, state government funding makes up less than 10% of a school’s annual income (in some as little as 2%). Many Section 83C investigations have also extended well over two years - at considerable cost to schools as well as taxpayers, who fund the private sector auditors undertaking the work on behalf of the Department. The current legislation enables the NSW Department of Education to scrutinise spending of income that does not come from the government. We contend that so long as a school can demonstrate that it has expended its government funds on expenses required for the operation of the school, decisions on spending of income from other sources belong solely to the school. Schools are accountable to parents and benefactors for how their private income is spent and this provides sufficient oversight.

Other NFP entities in receipt of government funding (including preschools, childcare centres, aged care providers, disability support and foster care organisations) are not accountable to the government for their expenditure of private income like non-government schools are under Section 83C. NFP organisations play an essential role in the planning, management and delivery of services in NSW, including non-government schooling which provides parents with genuine educational choice.

The Education Regulation 2017 (NSW) already provides exceptions specifying that a school does not operate for profit because of specific types of payments or funding contributions (r10 and r10A). To provide further clarity for regulated entities and for the regulator in complying with and applying the legislation, additional exceptions should be expressly specified through regulatory amendments. These further exceptions should cover:

- **Operation of early learning, preschool, prep/K minus 1, Outside School Hours Care (OSHC) or playgroup**

The Australian Government Department of Education already publishes clear advice that recurrent government funding provided to schools cannot be used to operate early education and care services. It is therefore helpful to make it clear that this expectation aligns with expenditure requirements for NSW recurrent government funding.

- **Funding contributions to student alumni associations and support for student alumni events** (such as providing use of meeting/gathering spaces on school premises so far as the work conducted by the association supports the operation of the school)

Student alumni associations (as well as being a quintessential part of a school community because of the school's mission, purpose and/or educational philosophy), contribute to a school's ongoing viability by maintaining or increasing future student enrolments. These associations also nurture strong intergenerational connections that provide current students with access to mentors, career guidance and support to transition to post school destinations, as well as a resource for private financial support for student bursaries and funding of initiatives that support student education such as library resource regeneration.

- Any other appropriate exception as specified by regulation.

These regulations should then be supported by the Guidelines to explain that the use of school income and assets for certain purposes excepted through specific regulations (like r10A) is acceptable provided the school can demonstrate (if required) that no recurrent government funds were used for the funding contributions.

While legislative and regulatory amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 5:** Legislative amendment (out of scope of this review) - Section 83C(2)(b)(ii).

That Section 83C(2)(b)(ii) be amended to replace the word "required" with "used", reading as *"for property, goods or services that are not used for the operation of the school"*.

**Recommendation 6:** Legislative amendment (out of scope of this review) - Section 83C(5).

That Section 83C(5) be amended to include a definition of **"for the operation of the school"**, specifying that what is for the operation of the school will be considered in the context of the ethos, mission, educational philosophy and purpose of the school and encompass:

- delivery of school educational and related programs,
- ancillary activities which are reasonably expected by the school community and
- administration of the school.

**Recommendation 7:** Regulatory amendment (out of scope of this review) - further exceptions akin to r10 and r10A.

That the following additional exceptions be specified through regulatory amendment "that a school is not taken to operate for profit because of a funding contribution made:

- as part of the school's operation of a centre-based Early Childhood Services (such as a Long Day Care service, a Preschool or Outside School Hours Care service); or, a class delivered to students in the year before Kindergarten (using a learning framework primarily based on the outcomes of the NESA Early Stage One syllabus); or, a playgroup servicing the school community, if the school demonstrates, to the Minister's satisfaction, that the funding contribution does not comprise any money provided by the Minister as financial assistance in respect of the school.
- to student alumni associations to support student alumni events and work (such as providing use of meeting/gathering spaces on school premises so far as the work conducted by the association supports the operation of the school), if the school demonstrates, to the Minister's satisfaction, that the funding contribution does not comprise any money provided by the Minister as financial assistance in respect of the school.
- and any other appropriate exceptions.

**Recommendation 8:** Revise wording in Guidelines to support regulatory amendments (Recommendation 7).

That the Guidelines refer to the existence of exceptions in the Regulations that the use of school income and assets for certain purposes excepted through specific regulations (like r10A) is acceptable provided the school can demonstrate (if required) that no recurrent government funds were used for the funding contributions.

That for other excepted payments, such as those covered by r10, the Guidelines go beyond the current wording of "Making a reasonable payment to a student in connection with a prize, scholarship or other activity as a student of the school does not constitute operating for profit". The Guidelines should also state plainly that such reasonable payments are for the purpose of school operation.

**Recommendation 9:** Revise wording in Guidelines to support legislative amendment (recommendation 5).

That the term "required for the operation of the school" be replaced with "used for the operation of the school" in the Guidelines.

**Recommendation 10:** Revise wording in Guidelines to support legislative amendment (recommendation 6).

That the expression 'operation of the school' is necessarily broad, and be removed from the Guidelines and replaced with a reference to the definition of 'operation of the school' in the legislation (once legislation is amended to include the definition).

## Reasonable Market Value (section 3.2)

*“Under section 83C(2)(b) of the Act, a school will operate for profit if the Minister is satisfied that a payment is made by the school “for property, good or services at more than reasonable market value.”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.7)**

Independent schools have no appetite for paying more for goods, services and property than is necessary. In addition to Section 83C legislation, the NSW Education Standards Authority (NESA) also impose governance standards on Independent schools as a requirement of their registration to ensure all school resources, including financial assistance from the NSW Government, are provided for the education of students, and not to any other purpose (Sections 3.9.3. & 3.9.4 of the [NESA Registered and Accredited \(Individual\) Non-Government Schools \(NSW\) Manual](#)). These regulations require schools to develop policies, procedures, disclosures and registers in relation to conflicts of interest and related-party transactions.

Despite this, 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.

### Real property and ‘reasonable market value’

*“The Minister recognises that the purchase price of a property at auction may be higher than an independent market valuation for that property provided by an independent qualified valuer”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.7)**

While recognition that schools may need to purchase property at a price higher than that quoted in an independent market valuation is a positive addition to the Guidelines, the wording in the exposure draft suggests that the only way to do this and remain compliant with Section 83C is to purchase a property at auction.

Land adjoining a school can command significantly higher prices than independent market valuation by virtue of the fact that land owners know a neighbouring school has limited options for expansion. Proximity to the school creates a niche supply and demand scenario where the value of the property is relative to its potential use for school growth ie a property may be worth much more to an adjoining or nearby school than any other potential buyer in the neighbourhood, and therefore the cost demanded by the seller will often far exceed independent market valuation.

Non-government schools do not have the power to compulsorily acquire land to expand their schools and limit the value paid to the owners for the purchase, as governments can. Non-government schools are at the mercy of neighbouring property owners and must pay the price demanded if they are to acquire land to expand. In many cases a landowner may only be

interested in selling to the school because they know no other party will pay the high price they are demanding from the school. For this reason, the landowner may not want to go to the expense of holding an auction (or even engaging a Real Estate agent to whom they would have to pay commission) and instead just negotiate a private treaty sale with the school. Where such a transaction takes place at arm's length from the school and any of its proprietors, purchase above standard market value should not constitute non-compliance with Section 83C.

**Recommendation 11:** Revise wording in Guidelines - purchase of property above independent market valuation

That the wording in the Guidelines be revised to make it clear that purchasing property at auction is not the only way a school may legitimately purchase property at above independent market valuation and still be compliant with Section 83C. This revised wording should also align with sections **4.1 Property** and **4.2 Acquisition of land for a future purpose**, where this issue also extends.

## Goods or services' and 'reasonable market value'

*"In the context of determining whether a payment for goods or services is at more than 'reasonable market value', the Minister will take into consideration that "reasonable market value" may be influenced by a range of factors including:*

- *the quality and consistency of provision of the goods or services;*
- *the location of the school;*
- *if the goods or services are required at short notice or must be obtained/completed within a specific timeframe (for example, outside of normal business hours);*
- *if the goods or services are in short supply;*
- *heritage or related issues (in relation to building and related works);*
- *the types of warranties provided (if any);*
- *local government requirements;*
- *installation costs and any ongoing maintenance and parts.*

*Generally, the higher the value of the good or service or the more significant the transaction, the more rigour and documentation/procurement the Minister would wish to see on the part of the school.*

### **Relevant records**

- *A contract between the proprietor/ school and the service provider, clearly setting out the services to be provided;*
- *tender documentation..."*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.8)

We welcome the recognition in the Guidelines, that there are a range of factors that will impact on the perception of reasonable market value, though further clarity to ensure schools are not

expected to engage in tender processes would be useful. We contend that tender processes are not always necessary so long as selection of provider/supplier is an arms length transaction (ie where there is no conflict of interest or third party transaction) and the cost is reasonable in the circumstances. This may not mean using the cheapest option, as other factors may be more important than price, including a supplier's/provider's knowledge and understanding of the school's needs, mission and purpose, the supplier's/provider's mission, and purpose or other relevant contextual factor.

Also see comments and recommendation for [section 4.17 Salaries](#).

**Recommendation 12:** Revise wording in Guidelines - Paying more than market value for goods or services.

That the wording in the Guidelines make it clear that school may legitimately pay more than market value for goods or services and still be compliant with Section 83C. This revised wording should also align with sections **4.1 Property** and **4.2 Acquisition of land for a future purpose**, where this issue also extends.

## ‘in any other way unreasonable in the circumstances...’ (section 3.3)

*“Whether a payment is ‘unreasonable in the circumstances’ will be considered based on the facts of the particular payment. It is not possible to conclusively state what will be ‘in any other way unreasonable in the circumstances’, as this is a matter of fact and degree, depending on all of the circumstances of a particular case and the evidence before the Minister when considering that question.”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.9)**

Despite the attempt made in the Guidelines, this guidance does not provide necessary clarity in a useful way. It is not helpful to say factors are contextual and will be considered based on the facts of each matter. If schools are expected to operate within the bounds of legislation, and regulators are expected to police those bounds, they need to be made clear to all parties, and not be dependent on subjective interpretation by individual public servants, investigators, or schools.

We appreciate that it may be difficult to provide clarity through the legislation or the Guidelines, and therefore recommend the regulator undertake to publish deidentified summaries of each decision/recommendation made by the Minister, Advisory Committee and officers of the Department that deal with the matter of reasonableness and what is ‘unreasonable in the circumstances’. These decisions and recommendation summaries should clearly articulate a rationale for the decision/recommendation, as well as outlining the relevant context and facts relied on by the decision maker or recommending body. This will build a catalogue of guidance that may provide clarity to schools about circumstances where facts establish that a payment is or is not ‘unreasonable’ and help them avoid inadvertent non-compliance. Publishing such decisions and recommendations will also help build trust between regulated entities (schools) and the regulator by demonstrating that decisions and recommendations have a rational factual basis, in light of all the evidence, and that they are transparent and defensible.

Also see recommendation for [Part 5. Engagement and Education \(Engagement and education initiatives\)](#).

**Recommendation 13:** Revise wording in Guidelines – Published deidentified decision summaries and recommendations.

That the Guidelines reference the location of published deidentified summaries of

- i. each decision of the Minister
- ii. each recommendation of the Advisory Committee and
- iii. each Recommendation/advice of officers of the Department to the Minister

that deals with the matter of reasonableness and what is ‘unreasonable in the circumstances’. These decision summaries and recommendations should include the rationale for each decision/recommendation/advice.

## Ethos, purpose and mission (section 3.4)

*“It is recognised that schools are often established with a constitution reflecting a stated ethos, purpose and/or mission. It is not the intention of s. 83C of the Act to prevent schools from following their particular mission or ethos in order to remain eligible for NSW government financial assistance.*

*Schools may follow their stated ethos, purpose or mission, while ensuring that all uses of school assets and income are for the purpose of the operation of the school and that all payments are at no more than reasonable market value (see section 3.2 above) and are not unreasonable in light of the fact that the Minister provides financial assistance to the school.*

*In determining whether a particular use of school assets or income is for the purpose of the operation of the school, the Minister will take into consideration the school’s stated ethos, purpose or mission, as set out in its constitution.*

### **Relevant records**

- *A copy of the school’s constitution setting out its ethos, purpose and/or mission;*
- *Records (including decisions and rationale) demonstrating how the relevant use of assets or income is for the purpose of the operation of the school;*
- *Approved Board minutes and reports to support the relevant use of school assets or income (as required)”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.9)**

All non-government schools have a mission, genuine purpose and/or ethos/educational philosophy which underlies their various practices, and which is integral to the education of students. We appreciate that the importance and relevance of ethos, purpose and mission to the operations of non-government schools are acknowledged in the Guidelines. Note we have also recommended that this be reflected in the legislation (See [Part 3. Key concepts and context \(Not for profit concept\)](#); recommendation 3 - Legislative amendment to introduce Objects of Division 6 of the Education Act 1990 (NSW).

Non-government schools may reflect their mission, purpose and/or ethos/educational philosophy in the school’s constitution or in other statements of purpose and philosophy such as those contained on the school’s website or other materials published to parents, the school community and prospective parents.

The Guidelines should reflect a broader range of sources for justifying a school’s expenditure in accordance with their stated mission, purpose and/or ethos/ educational philosophy. Limiting this scope of sources to the school’s Constitution alone is too narrow.

**Recommendation 14:** Revise wording in Guidelines - Mission, purpose and ethos/educational philosophy.

That the following wording replace the current wording on p.9 of the exposure draft to expand the scope of sources evidencing a school’s ethos, purpose or mission that may be considered by the Minister;



*“It is recognised that schools operate according to a mission, purpose and ethos/educational philosophy which underlies their various practices, and which is integral to the education of students. This may be reflected in the school’s constitution or in other statements of purpose and philosophy such as those contained on the school’s website or other materials published to parents, the school community and prospective parents. It is not the intention of Section 83C of the Act to prevent schools from following their particular mission, purpose, ethos/educational philosophy in order to remain eligible for NSW government financial assistance.*

*Schools may follow their stated mission, purpose, and ethos/educational philosophy, while ensuring that all uses of school assets and income are for the purpose of the operation of the school and that all payments are at no more than reasonable market value (see section 3.2 above) and are not unreasonable in light of the fact that the Minister provides financial assistance to the school.*

*In determining whether a particular use of school assets or income is for the purpose of the operation of the school, the Minister will take into consideration the school’s mission, purpose and/or ethos/educational philosophy as reflected in its constitution or the stated mission, purpose and/or ethos/educational philosophy contained in its published materials or both.*

***Relevant records***

- A copy of the school’s constitution or other materials setting out its mission, purpose and/or ethos/educational philosophy;
- Records (including decisions and rationale) demonstrating how the relevant use of assets or income is for the purpose of the operation of the school;
- Approved Board minutes and reports to support the relevant use of school assets or income (as required).”

## Part 4. Common Transactions and Areas of Operation

### Property (section 4.1)

See comments and recommendation for section 3.2 Reasonable market Value ([Real property and 'reasonable market value'](#)).

### Acquisition of land for a future purpose (section 4.2)

*"A school may wish to acquire land... as it becomes available, however the school may not be in a position to use the land ...until some later date... Generally speaking, a school will not operate for profit merely because the land is not intended to (or cannot) be used for its intended purpose immediately. However...the acquisition of land must still be...acquired at no more than reasonable market value (see section 3.2 of these Guidelines) and that the purchase is for the purpose of the operation of the school.*

*Once land has been acquired, the land may be used or disposed of, and the balance of these Guidelines will apply to that use or disposal (as appropriate).*

#### Relevant records

*In addition to documents which evidence the acquisition and establish that it is at no more than reasonable market value (see section 3.2), documents which record:*

- *the purpose of the acquisition;*
- *any initial masterplans or concept plans;*
- *expected timeframes and plans for any subsequent developments or acquisitions which may be required; and*
- *details of any rental agreements over the acquired land.*

(Non-Government Schools Not-for-Profit Guidelines - [October 2023], p.10)

We note the explicit recognition (for the first time) in the Guidelines that a school sometimes needs to buy and bank land before it is ready to use for a future purpose. This is a positive inclusion in the draft. However, the explicit statement that the land must be acquired at no more than reasonable market value creates some confusion when section 3.2 acknowledges that schools may purchase land at above market value.

Our comments and recommendation for section 3.2 Reasonable Market Value ([Real property and 'reasonable market value'](#)) highlight our concerns with the guidance about the circumstances when above market value purchases are considered reasonable. Where such transactions take place at arms length from the school and any of its proprietors, purchases of land at above standard market value should not constitute non-compliance with Section 83C.

The purchase of land before it is ready for use or development by the school may not always require a master plan, particularly for very small schools or where land becomes available for purchase unexpectedly and the school has only limited time to make the deal. We agree that

land banking purchases should be supported by records that clearly document the purpose of the acquisition, expected timeframes and plans for any subsequent developments or acquisitions which may be required; details of any rental agreements over the acquired land, as well as a documented plan for disposal of the land if it cannot ultimately be used for the operation of the school eg where development and use is contingent of DA approval that may ultimately not be granted.

Further clarity is needed about the statement “Once land has been acquired, the land may be used”. Where a school has purchased property that is not ready to be developed or used for the operation of the school, the school should be permitted to “use” the property to generate income for the school in the meantime. For example, by leasing out residential property or business premises while waiting for rezoning and or DA approval. As such, it would be useful to reference [section 4.5 Leasing of School-Owned Property and Assets](#).

Similarly, where land is purchased with an existing structure/s (such as a residence or business), the property and any existing structures become school assets, which the school then has a responsibility to maintain and not allow to fall into disrepair (and lose value). If the land and structure/s cannot or won't be redeveloped for the operation of the school for a period of time, the school should be able to use its income to pay for property maintenance and improvements and this should be made clear in the Guidelines.

**Recommendation 15:** Revise wording in Guidelines - Acquisition of land for a future purpose.

That the Guidelines are revised as follows:

- removing the sentence; “This includes that the land is acquired at no more than reasonable market value”. The reference to section 3.2 is sufficient to draw the connection between sections, where it is already established that land may be acquired at more than market value under some circumstances.
- the addition of a statement that a masterplan, while preferable, is not always necessary for land banking purchases.
- the addition of a statement that use of the property may include leasing premises until the property is ready for redevelopment or use for the operation of the school and referencing the link to [section 4.5 Leasing of School-Owned Property and Assets](#).
- the addition of a statement that schools may use school income to maintain or improve property it has purchased until it is redeveloped for future use for the operation of the school.

## Leasing of School-Owned Property and Assets (section 4.5)

*“Proprietors/schools may lease school-owned property and assets to third parties and remain eligible for NSW financial assistance, however the lease must be for the purpose of the operation of the school. This may include leasing the school canteen or uniform shop to a private operator”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.12)

This explanation is welcomed but we suggest it be expanded. The connection to section [4.10 Shared or Joint use of Assets](#) should be referenced in this section of the Guidelines to help clarify that schools can in fact lease or license use of school owned property to private business operators for more than just the operation of a canteen or uniform shop (or indeed, the operation of a Preschool, Early Learning and Outside School Hours Care (OSHC) service). Similarly, we believe that a school should be able lease out property that cannot or won't be developed or used immediately for the operation of the school (land banking). See comments and recommendation for [section 4.2 Acquisition of land for a future purpose](#).

**Recommendation 16:** Revise wording in Guidelines - Leasing of School-Owned Property and Assets.

That the Guidelines specify that the types of leases this section deals with is exclusive use occupancy ie leasing space to occupiers that will not be shared with the school for day to day use. Referencing the link to [section 4.10 Shared or Joint use of Assets](#) and [section 4.2 Acquisition of land for a future purpose](#) would also help clarify that schools can in fact lease or license use of school owned property to private business operators for more than just the operation of a canteen or uniform shop (or indeed, the operation of a Preschool, Early Learning and Outside School Hours Care (OSHC) service).

## Disposal of Assets (section 4.6)

*“The disposal of school assets at a value below reasonable market value is a factor that may indicate that a sale was not for the operation of the school or that the school otherwise operates for profit.”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.12)

Most Independent schools (and indeed many schools in all sectors) would consider supporting those experiencing disadvantage as part of their mission, ethos and/or educational philosophy. This sometimes includes disposing of low value assets they no longer need by gifting/donating them to other schools that may have use of them, rather than reselling them for a relatively low ‘market value’. We are strongly of the view these acts of generosity and partnership between schools should not require low value goods be sold to the other school at ‘reasonable market value’ as the residual value of the asset (which was originally purchased with school income, for the operation of the school and benefit of students) would be then used by another school for a similar purpose. This type of transaction, where a low value asset is disposed of by transferring it to another school assists students in schools with less resources, does not seek to enrich other persons or entities, and should therefore be allowed while remaining compliant with Section 83C.

For example, a large school in metropolitan Sydney upgrades to new computers. The old computers were purchased two years ago and have declined significantly in value but are still operational. Rather than sell these second hand computers for ‘market value’, which in the context of the school and its finances would constitute a trivial amount of money, they would like to donate/gift them to a low fee school in regional NSW. This low fee school has an immediate need for more computers and would be able to use these devices for 12-18 months while they raise the funds to purchase their own additional new computers.

See comments for the Regulatory Framework [Part 8. Responding to suspected or actual for profit activity \(Table 2. Summary of regulatory responses and actions - Preliminary enquiries\)](#).

**Recommendation 17:** Revise wording in Guidelines - Disposal of Assets.

That the Guidelines include additional wording to provide that schools can dispose of low value assets they no longer need by gifting/donating them to other registered NSW schools in receipt of government money and still remain compliant with Section 83C. This section of the Guidelines would also benefit by referencing the section of the Regulatory Framework that we propose should address the matter of materiality to determine what would be considered a low value asset.

## Shared or Joint Use of Assets (section 4.10)

*“It is a requirement of section 83C(2)(a) of the Act that school assets only be used for the purpose of the operation of the school. However, it is common practice for schools to have various arrangements for the shared or joint use of school assets and facilities, such as sporting facilities, school halls, classrooms, playgrounds and performance venues, by other schools or sectors of the community. In determining whether the shared or joint use of assets constitutes a use for the purposes of the school, the Minister may have regard to the following matters (in addition to any other matters relevant to a particular case)...*

- whether the shared or joint use of assets causes the proprietor or school to incur a financial liability (for example, where the school is liable under the arrangement for shared or joint use for damage caused to the asset by the other user);*
- whether the value of the arrangement for the shared or joint use of assets is at least reasonable market value (note: there are some circumstances where a school receives a non-financial benefit from the use of school-owned property or assets by a third party (such as a local not-for-profit entity) which cannot be given a “reasonable market value”. In these circumstances, the Minister will consider whether the terms of the arrangement are reasonable in the circumstances); and*
- whether the shared or joint use of assets otherwise contributes to the operation of the school (for example, where an asset is used to present an exhibition or show, by providing students with free access to that exhibition or show).*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], pp.15-16)**

We appreciate the acknowledgement that it is common practice for schools (in all sectors) to have various arrangements for the shared or joint use of school assets and facilities, such as sporting facilities, school halls, classrooms, playgrounds and performance venues, by other schools or sectors of the community. The Guidelines seek to provide clarity but would benefit from more specific guidance and common examples.

The example used to illustrate whether a school incurs a financial liability allowing a third party to use school premises/assets relates only to whether the school is liable for damage caused to the asset by the other user. It is not clear whether this limit of what the Department considers it means for the school to incur a financial liability.

Further, based on the example, it is unclear whether it is the intent of this guidance to require that any third party using school assets have their own insurance. It would provide more clarity to state the expectation plainly.

The mention of a non-financial benefit which cannot be given a “reasonable market value” as one of the matters a Minister might have regard to, introduces confusion and provides no clarity.

Similarly the inclusion of “whether the shared or joint use of assets otherwise contributes to the operation of the school” appears to suggest that allowing a third party to use school premises or assets must ‘contribute to the operation of the school’ through a direct benefit to students based on the activity the space is used for. This is concerning since Public schools routinely

allow third party use of premises to generate private income where the activity has no direct student benefit eg allowing school property and premises to be used for filming of television programs, selling weekend and evening access to sporting fields as public parking stations, and renting/licencing access to school grounds every Saturday for public second hand, bric-a-brac and antique markets. In these cases, the contribution these arrangements make to the operation of the school is limited to the generation of private income.

Referencing the link to [section 4.5 Leasing of School-Owned Property and Assets](#) would also help clarify the distinction between these sections.

**Recommendation 18:** Revise wording in Guidelines - Shared or Joint Use of Assets .

#### **Incurring a financial liability**

That the Guidelines be expanded to include what liabilities might be acceptable (in addition to financial liabilities) in shared or joint use arrangements.

That the Guidelines state plainly what insurance and/or other protection, is required of or by schools when contracting with third party users of school premises or assets.

#### **Circumstances where a school receives a non-financial benefit**

That the Guidelines include an example of what constitutes a non-financial benefit to communicate the intended meaning more clearly, though we acknowledge that without knowing the intent of this section of the Guidelines, it is difficult to be sure this would solve the confusion.

#### **Whether the shared or joint use of assets otherwise contributes to the operation of the school**

That the matter of whether the shared or joint use of assets otherwise contributes to the operation of the school, be removed from the Guidelines, or that the intent of the guidance be clarified to ensure restrictions are not imposed on non-government schools about the use of school assets to generate of private income where no such restriction applies to government schools.

## Preschool, Early Learning and Out of School Hours Care (section 4.11)

*“The current Guidelines (June 2019) provide guidance to non-government schools and proprietors in relation to ‘ancillary services’. It is recognised that this area of the Guidelines would benefit from further regulatory clarity regarding the use of income and assets for preschools, early learning and out of school hours care. For this reason, the Minister for Education and Early Learning has agreed to the development of a Regulation to provide this clarity. The corresponding section of the revised Guidelines is still to be inserted, subject to the finalisation of the new Regulation”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.16)**

While the draft of the Guidelines mention an existing intent to develop a regulation to provide clarity regarding the use of income and assets for preschools, early learning and outside school hours care, we are unable to provide feedback because the substance of the regulation has not been provided. We agree that a regulatory amendment relating to the use of income and assets for preschools, early learning and outside school hours care (and other related services) is necessary and have made this recommendation in relation to section 3.1 The operation of the school. See comments and recommendation for [section 3.1 The operation of the school](#).

Should the necessary regulatory amendment be achieved through this review or the [Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect the change/s.



## Investment of School Income (section 4.13)

*“A school’s proprietor may invest income that arises from the operation of the school provided that the investment is for the purpose of the operation of the school (section 83C(2)(a)) or, where the income is used to acquire property, goods or services (such as shares), it meets the requirements of section 83C(2)(b).*

*...The level of risk associated with the investment is also likely to be a matter the Minister will take into consideration in determining whether a particular investment is for the purpose of the operation of the school, or otherwise constitutes operating for profit.”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.17)**

Express recognition that school proprietors can undertake investment strategies using income from the operation of the school, subject to the level of risk and the use of its revenue, is a positive inclusion to the Guidelines. To help provide clarity about “the level of risk” as a consideration for the Minister as to whether a particular investment is for the purpose of the operation of the school, we suggest the Guidelines specify that investments should be conservative and designed to protect capital.

**Recommendation 19:** Revise wording in Guidelines - Investment of School Income.

That the underlined words be added to the first sentence of this section of the Guidelines:

*“The School’s proprietor may invest income that arises from the operation of the school in conservative investments designed to protect capital but may provide income for the school, provided that the investment is for the purpose of the operation of the school (section 83C(2)(a)) or, where the income is used to acquire property, goods or services (such as shares), it meets the requirements of section 83C(2)(b)”.*

## School fundraising activities for external causes (section 4.15)

*“Schools often fundraise for a particular external cause, holding these funds in trust for the relevant entity or cause, before making a donation to that cause. The Minister will consider all of the circumstances of particular fundraising when determining whether a school operates for profit”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.18)

Many schools in all three sectors consider that fundraising (with their school community) to support a range of charitable and other causes is a key part of their ethos, mission and/or educational philosophy. If schools engage in fundraising for specific external causes, the funds raised do not become school income and are therefore out of scope of Section 83C investigations or regulatory oversight by the Minister.

While legislative and regulatory amendments are not within the scope of this review, should the amendment be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes ie removing section 4.15 School fundraising activities for external causes from the Guidelines.

**Recommendation 20:** Legislative or Regulatory amendment (out of scope of this review) - exclusion of fundraising for external causes from the scope of Section 83C.

That Section 83C be amended to exclude fundraising for external causes (where funds raised do not become school income) from the scope of Section 83C investigations and regulatory oversight by the Minister.

## Salaries (section 4.17)

*“Schools set salaries following an assessment of the labour market context and often in accordance with relevant industrial and/or enterprise agreements. Schools may also pay a remuneration package for executive remuneration. 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 in the context of salaries/remuneration packages may be influenced by a range of factors (see ‘3.2 ‘reasonable market value’). Each circumstance should be assessed on its facts and supported by appropriate documentation”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.19)**

Non-government schools determine salaries based on the value and complexity of the role, the sum of its legal and financial responsibilities, the qualifications and expertise required by the employee, and other contextual factors including the labour market. While many assume that there is a common cross sectoral labour market and role definition for school employees such as teachers, business managers or principals, this assumption is not accurate. In fact, the labour market for employees of most Independent schools cannot be benchmarked against other school systems.

The operating structure of Independent schools cannot be equated with work that happens in the other school sectors. For example, teachers in Independent schools have additional responsibilities including supervision of Saturday sport and outside school hours extra-curricular activities and attendance at regular outside school hours functions. The roles and responsibilities of a school principal in a large system (like NSW Public Schools) are vastly different from those of an Independent school principal, who does not have the support of a bureaucracy to provide financial, HR, IT, legal, forward planning, capital works, procurement, purchasing, communications, curriculum and other operational support. Independent school principals have the additional responsibility of reporting to a governing school board to which they are accountable for their own performance and for the success of the school.

Another significant distinction for salaries of Independent school employees is the practice of salary packaging. While this is not available to many public servants, salary packaging is a common and expected practice in the wider Australian labour market. As such, it is often necessary for schools to offer salary packages to attract and retain highly skilled employees that could command higher salaries working in private companies rather than in not for profit schools. This calibre of employee (with skills and expertise beyond those required in a large school system) are necessary to successfully work in, lead and manage the complex business operations that are Independent schools.

Salary packaging is the inclusion of benefits (also called fringe benefits) in an employee remuneration package in exchange for giving up part of the monetary salary. These benefits may include things such as housing (particularly where an employee is required to live on

campus), meals, a vehicle, mobile phone or laptop, additional leave, school fees, additional superannuation, or other benefit. Salary packaging is legal and the Australian Taxation Office oversees the requirements for employees and/or employers to pay Fringe Benefits Tax on the benefits packaged.

As we have consistently stated, we remain concerned that salaries are considered within scope of Section 83C investigations. Salary levels were explicitly excluded from the scope of Section 83C as highlighted in the second reading speech at its introduction in 2014.

*“The Government will not be taking a heavy-handed approach to determining what is market value. For example, the Government will not be determining salaries within a school. It is up to the school governing body to determine the market in which the school operates and to set salaries according to that assessment. As with all other goods and services, salaries will only be considered as a for-profit issue if they are clearly beyond a reasonable level”*

*The Hon. Adrian Piccoli, Second Reading Speech, 15 October 2014*

The market value of salaries should therefore not be within the scope of Section 83C investigations.

This should be confirmed through legislative or regulatory amendments. While not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 21:** Legislative or regulatory amendment (out of scope of this review) - exclude market value of salaries from the scope of Section 83C investigations.

That Section 83C be amended to exclude market value of salaries from the scope of Section 83C investigations.

**Recommendation 22:** Revise wording in Guidelines – removal of section 4.17.

That section 4.17 be removed from any future version of the Guidelines.

## Shared services (section 4.19)

*“Schools may enter into shared services agreements provided that all payments made by individual schools under the agreement are for services that are required for the operation of that individual school, are at no more than reasonable market value and are not unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister...In considering whether a shared services agreement is in accordance with s83C, the Minister may have regard to (whether):*

- ...terms are flexible, so that each individual school only pays for the services it requires for its operation;*
- ...there are options for each school to opt in or out of the receipt of services (without penalty) according to changing needs and whether schools are provided with options to review and negotiate future services;*
- ...the agreement is well documented and clearly identifies the services to be delivered and costs;*
- ...the agreement includes a provision for itemised billing for each school participating in the shared services agreement;*
- ...the school or schools are subsidising services provided to any other organisation; and*
- ...payments for services made by each school are at no more than reasonable market value.”*

**(Non-Government Schools Not-for-Profit Guidelines - [October 2023], p.20)**

Express recognition that multiple schools may enter into shared service agreements from a single provider is a positive inclusion in the Guidelines.

To align with [recommendation 5 against section 3.1 The operation of the school](#), we also suggest replacing the term “required for the operation of the individual school” to “used for the operation of the individual school.”

**Recommendation 23:** Revise wording in Guidelines - Shared services, to align with legislative amendment (recommendation 5).

That the Guidelines replace the term “required for the operation of the individual school” with “used for the operation of the individual school”.

## School Related Travel (section 4.21)

*“Proprietors/schools can pay for travel expenses if required for the operation of the school. This may include travel expenses incurred by Board members, volunteers, teachers or other employees as a result of their attendance at excursions, sports events, training and similar events relevant to their position and responsibilities...All travel expenditure must not be unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister.”*

(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.21)

This guidance references “for the operation of the school” and “unreasonable in the circumstances”, which, already discussed, requires the provision of further clarity through proposed legislative and regulatory amendments and then to be supported by complimentary amendments to the Guidelines and Regulatory Framework. Once the amendments are achieved, this section of the Guidelines should reference those sources that provide clarity about “for the operation of the school” and “unreasonable in the circumstances”.

See comments and recommendation for the Guidelines; [section 3.1 The operation of the school](#) and [section 3.3 ‘in any other way unreasonable in the circumstances...’](#)

To align with [recommendation 5 against section 3.1 The operation of the school](#), we also suggest replacing the term “required for the operation of the individual school” to “used for the operation of the individual school”.

Note: It also seems like this section should be numbered 4.20, rather than 4.21. This change would be a simple technical adjustment.

**Recommendation 24:** Revise wording in Guidelines - School Related Travel, to reference sections 3.1 and 3.3.

That the Guidelines include references to sections **3.1 The operation of the school** and **3.3 ‘in any other way unreasonable in the circumstances...’**

**Recommendation 25:** Revise wording in Guidelines - School Related Travel, to align with legislative amendment (recommendation 5)

That the Guidelines replace the term “required for the operation of the school” with “used for the operation of the school”.

## Compensation, settlements and other one-off payments (section 4.22)

*“From time to time proprietors make payments to individuals in the context of pending or actual litigation alleging breaches of their obligations under contract, statute or common law. Examples include payments to settle a public liability claim or an employment related dispute.*

*Generally, these payments will be considered for the operation of the school where the litigation arises out of the proprietor's operation of the school and the payments are consistent with any professional legal advice or orders given by a relevant tribunal...*

*...Schools should exercise caution when considering providing other kinds of one-off payments without legal liability or obligation, or on the basis of a purely moral or social obligation. The school should assess each proposed payment on its facts to make sure the payment is required for the operation of the school and is not a payment for property, goods or services that is unreasonable having regard to the fact that financial assistance is provided to the school by the Minister. Appropriate supporting documentation should be kept.”*

**(Non-Government Schools Not-for-Profit Guidelines – [October 2023], p.21)**

The compensation, settlements and one off payments made to individuals in Independent schools, are carefully considered and can be for a range of reasons including recognition, reward and retention, in addition to managing threatened or actual litigation.

It would provide further clarity to include “threatened” litigation along with “pending or actual litigation alleging breaches of their obligations under contract, statute or common law” as a legitimate reason for one-off payments. Further, it would be useful in this context to include “professional industrial advice” in addition to the guidance that “payments are consistent with any professional legal advice or orders given by a relevant tribunal”.

We contend that one-off salary payments (with a clearly articulated rationale - such as thanking staff for their hard work during COVID) and that are reasonable in the context, are a means for schools to reward and retain staff without impacting on base line salaries driving up salary costs through the compounding effect of percentage increases and therefore should be allowed if well documented.

To align with [recommendation 5 against section 3.1 The operation of the school](#), we also suggest replacing the term “required for the operation of the individual school” to “used for the operation of the individual school”.

Note: It also seems like this section should be numbered 4.21, rather than 4.22. This change would be a simple technical adjustment.

**Recommendation 26:** Revise wording in Guidelines to include “threatened litigation”.

That the Guidelines include the word “threatened litigation” along with “pending or actual litigation alleging breaches of their obligations under contract, statute or common law”.

**Recommendation 27:** Revise wording in Guidelines – one off payments to school employees.

That the Guidelines include guidance that one-off payments to school employees will generally comply if well documented and supported with a clearly articulated rationale, demonstrating that the payment is reasonable in the context.

**Recommendation 28:** Revise wording in Guidelines - Compensation, settlements and other one-off payments, to align with recommendation 5.

That the Guidelines replace the term “required for the operation of the school” with “used for the operation of the school”.



# Feedback - Regulatory Framework

## Part 1. Introduction

### The Regulatory Context

*“The regulation of non-government schools in receipt of financial assistance from the NSW Government in accordance with Part 7, Division 3 of the Act is undertaken by the NSW Minister for Education and Early Learning, with support and advice from the NSW Department of Education and the Non-Government Schools Not-for-profit Advisory Committee”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.4)**

We support fair and proportionate regulation of non-government schools to demonstrate responsible expenditure of government funds provided for the operation of schools.

We remain concerned about the way the NSW Department of Education, as the current regulators of the non-government school sector’s compliance with Section 83C, continues to interpret the legislation. Despite some outward improvement in attitude towards Independent schools from the Non Government Schools Unit over the last 12 months, the expectation that non-government schools should operate like government schools continues to be the pervasive attitude in many conversations, investigations, and lines of inquiry.

It is our view that there is an inherent conflict of interest in having the operator of government schools decide what is fair and acceptable expenditure by non-government schools. Non-government schools provide important choice for parents in education options for their children. In October 2023, the current Education Minister declared in her Plan for NSW Public Schools that she wants NSW Public Schools to be the first choice for parents. This statement clearly established the Department of Education as a competitor to non-government schools. We believe that a strong public education system benefits all of society, and we support full funding of public schools. However, we are opposed to actions and attitudes taken by governments that seek to restrict parental choice in education, which is an established human right under Article 26 of The United Nations Universal Declaration of Human Rights.

Regulators perform an important role in society, by safeguarding sections of the community and, as in the case of Section 83C regulation, protecting government revenue. However, a regulator can fail to deliver this important public service if their activities are unduly influenced by conflicts of interest, or there is a public perception of an interest conflict. Both can impact a regulator’s ability to maintain regulatory neutrality. According to the 2012 OECD Recommendation of the Council on Regulatory Policy and Governance, the use of independent regulatory agencies should be considered where:

1. there is a need for the regulator to be seen as independent from politicians, government and regulated entities, to maintain public confidence in the objectivity and impartiality of decisions and effective operation for trust in the market;
2. both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required; or
3. the decisions of the regulator can have significant impact on particular interests and there is a need to protect its impartiality.

We believe each of these factors are relevant to the regulation of non-government schools.

Appointing an independent regulator would send an important message to the public and to regulated entities (non-government schools) about this Government's commitment to transparent and objective regulation and oversight of financial assistance to non-government schools. Other benefits of an independent regulator include more consistent and predictable regulatory decision making as a result of the increased distance from undue influences (including political influence), and enhanced trust in the regulator and its decisions.

It would certainly be viewed as inappropriate to give a non-government school system the authority to regulate government school spending, just as it would be inappropriate to allow one commercial Bank to regulate its competitors. The same conflict of interest must be recognised under the current arrangement for the regulation of Section 83C. As such, an independent regulator is needed who understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality.

When Section 83C of the *Education Act 1990* (NSW) was introduced in 2014, the then Board of Studies, Teaching and Educational Standards (BOSTES) concurrently introduced standards for the 'proper' governance of Independent schools. Eleven domains of compliance and the duties of 'Responsible Persons' were specified (and continue to be required in NESA's current [Registered and Accredited \(Individual\) Non-Government Schools \(NSW\) Manual](#)). Schools must provide detailed evidence in the form of policies, procedures, disclosures, registers and notifications to show that they have complied with these requirements. Arguably, NESA governance standards all aim to ensure schools in receipt of recurrent funding use those funds for the intended and authorised purposes. The compliance domains of Conflicts of Interest and Related-Party Transactions make this clear. Given these requirements, a question remains about why the Department of Education duplicates regulatory oversight at additional cost to the taxpayer, with a not-for-profit compliance regime when these matters are effectively regulated by NESA. NESA is institutionally well-placed to oversee how independent schools expend recurrent funding and use income and assets for the operation of the school.

While legislative amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 29** Appointment of an independent regulator who understands and accepts the purpose and autonomy of non-government schools and who can maintain regulatory neutrality (out of scope of this review).

That an independent regulator (possibly NESAs) be given the necessary legislative powers to regulate non-government schools' expenditure of NSW Government funds provided for the operation of schools - Legislative amendments (out of scope of this review).

This might be accomplished by amending the *Education Standards Authority Act 2013* to give NESAs responsibility for regulating compliance with Section 83C of the *Education Act 1990* (NSW), by incorporating a requirement non-government schools comply with expenditure requirements for NSW recurrent school funding as part of the existing Non-Government School Registration process.

### Other laws applying to non-government schools

Non-government schools in NSW are already highly accountable to their parents for the spending of private income (most provided by parents through fees) and are also subject to extensive financial regulation and scrutiny of all spending by multiple Federal and State Government agencies including NESAs, ACARA, the ACNC, ASIC, the Department of Fair Trading and the Australian and NSW Departments of Education. There is currently a clear restriction on the ability of Independent schools to meet the expectations of their school communities and a disproportionate regulatory burden imposed on schools through the current application of Section 83C.

It would be in the interests of governments (and taxpayers) providing funding to schools to seek more opportunities to harmonise requirements where possible, rather than seek to create distinctions that disproportionately increase the regulatory burden for non-government schools (which increases schools costs and expenditure in order to comply).

## Part 5. Regulatory Approach

*“An outcomes-focused and risk-based approach is adopted in the allocation of resources to achieve our stated regulatory outcomes. Effort is focused on raising awareness and understanding of section 83C of the Act to support compliance by non-government schools in receipt of NSW Government financial assistance. Suspected for profit activity is assessed on the facts of each matter, in order to determine the most appropriate regulatory response or intervention..*

*...decisions are made in accordance with the following general principles:*

- Decisions have a rational factual basis, in light of all the evidence*
- Decisions are made in a way that is procedurally fair and parties are kept informed*
- Available resources are maximised to achieve regulatory outcomes through a focus on more serious instances of suspected for profit activity..”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.9)**

We support regulatory oversight of government funding expenditure by non-government schools. However, as the vast majority of schools conscientiously seek to comply with the legal obligations they are subject to, punitive action should not be the routine aim of regulatory action. For schools able and willing to comply the focus should be on education and where required, taking action to direct and deter inadvertent non-compliance. Regulation of Section 83C of the *Education Act* 1990 (NSW) should only seek to punish those that are unwilling or otherwise unable to comply. This would encompass deliberate, deceitful attempts to profit from government funding and careless/irresponsible actions resulting in non-compliance. It should not be used to interrogate administrative transactions and functions that are conducted openly and properly reported.

While the proposed Regulatory Framework recognises that schools should be afforded natural justice and procedural fairness in the regulatory process, this is something that should have already been happening with processes and timelines explicitly articulated. It is not a concession. It is a responsibility of all regulators; the fair and responsible exercise of power. The regulatory approach should be guided by the intent articulated at the time the legislation was introduced (as well as best practice responsive regulation principles).

See comments for [Part 3. Key concepts and context \(Not for profit concept\); Legislative amendment to introduce Objects of Division 6 of the \*Education Act\* 1990 \(NSW\) and](#) our recommendation that the legislation be amended to provide clarity about the original intent and purpose of Section 83C, and also provide the scope for non-government schools to operate in accordance with their mission, purpose and ethos/educational philosophy, to meet the expectations of their school communities (recommendation 3). Once this has been realised, producing a more useful Regulatory Framework document should be achievable.

Refer also to comments and recommendations 1, 4, 5 and 6.

## Part 6. Engagement and Education

### Engagement and education initiatives

*“The Minister and Department implement a number of initiatives to improve awareness and understanding of section 83C of the Act. These include (but are not limited to):*

- providing feedback in response to enquiries from non-government schools, systems of schools or proprietors regarding specific not-for-profit compliance issues*
- a regulatory topic index on the Department’s website*
- regular newsletters for schools or proprietors to promote greater understanding of section 83C of the Act and provide information and case studies on specific topics*
- information sheets describing stages of the compliance process, including investigations, for profit declarations and non-compliance declarations (which includes information about the imposition of conditions on financial assistance)*
- presentations on section 83C of the Act at forums and workshops, including those held by peak representative groups of non-government schools including Catholic Schools NSW and the Association of Independent Schools of NSW*
- supporting new non-government schools who wish to receive financial assistance from the NSW Government, to understand section 83C of the Act”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.10)**

See comments for the Guidelines [section 3.3 ‘in any other way unreasonable in the circumstances...’](#)

**Recommendation 30:** Revise wording in the Regulatory Framework to include additional “engagement and education initiative” re ‘unreasonable in the circumstances’.

That the Regulatory Framework include an express a commitment by the Regulator under ‘Engagement and education initiatives’ to publish deidentified summaries of each investigation

i. decision of the Minister, and

ii. recommendation of the Advisory Committee, and

iii recommendation/advice of officers of the Department to the Minister

that deals with the matter of reasonableness and what is ‘unreasonable in the circumstances’.

This will build a catalogue of guidance that may provide clarity to schools about circumstances where facts establish that a payment is or is not ‘unreasonable’ and help them avoid inadvertent non-compliance.

## Part 7. Monitoring compliance

*“The Department undertakes activities to monitor the compliance of non-government schools who receive financial assistance from the NSW Government with section 83C of the Act, with the objective of informing advice to the Minister and identifying:*

- instances of suspected for profit activity;*
- areas of focus for our engagement and education activities, and*
- emerging regulatory themes and issues that would benefit from or require further education or regulatory intervention.*

*In addition to the annual audit of financial affairs program (outlined below), a range of information sources inform the monitoring of compliance with section 83C of the Act, such as:*

- complaints received by the Minister or Department, including those from members of the public, that may allege or indicate a suspicion of for profit activity*
- referrals from stakeholders (e.g. representative bodies) of information that may allege or indicate a suspicion of for profit activity*
- co-operation and regulatory information sharing with other regulators such as NESAs, ACNC or the Australian Government Department of Education*
- media and/or social media reports that may allege or indicate a suspicion of for profit activity”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.11)**

There is concerning lack of transparency about the detail of Department’s ‘risk based’ approach to regulation of non-government schools. While we don’t seek to limit the Department’s ability to make reasonable enquiries or investigate legitimate allegations of potential non-compliance, the current approach is highly subjective and opaque. The publication of any documents the regulator uses to guide its ‘risk based’ approach would improve transparency and promote trust in the process. The inclusion of several case study examples might also help illustrate how the ‘risk based’ approach works in practice.

**Recommendation 31:** Revise wording in the Regulatory Framework to include or reference the location of the Risk Framework used by the regulator for monitoring and compliance.

That any Risk Framework used by the regulator to guide its ‘risk based’ approach monitoring and compliance be published.

**Recommendation 32:** Revise wording in the Regulatory Framework – Monitoring compliance, to include case studies.

That the Regulatory Framework include (or reference the location of) case studies that illustrate how the ‘risk based’ approach works in practice.

## Audit of Financial Affairs Program

*“In identifying non-government schools or proprietors to be included in the annual audit of financial affairs program, a number of risk factors (regularly reviewed) are considered. At various times, informed by a range of information sources, this risk assessment has considered:*

- *newly established non-government schools*
- *non-government schools with large transactions, such as capital transactions*
- *systems of schools, with risks such as shared services*
- *trends and issues identified in non-government school income and expenditure data, regulatory information sharing, or compliance monitoring”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, pp.11-12)**

We understand that the regulator has a documented Risk Framework which is used to identify the non-government schools initially selected each year for an Audit of Financial Affairs. Publishing this Risk Framework would help address the current lack of transparency about the detail of Department’s ‘risk based’ approach to regulation of non-government schools.

Publishing this Risk Framework would not limit the Department’s ability to make reasonable enquiries or investigate legitimate allegations of potential non-compliance, and would promote trust between regulated entities (non-government schools) and the regulator. In addition to the publication of the Risk Framework, the inclusion of case study examples in the guidelines might help illustrate how the ‘risk based’ approach works in practice.

**Recommendation 33:** Revise wording in the Regulatory Framework to include or reference the location of Risk Framework used by the regulator for audit identification.

That the Risk Framework used by the regulator to identify the initial sample non-government schools selected each year for an Audit of Financial Affairs be published.

**Recommendation 34:** Revise wording in the Regulatory Framework - Audit of Financial Affairs Program, to include case studies that illustrate how the ‘risk based’ approach works in practice.

That the wording in the Regulatory Framework – Audit of Financial Affairs Program, be revised to include case studies which illustrate how the ‘risk based’ approach works in practice.

## Part 8. Responding to suspected or actual for profit activity

*“The Act provides a range of regulatory tools that may be used in response to suspected for profit activity (see Table 2). The regulatory responses available are graduated, to enable an appropriate regulatory response in light of the nature and severity of the breach or suspected breach of section 83C of the Act. For example, more minor breaches (such as those which are the result of a one-off oversight or error) may result in a direction to cease specified activity or a non-compliance declaration. A for-profit declaration may be considered in more serious instances of breaches of section 83”*

(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.12)

### Table 2. Summary of regulatory responses and actions - Preliminary enquiries

The length of Section 83C investigations and the changing scope of investigations have led to unreasonably high costs being incurred by Independent schools, including costs of engaging legal expertise and additional administrative support. In addition to legal fees, some in excess of \$200,000 for schools that have been ultimately found to be compliant, the administrative cost of the time of Heads of School, Business Managers and other staff spent collating paperwork and responding to requests for information, are disproportionate and excessive. While the introduction of a Regulatory Framework seeks to provide some confidence to schools about the process they can expect and the conduct of investigations, there is still little certainty about timeframes, scope, limits of investigations and audits, and costs.

We note that the Summary of regulatory responses and actions does not refer to the Minister’s powers to give directions in writing to a school or to the proprietor of a school (s83I(1)). We consider that there is scope to further clarify the intention and use of this power so that confidence in the non-government sector is maintained, particularly subsection 83I(1)(b) as it relates to the school or proprietor being directed to provide specified information to other specified persons, typically the school community, relating to the affairs of the school,

Regulatory responses and actions may also be addressed by potential regulatory amendments, as part of the Section 83C Review.

**Recommendation 35:** Revise wording in the Regulatory Framework to reference the Minister’s powers to give directions in writing to a school or to the proprietor of a school under s83I(1).

That the Regulatory Framework include content that clarifies the intention and use of the Minister’s directions powers, particularly subsection 83I(1)(b) as it relates to a school or proprietor being directed to provide specified information to other specified persons, typically the school community, relating to the affairs of the school.



### *Preliminary enquiries*

While the summary of regulatory responses and action is helpful in that it clearly lays out a sequence of intervention options and actions, the ongoing issues of materiality and procedural fairness continue to be serious concerns for Independent schools. This concern arises out of intensive investigations by the Department which are time consuming and expensive but relate to what are often, in the context of the school and its finances, trivial matters, such as questioning the cost of a \$20/head catering invoice for a one off staff event.

**Recommendation 36:** Revise wording in the Regulatory Framework of “Description” against “Preliminary enquiries” to address ‘materiality’.

That the following wording replace the current wording in the Regulatory Framework:

*“The Minister or Department will make preliminary enquiries with a non-government school or proprietor to determine whether the alleged breach is a material breach requiring further detailed investigation. If it is determined that any potential breach was not likely to be material the school will be informed and, depending on the circumstances, may receive an administrative warning. If it is determined that the alleged breach is material and further action is required the options and actions detailed below will be followed”.*

### *Direction to undergo an audit of financial affairs*

This section of the table references the sections of the legislation that empower the Minister to “direct a non-government school or proprietor to undergo an audit of financial affairs (see section 83I(1)(a))” and “direct the non-government school to pay reasonable costs of the audit (see section 83I(3)). It is certainly important that the Minister have the power to direct a school to undergo an audit, and direct a school to pay reasonable costs of an audit. However, we assert that it is important to assure schools that such payment directions will only be used by the Minister in limited circumstances.

Legislation should reflect the need for the Minister, before requiring an audit, to first obtain advice from the Advisory Committee or a body replacing that Committee:

- that there are reasonable grounds for suspecting that a school has used funds in ways which are not authorised,
- the amount of the funds misused was material in the context of the school, and
- if the Minister determines that funds were misused it may be appropriate for the Minister to make directions under Section 83I(3) for the school to repay reasonable costs of an audit.

Any decision of the Committee to provide the relevant advice to the Minister should be subject to review.

**Recommendation 37:** Legislative or Regulatory amendment (out of scope of this review) - limiting the application of s83I(3).

That legislation be amended to specify the limited conditions under which the Minister may exercise the power to direct a school or proprietor to repay reasonable costs of an audit they were directed to undergo, and include an avenue for a school or proprietor to challenge such a direction.

### Triage and assessment

*“Where the Minister or Department has identified or received information about a specific allegation of suspected for profit activity, an initial assessment to determine an appropriate regulatory response is conducted. This initial assessment may include preliminary enquiries directly with a non-government school, system of schools or proprietor to clarify or obtain further information to facilitate the assessment”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.13)**

Preliminary enquiries to determine an appropriate regulatory response are a critical element in the regulatory process. The wording that “initial assessment may include preliminary enquiries directly with a non-government school” fails to provide certainty that schools will be afforded procedural fairness (as mentioned throughout the Regulatory Framework) and that the regulator will conduct initial assessments that afford natural justice to schools.

Where the Minister or Department has identified or received information about a specific allegation of suspected for profit activity, an initial assessment to determine an appropriate regulatory response should be undertaken by making preliminary enquiries directly with the school. The enquiries should be undertaken by the regulator with the attitude that any allegation or suspicion is not substantiated and that it therefore may be false. Allegations of wrongdoing may be spurious, vexatious or based on misunderstanding. As such, regulated entities (schools) deserve the presumption of innocence unless or until an allegation or suspicion is actually substantiated by evidence. This attitude should extend through the process for any investigation until a finding or decision is determined/made.

**Recommendation 38:** Revise wording in the Regulatory Framework under “Triage and assessment”.

That the wording “may include preliminary inquiries” is replaced with “will include preliminary inquiries” in the Regulatory Framework.

That a statement be added to the Regulatory Framework to the effect that the initial assessment, including preliminary enquiries will be conducted with the presumption that the allegation or suspicion has not been substantiated and may well be false.

## Investigations

*“If the Minister or Minister’s delegate forms a view that an investigation should be commenced into a school or proprietor of a school, on the basis of a suspicion that the non-government school may be operating for profit or may be a non-compliant school, the Advisory Committee is consulted before the commencement of that investigation.*

*Investigations are conducted by the Department, under delegation by the Minister, to identify if a school or proprietor operates or has operated for profit or is a non-compliant school.”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.14)**

Where the Minister or Minister’s delegate forms a view that an investigation should be commenced, the investigation should be undertaken by the regulator with the attitude that any allegation or suspicion is not substantiated and that it therefore may be false. Regulated entities (schools) deserve the presumption of innocence.

It would provide more clarity and certainty for schools to have the detail of investigation processes stipulated in the legislation or in the regulations that includes expectations of procedural fairness.

For example, the time an investigation may take should be clearly stated. This might be 6 months or a similar period. The circumstances under which this timeframe may be extended should also be included. Appropriate wording might include “the period referred to in subsection XX may be extended by up to 30 days with the agreement of both parties” or “the period referred to in subsection XX may be extended for a period of not more than 3 months at the discretion of the Minister or by agreement of both parties”.

Further, the requirement that a school be given the opportunity to respond to a recommendation of the Advisory Committee before it goes to the Minister should be included in the legislation (or the Regulations). Along with the amount of time a school has to provide the response (we suggest 30 days or similar), what happens once they have provided the response. For example, when can the school expect the Minister’s decision? Will the Advisory Committee consider it or will the response be sent to the Minister with the Advisory Committee’s original recommendation?

While regulatory amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 39:** Legislative or Regulatory amendment (out of scope of this review) – include detail of investigation processes in the Act or in the Regulations.

That Legislative or Regulatory amendment include

- the timeframe in which an investigation should be completed, the circumstances under which this timeframe may be extended and by how long,

- how schools will be kept informed and provided the opportunity to respond to any proposed recommendation of the Advisory Committee, and what happens once an investigation is concluded.

**Recommendation 40:** Amend Regulatory Framework to align with legislative/regulatory amendments relating to the inclusion of detail of investigation processes.

That the Regulatory Framework be amended to align with legislative/regulatory amendments relating to the inclusion of detail of investigation processes (recommendation 39)

**Recommendation 41:** Revise wording in the Regulatory Framework under “Investigations”.

That a statement be added to the Regulatory Framework to reflect that investigations will be conducted with the presumption that the allegation or suspicion has not been substantiated and may well be false.

## Following an investigation

*“Upon the completion of an investigation, the Advisory Committee considers the evidence gathered to inform its recommendation to the Minister as to whether a for profit declaration, or a non-compliance declaration should be made... If such a recommendation is ultimately made by the Advisory Committee (to the Minister), the non government school is afforded the opportunity to have that recommendation internally reviewed.”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, pp.14-15)**

The Regulatory Framework mentions that an avenue for internal review of an adverse recommendation of the Advisory Committee against a non-government school but provides no further explanation.

It would provide more clarity and certainty for schools to have the detail of post investigation processes stipulated in the legislation or regulations.

While regulatory amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 42:** Legislative or Regulatory amendment (out of scope of this review) - include detail of post investigation processes in the Act or in the Regulations.

That legislative or Regulatory amendment include;

- the timeframe for the Advisory Committee to make a recommendation, and the circumstances under which this timeframe may be extended and by how long,
- how the school will be kept informed,

- the school's right to seek an internal review of the Advisory Committee's recommendation, when they can access it, under what circumstances, who will conduct the review, how the review will be conducted, how long the review will take, and how such a review fits into the Minister's process for making a decision about whether to make non-compliance declaration or a for profit declaration in relation to the school.

**Recommendation 43:** Amend Regulatory Framework on to align with legislative/regulatory amendments relating to the inclusion of detail if post investigation processes.

That the Regulatory Framework be amended to align with legislative/regulatory amendments relating to the inclusion of detail if post investigation processes (recommendation 42).

### Recovery of Financial Assistance

*"The Minister may recover the amount of any financial assistance provided by the Minister to or for the benefit of a school (whether under Part 7, Division 3 of the Act or otherwise) if the financial assistance was provided in respect of a period when the school operated for profit or was a non-compliant school*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, p.16)**

It is right and proper that a school be required to repay government funds if they have been used in a way that breaches their funding conditions, and where the noncompliance was not inadvertent or trivial.

The amount to be repaid should be proportionate to the amount involved in the breach. In the 2022 Malek Fahd judgment<sup>3</sup> Justice Rothman found that Minister could only recover the exact amount of funding provided to a school and not some lesser amount even if only a smaller amount had been misused. In some cases it may be reasonable to recover an amount equal to an entire recurrent funding payment. In other cases, the Minister may wish to recover a lesser amount. The Act should be amended to allow greater discretion to the Minister to determine the appropriate amount of funding to be repaid based on the circumstances of the matter.

While legislative amendments are not within the scope of this review, should the amendments be achieved through the [Review of Review of Section 83C of the Education Act 1990 \(NSW\)](#), revised guidelines will need to reflect these changes.

**Recommendation 44:** Legislative amendment (out of scope of this review) - allowing greater discretion to the Minister to recover funding.

That the Legislation be amended to allow greater discretion to the Minister to recover funding of other (including lesser) amounts than the Act currently permits.

<sup>3</sup> Malek Fahd Islamic School Limited v Minister for Education and Early Childhood Learning [2022] NSWSC 1176.

## Part 9. Measuring outcomes and assessing impact

### Performance measures *and* Key performance indicators

*“Performance information is used to reflect on and, where needed, revise our approach to interventions, improve future education and engagement activities, and monitor progress against the regulatory framework. It should be noted these quantitative key performance indicators are considered holistically against the outcomes of the regulatory purpose and outcomes of this framework, together with feedback from the sector and through our education and engagement activities”*

**(Draft Regulatory Framework – Oversight of financial assistance provided to non-government schools, pp.17-18)**

The fair and responsible exercise of power by a regulator is improved by operating transparently. So, offering to share information about the performance of the regulator against specific measures is a positive step to demonstrate that the regulator holds itself accountable. However, the Key Performance Indicators (KPIs) listed in the table appear to be a list of data sources that would be routinely used for internal reporting of workload rather than set performance measures. While such data might be used to measure performance against KPIs, without actual quantitative targets there is nothing objective against which to measure achievement or judge accountability. The mark of a good regulator is one that is trusted by the entities it regulates. This means that regulated entities have a clear understanding of the regulator’s approach to regulation, are satisfied that the regulator acts consistently, and that they are treated fairly and are respected in the regulatory process.

**Recommendation 45:** Revise wording in the Regulatory Framework to specify actual performance measures and “Key performance indicators”.

That that wording in the Regulatory Framework be revised to specify actual performance measures and “Key Performance Indicators”, including timeframes and measures for assessing and increasing the number of regulated entities (schools) that feel they have been treated fairly and are respected in the regulatory process.

## Conclusion

We recognise that legislation of this nature necessarily needs to be flexible to cater for a wide variety of practices and that over-prescription can lead to unintended consequences. However, this flexibility creates uncertainty. This uncertainty can be partly overcome by having clear objectives in the Act to provide guidance to both regulated entities (schools) and the regulator.

Another way of creating more certainty is for the Regulator to provide clear Guidelines as to how the Act may be interpreted, but the Guidelines must reflect the legislative intent. We believe that in the past the regulator has ignored or dismissed the legislative intent which has been contained in extrinsic materials such as the Second Reading Speech.

However, even Guidelines will not totally overcome uncertainty as they also need to be applied in the light of the particular circumstances. This makes it very important that any regulator applying the Act and the Guidelines is transparent as to their reasons for any decision in the light of the applicable facts. This is a fundamental concept in promoting good governance. In short, we are saying that the Guidelines and Regulatory Framework should; reflect legislative intent, be clear but recognise that they cannot be exhaustive, and be administered transparently by the regulator.

Of the recommendations proposed in this submission, some are within the scope of this review and others, such as legislative and regulatory amendments are out of scope. As is the recommendation to move responsibility for regulating Section 83C to an independent regulator. They are included in this submission in recognition that legislative and regulatory amendments are required and will ultimately impact on the development of the Non-Government Schools Not for Profit Regulatory Framework and Not-for-Profit Guidelines.

# Appendix A

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*“We have a primary school and an Early Years Program. If the Early Years program makes a loss, can we use any of the funds from the Primary School to cover the shortfall?”*

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*“Can the school use funds to provide a lunch (a sandwich platter and a fruit platter) for the staff that attend a planning meeting?”*

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*“The University of Sydney has proposed a Scholarship Grant Agreement, where the school would make a grant to the University in relation to the practical placement of a high achieving teaching student in their final year at University. Despite the potential benefit to the school, we are reluctant to accept because we are worried the Department would consider this a s83C breach”.*

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A Special Assistance School has a significant percentage of teen mothers or mothers to be. The school is proposing to operate a creche on school premises so the students can put their babies into the creche and be able to attend school more regularly. The school will staff the creche with a nurse and qualified childcare workers. They also want to partner with the Benevolent Society to provide the girls with training in childcare, budgeting, baby health, cooking etc and they will come to the creche site to deliver these education sessions. School is concerned that this may not be considered necessary for the operating of the school and might therefore breach Section 83C.

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*“Our parent company provides shared services to schools which are hard to assess in terms of market value. How can reasonable market value be assessed in these circumstances so we are compliant with s83C?”*

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A school for Indigenous students would like to provide a fuel voucher to support a student’s regular attendance but is worried this could be viewed as a breach of Section 83C. They want to support the student’s attendance but are worried they could lose their funding if using school oncome for this purpose means they are declared to be operating for profit.

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A school discovered that it had underpaid an ex-employee during their employment. *“Is it a s83C breach to provide the payment now they are no longer an employee?”*

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*“a staff member’s windscreen has been damaged by another school employee while parked on school grounds. Can the school pay for the repairs, or will this breach s83C?”*

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*“School staff member lives on campus with their family in a dedicated residence. This residence was destroyed by recent floods and the staff member and their family lost all of their possessions. Can the school provide a payment to assist the family to reestablish themselves in temporary accommodation?”*

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*“Staff park in surrounding streets and residents are not happy as pick up time is a nightmare for them, as there is no available parking for parents to pick up their kids, so there is double parking, parking in driveways etc. We want staff to use public transport but they won’t do so without a major incentive. Can the School pay public transport costs to the College through an Opal card? This would only be used for travel to and from the College. This would also be monitored to ensure it is only used for this purpose otherwise they would lose the card. Are we allowed to use school income to pay for these Opal cards or will this breach s83C?”*

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*“To alleviate the teacher shortage, can the school contribute towards the university fees of teacher’s aides currently employed at the school who wish to retrain as teachers?”*

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*“Can the school rent a school building to allied health professionals who will service the needs of students and the broader community?”*

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