

**EXPOSURE DRAFT FOR PUBLIC CONSULTATION THURSDAY 19 OCTOBER TO
FRIDAY 24 NOVEMBER 2023**

| NSW Department of Education

DRAFT Regulatory Framework

**Regulatory Framework for the oversight of financial
assistance provided to NSW non-government schools**

[October 2023]

Version 9

Acknowledgements

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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1. Introduction

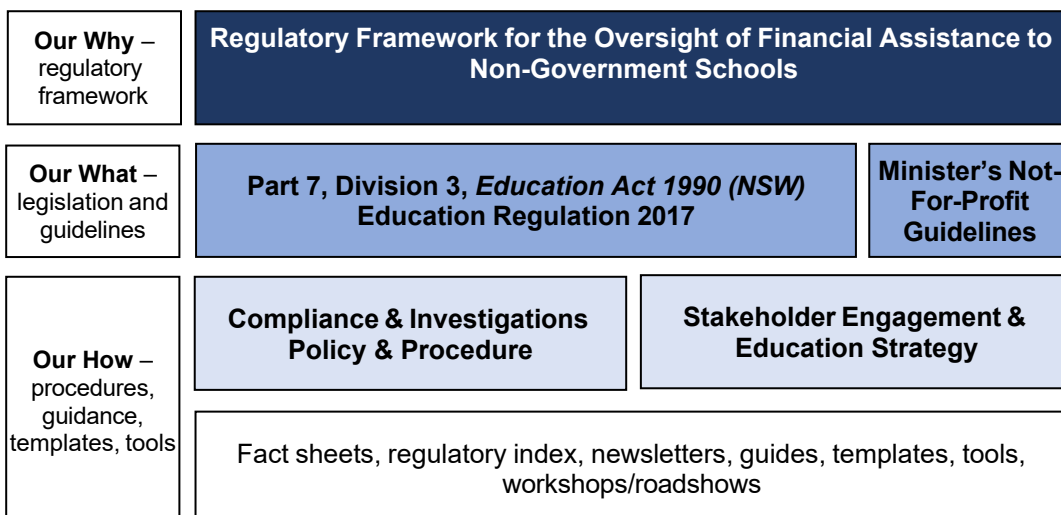
This regulatory framework sets out the NSW approach to the oversight of financial assistance provided to or for the benefit of NSW non-government schools in accordance with Part 7, Division 3 of the *Education Act 1990* (NSW) (the Act).

The regulatory context

The NSW Government is the minority funder of non-government schools in NSW. The Commonwealth Government is the majority funder of non-government schools in NSW.

To be eligible for financial assistance from the NSW Government, a non-government school must not operate for profit (section 83C(1) of the Act). Section 83C(2) of the Act identifies (without limitation) a number of specific circumstances in which non-government schools will operate for profit. For instance, a school will operate for profit if any part of its assets or income is used for a purpose other than the operation of the school. A school will also operate for profit if it makes a payment for property, goods or services, and that payment is at more than reasonable market value or is in any other way unreasonable in the circumstances, given the fact that financial assistance is provided to or for the benefit of the school. Additionally, the regulations may specify further circumstances in which a non-government school will or will not operate for profit (section 83C(3) of the Act).

The regulation of non-government schools in receipt of financial assistance from the NSW Government in accordance with Part 7, Division 3 of the Act is undertaken by the NSW Minister for Education and Early Learning, with support and advice from the NSW Department of Education and the Non-Government Schools Not-for-profit Advisory Committee. The diagram below assists stakeholders to understand our regulatory approach and the documentation supporting ‘our why’, ‘our what’ and ‘our how’.



Other laws applying to non-government schools

Non-government schools must comply with other requirements applying to NSW non-government schools, such as:

- the educational standards and registration and accreditation requirements for non-government schools under the *Education Act 1990* (NSW), administered by the NSW Education Standards Authority (NESA);
- requirements under the *Australian Education Act 2013* (Cth) pertaining to financial assistance provided to non-government schools by the Commonwealth Government and administered by the Australian Government Department of Education;
- legal obligations that apply to non-government schools registered as charities, administered by the Australian Charities and Not-For-profits Commission.

The Department may share and exchange information with other regulators for the purposes of exercising our respective regulatory functions, and in accordance with formal arrangements and the laws of each jurisdiction.

Roles and responsibilities

Minister for Education and Early Learning

The Minister for Education and Early Learning (Minister) may provide financial assistance or other assistance, or both, in respect of non-government school children (section 83B(1) of the Act).

However, this is subject to the requirement that the Minister must not provide financial assistance to or for the benefit of a school that operates for profit (section 83C(1) of the Act).

The regulatory scheme set out in Part 7, Division 3 of the Act gives the Minister a number of powers with respect to the provision of financial assistance to non-government schools, including:

- to give a direction in writing to a school or proprietor to undergo an audit of its financial affairs (section 83I(1)(a)) and to pay the reasonable costs of the audit (section 83I(3)).
- to give a direction in writing to a school or proprietor to provide specified information to the Minister (or other person) relating to the affairs of the school or proprietor (section 83I(1)(b)).

- to give a direction in writing that a school or proprietor cease any specified conduct that is in breach of the obligation not to operate for profit in order to be provided with financial assistance (see section 83I(1)(c)).
- to carry out an investigation into a school or the proprietor of a school if the Minister suspects that the school may be operating for profit or may be a non-compliant school (section 83H(1))
- to defer all or part of any financial assistance to or for the benefit of the school during an investigation (section 83H(3))
- to declare that a school is a non-compliant school (section 83F(1))
- to suspend, reduce, or impose conditions on the provision of financial assistance to or for the benefit of a school that is a non-compliant school (section 83E(1))
- to declare that a school operates for profit or has operated for profit during a specified previous period, or both (section 83D(1))
- 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 (section 83J(1))

The Minister also appoints the members of the Non-Government Schools Not-For-Profit Advisory Committee (section 83K(1)) and publishes the Not-For-Profit Guidelines for Non-Government Schools (“NFP Guidelines”) in the NSW Government Gazette (section 83L(1)).

Non-Government Schools Not-For-Profit Advisory Committee

The members of the Non-Government Schools Not-for-profit Advisory Committee (the Advisory Committee) are appointed by the Minister. They include:

- a Chairperson, who is independent of the non-government school sector and the NSW Government
- one person who represents the Association of Independent Schools of NSW
- one person who represents Catholic Schools NSW Limited
- one person who represents NESA
- one person who represents the Department of Education; and
- any other persons who, in the opinion of the Minister, will be of assistance to the Committee in the exercise of its functions.

The Advisory Committee provides advice and makes recommendations to the Minister to support the exercise of regulatory functions.

The Advisory Committee:

- advises the Minister on compliance with Part 7, Division 3 by non-government schools and proprietors of non-government schools (section 83K(2)(a))
- advises the Minister before the carrying out of an investigation, and in relation to that investigation (section 83H(2)&(5))
- advises the Minister in relation to any proposed Direction to a non-government school (section 83I(4))
- makes recommendations to the Minister on the making of 'for profit' declarations (section 83D(2))
- makes recommendations to the Minister on the making of 'non-compliance' declarations and on any consequent suspension or reduction of, or imposition of conditions on, the provision of financial assistance (section 83F(2)&(3))
- advises the Minister on the revocation of for profit declarations and non-compliance declarations (sections 83D(4) & 83F(5))
- advises the Minister on the Not-For-Profit Guidelines for Non-Government Schools before they are published (section 83L).

NSW Department of Education

The NSW Department of Education (Department) exercises regulatory functions delegated to Officers by the Minister. With reference to Part 7, Division 3, these delegated functions relate to: investigations (section 83H), the issuing of directions to non-government schools and proprietors (section 83I), notice requirements of an Advisory Committee recommendation (section 83G), coordinating audits of non-government schools/proprietors (section 83I), and the management of litigation.

The Department:

- advises the Minister on regulatory policy and regulatory decision making
- provides advice and publishes guidance material to raise awareness and assist non-government schools, systems of schools and proprietors who receive financial assistance from the Minister to understand and comply with s. 83C of the Act
- monitors the compliance of schools who receive financial assistance from the Minister with s.83C and with any conditions imposed on financial assistance by the Minister
- monitors and reports on its own performance against key performance indicators.

The Department also provides secretariat support to the Non-Government Schools Not-For-Profit Advisory Committee to support its operation.

2. Regulatory purpose

Our regulatory purpose is:

To ensure non-government schools in receipt of NSW Government financial assistance use all of their income and assets for the purpose of the operation of the school, including delivering educational outcomes for students, and not for the purpose of enriching other persons or entities.

3. Regulatory principles

The following principles generally guide the exercise of functions:

| Principles | Behaviours |
|-----------------------|--|
| Risk-based | A risk-based approach is applied to guide regulatory activities and decision-making. |
| Timely | Actions are prompt and efficient, with a focus on ensuring regulatory burden and cost are minimised as much as possible. |
| Fair | An impartial and objective approach is adopted at all times, and parties are given the opportunity to be heard as part of the regulatory process. |
| Proportionate | Regulatory actions are proportionate to the seriousness of the relevant conduct, considering the circumstances and all available information. |
| Evidence-based | Each individual situation is considered on the basis of the available evidence, with an understanding of each non-government school's stated ethos and/or purpose. |
| Accountable | Regulatory decisions, actions and performance are transparent and consistent, supported by clear documentation and reporting. |

4. Regulatory outcomes

Our key regulatory outcomes are:

- Non-government schools in receipt of NSW government financial assistance do not operate for profit

- Non-government schools in receipt of NSW government financial assistance use their income and assets to support the education of students and do not divert it to other purposes, acknowledging schools may follow a stated ethos and/or purpose
- Clear guidance is provided to non-government schools regarding the factors which are likely to be taken into account in determining whether a school operates for profit.

5. Regulatory approach

An outcomes-focused and risk-based approach is adopted in the allocation of resources to achieve our stated regulatory outcomes. Effort is focused on raising awareness and understanding of section 83C of the Act to support compliance by non-government schools in receipt of NSW Government financial assistance.

Suspected for profit activity is assessed on the facts of each matter, in order to determine the most appropriate regulatory response or intervention.

Decision making

In making decisions, the Minister, Advisory Committee and officers of the Department must adhere to the Act and the *Education Regulation 2017* (NSW) (Regulation).

Further, decisions are made in accordance with the following general principles:

- Decisions have a rational factual basis, in light of all the evidence
- Decisions are made in a way that is procedurally fair and parties are kept informed
- Available resources are maximised to achieve regulatory outcomes through a focus on more serious instances of suspected for profit activity.

6. Engagement and education

Effort is focused on raising awareness and understanding of the requirements of section 83C of the Act for non-government schools who receive NSW Government financial assistance, in order to boost the capability of those schools to meet the requirements of the Act in order to remain eligible for financial assistance.

Priorities for engagement and education initiatives are identified through:

- review of trends, themes and issues raised with the Department, or which come to the Department's attention as a result of regulatory interventions (including the outcomes of investigations)

- consultation with the Minister, Advisory Committee and/or peak representative groups of non-government schools.

Engagement and education initiatives

The Minister and Department implement a number of initiatives to improve awareness and understanding of section 83C of the Act. These include (but are not limited to):

- providing feedback in response to enquiries from non-government schools, systems of schools or proprietors regarding specific not-for-profit compliance issues
- a regulatory topic index on the Department's website¹
- regular newsletters for schools or proprietors to promote greater understanding of section 83C of the Act and provide information and case studies on specific topics
- information sheets describing stages of the compliance process, including investigations, for profit declarations and non-compliance declarations (which includes information about the imposition of conditions on financial assistance)
- presentations on section 83C of the Act at forums and workshops, including those held by peak representative groups of non-government schools including Catholic Schools NSW and the Association of Independent Schools of NSW
- supporting new non-government schools who wish to receive financial assistance from the NSW Government, to understand section 83C of the Act.

Education and Engagement Strategy

The Education and Engagement Strategy outlines our planned approach to engaging and educating stakeholders in relation to section 83C of the Act. The Strategy puts into place best practice mechanisms that support regular and fit-for-purpose engagement with non-government schools, proprietors, and representative bodies.

The Strategy includes:

- our approach to engaging with non-government schools, systems of schools, proprietors, peak sector representatives and other regulators

¹ Under development

- planned educative activities aimed at fostering an increased understanding of section 83C of the Act and supporting proactive compliance by non-government schools, systems of schools and proprietors
- how we assess the effectiveness of our engagement and education activities and use this information to further improve our approach.

7. Monitoring compliance

The Department undertakes activities to monitor the compliance of non-government schools who receive financial assistance from the NSW Government with section 83C of the Act, with the objective of informing advice to the Minister and identifying:

- instances of suspected for profit activity;
- areas of focus for our engagement and education activities, and
- emerging regulatory themes and issues that would benefit from or require further education or regulatory intervention.

In addition to the annual audit of financial affairs program (outlined below), a range of information sources inform the monitoring of compliance with section 83C of the Act, such as:

- complaints received by the Minister or Department, including those from members of the public, that may allege or indicate a suspicion of for profit activity
- referrals from stakeholders (e.g. representative bodies) of information that may allege or indicate a suspicion of for profit activity
- co-operation and regulatory information sharing with other regulators such as NESA, ACNC or the Australian Government Department of Education
- media and/or social media reports that may allege or indicate a suspicion of for profit activity.

Audit of Financial Affairs Program

A key component of our compliance monitoring activities is the audit of the financial affairs of non-government schools who receive financial assistance from the NSW Government. An annual program is implemented by the Department, with advice from the Advisory Committee in relation to any direction that a non-government school or proprietor undergo an audit of financial affairs (section 83I of the Act).

In identifying non-government schools or proprietors to be included in the annual audit of financial affairs program, a number of risk factors (regularly reviewed) are considered.

At various times, informed by a range of information sources, this risk assessment has considered:

- newly established non-government schools
- non-government schools with large transactions, such as capital transactions
- systems of schools, with risks such as shared services
- trends and issues identified in non-government school income and expenditure data, regulatory information sharing, or compliance monitoring.

Audits undertaken under the audit of financial affairs program may address specific elements of section 83C or focus on a specific theme to assist in compliance monitoring objectives.

8. Responding to suspected or actual for profit activity

The Act provides a range of regulatory tools that may be used in response to suspected for profit activity (see Table 2). The regulatory responses available are graduated, to enable an appropriate regulatory response in light of the nature and severity of the breach or suspected breach of section 83C of the Act. For example, more minor breaches (such as those which are the result of a one-off oversight or error) may result in a direction to cease specified activity or a non-compliance declaration. A for-profit declaration may be considered in more serious instances of breaches of section 83C.

Table 2. Summary of regulatory responses and actions

| Intervention Option / Action | Description |
|---|---|
| Preliminary enquiries | The Minister or the Department may make preliminary enquiries with a non-government school or proprietor to determine if any further action is required to be taken. |
| Direction to undergo an audit of financial affairs | After seeking the advice of the Advisory Committee, the Minister may direct a non-government school or proprietor to undergo an audit of financial affairs (see section 83I(1)(a)). The Minister may also direct the non-government school to pay reasonable costs of the audit (see section 83I(3)). |
| Direction to provide specified information | The Minister may direct a non-government 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)). |
| Direction to cease any specified conduct | After seeking the advice of the Advisory Committee, the Minister may direct a non-government 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)). |

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| Intervention Option / Action | Description |
|---|--|
| Investigation | After consulting with the Advisory Committee, the Minister may carry out an investigation into a non-government 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). |
| Declaration that a school is non-compliant | The Minister may declare that a non-government 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 the suspension, reduction, or imposition of conditions on the provision of financial assistance (see section 83F and s83E). |
| Financial assistance may be suspended, reduced or made subject to conditions | The Minister may suspend, reduce or impose conditions on the provision of financial assistance to or for the benefit of a non-government school that is a non-compliant school (see section 83E). |
| Declaration that a school operates for profit | The Minister may declare that a non-government 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 must not be provided to a non-government 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). |
| Recovery of amounts from schools | The Minister may recover the amount of any financial assistance provided by the Minister to or for the benefit of a non-government 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). |

Triage and assessment

Where the Minister or Department has identified or received information about a specific allegation of suspected for profit activity, an initial assessment to determine an appropriate regulatory response is conducted.

This initial assessment may include preliminary enquiries directly with a non-government school, system of schools or proprietor to clarify or obtain further information to facilitate the assessment.

Determining the appropriate regulatory response

Once all relevant information is gathered, an assessment is undertaken to determine the appropriate regulatory action. Possible regulatory actions may include:

- issuing a direction to undergo an audit of financial affairs of a non-government school or proprietor
- issuing a direction to a non-government school or proprietor to provide specified information
- issuing a direction to a non-government school or proprietor to cease any specified conduct that may be in breach of the obligation of the school not to operate for profit in order to be provided with financial assistance
- commencing an investigation into a school or proprietor if there is a suspicion that the school may be operating for profit or may be a non-compliant school
- continuing to monitor the non-government school or proprietor (see Section 7: Monitoring Compliance)
- taking no further action and closing the matter.

The Department's triage and assessment is also intended to ensure the proposed regulatory response is proportionate and fair, and in accordance with the requirements of the Act.

Investigations

If the Minister or Minister's delegate forms a view that an investigation should be commenced into a school or proprietor of a school, on the basis of a suspicion that the non-government school may be operating for profit or may be a non-compliant school, the Advisory Committee is consulted before the commencement of that investigation.

Investigations are conducted by the Department, under delegation by the Minister, to identify if a school or proprietor operates or has operated for profit or is a non-compliant school.

An investigation is required to be completed as soon as is reasonably practicable (Section 83H(4)). Upon commencement of an investigation, a non-government school or proprietor is formally notified and provided with an information package on the process, together with details of the allocated investigations officer/s.

The Minister or Minister's delegate is to have regard to any advice of the Advisory Committee in relation to the investigation (section 83H(5)).

Following an investigation

Upon the completion of an investigation, the Advisory Committee considers the evidence gathered to inform its recommendation to the Minister as to whether a for profit declaration

or a non-compliance declaration should be made. A non-government school or proprietor will be notified if the Advisory Committee is considering recommending to the Minister that the Minister make a for profit declaration or a non-compliance declaration (including if it is considering recommending that the Minister suspend, reduce or impose conditions on the provision of financial assistance) in respect of the school. In the event that such a recommendation is proposed to be made, the Advisory Committee will give the school an opportunity to be heard, including by the provision of written submissions and other materials, before the recommendation is made.

If such a recommendation is ultimately made by the Advisory Committee, the non-government school is afforded the opportunity to have that recommendation internally reviewed.

Where an investigation determines there is no evidence of for-profit activity and no evidence that a school is a non-compliant school, the Advisory Committee may also provide advice to the Minister or Minister's delegate on the closure of an investigation. A non-government school or proprietor will be notified of the closure of an investigation.

Notice of recommendation of Advisory Committee relating to for profit or non-compliance recommendations

The Minister is not to make a for profit declaration or a non-compliance declaration unless the Minister (or Minister's delegate) has given written notice to the school and to the proprietor of the school setting out the relevant recommendation of the Advisory Committee (section 83G). Such notice will include:

- the recommendation of the Advisory Committee
- review rights (administrative review in the NSW Civil and Administrative Tribunal (Tribunal)).

This notice is generally issued after the expiration of internal review rights or following the completion of an internal review.

Additionally, the Minister is not to make a for profit or non-compliance declaration unless:

- 30 days has elapsed since the notice was given and no application has been made to the Tribunal for administrative review;
- The Tribunal has determined an application for administrative review and the Minister has considered any contrary recommendation of the Tribunal and the reasons for it, or
- Any application for administrative review of the recommendation has been withdrawn.

Suspension, reduction or imposition of conditions on financial assistance

As part of imposing a graduated regulatory response, the Minister may suspend, reduce or impose conditions on the provision of financial assistance to or for the benefit of a school that is a non-compliant school (section 83E). The Act outlines when a school is a non-compliant school.

Conditions on financial assistance are generally designed to provide a non-government school and its proprietor with a clear set of actions to address any for profit activities and, as appropriate, support compliance into the future. Non-government schools are required to comply with the conditions and complete actions identified, or face further regulatory action by the Minister.

Conditions imposed on financial assistance may include matters such as:

- clear guidance on actions required to address for profit activities
- the appointment of an independent and appropriately qualified governance and compliance assessor to review the non-government school's governance and compliance policies and processes. Assessors may also assist the school to develop and implement a plan to address identified compliance and governance risks
- systems changes required to reduce the risk of operating for profit in the future (such as the development and implementation of policies or procedures)
- an adjusted payment schedule until the non-government school demonstrates it has completed actions in the conditions
- regular reporting to the Department and Advisory Committee on significant activities and financial transactions
- suspended eligibility to receive NSW capital grants.

The Department closely monitors the non-government school's compliance with conditions on financial assistance until these have been met, and/or are lifted.

If a school ceases to be a non-compliant school, the school is not entitled to any payment that was not made because it was a non-compliant school.

Recovery of financial assistance

The Minister may recover the amount of any financial assistance provided by the Minister to or for the benefit of a school (whether under Part 7, Division 3 of the Act or otherwise) if the financial assistance was provided in respect of a period when the school operated for profit or was a non-compliant school.

A non-government school or proprietor will be notified by the Minister if recovery is being considered and will be afforded an opportunity to be heard before a decision is made,

including by providing written submissions and other materials to the Minister. Having an opportunity to be heard is an important part of procedural fairness.

In considering the recovery of financial assistance, the Minister will have regard to:

- whether to recover and, if so
- the amount of financial assistance to recover; and
- the timing and method of recovery, including whether:
 - a) to recover financial assistance as a debt; or
 - b) to recover financial assistance by reducing future amounts of financial assistance payable by the Minister to or for the benefit of the school; or
 - c) both.

9. Measuring outcomes and assessing impact

Performance measures

Our regulatory activities are measured to assess their effectiveness. A structured and consistent approach to performance monitoring and reporting enables:

- Understanding and assessment of the efficiency and effectiveness of regulatory interventions
- Identification of opportunities for improving our regulatory activities and interventions; and
- measurement of trends, including in relation to regulatory performance, over time.

Key performance indicators

| Area | Indicator | Rationale |
|------------------------------|--|---|
| Audits | No. of audits of financial affairs undertaken | Effectiveness - demonstrates the reach of audits |
| | No. of audits that lead to an investigation | Effectiveness – demonstrates the efficiency of the regulatory approach |
| Enquiries | No. of enquiries % of formal preliminary enquiries completed within 30 days | Efficiency - demonstrates the efficiency of the formal enquiries function |
| Triage and Assessment | % of preliminary enquiries / financial audit findings completed within 30 days | Efficiency - demonstrates the efficiency of the assessment function |

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| Area | Indicator | Rationale |
|------------------------------|--|---|
| Investigations | % of routine investigations completed within 6 months | Efficiency - demonstrates the timeliness of the investigative function for routine matters. Unforeseen circumstances and/or more complex investigations will require additional timeframes. |
| Directions | No. of formal directions to provide specified information No. of directions to cease specified conduct | Effectiveness – demonstrates the regulatory responses imposed |
| Declarations | No. of for profit declarations No. of non-compliance declarations No. of conditions on financial assistance on non-government schools imposed | Effectiveness – demonstrates the regulatory responses imposed |
| Stakeholder Enquiries | No. of informal not-for-profit related enquiries received from schools/proprietors/other stakeholders % of informal enquiries responded to within 30 days | Effectiveness – demonstrates the efficiency of the engagement with stakeholders |
| Complaints | No. of complaints received from schools/proprietors/other stakeholders | Effectiveness – demonstrates the efficiency of the revised compliance approach |

* Note the matters listed above are not in sequential order of event.

Performance information is used to reflect on and, where needed, revise our approach to interventions, improve future education and engagement activities, and monitor progress against the regulatory framework. It should be noted these quantitative key performance indicators are considered holistically against the outcomes of the regulatory purpose and outcomes of this framework, together with feedback from the sector and through our education and engagement activities.