EDUCATION AMENDMENT (NOT-FOR-PROFIT NON-GOVERNMENT SCHOOL FUNDING) BILL 2014

Bill introduced on motion by Mr Adrian Piccoli, read a first time and printed.

Second Reading

Mr ADRIAN PICCOLI (Murrumbidgee—Minister for Education) [4.13 p.m.]: I move:

That this bill be now read a second time.

I seek agreement in principle to the Government's amendments to the Education Act 1990 contained in the Education Amendment (Not-for-profit Non-Government School Funding) Bill 2014. This bill exemplifies the Government's responsible approach to the regulation of non-government schooling in New South Wales. The bill's amendments are designed to give the community greater confidence that the significant financial investment in non-government schools, by both the Government and parents, is not directed to schools that operate for a profit. The amendments are proportionate and fair. They build on the longstanding requirement that non-government schools in receipt of public funding do not operate for profit. The measures aim to strengthen the rules around this funding condition, making it harder for operators to run a school as a profit-making business or to divert school funds to other individuals or entities.

The measures will also help schools better understand what they need to do to comply with the not-for-profit condition, including rectifying any policies and practices that may cause them to be in breach of the rules. The amendments in the bill are not about putting obstacles in the way of non-government schools, nor are they meant to constrain in any way a school's right to meet the particular needs of its community. The amendments enable the Government to meet the legitimate public expectation that funding provided to educate school students is used for that purpose rather than improving an investor's bottom line. The measures are not intended to disproportionately increase the regulatory burden for non-government schools. Government schools are subject already to the full range of regulatory requirements because they are public entities. Government schools are within the scope of the Audit Office of New South Wales, the Independent Commission Against Corruption, the internal audit processes of the Department of Education and Communities, and the NSW Police Force.

Government schools will now be required to demonstrate that they meet registration requirements monitored by the Board of Studies, Teaching and Educational Standards. This will strengthen existing quality assurance processes by ensuring there is independent verification that government schools meet required standards for operation. I take my role as Minister for Education for all schools very seriously. I am responsible for ensuring that all

New South Wales students receive an education of the highest quality, and that extends to every school, regardless of location, religion or sector. Non-government schools greatly enrich the education landscape in New South Wales, providing a diverse range of choices for parents considering the educational needs of their children. Of course, the Government sees the non-government school sector as a key partner in our aim to have New South Wales students be the best in the world. This is more than rhetoric.

In 2012 we established the NSW Schools Advisory Council, which includes representation from the Catholic Education Commission and the Association of Independent Schools, to advise me on a range of school education matters from across the sectors. Since its establishment, the council has contributed important work in a range of areas, in particular, the governance of the Great Teaching, Inspired Learning reforms that aim to lift the standard of teaching in New South Wales. The council is a now a vital part of the educational landscape of the State and I take this opportunity to thank members for their valuable contribution. In recognition of the role of non-government schools, the Government provides significant financial assistance to the sector. This is currently provided for in section 21 of the Act. In 2014-15 that assistance amounts to more than a billion dollars.

The community expects that public funding going to non-government schools be used only for the purpose of enhancing student outcomes. Parents have the same expectation concerning the fees they pay. That is why government funding is available only to schools that certify they are not for profit. It does not mean that a school cannot make a surplus; just that any surplus must be used only for the operation of the school. This Government will not countenance individuals enriching themselves at the expense of students. If school funds are siphoned off for other purposes, it means fewer dollars are available for resources to support student learning. This is unacceptable and prohibited under State legislation. To date only one school has been found to be operating for profit under the existing conditions of the Education Act. In establishing compliance with the existing legislation, a number of areas have been identified where strengthened regulation is called for, and where more nuanced responses need to be available.

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The amendments I propose today strengthen the Act by removing anomalies, which will provide greater clarity and equip the Minister for Education with enhanced powers to ensure that schools comply with the not-for-profit provisions. This should not be seen in any way as a punitive exercise, nor is it a licence for unnecessary interference in a school's operations. The Government respects the autonomy of the non-Government school sector and has no intention of undermining that autonomy. As long as the requirements of the Act are met, a decision to employ staff or purchase equipment belongs solely to the school. We will not restrict the capacity of non-government schools to meet the needs and expectations

of their communities, and to follow their particular mission or ethos.

For example, religious organisations perform many vital services in our community, including operating schools. The changes in this bill do not prevent those schools from purchasing appropriate resources to support their unique mission. They do not challenge the right of the schools to deliver religious education. That fundamental human right is underwritten in common law and will not be undermined by this legislation. This applies to all faith-based schools, no matter what their religion. The changes will also not undermine schools that may have an emphasis on sports or performing arts. These schools would rightly be purchasing goods and services that support their particular focus.

I turn now to the specific provisions of the bill. Section 21 of the current Act, which provides for financial assistance for non-government schoolchildren will be renumbered and transferred to section 83B in the new legislation. This does not change any of the current arrangements for funding non-government schools. Section 83C (1) makes clear that the Minister must not provide any financial assistance to a for-profit school. Section 83C (2) (a) makes it clear that a school will be taken to be operating for profit if its income is used for a purpose other than for the operation of the school. This is an important principle and is intended to ensure school assets and income are used for the operation of the school such as paying teacher salaries, the school library, maintenance and many other related areas. The key test is that the payment is for the school and not for the benefit of another individual or entity.

Under the current legislation a school can make payments at above market value to a related party that is also not for profit. This exception has led to some uncertainty in implementing the regulations. Section 83C (2) (b) removes any doubt by requiring all financial transactions entered into by a school to be at market value. The Government will not be taking a heavy-handed approach to determining what is market value. For example, the Government will not be determining salaries within a school. It is up to the school governing body to determine the market in which the school operates and to set salaries according to that assessment. As with all other goods and services, salaries will only be considered as a for-profit issue if they are clearly beyond a reasonable level. The same section also requires that payments are necessary for the running of the school.

Section 83C (2) (b) further requires that payments are reasonable given the fact that financial assistance is being provided for the benefit of the school. The three tests—that payments meet market value, are required for the running of the school and are reasonable—work together to ensure that payments are genuinely required to meet the educational objectives and operational requirements of the school. The payment of fees to directors of school boards provides a means for some individuals to obtain significant personal benefit from a school. In most non-government schools, parents and community

members volunteer their expertise and work tirelessly free of charge on school boards. Section 83C (2) (c) ensures that no payments are made to directors in connection with their activities as members of the governing body of a school beyond reasonable reimbursement for out-of-pocket expenses. The not-for-profit guidelines will require the school's proprietor to identify the governing body that has delegated authority for the school.

Section 83C (3) allows the regulations to provide further detail of uses of school assets or income that may or may not be considered for profit. This will ensure that we can take steps at a later time to prevent any future financial practices from occurring that seek to circumvent the legislation. The regulations may also enable prohibitions on particular types of entities or legal structures that may be established in the future with the purpose of evading the not-for-profit requirements. Sections 83C (3) and 83E (3) allow the Minister to apply graduated responses to less serious breaches of the not-for-profit requirements. While the Government is committed to the policy of not funding for-profit schools, and the bill maintains this prohibition, there are cases where a school may have a more minor infringement of the not-for-profit requirements that calls for a proportionate response.

The current arrangements impose a threshold whereby the only possible outcome for any minor breach of the not-for-profit requirements is to declare the school as operating for profit and cease funding. This is the only possible sanction no matter how serious or trivial the breach. This section enhances the Minister's regulatory powers by allowing for graduated responses that better fit the nature and severity of the infringement. These less serious cases that meet the legislation's definition of for profit, but in a more minor way, will be considered non-compliant and will allow the graduated responses under section 83E (1) to be invoked. More minor breaches could be an oversight or error, a one-off payment that breaches the requirements, or a transaction or practice that can be easily rectified and return the school quickly to a compliant status. A range of responses could be considered, such as withholding part of the school's funding, or funding the school on a month-by-month basis until the for-profit conduct is rectified.

There will also now be scope to impose conditions on the provision of funding. For example, the school could be directed to take certain actions in relation to its financial management. This change is consistent with best regulatory practice. It avoids an unnecessary, heavy-handed approach. It is designed to ensure minimum Government intervention, which will reduce the burden on schools and concentrate resources on the highest areas of risk. It is not intended that these more graduated responses will apply to systemic breaches of the law. The prohibition on schools that operate for profit from receiving New South Wales Government funding remains in force. Schools that do not meet the not-for-profit requirements in any substantive way will continue to not be eligible for funding and funding may be recovered.

Section 83D provides that the Minister may declare a school to be operating for profit, if he or she is satisfied that is the case, for a specified time in the past or into the future. The declaration is conclusive proof that the school is a for-profit school. Once a declaration is made, steps can then be taken to stop payments and/or recover payments made during the period the school was declared to be operating for profit. I must emphasise that the declaration will be based in fact, follow a rigorous investigation process, be subject to independent scrutiny, and also take into account the outcome of any appeal made by the school against the declaration prior to it being made. The Minister will not make the declaration in isolation and will have the benefit of independent advice. This is demonstrated by the fact that under section 83D (2) the declaration can only be made on the recommendation of the Not-for-profit Advisory Committee, which will provide independent advice to the Minister. I will discuss the role and functions of the advisory committee in more detail later.

Additionally, section 83D (6) provides a reserve power for the Minister to make an alternative decision to that recommended by the committee if he or she considers that appropriate. The declaration will also occur at the conclusion of the process and will be based on the principles of procedural fairness. The bill also provides for a new type of declaration, which is one of non-compliance with not-for-profit requirements. This type of declaration is one step down from a for-profit declaration. As I have previously outlined under section 83C (4), it allows for a determination that better reflects the severity of the breach.

The distinction between for profit and non-compliant is important. A school may have been established purely for the purpose of making a profit, which it is legally entitled to do. However, in accordance with the Act, we must ensure there is no scope for that entity to access public funds. A school may also, in terms of its behaviour, demonstrate that it is, in fact, operating for profit, contrary to its declared not-for-profit status. For-profit declarations made by the Minister are reserved for serious infringements and remove any discretion to provide funding. Alternatively, under section 83E (3), where a non-compliance declaration is in force, the Minister will retain the discretion to stop funding or provide funding, albeit at a reduced level or on a different basis, such as month to month. This can only occur if the Minister is satisfied that the infringement is minor or more appropriate action could be taken instead of termination of financial assistance.

The new non-compliant declaration will be very helpful in giving the Minister the option of a more graduated response detailed in section 83E (1), which provides that the Minister may suspend, reduce or impose conditions on a non-compliant school. Other reasons for a Minister's declaration of non-compliance, in addition to minor breaches of 83C, can be that the school has not complied with a funding condition or a direction, or that it has failed to provide reasonable assistance in relation to the conduct of an investigation of the school.

Some of these reasons are detailed in section 83E (2), but there may be others that arise in future. Under section 83E (4) if a school later becomes compliant it is not entitled to government funding during the period it did not receive any payments because it was non-compliant.

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Under section 83F (1) the Minister may make a declaration that a school is non-compliant. As I have indicated, this is a second tier of misconduct and can range from minor infringements of not-for-profit requirements to hindering an investigation. Section 83F (2) provides that the Minister may make a declaration only on the recommendation of the Not-for-profit Advisory Committee. The Not-for-profit Advisory Committee may also recommend that the Minister impose funding conditions or other sanctions under section 83F (3) to ensure that the school rectifies any issues. Section 83F (4) provides that a declaration of non-compliance will be conclusive proof that a school is a non-compliant school and that there were grounds for making the declaration. Section 83F (5) allows the Minister to modify or revoke a non-compliance declaration at any time, and section 83F (6) provides a reserve power for the Minister in the use of the provisions. As with a for-profit declaration, the reserve power allows the Minister to make a decision without the advisory committee's recommendation if he or she considers this appropriate.

Section 83G requires the Minister to give written notice to the school or proprietor prior to making either a for-profit or non-compliant declaration. The school will then have a legal right to appeal to the New South Wales Civil and Administrative Tribunal under section 107 (1) (e2) prior to any decision by the Minister. This is consistent with other government decisions. For example, if the Board of Studies, Teaching and Educational Standards should find a school non-compliant with registration requirements, the school will be able to appeal to the tribunal. The Office of Education will conduct an internal review of the advisory committee's intended recommendation prior to any appeal being lodged with the tribunal. Section 83G (a) gives the school 30 days to appeal the advisory committee's recommendation to the tribunal, while section 83G (b) requires the Minister to consider any contrary recommendation of the tribunal unless the appeal has been withdrawn under section 83G (c). The Minister must consider the advice of both the tribunal and the advisory committee prior to making his or her decision.

Section 83H (1) provides that the Minister will carry out an investigation into a school if any for-profit or non-compliant conduct is suspected. In practice this function will be undertaken by that part of the department that is separate to the area that has responsibility for the running of public education. This will protect against any conflicts of interest in terms of the regulation of non-government schools. Section 83H (2) requires the Minister to consult with the advisory committee before carrying out an investigation. Section 83H (3) gives the Minister the power to defer all or part of any payment to a school

during an investigation. Deferral of funding is only to be undertaken where there are serious allegations of for-profit activity. This will ensure that Government funding is protected in cases where there is a reasonable suspicion that payments are not being properly directed to the school's operations.

Section 83H (4) provides that an investigation is completed as soon as is reasonably practicable. This will give reassurance to schools, particularly where funding has been suspended, that an investigation will not be open-ended or take an unreasonable amount of time to resolve. A specific time cannot be set for an investigation as it depends on the number and severity of the issues, but every effort will be made to progress investigations as quickly as possible. The Minister is also required under section 83H (5) to consider advice from the advisory committee in relation to an investigation. A key component of the changes to the Act is that the Minister will be able to give directions to schools. These directions include requiring a school to agree to an audit under section 831 (1) (a). This will ensure that schools must give the auditors access to the school and its financial records and provide reasonable assistance.

It is not acceptable for a school to refuse an audit, attempt to mislead or put up barriers to the auditors conducting their investigation or in any way prevent the audit from proceeding. Giving the Minister the power to require schools to pay for an audit under section 831 (3) will ensure that schools that have ongoing financial irregularities will pay for the costs of their increased regulation. The Minister may also direct a school to provide specified information relating to the affairs of the school or proprietor under section 831 (1) (b) in any form and time frame as he or she sees fit. Again, this should not pose any significant new burden on schools. There is a reasonable expectation that appropriate financial and other records are kept and can be readily accessed in relation to the operation of a school.

Section 831 (1) (c) gives the Minister the power to direct a school to cease any activity that is in breach of the not for profit requirements. The advisory committee would be consulted prior to any direction of the Minister, except for the information-gathering power under section 831 (1) (b). For reasons of practicality, this will be conducted on behalf of the Minister by the Office of Education in the Department of Education and Communities. If an investigation finds a school is operating for profit, it is reasonable that the school should repay the public funds received while the school was in breach of funding conditions. This is an important principle. There is community expectation that public funding provided during a period when a school was later found to be ineligible for funding will be recovered and returned to the people of New South Wales. At present, the only means of seeking repayment is by taking action through the courts. Under the current legislation, this has been a time-consuming and expensive exercise.

By inserting section 83J the Minister will be able to recover the money either as a debt in

court under section 83J (3) (a), which is the current situation, or by offsetting it against future funding under section 83J (3) (b). In some cases both provisions will need to be applied. The intention of the debt-offset provision is to simplify any potential recovery proceedings. This will mean that if a school is currently compliant, but was not so during a past period, deductions can be made from future payments until the school has repaid the debt. Of course, there is no intention to take any arbitrary or unreasonable action against a school. It may be that the debt could be repaid in instalments. The outcome of the measure is simply to ensure there is a practical avenue for recovery of Government funds beyond an expensive and protracted court process.

Section 83J (2) also allows the costs of an audit to be deducted from future payments, while section 83J (4) outlines the responsible parties for repaying the debt owed by a school for breaches of the not-for-profit requirements. The school, proprietor and any funding system are jointly and severally liable for repayment of the amount. A key aspect of the new not-for-profit arrangements proposed in this bill is the establishment of the Not-for-profit Advisory Committee. The committee will advise me directly on individual school compliance with the not-for-profit requirements. Establishing the advisory committee in legislation underlines the serious nature of its responsibilities and ensures transparency of its roles and functions. The relevant part of the bill is section 83K.

This legislative basis also sends a strong message to the community that the Government is serious about ensuring appropriate use of public funds. The advisory committee will be representative of the whole education community in New South Wales. Membership will include representatives of the Catholic Education Commission, the Association of Independent Schools, the Board of Studies, Teaching and Educational Standards, and the Department of Education and Communities through the Office of Education. To mitigate real or perceived conflicts of interest, the advisory committee will have an independent chair from outside government and the non-government schooling sector. This will ensure that the advisory committee has the highest standards of probity and transparency, and provide greater assurance of procedural fairness. There will also be independent experts and members of other relevant agencies, as determined by the Minister.

The advisory committee will be supported by the Office of Education, which will be responsible for the day-to-day management of the audit process and investigations. Section 83K (2) outlines the functions of the advisory committee. Primarily this is to advise the Minister on compliance by schools with the not-for-profit requirements under section 83C and to make recommendations on the making of for-profit or non-compliant declarations. The bill also specifies that the Minister has the power to develop guidelines under section 83L (1) to assist non-government schools to better understand their responsibilities under the Act. The advisory committee will be involved with the preparation of these guidelines under section 83L (2). The cumulative expertise and experience of members will be very

valuable in this process.

In the future there may be emerging issues where the advisory committee will also need to have a role. There may also be a need to change the composition of the committee or its procedures. For this reason section 83K (3) provides that the regulations may contain these provisions in the future. Section 83K (4) provides that members of the advisory committee are not personally liable for any action, claim or demand arising from their committee work. New section 123(2A) states that if the Minister signs a certificate stating that an amount has been paid to the school or that a for-profit or noncompliant declaration is in force, this is evidence that the amount was paid or that the misconduct has occurred.

This evidentiary process will streamline debt recovery procedures. The transitional arrangements provide schools with time to make changes to their financial arrangements in order to be compliant with the new requirements. The not-for-profit requirements under section 21A of the current legislation will continue for three months from the date of assent of the amendments. This means that if allegations are made that a school was operating for profit prior to this time, the old definition of "for profit" will be used. There is no intention to backdate the new rules under the new legislation. There is no suggestion that the new definition of "for profit" under section 83C will be applied retrospectively, nor will there be any "fishing expeditions".

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However, the new process—involving the advisory committee, appeals and declarations—will be used to assess any past breaches of section 21A and any that occur up to three months after the commencement of the Act. This is a sensible provision. It means that there will be one process that starts on the commencement of the Act, thus allowing the advisory committee to have an immediate advisory role. This will require the advisory committee to oversight investigations covering either the old or new definition of "for profit". In some cases there may be infringements covering both the old section 21A and the new section 83C. In these situations, the advisory committee can make a recommendation that a school be declared to be operating for profit or noncompliant for past breaches under the old rules as well as the new rules proposed by this bill. However, each investigation will follow exactly the same process regardless of the law that applied when the breach occurred.

To recap, the process will allow the Minister to make directions that the school cooperate with an investigation, including undergoing an audit and providing information, and to cease any conduct that may breach for-profit requirements. At the end of the investigation, on the advisory committee's recommendation, the Minister can make the same "for profit" or "noncompliant" declaration irrespective of whether the old or new legislation has been breached. Any funding provided by the New South Wales Government during the period the school was assessed as noncompliant or operating for profit can also be deducted from

future payments under section 83J. Again, it does not matter whether the breach was of section 21A or the new section 83C. The advantage for a school is that it will have a right of appeal to the New South Wales Civil and Administrative Tribunal which is not currently available for breaches of section 21A.

In addition, if a noncompliant declaration is subsequently made, a graduated response will be possible, rather than the only currently available option of terminating funding and recovering past funding. Only one school, Malek Fahd Islamic School at Greenacre, has been found to be operating for profit under current legislation. In the bill, a provision has been included to specifically address this finding. The provision will deem the school to have been operating for profit under the new legislation and allow a "for profit" declaration to be made. This will ensure that the Minister's finding is consistent with the amended legislation. The declaration will apply to the period 1 January 2010 to 31 July 2012.

These changes to the legislation are not intended to remedy every financial management issue at a non-government school. In recent years, allegations of financial irregularity have been referred to the Minister for Education and the department to investigate under the existing legislation around for-profit activity by non-government schools. These include allegations relating to corporate governance, tax evasion, fraud, corruption, grant acquittal, environmental protection and school management. However, investigating potentially fraudulent or criminal activity or breaches of corporation requirements is outside the scope of the education Act. This is appropriately the role of the NSW Police Force and other State and Federal agencies. Improved information sharing with other agencies will strengthen the protocols and procedures for referrals.

When the new legislative provisions have been in operation for some time, the Government will be in a better position to assess whether any unforeseen issues have arisen from the Act. For this reason, I will require the advisory committee to give a report on any unintended consequences of the legislation within three years of its commencement. I am pleased to advise that these amendments are fully supported by both the Catholic Education Commission NSW and the Association of Independent Schools of NSW. In particular I thank Dr Geoff Newcombe and Dr Brian Croke for their continued support in developing these necessary changes to the education Act.

New South Wales has a long tradition of excellence in education, and the non-government sector has made a significant contribution to that tradition. The Government knows that the majority of schools in the sector do not want that contribution to be undermined by a small number of operators that could be using schools to line their own pockets. The sector's schools, teachers, parents and alumni are concerned only with providing a high-quality education for their students. They are committed to meeting the requirements associated with receiving government funding. This bill is a measured and appropriate response to

ensuring that happens. I commend the bill to the House.

Debate adjourned on motion by Mr Ryan Park and set down as an order of the day for a future day.