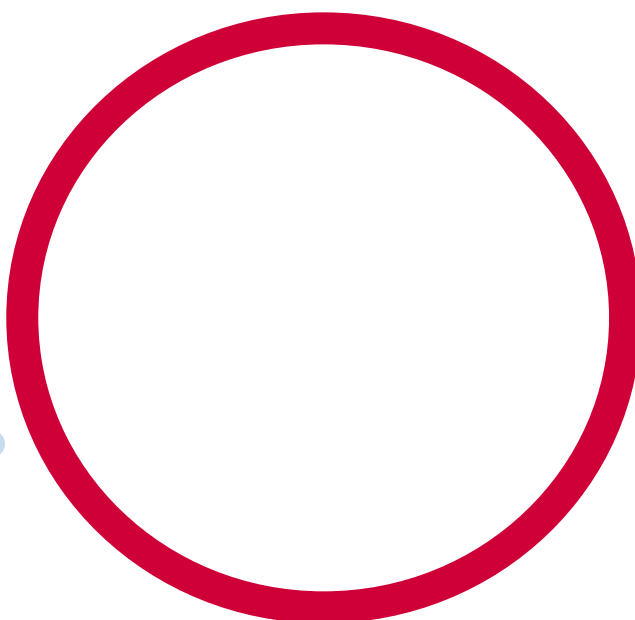
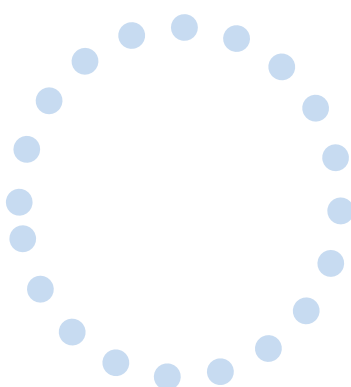
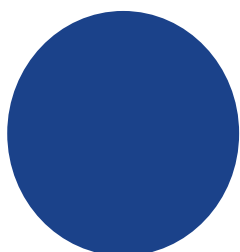


# Discussion Paper: Development of a Regulatory Framework for the not for profit requirements of the *Education Act 1990* and review of the Not-For-Profit Guidelines



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In the spirit of Reconciliation, the NSW Department of Education acknowledges the Traditional Custodians of Country throughout New South Wales and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

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### **Purpose of Discussion Paper**

As part of the development of a Regulatory Framework for the Not for profit requirements of the *Education Act 1990* (NSW), the NSW Department of Education is releasing a Discussion Paper as an opportunity to engage stakeholders and the community in the design of the regulatory framework, and as an opportunity to provide input into the review of the Minister for Education and Early Learning's Not-For-Profit Guidelines for Non-Government Schools.

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### **How to provide input or comment**

You are invited to provide written comment on this Discussion Paper. There are targeted questions throughout the paper. Submissions can be sent via email to:

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

### Content of submissions

Your submission should include your name and full contact details, comment on the areas/questions set out in this Discussion Paper, any other relevant information, and identification and discussion of anything that you believe might be missing, or any alternative approaches that you might suggest.

### Privacy Notice

Any personal information you provide in your submission is being collected by the NSW Department of Education. The NSW Department of Education will use the information for the purpose of developing the Regulatory Framework referred to in this Discussion Paper and to review and revise the Not-For-Profit Guidelines for Non-Government Schools. Your submission may be publicly published on the NSW Department of Education website. If you would like any information in your submission to be treated as confidential, please clearly identify this information and why it should be treated confidentially. Please note, general disclaimers in emails are not interpreted as specific requests for confidentiality. Provision of a submission is entirely voluntary. You have a right to access and correct any personal information you provide. Should you wish to do so, please contact the NSW Department of Education at the email address provided above or by directing your correspondence to 105 Phillip Street Parramatta NSW 2150.

### Deadline for submissions

The deadline for submissions is 23 November 2022.

# Introduction

Non-government schools form an integral part of the education landscape in NSW, providing a diverse range of choices for parents considering the educational needs of their children. The Commonwealth Government is the majority funder of non-government schools and the NSW Government is the majority funder of public schools. Each year, the NSW Government provides \$1.5 billion to assist non-government schools in the education of approximately one third of NSW school students.

To be eligible for financial assistance from the NSW Government, a non-government school must not operate for profit. This means that all income and assets of a school must only be used for the operation of the school. It also means that if a school makes a payment for a property, good or service, that payment must be at no more than the reasonable market value and must not be in any other way unreasonable in the circumstances, given the fact that financial assistance is provided to or for the benefit of the school. Collectively, these are known as the 'not for profit requirements of the Act'. They are contained in section 83C, within [Part 7, Division 3 of the Education Act 1990](#) (NSW) (the Act).

The regulation of the not for profit requirements of the Act is undertaken by the Minister for Education and Early Learning (Minister), the NSW Department of Education (Department) and the Non-Government Schools Not-for-profit Advisory Committee (Advisory Committee).<sup>1</sup>

These requirements have been in place since 2014 and it is timely to review and refine the regulatory approach, and develop a regulatory framework. To guide the development of the regulatory framework, terms of reference have been developed (Attachment 1), for delivery of:

- an outcomes and risk-based regulatory framework for the not for profit requirements of the Act
- a review of the [Not-for-Profit Guidelines for Non-Government Schools \(June 2019\)](#) (NFP Guidelines)
- recommendations for any policy and/or operational changes to improve regulation of the not for profit requirements of the Act.

The NFP Guidelines are published under section 83L of the Act by the Minister. The purpose of the NFP Guidelines is to assist non-government schools in receipt of NSW

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<sup>1</sup> Note: The non-government school sector in NSW is also regulated by other bodies including the NSW Education Standards Authority (NESA), Australian Government Department of Education, Skills and Employment, and the Australian Charities and Not-for-profits Commission (ACNC). Each authority has different roles and responsibilities and thus different areas of regulatory oversight.

Government funding to understand the not for profit requirements of the Act, and how to meet these obligations.

The purpose of this Discussion Paper is to facilitate engagement on the regulatory framework and revision of the NFP Guidelines. Submissions on the Discussion Paper will form an integral part of further regulatory thinking. They will also inform the drafting of exposure drafts of the regulatory framework and NFP Guidelines that we intend on releasing for public consultation.

This paper is structured in two parts. The first part considers key questions and issues related to the development of a regulatory framework. The second part considers key questions and issues related to the review of the NFP Guidelines. The conclusion summarises the key consultation questions posed.

## Part 1: Regulatory Framework

### Why a regulatory framework?

Under the NSW Government's Quality Regulatory Services initiative, NSW regulators are encouraged to implement an outcome and risk-based approach to regulation. The NSW Productivity Commission's [Guidance for regulators to implement outcomes and risk-based regulation \(2016\)](#) provides guidance to NSW regulators on how to develop the key components of a regulatory framework.

The development of an outcomes and risk-based regulatory framework is important in the regulation of the not for profit requirements of the Act for a number of reasons, including:

- Ensuring consistency and transparency in the way we regulate and administer the legislation, including our approach, our principles, and our objectives.
- Ensuring the approach to applying the legislation continues to be reasonable and responsive to risk, and minimises unnecessary regulatory burden on non-government schools.
- Maintaining public confidence that NSW Government financial assistance is not provided to non-government schools that operate for profit.
- Supporting non-government schools to meet and understand the not for profit requirements and obligations.

An outcomes and risk-based regulatory approach also enables regulators to respond to the challenge of having to deliver more with fewer resources while increasing their effectiveness in achieving regulatory outcomes.<sup>2</sup>

## What will the regulatory framework for the not for profit requirements contain?

The regulatory framework will contain a number of key elements including:

- regulatory principles to guide roles and responsibilities under the Act
- a clear and unambiguous statement on the regulatory purpose
- regulatory outcomes, and measures for the regulatory outcomes
- the articulation of our risk-based approach, to ensure our limited resources are focussed on where they are needed most
- a broad range of regulatory tools and interventions to apply as appropriate
- monitoring, reporting and key performance indicators with which to assess and review performance
- engagement measures to strengthen interactions with and support non-government schools.

## Regulatory principles

Regulatory principles are an important means of guiding the exercise of functions and powers, and engagement with the non-government school sector in NSW.

The following set of draft regulatory principles have been designed with input from stakeholders including Catholic Schools NSW, the Association of Independent Schools of NSW, the Advisory Committee, NSW Education Standards Authority, the NSW Parents' Council and the Council of Catholic School Parents. These draft principles support an outcomes and risk-based approach to regulation, and provide accountability and transparency to our stakeholders.

**Table 1: Draft regulatory principles**

Principles	Behaviours
<b>Risk-based</b>	A risk-based approach is applied to regulatory decision-making.

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<sup>2</sup> Department of Finance, Services and Innovation (October 2016), *Guidance for regulators to implement outcomes and risk-based regulation*, p.3, 6.

Principles	Behaviours
<b>Timely</b>	Actions are prompt and efficient, with a focus on ensuring regulatory burden and cost are minimised as much as possible.
<b>Fair</b>	An impartial and objective approach is adopted at all times, giving parties the opportunity to engage, be heard and to respond as part of regulatory intervention/s.
<b>Proportionate</b>	Regulatory actions are proportionate to the seriousness of the relevant conduct, considering the circumstances and all available information.
<b>Evidence-based</b>	Each individual situation is considered on its merits and available evidence, with understanding and acknowledgement of each non-government school's stated ethos and/or purpose.
<b>Accountable</b>	Regulatory decisions, actions and performance are transparent and consistent, supported by clear documentation and reporting.

## Regulatory purpose

A core regulatory purpose supports regulators in the definition and achievement of regulatory outcomes.<sup>3</sup>

The legislative obligations in Part 7, Division 3 of the Act inform the development of a core regulatory purpose.

A potential regulatory purpose for consideration is:

***Ensuring the financial investment in non-government schools by the NSW Government is not directed to schools that operate for profit.***

The regulatory purpose will guide both the Advisory Committee and the Department in the pursuit of regulatory outcomes.

## Regulatory outcomes

Well-defined outcomes help enable better regulation. They openly clarify the regulatory objectives to be achieved, and help regulators demonstrate how their initiatives and interventions contribute to outcomes over time.<sup>4</sup>

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<sup>3</sup> Department of Finance, Services and Innovation (October 2016) Guidance for regulators to implement outcomes and risk-based regulation, p.14.

<sup>4</sup> Department of Finance, Services and Innovation (October 2016), *Guidance for regulators to implement outcomes and risk-based regulation*, p. 15.

The following set of draft regulatory outcomes has been developed with input from stakeholders including Catholic Schools NSW, the Association of Independent Schools of NSW, the Advisory Committee, NSW Education Standards Authority, the NSW Parents' Council and the Council of Catholic School Parents:

- Public money is used to support the education of students and is not diverted to other purposes.
- Non-government schools in receipt of NSW government financial assistance do not operate for profit, with clarity about the regulatory requirements and how to meet them.
- Non-government schools and proprietors will ensure their income and assets are used only for the operation of the school, acknowledging schools may follow a stated ethos and/or purpose.

### **Consultation questions**

In the context of the development of a regulatory framework for the not for profit requirements of the Act, we welcome views on the following questions:

1. Do you think the proposed regulatory principles, core regulatory purpose and regulatory outcomes are appropriate to underpin the regulatory framework?
2. Are there any other suggestions you can make to improve the proposed regulatory principles, core regulatory purpose and/or regulatory outcomes?

## Regulatory tools and interventions

As part of the terms of reference (Attachment 1), the regulatory framework will need to support a regulatory approach that is proportionate and responsive to risk, and focused on outcomes.

There are a number of regulatory tools and interventions that support the achievement of regulatory outcomes. The source of authority for these is the Education Act. It is also important in this context to highlight the Advisory Committee is required to be consulted on a number of regulatory interventions prior to their application.

The Advisory Committee is comprised of the following members:

- an independent Chairperson
- one person who represents the Association of Independent Schools
- one person who represents Catholic Schools NSW
- one person who represents the NSW Education Standards Authority
- one person who represents the NSW Department of Education
- any other persons who, in the opinion of the Minister, will be of assistance to the Committee in the exercise of its functions.

The available regulatory interventions/actions include:



**Table 2: Available regulatory interventions/actions**

<b>Intervention Option / Action</b>	<b>Description</b>
<b>Preliminary enquiries</b>	The Minister or the Department may make preliminary enquiries with a school or proprietor to determine if any further action is required to be taken.
<b>Direction a non-government school undergo an audit of financial affairs</b>	After seeking the advice of the Advisory Committee, the Minister may direct a school or proprietor to undergo an audit of financial affairs (see section 83I(1)(a)). The Minister may direct the school to pay the Minister for reasonable costs (see section 83I(3)).
<b>Direction a non-government school provide specified information to the Minister (or other specified person)</b>	The Minister may direct a school or proprietor to provide specified information to the Minister (or other person) relating to the affairs of the school or proprietor (see section 83I(1)(b)).
<b>Direction a non-government school cease any specified conduct that is in breach of the obligation not to operate for profit in order to be provided financial assistance</b>	After seeking the advice of the Advisory Committee, the Minister may direct a school or proprietor to cease any specified conduct that is in breach of the obligation not to operate for profit in order to be provided financial assistance (see section 83I(1)(c)).
<b>Investigation into a non-government school</b>	After consulting with the Advisory Committee, the Minister may carry out an investigation into a school or the proprietor of a school if the Minister suspects the school may be operating for profit or may be a non-compliant school. The Minister may defer all or part of the school's financial assistance during an investigation (see section 83H).
<b>Declaration that a non-government school is non-compliant</b>	The Minister may declare that a school is a non-compliant school. The Minister may make a non-compliance declaration only if the Advisory Committee recommends that the declaration be made. Any such recommendation may include a recommendation on any consequent suspension or reduction of, or imposition of conditions on, the provision of financial assistance (see section 83F and s83E).
<b>Declaration that a non-government school operates for profit</b>	The Minister may declare that a school operates for profit or has operated for profit during a specified previous period, or both. The Minister may make a for profit declaration only if the Advisory Committee recommends that the declaration be made (see section 83D). Financial assistance is not to be provided to a school that operates for profit. The Minister's obligation not to provide financial assistance to a school that operates for profit applies, whether or not a for profit declaration has been made (see sections 83C and 83D).

Intervention Option / Action	Description
<b>Recovery of amounts from a non-government school</b>	The Minister may recover the amount of any financial assistance provided by the Minister to or for the benefit of a school if the financial assistance was provided in respect of a period when the school operated for profit or was a non-compliant school (see section 83J).

Not all of the regulatory interventions/actions outlined above are used in each circumstance. As part of the development of the regulatory framework, the Department is developing a regulatory decision-making guide to support departmental procedural decision-making on the appropriate regulatory actions/interventions.

The scope and nature of interventions and options available are consistent with compliance and enforcement practices in the context of a regulatory framework. There are, however, opportunities that we have identified for improving the framework and regulatory approach, and these are explored briefly below.

## Opportunities

### Audit

A risk-based methodology is applied to identify non-government schools to be included in an annual audit program, overseen by the Advisory Committee.

An analysis of past compliance activities and audits and reasons for a for profit and/or non-compliance declaration has identified areas of risk for non-government schools in relation to compliance with the not for profit requirements of the Act such as:

- land and property transactions
- credit and monetary loans
- consultancy and professional services
- shared services.

We believe there is an opportunity to review and further refine the audit cycle to promote regular and proportionate auditing of key areas, supported by education and engagement on those areas. For example, auditing based on theme or topic is an avenue currently being explored to increase the number of audits undertaken. This will also help to assess compliance and subsequent education measures in a targeted way.

### Regulatory decision-making

Regulatory decision-making and discretion is an area that would benefit from further guidance by way of a decision-making guide (refer to the section above, *'Regulatory Tools and Interventions'*). This would ensure (among other things) that assessments and

interventions are proportionate and appropriate. An early outline of the key elements to be included in such a decision-making guide when a compliance issue is first identified and/or following the outcomes of a financial audit of a school, are as follows:

- **overview of the compliance process**
  - articulation of the key decision points in the compliance process and available regulatory tools and interventions
- **triage and assessment**
  - analysis of the compliance issues and possible intervention/s
    - based on an assessment of the available evidence
    - consideration of the regulatory principles and regulatory outcomes, together with any areas of compliance focus of the Minister and/or the Advisory Committee
  - determining the desired impact of the nominated intervention, views towards compliance (if known), purpose of the intervention and alignment to regulatory outcome
  - identifying regulatory risks, and resource implications of the proposed intervention
    - overlay of risk analysis, control measures, and available resources
  - consideration of preliminary enquiries (if required) to aid triage and assessment
- **intervention option / strategy**
  - determining intervention option / strategy and seeking the guidance and input of the Advisory Committee as required
  - applying the intervention option/strategy
    - development of the appropriate plan (e.g. audit plan, investigation plan) with clearly defined scope, roles and responsibilities and milestones/timeframes
    - affording of procedural fairness and due process to the non-government school / proprietor
  - monitoring performance against the plan and desired outcome/s
- **evaluating compliance/intervention and educational inputs**
  - considering further interventions/escalations following the evaluation
  - data collection and analysis to determine the success of the intervention strategy and enable reporting against key measures / key performance indicators
  - reviewing interventions for process improvement
  - development of education and engagement materials for outcomes of interventions / intervention strategies.

Further work will be undertaken to develop a decision-making guide to elaborate on these elements.

**Reducing unnecessary regulatory and compliance burden** is also a key focus through the regulatory framework, and has been highlighted by stakeholders as an area of importance. Identified opportunities to reduce regulatory burden include:

- Duplication – Clearer requests for information issued to non-government schools through audit, and directions to provide information under the Act, and consideration of information flow to ensure the same information is not being inadvertently requested more than once of schools.
- Regulatory overlap – Harmonisation of data between the Commonwealth and the States (this work is already underway to further reduce the regulatory burden), and identification of further opportunities (recognising privacy obligations that may be in place).
- Collaboration between regulators – Further enhancing and promoting communication and collaboration between regulatory authorities (recognising privacy obligations that may be in place and separate regulatory functions).

### **Consultation questions**

In the context of the development of a regulatory framework for the not for profit requirements of the Act, we welcome views on the following questions:

3. Do you have any feedback on the opportunities identified of audit and regulatory decision making, or any other opportunities that should be explored in the context of the regulatory framework and the available regulatory tools?
4. Are there specific areas where unnecessary regulatory or compliance burden has been acute, relevant to the development of the regulatory framework?

## Engagement measures

A number of engagement measures have been implemented to date which focus on improving stakeholder awareness and capacity to comply with the not for profit provisions under the Act. Initiatives have primarily been driven by sector feedback on areas which require further clarity. Activities include:

- [Newsletters](#) which provide information on specific topics with case studies.
- [Information sheets](#) that describe aspects of the not for profit compliance process.
- A [Not for Profit Self Check Tool](#) to assist non-government schools to independently assess their governance arrangements in relation to not for profit requirements.
- A series of [Good Governance Principles](#) and related templates to assist non-government schools and their boards to develop and maintain good governance practices.
- Working with our sector representative partners, Catholic Schools NSW and Association of Independent Schools NSW to present at forums and workshops on the not for profit requirements and how schools can meet their obligations under the Act.

- Providing written and verbal feedback to inquiries from non-government schools regarding specific not for profit compliance situations.
- Supporting new schools to understand the not for profit requirements through presenting at the NSW Education and Standards Authority annual new schools forum.

In the future, we seek to put into place best practice mechanisms that support regular, genuine, and fit-for-purpose engagement with our stakeholders. Some of the ideas that we are exploring include:

- Establishing an advice and enquiry channel for stakeholders to enquire about specific not for profit related matters.
- Running educational webinars and seminars and/or release of publications on key topics of interest.
- Refreshing the non-government schools page of the Department's website to ensure information is clear, accessible and easy to navigate.
- Developing further case studies and outcomes of investigations aimed at assisting schools understanding of how not for profit requirements are applied in various 'real world' scenarios.
- Improving information for new schools and non-government schools which are part of a system of schools.

In August, a further co-design workshop was run with key stakeholders on how we can improve our engagement with, and education of, the sector to ensure effective application of the regulatory framework. This was one of many future engagement opportunities with the sector.

### **Consultation questions**

In the context of the development of a regulatory framework for the not for profit requirements of the Act, we welcome views on the following questions:

5. Do you have any views on engagement measures to inform our thinking in the development of the regulatory framework?

## Measures and reporting

Monitoring, reporting, and continual improvement are the processes through which the benefits of an outcomes and risk-based regulatory framework are capitalised and maximised over time.<sup>5</sup> A structured and consistent approach to monitoring and reporting enables regulators to:

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<sup>5</sup> Department of Finance, Services and Innovation (October 2016), *Guidance for regulators to implement outcomes and risk-based regulation*, p. 55.

- understand, adapt and strengthen the evidence underpinning its regulatory initiatives, including the efficiency and effectiveness of those initiatives
- identify and reprioritise its risks over time
- inform its corporate direction and strategic priorities over the longer term.<sup>6</sup>

Reporting of compliance information related to regulatory interventions in the context of the regulation of the not for profit requirements of the Act is currently limited. We are seeking to develop key performance indicators, to monitor and report on areas such as audits undertaken, length of investigations and compliance action.

Meaningful data collection, together with strong regulatory principles, outcomes, and regulatory decision making, will enable a focus on performance and reduction of administrative burden.

### **Consultation questions**

In the context of the development of a regulatory framework for the not for profit requirements of the Act, we welcome views on the following questions:

6. Do you have any views on regulatory outcomes measures and/or key performance indicators to inform our thinking in the development of the regulatory framework?

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<sup>6</sup> Department of Finance, Services and Innovation (October 2016), *Guidance for regulators to implement outcomes and risk-based regulation*, p. 55.

# Part 2: Not-For-Profit Guidelines for Non-Government Schools

## Review of the Not-For-Profit Guidelines for Non-Government Schools

The [NFP Guidelines](#) are published under section 83L of the Act by the Minister for Education and Early Learning. The purpose of the NFP Guidelines is to assist non-government schools in receipt of NSW Government funding to understand the not for profit requirements of the Act, and how to meet these obligations.

The NFP Guidelines are being reviewed to ensure that they continue to be relevant and provide the necessary guidance for non-government schools and align with the public interest and legislative intent of Parliament.

### What is the role of the NFP Guidelines?

The NFP Guidelines are published by the Minister under Section 83L of the Act and apply to all non-government schools/proprietors in NSW.

The NFP Guidelines provide examples of documentary evidence that may be used to help demonstrate compliance with the Act, and address transactions and payments commonly carried out by schools/proprietors (noting it is not intended to be an exhaustive list). The NFP Guidelines do not restrict the operation of s83C or any other provisions of the Act, or any other laws.

### What do the NFP Guidelines currently contain?

The NFP Guidelines currently include a range of topics aimed at assisting non-government schools to meet the not for profit requirements under the Act. These are currently grouped under two broad headings: Payment for Property, Goods or Services; and Proprietor/School Assets.

Additionally, the NFP Guidelines summarise ways in which schools can demonstrate compliance, describe the role of the Advisory Committee, and provide an overview of the not for profit requirements.

### **Consultation questions**

In the context of a review of the Not-For-Profit Guidelines for Non-Government Schools (June 2019), we welcome views on the following questions:

7. Do you have any views on the structure of the current NFP Guidelines, and/or what might be useful to consider in structuring the revised NFP Guidelines?

## Guidance issued by the Non-Government Schools Not-for-profit Advisory Committee

The Advisory Committee publishes newsletters addressing contemporary regulatory issues and updates. Recent topics addressed in newsletters include: gifts and honorariums, marketing/sponsorship, and shared service agreements.

The newsletters are considered an effective method of communicating regulatory issues and updates from the Committee's perspective. However, it is acknowledged that it may be challenging to locate topic updates and guidance at a later date (that is, knowing and locating which topic is contained in which newsletter).

There is an opportunity to consider whether it would be useful to have an online 'handbook' or similar index available for non-government schools, which summarises key information and updates in relation to regulatory topics and subject matter. This approach is adopted by some other regulators – see, for example, the Australian Charities and Not-for-profits Commission [Topic Guides](#), or the Australian Securities & Investments Commission's [Regulatory Index](#).

### **Consultation questions**

In the context of a review of the Not-For-Profit Guidelines for Non-Government Schools (June 2019), we welcome views on the following questions:

8. Do you have any feedback on the opportunity identified to have an NFP regulatory index or topic guide? What might be important or helpful to include in such an index/guide?

## Not for profit requirements and guidance to non-government schools/proprietors

The legislated purpose of the NFP Guidelines is *“to assist proprietors/schools in receipt of NSW Government funding to understand the not for profit funding requirements established under the Act”*<sup>7</sup>.

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<sup>7</sup> NSW Department of Education (June 2019) *Not-for-Profit Guidelines for Non-Government Schools*, p. 6.



The NFP Guidelines currently provide guidance on a range of matters relevant to the regulation of the not for profit requirements.

It has been identified that further guidance (in various forms such as further information in the NFP Guidelines, potential evidentiary considerations by the Advisory Committee, case studies, etc) would be beneficial in some areas. This guidance could either be included in the NFP Guidelines, or via a regulatory index or similar (if this approach is adopted).

Identified areas for potential further guidance include:

- related entity transactions
- reasonable market value
- land and property transactions
- school owned property and assets, and shared or joint use of assets
- onsite ancillary services
- systems of schools.

A range of guidance approaches are being considered (as outlined above), recognising that the regulation of the not for profit requirements turns upon the individual circumstances and facts of each matter, and it will not be possible to provide guidance on every potential scenario that may arise.

#### **Consultation questions**

In the context of a review of the Not-For-Profit Guidelines for Non-Government Schools (June 2019), we welcome views on the following questions:

9. Are there any specific areas that may benefit from guidance and/or further guidance in the NFP Guidelines, in relation to the not for profit requirements? If so, please provide details and examples, including the nature of the guidance sought.

# Conclusion

## Next steps

A regulatory framework and the revised NFP Guidelines are due to be released in early 2023. We remain committed to consultation with stakeholders throughout this process, with the further development of the framework and revised NFP Guidelines.

Feedback on this Discussion Paper will greatly inform this development.

Details on how to provide a submission are contained in the first part of this paper. Our consultation questions are summarised below:

### **Summary of consultation questions**

In the context of the development of a regulatory framework for the not for profit requirements of the Act, we welcome views on the following questions:

1. Do you think the proposed regulatory principles, core regulatory purpose and regulatory outcomes are appropriate to underpin the regulatory framework?
2. Are there any other suggestions you can make to improve the proposed regulatory principles, core regulatory purpose and/or regulatory outcomes?
3. Do you have any feedback on the opportunities identified of audit and regulatory decision making, or any other opportunities that should be explored in the context of the regulatory framework and the available regulatory tools?
4. Are there specific areas where unnecessary regulatory or compliance burden has been acute, relevant to the development of the regulatory framework?
5. Do you have any views on engagement measures to inform our thinking in the development of the regulatory framework?
6. Do you have any views on regulatory outcomes measures and/or key performance indicators to inform our thinking in the development of the regulatory framework?

In the context of a review of the Not-For-Profit Guidelines for Non-Government Schools (June 2019), we welcome views on the following questions:

7. Do you have any views on the structure of the current NFP Guidelines, and/or what might be useful to consider in structuring the revised NFP Guidelines?
8. Do you have any feedback on the opportunity identified to have an NFP regulatory index or topic guide? What might be important or helpful to include in such an index/guide?
9. Are there any specific areas that may benefit from guidance and/or further guidance in the NFP Guidelines, in relation to the not for profit requirements? If so, please provide details and examples, including the nature of the guidance sought.

## Further reading

Department of Finance, Services and Innovation (October 2016), *Guidance for regulators to implement outcomes and risk-based regulation*.

*Education Act 1990* (NSW), Part 7 Division 3.

NSW Department of Education (June 2019), *Not-for-Profit Guidelines for Non-Government Schools*.

# Attachment 1

## Development of a regulatory framework for the oversight of financial assistance provided to non-government schools in NSW

### Terms of Reference

#### Context

Non-government schools form an integral part of the education landscape in NSW, providing a diverse range of choices for parents considering the educational needs of their children. Each year, the NSW Government provides \$1.5 billion to assist non-government schools that educate approximately one third of NSW school students.

Financial assistance to non-government schools in NSW is regulated by the NSW Department of Education ('the Department') under Part 7 Division 3 of the *Education Act 1990* ('the Act'). Section 83C of the Act requires non-government schools in receipt of financial assistance to not operate for profit. This is a longstanding requirement that was first introduced in 2006, then later strengthened in 2014 with the enactment of the *Education Amendment (Not-for-profit Non-Government School Funding) Act 2014*. Part 7 Division 3 of the Act is supported by the Education Regulation 2017.

Further to the strengthening of the not-for-profit requirement of the Act, the operating environment of non-government schools has become more nuanced and complex. This requires the Department to continuously review and adapt its regulatory approach.

Given this complex context, and in accordance with these Terms of Reference, the Department will seek to recommend a regulatory framework to enhance the regulation of financial assistance to non-government schools under Part 7 Division 3 of the Act. This will include a review of the 'Not-For-Profit Guidelines for Non-Government Schools' ('the NFP Guidelines'). The Minister for Education and Early Learning ('the Minister') has been briefed on the commencement of this work.

An outcomes-focused and risk-based regulatory framework would provide for:

- The flexibility to respond to challenging and changing circumstances (as guided by risk)
- A consistent and transparent approach to compliance education, engagement, monitoring and enforcement
- A practice of continuous improvement.

#### Terms of Reference

- (1) Develop an outcomes-focused and risk-based regulatory framework for Part 7 Division 3 of the Act that includes:
  - (a) The Department's core regulatory purpose under Part 7 Division 3 of the Act
  - (b) Regulatory principles that will guide how the Department will carry out its roles and responsibilities under the Act and engage with the non-government school sector

- (c) A statement on the available regulatory interventions and activities, interactions with the NFP Guidelines, and a decision-making guide to support the Department (as the regulator) and the non-government school sector
  - (d) A regulatory approach that is proportionate and responsive to risk, and focused on outcomes
  - (e) The roles and responsibilities of key parties, including the Non-Government Schools Not-For-Profit Advisory Committee ('the Advisory Committee')
  - (f) Accountability arrangements, including key performance indicators
  - (g) Measures to improve the engagement and education of the non-government school sector to ensure the effective application of the regulatory framework.
- (2) Coordinate a review of the Minister's NFP Guidelines in consultation with non-government schools and key stakeholders.
- (3) Having regard to the above, recommend policy and/or operational changes to improve the regulation of financial assistance to non-government schools under Part 7 Division 3 of the Act.

### **Consultation**

The Department will coordinate a series of public consultations with key stakeholders. It will also draw on the unique expertise of the Advisory Committee. Key stakeholders to be engaged include (but are not limited to):

- The Advisory Committee
- The Association of Independent Schools of NSW
- Catholic Schools NSW
- Non-government schools that receive financial assistance under Part 7 Division 3 of the Act
- The NSW Education Standards Authority
- NSW Parents' Council
- Council of Catholic School Parents.

### **Methodology**

- Review current regulatory approach and NFP Guidelines
- Consult with key stakeholders
- Prepare draft regulatory framework and revised NFP Guidelines for public consultation
- Receive public submissions
- Incorporate feedback on the regulatory framework and NFP Guidelines
- Present recommendations to the Minister
- Consider resourcing implications of recommendations.

It is anticipated recommendations will be made to the Minister by December 2022.

### **Scope**

For this current scope of work in the development of a regulatory framework and the review of the NFP Guidelines, outside of scope will be:

- A comprehensive review of the operation of Part 7 Division 3 of the Act – this will be considered following the development of a regulatory framework, review of the NFP Guidelines, and any subsequent policy/operational recommendations;
- A review of the *Criteria for expenditure of NSW funds for non-government schools* – this will be considered by the Department as part of the terms of the *Memoranda of Understanding to Strengthen Accountability for Non-Government Schools* (2020).

### **Secretariat**

Secretariat support is provided by the Department's Non-Government Schools Policy Unit.

Email: [NonGovSchools.RegulatoryFramework@det.nsw.edu.au](mailto:NonGovSchools.RegulatoryFramework@det.nsw.edu.au)