

# Non-Government Schools Not-For-Profit Good Governance Principle 2 – Compliance with the law and governing documents

Good governance arrangements ensure school proprietors and boards<sup>1</sup> manage their affairs with suitable oversight and accountability, and are critical for meeting not-for-profit (NFP) obligations under section 83C of the *Education Act 1990 (NSW)* (the Act).

To help schools develop and maintain good governance practices, the Non-Government Schools Not-for-Profit Advisory Committee has developed a set of [Guiding Principles for Good Governance](#).

## Good Governance Principle 2: Compliance with the law and governing documents states that:

'Boards must be aware of and must meet the requirements of all Australian legislation that applies to non-government school governance and any other legislation applicable to the school (that is, ACNC regulation if the school is a registered charity). Board members must also meet the requirements under the school's governing documents, such as their constitution.'

Compliance with the law and governing documents is required for effective governance. The 2 key elements of this principle, outlined in the following sections, are meeting:

- Legislated governance obligations.
- Obligations in the school's governing documents.

## Meeting legislated governance obligations

'Legislated governance obligations' refers to the legal obligations of the school proprietor and board members that concerns the running of the school. These legal requirements often have significant implications for the school/proprietor and for board members individually so it is critical that board members understand and have effective processes in place to meet these legal obligations.

Board members should regularly review and, if necessary, seek independent help to understand their governance obligations under the relevant laws, including (but not limited to):

- Education Act 1990 (NSW)
- Education Regulation 2017 (NSW)
- Australian Education Act 2013 (Cwth)
- Australian Education Regulation 2017 (Cwth)
- Australian Charities and Not-for-profits Commission Act 2012 (Cwth)
- Corporations Act 2001 (Cwth).

<sup>1</sup> 'Proprietors and Boards' refers to all members of the governing body of the school sometimes also referred to as 'directors'. In these documents the governing body is referred to as the 'school board' or 'board members'.

Under section 83C of the Act, to receive funding, a non-government school must not operate for-profit. This means that the income and assets of the school must be used for the operation of the school and the education of students. Board members are responsible for ensuring the NFP requirements are met by the school. The school board must make sure that all financial transactions comply with the following requirements under the Act:

- That any payment for services, property or goods is at reasonable market value.
- The use of school income and assets is for the operation of the school only.
- That any payment for services, property or goods is reasonable in the circumstances, having regard to the fact that financial assistance is provided to the school.
- That school board members are not paid for their role on the board.

### **Implementing policies and procedures for proper governance**

To comply with legislated governance requirements boards should implement and follow good governance practices. This includes:

- Adopting and maintaining clear and appropriate policies and procedures aligned with these requirements.
- Making clear, well documented decisions. More information can be found in **Good Governance Principle 6: Integrity in reporting**.
- Maintaining all relevant documentation for legally required periods.

Detailed information on how boards can meet their obligations to operate not-for-profit under the Act can be found in the [Not-For-Profit Guidelines for Non-Government Schools](#), [information sheets](#) and [newsletters](#).

Detailed information on how boards can meet their legal governance requirements for registration and accreditation can be found in the [NSW Education Standards Authority \(NESA\) Registered and Accredited Individual Non-government Schools \(NSW\) Manual](#).

### **Maintaining appropriately detailed financial records**

Maintaining appropriately detailed financial records allows boards to demonstrate compliance with the law. This includes:

- Details of financial administration and capital expenditure, including records of audited annual financial statements.
- Evidence that financial transactions and decisions are transparent, at arm's length and of reasonable market value.
- Evidence that conflicts of interest between board members and related entities are being appropriately managed and mitigated in relation to school operations.

For further information on management of finances see **Good Governance Principle 9: Responsible management of finances**.

Schools/proprietors are required to maintain records to meet other legislative/regulatory requirements (for example, for NESA, Department of Education, Skills and Employment (DESE), Australian Taxation Office (ATO), Australian Charities and Not-for-Profits Commission (ACNC) and Australian Securities and Investments Commission (ASIC) and as part of internal school management practices. In many cases these records can be used to demonstrate compliance with the not-for-profit requirements under the Act.

For further guidance on record retention for good governance, see **Good Governance Principle 6: Integrity in reporting**.

## Requirements to share information of not-for-profit compliance

If a school/proprietor is subject to a not-for-profit investigation under section 83H of the Act or directed to provide information under section 83I of the Act, the board may be required to provide documentation to demonstrate that the school/proprietor is compliant with its legal obligations to operate not-for-profit.

Boards should ensure their schools' record retention policies enable them to provide reasonable assistance in response to such requests. Failure to provide these records can result in legal action being taken against the school by the NSW Minister for Education.

## Meeting obligations in the school's governing documents

Governance responsibilities and obligations of the school board should be clearly set out in the school's governing documents, that is the school's constitution, policies and procedures. This helps schools to operate effectively and promotes compliance with the not-for-profit requirements of the Act.

Board members should regularly review and confirm that they understand, and always follow, their obligations under the school's governing documents. To ensure this happens, board performance assessment measures should be included in the school's governing documents (see **Good Governance Principle 7: Assessment of board performance**).

## Case studies

### Case study A – Effective compliance with governing documents

Excalibur School is a secondary metropolitan school. Excalibur Ltd is the proprietor. An extension to the main school building is required to accommodate additional students. A quote was obtained from a construction contractor which was to be considered by the Board at its next meeting. The quote appeared to meet the requirements of the build and was within expected price range.

During the Board meeting, when considering the proposal, a recently appointed board member questioned the use of a quote against the procurement policy expectation of a tender process, in line with the school's procurement policy. The other Board members were not aware that the school had a procurement policy and it was agreed to defer the decision, allowing time for board members to ensure the decision met the requirements of the school's procurement policy. A tender process was arranged and executed in line with the policy which also allowed the Board to evidence that the cost of the work was at reasonable market value. All records in relation to the tender were kept. The Board also resolved to arrange annual training so that all members would all be familiar with the school's policies.

The Board practiced effective compliance with its governing documents as:

- The procurement decision was deferred until all board members ensured the decision met the requirements of the school's procurement policy.
- Appropriate evidence of reasonable market value was obtained.
- Annual board member training was arranged to ensure members were familiar with school policies.

## Case study B – Ineffective compliance with the law

The proprietor of Beech School is Elm Ltd. For-profit activity was suspected at Beech School and as a result, the school was put under investigation under section 83H of the Act. Initial findings from the investigation suggested that the school appeared to have been making payments that were above reasonable market value to a related entity. An information direction was sent to the school under section 83I of the Act, legally requiring the school to provide evidence that the board had:

- Independently verified payments were not above reasonable market value before it had entered into the arrangement.
- Formally disclosed the related entity on its audited related party transaction register at the time of entering into the arrangement.

The Board was unable to provide the required documents as it had not sought verification that payments were at market value, and had not documented the transaction in the related party transaction register.

Rather than responding that it did not have the required documents, and making efforts to resolve the issues, the school board determined not to respond. As a result, the Minister declared the school non-compliant with the NFP requirements of the Act, and conditions were placed on funding.

The Board did not practice good governance in relation to compliance with the law and governing documents as:

- The Board did not implement policies and processes that allowed the school to meet NFP legal requirements.
- The school did not have the required documentation to evidence compliance with section 83C.
- The school/proprietor did not respond to an information direction which it was legally obligated to do under section 83I of the Act.

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