

INFORMATION SHEET: NOT-FOR-PROFIT REQUIREMENTS

Not-For-Profit Compliance Process

Background

This information sheet provides NSW non-government schools with an overview of the not-for-profit compliance process.

The NSW Department of Education oversees the not-for-profit requirements of non-government schools outlined in Section 83C-L of the NSW Education Act 1990 (Act). The Non-Government Schools Not-For-Profit Advisory Committee (Committee) oversees compliance with this section of the Act and advises the Minister on matters relating to non-government schools' compliance.

The Act requires that to be eligible for funding, non-government schools **must not operate for profit**. This means that the income and assets of the school must be used for the benefit of the students and the operation of the school. Income refers to **all income** received by the school, not just government funding.

Schools and their proprietors¹ (schools) are encouraged to take a proactive approach to managing compliance to help mitigate any compliance risks. School representatives can contact the Secretariat or their independent sectors (AIS-NSW and CSNSW) for further advice and support.

Compliance issues, particularly ones of a complex nature, can cut across agencies and jurisdictions. The department works with and makes referrals to key agencies such as NSW Education Standards Authority (NESA), Australian Charities and Not-for Profit Commission (ACNC) the Australian Department of Education Skills and Employment (DESE), and other jurisdictions education agencies/departments.

The compliance process

The compliance process involves a series of stages following the identification of any potential compliance issues. Following the identification of compliance risks, an assessment will be undertaken, and options considered to address any identified issues. This compliance process ensures all NSW non-government schools meet their not-for-profit requirements under s.83C of the Act. The diagram below provides a summary

of the key stages. The process involves an inquiry into potential for-profit or non-compliance activity and covers initial investigation, reviews, recommendations to the Minister from the Committee and finally Ministerial declarations.

Who is involved in the compliance process?

The following parties each play an integral part in the compliance process:

- NSW Minister for Education (Minister)
- NSW Department of Education
- Non-Government Schools Not-for-Profit Advisory Committee (Committee)
- Committee's Secretariat (Secretariat) (these are members of the NSW Department of Education Non-Government Schools Unit that support the work of the Committee)
- Non-government schools' proprietors and/or governing Boards
- External service providers including auditors, valuers, governance specialists
- Tribunals and legal service providers if relevant.

¹ A proprietor is a person or incorporated body legally responsible for the School.

Key stages in the Not-For-Profit compliance process

Referral to Committee or Department via Compliance audit, desktop review, information received from another agency or member of the public.

Schools can be audited and/or directed to provide information to the Committee via a directions letter (s.83I)

Reasonable suspicion of non-compliance or for-profit activities

School put under investigation (s.83H of the Act)

Committee reviews evidence and may recommend the Minister make a non-compliant (s.83F of the Act) or for-profit (s.83D of the Act) declaration

School notified of the Committee's recommendation

Schools can request internal review (28 days from letter)

Internal review decision confirms non-compliance or for profit finding

Notice of Recommendation sent by Minister to schools

Schools can request external (NCAT) review (within 30 days of notice)

External (NCAT) review confirms non-compliance or for profit finding

Minister may issue a non-compliant declaration (s.83F of the Act) or for profit declaration (s.83D of the Act) and impose sanctions on the school.

Compliance review and audit

Schools are selected for a compliance review through a risk-based ranking. Schools identified through referral may also be reviewed. An audit may be undertaken as part of this review, conducted by an independent firm.

The focus on the review is to assess schools' compliance with the not for profit obligations under s.83C of the Act and any specific compliance issues identified. Schools can be directed to participate in an audit or provide specific information under s.83I of the Act. Audited schools will be provided with an opportunity to review the audit report.

If there is a reasonable suspicion of for-profit or non-compliant activity then the Minister may instigate an investigation under s.83H of the Act.

Investigation

An investigation is a way to assess potential for-profit activity at a school. Opening an investigation under s.83H of the Act allows the Minister to determine if a for-profit or non-compliance declaration should be made (following a recommendation of the Committee) or if no further action should be taken.

Schools will be informed in writing if they are being investigated under s.83H of the Act. An [Investigations information sheet](#) is available on the Department's website.

What occurs at the end of the investigation process?

At the end of the investigation, the Committee may recommend to the Minister that a school is declared for-profit or non-compliant (per s.83G of the Act) or that no further action is needed.

If a for-profit recommendation is made by the Committee (and then declared by the Minister) the Minister cannot provide funding to the school.

If a non-compliant recommendation is made, the Committee can also recommend suspension, reduction, or the imposition of conditions on funding.

The regulatory response will be proportionate to the issues identified. It is always in the school's best interest to take a proactive approach to understanding their not-for-profit obligations and collaborate with the investigation process.

Notification of the Committee's recommendation

The school will receive written notification as soon as possible after the Committee recommendation is made. The letter will detail the recommendation the Committee will make to the Minister and provide information on the next steps available to the school.

At this stage a school made choose to have the recommendation reviewed. This is called an 'internal review'.

Internal review

A school can request an internal review if the school believes the Committee has made an error in their recommendation. Internal reviews are conducted by independent legal experts, either in-house or engaged by the department who are referred to as internal reviewers.

The school can request an internal review within 28 days of receiving notice of the Committee's recommendation. A form to request the internal review is attached to the letter notifying the school of the Committee's recommendation.

The aim of an internal review is to identify the correct decision, not to resolve any disagreements. The internal review will either affirm, vary or set aside findings and recommendations of the Committee, and the internal review decision replaces the recommendation of the Committee.

Once the internal review is finalised the school will be provided with the internal review report which includes the decision of the internal reviewer.

Notice of recommendation

The school will receive a 'notice of recommendation' from the Minister's delegate which will indicate what compliance action the Minister intends to take. In general, this recommendation is based on the

Committee's original recommendation or the internal review decision (if the school has chosen to have the Committee's recommendation reviewed). Schools may elect within 30 days to have an external review. If the school does not pursue an external review, they will then receive the Ministerial declaration.

External review

External reviews are conducted by the NSW Civil and Administrative Tribunal (NCAT). NCAT has more powers to assess an appeal than those available in an internal review. The NCAT is able to either affirm, vary or set aside the original decision. For further information refer to the [NCAT website](#).

If NCAT confirms the findings of the Committee, then the Minister will issue the declaration that the school was and/or is for profit or non-compliant based on the NCAT findings.

What else can a school do instead of internal and external review?

Schools can proactively address and work towards resolving any prior and/or current for-profit activity at any time during the process. Proactively addressing the issues does not guarantee that a declaration will not be made, however by doing this the school simplifies the process and can significantly reduce costs incurred.

Outcomes in the compliance process

There are three main outcomes of the Compliance process. These are:

Outcome 1:

No further action

School is notified by the Committee that no further compliance action is required at this time.

Outcome 2:

For Profit-Declaration made by Minister

Minister cannot fund a for-profit school.

Outcome 3:

Non-Compliant Declaration made by the Minister

Minister may also suspend, reduce or impose conditions on funding.

Outcome 1 - No further action

The Committee have not pursued compliance action as no for-profit activity was confirmed and the school may have had minor compliance issues that they proactively resolved. The school has shown a willingness to address issues, improve policies and procedures and their understanding of compliance that demonstrates further compliance issues are not likely to arise. Schools are encouraged to use the resources available on the department's website to understand not-for-profit compliance requirements.

Outcome 2 - For Profit Declaration made by Minister

The Minister may make a declaration that a school is, and/or was operating for profit for a specified period of time and/or is ongoing. The Minister cannot fund a School that operates for-profit and any school doing so will have their funding cancelled.

Outcome 3 - Non-Compliance Declaration made by Minister

The Minister may make a declaration that a school is, and/or was, not complying with the not-for-profit requirements of the Act for a specified period of time. The Minister may decide to suspend, reduce or impose conditions on funding provided to the school (or the Minister may decide not to do so).

A non-compliance declaration can also be made after an investigation occurs if the school:

- fails to provide reasonable assistance during the investigation s.83E(2)(a); or
- fails to comply with a direction made under s83I; or
- operates (or has operated) for-profit but the Minister is satisfied that the not-for-profit issues are minor or more appropriate action can be taken.

Conditions

Conditions may be imposed on a school that is declared non-compliant. Conditions are a series of actions that a school must meet in order to continue to receive funding or have their funding reinstated. The actions provide a road map for schools to return to a compliant status. For further detailed information please see the [Conditions information sheet](#).

For-Profit or Non-Compliant Declarations

Schools will receive a for-profit or non-compliant declaration from the Minister in writing. If a non-

compliant declaration is made, conditions on funding may also be issued (note the school will be aware of conditions as they are generally developed at the stage of Committee recommendation).

Recovery of funding

The Minister may recover NSW funding paid to the school for the period the school was operating for profit or non-compliant.

Who can I contact if I need further advice?

If you have any questions or require assistance you can contact the Secretariat at: NGS-Compliance@det.nsw.edu.au.

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