



Catholic
Schools
NSW



ISSUES BRIEF



SCHOOL'S IN,
SCHOOL'S OUT –
says who?

OVERVIEW

The COVID-19 experience continues to be a challenging time for schools. Containing the spread of the virus required coordinated responses from government and non-government schools in closing, and subsequently managing their staged reopening.

Discussions between governments and the non-government schools sector have raised interesting questions on the issue of the regulation of schools: Who has the authority to determine when schools should be open or closed, and who determines their operational hours?

This short Issues Brief is a primer on this topic aimed at providing the reader with a historical perspective and a snapshot of the relevant information.

It arrives at a rather counter-intuitive answer that in the case of NSW schools the determination of instructional time is, at law, an undefined parameter of schooling. This is not the result of a regulatory omission. Rather, it is a product of regulations drawn up by co-design which sought to grant non-government schools flexibility, while upholding educational standards.

In doing so, the then NSW Government in 1989 stated:

”

The Government favours a more balanced and less prescriptive approach... Standards will be maintained but diversity and innovation will not be discouraged.

Interestingly, this approach presents a contrast with more recent trends, which have seen the Commonwealth government progressively return to a model of more direct government intervention in respect of the regulation of all schools.

This paper also demonstrates that in the design of regulation, cooperation between the regulator and those regulated can be productively applied to the governance of schooling.

Importantly for Catholic schools, the self-regulation of ‘school hours’ has been, from the perspective of Catholic schools, an intentional public policy result driven by three interrelated imperatives:

- The necessity to preserve and promote the Catholic identity of Catholic schools;
- The need to maintain the management prerogatives of the proprietors of Catholic schools; and
- The historic struggle to win and maintain public funding for Catholic schools following the NSW *Public Instruction Act 1880*.



REGULATION OF SCHOOL HOURS AND THE ACCOUNTABILITY OF CATHOLIC SCHOOLS

The impact of COVID-19 on the provision of schooling, both within NSW and across Australia, has been unsettling. A by-product of this time has been discussions as to who holds the authority to make decisions to open and close schools, and relatedly, on school calendars and operating hours.¹

Interestingly, for NSW schools the somewhat counter intuitive answer is that school operating hours, including the length of the school year, the duration of the school day, and the allocation of instructional time to subjects are at law, undefined parameters of schooling.

This is not to imply that the regulation of school hours has not been a matter of significant public policy interest. In fact, the question of who is best placed to determine the operational delivery of schooling has been a much contested issue in NSW since 1866.

This brief analysis covers six historic periods of NSW school regulation, being:

- 1 1866 to 1880
- 2 1880 to 1916
- 3 1916 to 1961
- 4 1961 to 1990
- 5 1990 to 2013
- 6 2013 to present.

In 1866, the NSW Parliament enacted the first *Public Schools Act*. This Act aimed to unify the administration of the pre-existing “National” (public) schools and denominational schools under the authority of a single NSW Council of Education. The effect of this Act was that: “Apart from their religious distinction, the Denominational schools were identical with Public Schools”.² This was the era when the operational hours of all schools, along with Curriculum and

Teacher training, were determined by a single statutory authority: the NSW Council of Education. While the Council of Education included a representative of the Catholic Church, the Council acted as a single, secular, governing entity for all schools in NSW at this time. This universal oversight of NSW schooling persisted until 1880 with the enactment of the *Public Instruction Act 1880* (NSW).

In any case, in 1880 the *Public Schools Act 1866* was repealed by the *Public Instruction Act 1880*.³ The *Public Instruction Act* removed all legal recognition and funding from denominational schools, and required denominational schools to transfer governance to the State Department. This meant that Catholic schools would effectively be a part of the public education system. In reality, Catholic schools continued to govern themselves, and the consequence was an era (1883 to 1916) of the unregulated, but unfunded, Catholic school.⁴

By the period 1912 to 1916, the statutory requirement for all denominational schools to transfer their governance to the State Department was an obvious legal anomaly that had to be addressed, particularly given the growing enrolments in Catholic schools. Consequently, the legal standing of Catholic schools had become so conflicted that the NSW Parliament acted to grant legal recognition to them as ‘non-government’ schools, while still denying access to government funding. This legal recognition was extended through the provisions of two Acts: the *Bursary Endowment Act 1912* (NSW) and the *Public Instruction (Amendment) Act 1916* (NSW). The effect of these enactments was to transfer school governance back to denominational schools, while imposing limited regulatory requirements, such as government inspections.

2013

AUSTRALIAN EDUCATION ACT 2013 (CTH)

Introduced compliance with basic governance criteria, not-for-profit and audit requirements, record keeping, census requirements and information about students, curriculum implementation, student reports (A-E reporting for years 1-10, and school annual reports.

2008

AUSTRALIAN CURRICULUM, ASSESSMENT AND REPORTING AUTHORITY ACT 2008 (CTH)

Introduced the National Curriculum, NAPLAN, and provided for the publication of information relating to school education (e.g. MySchool).

1990

EDUCATION ACT 1990 (NSW)

Provided indications as to the period of time for the teaching of a course, but did not specify mandatory instructional time.

1961

THE EDUCATION ACT 1961 (NSW)

Created the Year 10 School Certificate, the Year 12 Higher School Certificate and their associate curriculum requirements, inclusive of instructional hours for courses of study.

1912/1916

BURSARY ENDOWMENT ACT 1912 (NSW)

Recognised denominational schools for the purpose of granting bursary scholarships to students.

PUBLIC INSTRUCTION ACT 1916 (NSW)

Provided non-government schools, including Catholic schools, the authority to award the public certificates of schooling, such as the Leaving Certificate first in Year 10 and later in Year 11.

1880

NSW PUBLIC INSTRUCTION ACT 1880 (NSW)

Removed legal recognition, and funding, from denominational schools. This ushered in the era (1880 to 1916) of the unfunded but also unregulated denominational, Catholic School.

1866

PUBLIC SCHOOLS ACT 1866 (NSW)

Made denominational schools effectively identical with public schools. Unified government and non-government school administration under the NSW Council of Education.

The enactments of 1912 and 1916 settled questions around denominational school funding and regulation that lasted until the 1960s.⁵ That is, denominational, including Catholic, schools were flexibly regulated but denied government funding. Under a general rubric of “Regular and Efficient Instruction” Catholic schools determined their own school year and hours of operation. This Catholic school year especially accommodated Saints days and days of religious obligation.

In the 1960s, two separate developments refocused public policy attention on the regulation of non-government schooling and, in particular, the question of mandatory instructional hours.

The first of these developments was the *Education Act 1961* (NSW). Its purpose was to implement the recommendations of the Wyndham review. This resulted in the creation of the Year 10 School Certificate, the Year 12 Higher School Certificate, together with their associated curriculum requirements, including instructional hours for courses of study.⁶

Parallel with this reform of the structure of secondary schooling and its attendant costs, was the campaign for the reintroduction of public funding for non-government schools (noting public funding had been terminated in 1883) and the related debate over the accountability that should be attached to government funding.⁷

As the Wyndham scheme was implemented, with the first School Certificate in 1965 and the first HSC in 1967, two layers of school regulation further developed: ‘Registration’ for the provision of the compulsory years of schooling and ‘Accreditation’ for the delivery of the Wyndham Certificates of Education (being the School Certificate and HSC). The latter regulatory process raised the question of the specification of school hours.⁸

This step in effect introduced a *de facto* set of school operating hours. Over the years 1965 to the late 1980s this became a highly contentious matter for both educational public policy and politics.⁹ This debate culminated in the 1989 report of ‘The Committee of Review of New South Wales Schools’ (The Carrick Report) and the complementary 1989 White Paper on Curriculum Reform in New South Wales Schools (The Excellence and Equity Report). The conclusions of these reports regarding the proper scope of government regulation of schooling are reflected in the NSW *Education Act 1990*.

THIS POLICY POSITION IS CRYSTALLISED IN THE FOLLOWING EXTRACT FROM THE 1989 ‘NSW CURRICULUM REFORM WHITE PAPER’:



The great attraction of a time specification is its administrative simplicity..

Apart from its administrative ease, there has been a view that an unequivocal time requirement is the only effective way of guaranteeing that schools meet the Board’s curriculum objectives. The Government does not agree with this. There are effective alternatives which have the advantage of being educationally sound and of greater benefit to students and schools.

The Government favours a more balanced and less prescriptive approach. Mandatory curriculum requirements will be specified in terms of objectives, content and expected outcomes. Schools will be assessed against these requirements in terms of the broad educational quality of their program. Standards will be maintained but diversity and innovation will not be discouraged.¹⁰

This policy imperative is still embedded in the *NSW Education Act 1990*. This legislation, together with its regulations and relevant NESA Manuals, avoid mandating ‘school hours’ in respect of the length of the school year, term or day for NSW schools.

From the perspective of Catholic schools this public policy result was both intentional and positive.¹¹ Catholic schools advocated for a policy that granted Catholic schools the operational flexibility to choose their own operating hours and calendar. This is evidenced by Catholic school submissions to the Carrick Review in 1989 and the McGaw HSC Review in 1988.¹²

Catholic educators have always been mindful that the secular, statutory requirements for “efficient” (and effective) schooling can only ever form a set of necessary but not sufficient requirements for Catholic Schooling. Catholic schooling must always provide for religious education and this need itself generates a requirement for instructional time.¹³

Moreover, the necessity for Catholic school education to encompass religious education critically informed the educational accountability dimension of the “state aid” debate. This was the second driver of public policy making with respect to the regulation of all non-government schools, including Catholic schools, across the period 1961 to 1990.¹⁴

As the 1989 Carrick Report observes, while State Aid was gradually reintroduced across the period 1963 to 1973 (from Menzies scholarships and science blocks to the Whitlam government’s Karmel Report) a parallel debate on accountability for funding arose.¹⁵ This took the form of an argument for integrating funding accountabilities into school registration requirements. As the Carrick Report documents, this “fused” approach was not adopted by Governments, either State or Commonwealth, in the period to 1990.¹⁶ Rather, school registration requirements and school funding accountabilities were treated separately, both with respect to statutory obligations and administrative requirements.

In this context Catholic authorities championed the management prerogatives of Catholic Schools, together with the rights of other education providers.¹⁷

Up until 2013, Commonwealth regulation of schools was largely administrative and predominantly dealt with providing funding by way of grants to the states. Other policy requirements were mostly incidental. The most notable exception to this is the *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth), which introduced the National Curriculum and NAPLAN, and provided for the publication of information relating to school education.

The *Australian Education Act 2013* is the Commonwealth’s most significant intervention in education policy. The 2013 Act was not just an instrument designed to improve accountability, but engaged with national education policy through introducing basic governance criteria, not-for-profit and audit requirements, record keeping, expanded census requirements, curriculum implementation together with student assessments (in conjunction with ACARA), NCCD information on students with disability, student reports and the five-point reporting scale, and annual public reporting in addition to MySchool.

This has directly impacted the management of schools and has effectively become a whole new layer of regulation on top of existing state regulation.

This progression of the Commonwealth into education policy, as distinct from school funding, has initiated a new post-2013 era of debate as to the proper role of government with respect to the regulation of schools.





It is in this context of increased regulation and accountability that COVID-19 has now highlighted the question:

“Who determines when schools should be open or closed, and who determines their operational hours?”

The answer to this question is: the School Proprietor, being the Minister for Public schools and each school’s owner/operator for non-government schools. Indeed, this has been the case since 1880 but along the way certain alignments of school operations across Government and Catholic systemic schools have taken place:

- From 1963, as part of funding agreements, Catholic systemic schools voluntarily aligned their school year with government schools in their State/Territory. At that time Saints days and days of religious obligation were incorporated into the Catholic school year. This process of “alignment” was completed with the establishment of the Commonwealth Schools’ Commission in 1973.
- The 1987 adoption by all NSW schools of the four term year, with a school year of 200 days.¹⁸

In essence, the regulation of ‘school hours’ across NSW has been an example of regulation by co-design as between regulators and school authorities. Productive dialogue between regulators and Catholic schools gave rise to a regulatory approach that achieved an appropriate balance between flexibility and public oversight.

Co-design is, moreover, an approach to school regulation that can productively be applied more generally.¹⁹

However, as noted above, the enactment of the *Australian Education Act 2013* (Cth) is perhaps indicative of a trend towards the increased regulation of schools. If this trend continues, then cooperation between the regulator and the regulated will help find the appropriate balance between public interest in schooling oversight and flexibility to guarantee the management prerogatives of non-government schools.

ENDNOTES

- ¹ ABC News. 15 April 2020. *Corona virus schools debate continues as Morrison says education 'hangs in the balance'*. <https://www.abc.net.au/news/2020-04-15/coronavirus-covid19-education-schools-scott-morrison-response/12149984>.
- ² G.T. Spaul. 1920. *The Educational Aims and Work of Sir Henry Parkes, records of the Education Society No 43*. (Sydney Government Printers 1920). p 26.
- ³ Ibid, pp 30-47. At page 47 Archbishop Vaughan's Pastoral letters on education are canvassed.
- ⁴ No. 23., 43 VIC 1880. An Act to make more adequate provision for Public Education: *Public Instruction Act 1880* (NSW), at section 28 "Aid to Denominational Schools to Cease". http://www.austlii.edu.au/au/legis/nsw/num_act/piao1880n9275.pdf
- ⁵ NSW Government. (1989). *Report of The Committee of Review of New South Wales Schools (The Carrick Report)*. Chapter 7 "The Provision of Schooling", see especially 7.2.2 "History of Registration" in NSW and 7.2.3 "Registration Models". See also the "Wyndham Report" at note 7 below and the NSW *Public Instruction (Amendment) Act 1916* at section 10.
- ⁶ NSW Government. October 1957. *Report of The Committee Appointed to Survey Secondary Education in New South Wales (The Wyndham Report)*. See chapter IV "Major Recommendations".
- ⁷ Luttrell, J. 2003. *Regaining State Aid: Interviews Relating to the Campaign for State Aid for Non-Government Schools, 1960-1980*. Catholic Education Office, Sydney. Refer to reflections of Archbishop F Carroll at page 149f, Fr Thomas Doyle at page 165f, and Peter Tannock at 229f.
- ⁸ Wyndham, op.cit note 7 above.
- ⁹ Carrick op.cit note 6 above, see in particular at 7.2.3 and chapter 10 "Certificates of Education".
- ¹⁰ *New South Wales Curriculum Reform White Paper, Excellence and Equity* (November 1989) at page 14.
- ¹¹ Regaining State Aid, op.cit note 8 above.
- ¹² Catholic Education Commission NSW. (1989). *Submission to The Committee of Review of New South Wales Schools*. See also: Catholic Secondary Schools Association of NSW. (1989). *Submission to The Committee of Review of New South Wales Schools*.
- ¹³ Ibid. Also the need for Catholic school flexibility with respect to curriculum was identified early in the State Aid debate from 1963, as documented in the record of the September 1972 first National Conference on organisation and administration of Catholic education in Australia, refer P.D Tannock (ed). (1975). *The Organisation and Administration of Catholic Education in Australia*. (University of Queensland Press) see in particular the observations of Sister M Britt (pages 14f) and A.R Crane (pages 184f).
- ¹⁴ Refer notes 8 and 13 above.
- ¹⁵ Ibid. Also refer W.T Southerwood. (1993). *A Time-line of Catholic Australia*. (Stella Maris Books, Tasmania).
- ¹⁶ Carrick, op.cit at 7.2.1 and 7.2.4.4.
- ¹⁷ Refer notes 8 and 13 above.
- ¹⁸ Verbal advice provided by Brother Kelvin Canavan, FMS. Brother Kelvin was Executive Director of Sydney Catholic Schools for 22 years. Refer: Sydney Morning Herald. 23 March 2009. *The Man Who Transformed a School System*. <https://www.smh.com.au/national/the-man-who-transformed-a-school-system-20090322-95mv.html>
- ¹⁹ Australian Government Response to Senate Red Tape Committee Report. (November 2019). "Effect of Red Tape on Private Education - Interim Report". p. 9. Also see PTR Consulting. (2020). *Reducing Red Tape: Key Issues* (Consultation paper for AITSL). p. 6.



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