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NSW Department of Education

**Emailed to:** [NonGovSchools.RegulatoryFramework@det.nsw.edu.au](mailto:NonGovSchools.RegulatoryFramework@det.nsw.edu.au)

Dear Colleagues

**EXPOSURE DRAFT REGULATORY FRAMEWORK AND EXPOSURE DRAFT NOT-FOR-PROFIT GUIDELINES  
RESPONSE TO PUBLIC CONSULTATION**

We thank the Department for the opportunity to provide feedback on the exposure draft of the Regulatory Framework for the Oversight of Financial Assistance Provided to NSW Non-Government Schools (**Draft Framework**) and the exposure draft of the Not-for-Profit Guidelines for Non-Government Schools (**Draft Guidelines**).

Carroll & O'Dea Lawyers' Education Law team is one of the few specialist education law practices in Australia. We act for a large number of registered non-government schools in New South Wales across a range of matters affecting the operation of non-government schools. We regularly advise schools and their registered proprietors in relation to not-for-profit requirements for non-government schools under the *Education Act 1990* (NSW) and the *Australian Education Act 2013* (Cth).

In our day-to-day work with non-government schools across all faiths, and none (including high fee and low-fee paying schools), we see the incredible contributions these schools make in our communities and to the advancement of education for our students. In this respect, our submissions are focused on ensuring policy setting and consideration is geared towards supporting our non-government schools to continue in this work.

We are encouraged by the Department's commitment to reviewing section 83C, its wording and effectiveness, and the broader regulatory framework that surround this. We strongly recommend that the Department continue with this work in light of the public consultation.

Our comments on the Draft Framework and the Draft Guidelines focus on a number of key issues that the Department should address in its final version of the Guidelines.

**Question 1:** *Does the Regulatory Framework provide you with a transparent and sufficient understanding of the outcomes and risk-based approach to the oversight of financial assistance provided to or for the benefit of non-government schools under the Education Act 1990?*

- (a) In summary, no. The Draft Framework does not to us add anything further to the current understanding of the not-profit requirements, and the process for investigations and regulation. We appreciate that the Department has taken steps through the Draft Framework to set out the purpose and intention behind the Department's current approach to the not-for-profit requirements, and confirms that the focus will be on cases of serious misconduct and material breaches of the requirements.
- (b) The Draft Framework does provide some more clarity in certain aspects. However, we find it disappointing that the Draft Framework does not provide a formal mechanism for obtaining feedback in relation to a proposed transaction, nor does it clarify what means are available for discussing specific matters or transactions with the Department. Given the emphasis on education and other such initiatives, it is disappointing to see that there is no suggested mechanism for a pre-approval process, or for the Minister to provide a school with a private ruling in regard to a proposed transaction.
- (c) In our experience, the regulatory uncertainty surrounding not for profit requirements have constrained non-government schools and their activities, such that they have foregone opportunities to enter into transactions that would provide significant benefits to schools and their students. For example, Schools have refrained from entering into large transactions (involving a number of documents and smaller agreements) that is overall well under market value, because one small aspect of the overall transaction *may* be considered to breach section 83C.
- (d) On this basis, there should be a mechanism for a school to have large transactions submitted for consideration by the Minister (in a similar manner to which the ATO will provide private rulings, or failing that, administratively binding advice). Failing this, the Draft Guidelines need to go to more detail around large transactions that involve multiple elements and stages – if each individual element or stage of such a transaction is considered on its own (and will not take into account the benefit of the overall transaction) this needs to be clarified.
- (e) It would also be helpful if the Framework clarified the approach for auditing and investigating Approved System Authorities (ASA), and if the Minister will be concerned with how an ASA allocates funding based on need. In this regard, we note neither the Draft Framework or the Draft Guidelines provide any commentary or guidance on the interaction between the Needs Based Funding arrangements under the *Australian Education Act 2013* and the not for profit requirements under the *Education Act 1990*.
- (f) Finally, the Draft Framework should include as part of the education initiatives a means for the Department to comment on any relevant decisions. There has been a number of decisions in the Courts and in the NSW Civil and Administrative Tribunal relation to section 83C and it would be helpful for the Department to publish Decision Impact Statements (or similar) that comment on how (or if) the Department will change its approach after a relevant decision.

**Question 2:** *Do the revised Not-For-Profit Guidelines assist non-government schools in understanding their obligations in relation to financial assistance provided to or for the benefit of non-government schools under the Education Act 1990?*

- (g) In summary, no. We see that there are a number of issues with the Draft Guidelines and consider that, in some respects, the Draft Guidelines may provide **less guidance** to registered non-government schools and their administrators than the current Guidelines. In particular, the focus on a 'case by case' approach and the 'particular circumstances of each school' lacks certainty for a school in entering into any transactions and increases regulatory burdens on schools.
- (h) For this approach to assist non-government schools, it needs to be supported by specific circumstances and examples of conduct that will be considered to comply with the requirements and conduct that does not, similar to how NSW Revenue Rulings (including, for example, Revenue Ruling DUT034 for charitable exemptions from transfer duty) will provide practical examples for the public to compare against their own circumstances. We note that the Department's Non-Government Schools Not-For-Profit Good Governance Principles provide case studies to assist schools in interpretation – we suggest that the Draft Guidelines be amended throughout to include similar case studies and practical examples.
- (i) In our view, the Draft Guidelines contains conflicting messaging relating to encouraging a school to make their facilities available for use to the community (when not required by the School). We see that there are strong policy considerations that support schools partnering with community organisations and not-for-profit entities. The Draft Guidelines should clearly state that, provided a school sees some benefit (financial or non-financial) to its students (or the broader school community) in such a partnership, this will not breach section 83C.
- (j) Further, if there are non-financial benefits that flow to a school from providing facilities to a 'for-profit' entity (such as a service provider which may provide services to students or their parents), we consider that a school should also be able to take this into account – the Guidelines need to deal with this (although we note we are still waiting further material relating to onsite following the new draft Regulation being finalised).
- (k) Further, and especially given the need to hire and retain talented individuals to teach and administer in the non-government sector, schools should be able to determine as is appropriate in their unique circumstances how to reward and remunerate staff (including by providing bonuses to staff) without being constrained by non-compliance concerns.
- (l) It should be for a school to determine what is 'for the operation of the school', and what will benefit or educate its students. This expression 'for the operation of the school' is found in section 83C(2)(a) and in section 83C(2)(b)(ii). Understanding its meaning is crucial to understanding when the Minister might find that a school operates for profit. It is therefore regrettable that the Draft Guidelines provide no practical guidance about how the Minister will interpret this expression. It does not assist schools to be told that the determination of the question as to whether something is 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."
- (m) Our recent experience in acting for non-government schools in New South Wales is that the Minister, based on the findings and recommendations of Department auditors, is deciding what is required for the operation of a school as if the Minister was the school principal. With respect, the Minister and those in the Department administering this legislation will rarely have had experience as a school principal and therefore ought not

to be deciding subjectively what the purpose of some expenditure is or what is required for the operation of the school. The test must be objective and the Draft Guidelines should provide practical examples of what are and are not considered by the Minister to be purpose of operating a school and/or required for the operation of a school.

- (n) In our submission, matters which are for the purpose of operating a school and/or required for the operation of a school include:
- a. employing staff including decisions about how many, their experience and qualifications;
  - b. determining class sizes and staff to student ratios;
  - c. facilities and buildings including decisions about size, type and use (for example, the use of an off-campus storage facility to store school equipment is for the operation of a school and it is not up to the Minister to say that the School ought to find an on-campus place to store the equipment, or as another example, the hiring of a church hall or mosque as a facility in which to provide religious services for staff and students);
  - d. curriculum including off-campus learning experiences (for example, a high school excursion to Arnhem Land is for the purposes of a school's operations even if there are ancillary benefits to the people living in that part of Arnhem Land);
  - e. building and maintaining relationships with those in the school community such as parents and former students (for example, allowing these people to use school facilities when not in use by students is for the operations of a school because these people in turn support the school in practical ways, by giving and making requests, and by sending their children to the school).

More examples could be given. Doing so would make the Draft Guidelines a more useful document. At the moment, the Draft Guidelines are not useful or helpful for those running schools.

- (o) There also appears to be an implication in parts of the Draft Guidelines that the use of a school's assets or income where there is no legal liability or obligation is not for the operation of the school; for example, the section headed One-off payments to individuals. The Draft Guidelines should make it clear that this is not the case. Schools pay for many things which are for their operations even though there is no legal obligation to do so. For example, it is clearly for the operations of a school to maintain and enhance staff job satisfaction and loyalty to the school. Little things go a long way in this area (such as provision of comfortable staff facilities, a bunch of flowers or comparable gift to a departing member of staff, and so on) even though there is no legal obligation to provide these things.
- (p) With respect, without evidence as to intentional wrongdoing, we see that it is a matter for the school to decide what is for its operation, in its context and circumstances, taking into account its ethos and mission, and in accordance with its objects and purpose.

- (q) Schools often engage with and support other groups in the community, as part of their overall purpose. In particular, schools often support alumni associations and parent associations through various means, which in turn will see the school receive significant support and benefits flowing from these ongoing relationships. We consider supporting an alumni network as part and parcel of the broader operation of a school. Unfortunately, there is nothing in the Draft Guidelines that assists with a determination as to whether this activity would breach the requirements.
- (r) The Draft Guidelines should provide more clarity on how non-government schools can support related or associated organisations. For example, where the school has established a 'foundation' for fundraising for various School activities, how can the school support the operation of the foundation (if at all)? Can the school provide services or facilities?
- (s) We encourage the Department to make a more holistic and expansive view of what 'for the operation of the school' means, and submit this should ultimately be for the School, its leaders and the Board to determine. While the proposed test in the Draft Guidelines may appear broad, going forward it needs to take into account the whole-of-enterprise approach to school operations (including direct, indirect and broader / downstream benefits from school activities). If the Department is not inclined to adopt a holistic or expansive view, it needs to adopt a more fulsome test in the Draft Guidelines for what 'the operation of the school' means. In considering what this encompasses, consideration should also be given to including overall student, parent and staff wellbeing, and other factors that may indirectly support education at the school.

We would welcome the opportunity to discuss this further with you, and provide our further feedback in relation to any amended drafts and the additional material relating to ancillary services.

Please contact us if you have any questions or comments.

Yours faithfully

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