



New South Wales

Education Amendment (Not-for-profit Non-Government School Funding) Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are to make further provision for preventing financial assistance being provided to or for the benefit of non-government schools that operate for profit and to provide for the recovery of any amounts paid to a non-government school that operates for profit. For that purpose, the Bill:

- (a) restates the prohibition on financial assistance being provided by the Minister for Education (the *Minister*) to or for the benefit of non-government schools that operate for profit, and
- (b) sets out when a non-government school operates for profit, and
- (c) provides for the appointment, composition and functions of a Non-Government Schools Not-for-profit Advisory Committee (the *Advisory Committee*), and
- (d) empowers the Minister to conduct an investigation of, or to give directions to, non-government schools and proprietors of those schools in connection with financial assistance, and
- (e) authorises the Minister to suspend, reduce or impose conditions on financial assistance to a non-government school that is a *non-compliant school* because it has not assisted in any such investigation or complied with any such direction or has operated for profit, and
- (f) permits the Minister, on the recommendation of the Advisory Committee, to make a conclusive declaration that a non-government school is operating or has operated for profit or is a non-compliant school, and
- (g) provides for an administrative review by the NSW Civil and Administrative Tribunal (*NCAT*) of any such recommendation of the Advisory Committee, and

- (h) enables the Minister to recover financial assistance provided to a non-government school that operates for profit or to a non-compliant school, and
- (i) authorises the Minister to publish guidelines in relation to the above matters.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Education Act 1990 No 8

Schedule 1 [14] inserts a proposed Division 3 (Financial assistance to non-government schools) into Part 7 of the Act and **Schedule 1 [3]–[13], [15] and [16]** make consequential amendments (including the re-arrangement of provisions of the Act in connection with the transfer of provisions relating to financial assistance to non-government school children being transferred to the proposed Division). The proposed Division contains the following proposed sections:

Proposed section 83A sets out a number of definitions of terms used in the proposed Division (including that *school* means a non-government school).

Proposed section 83B is current section 21 (which authorises financial and other assistance to be provided in respect of non-government school children and which is renumbered and transferred to the proposed Division).

Proposed section 83C restates the prohibition (currently contained in section 21A) on the Minister providing financial assistance to or for the benefit of a school that operates for profit. The proposed section provides that a school operates for profit if any part of the assets of the proprietor of the school (in so far as they relate to the school) or income (in so far as it arises from the operation of the school) is used for a purpose other than for the operation of the school. The proposed section also sets out some circumstances in which certain payments are taken not to be for the operation of a school (including more stringent requirements in relation to payments to related entities for the provision of goods and services). The proposed section also removes the current provision that allows payments to be made to the members of the governing body of the school.

Proposed section 83D enables the Minister, on the recommendation of the Advisory Committee, to declare that a non-government school operates, or has operated, for profit (a *for profit declaration*). The making of a for profit declaration in respect of a school is conclusive evidence that the school is or has operated for profit. The declaration may be revoked and is required to be revoked if the Advisory Committee advises that the school has ceased to operate for profit.

Proposed section 83E authorises the Minister to suspend, reduce or impose conditions on financial assistance to a non-compliant school. A non-government school is a non-compliant school if the Minister is satisfied that the school or the proprietor of the school has failed to provide reasonable assistance in relation to an investigation conducted by the Minister under the proposed Division or has failed to comply with a direction of the Minister under the proposed Division. A school that operates for profit, or has operated for profit is also a non-compliant school if the Minister is satisfied that termination of financial assistance to the school is not justified because of the minor nature of the relevant conduct or that it is more appropriate to suspend, reduce or impose conditions on financial assistance to the school.

Proposed section 83F enables the Minister, on the recommendation of the Advisory Committee, to declare that a non-government school is a non-compliant school (a *non-compliance declaration*). The making of a non-compliance declaration in respect of a school is conclusive evidence that the Minister has grounds to suspend, reduce or impose conditions on financial assistance to the school. The declaration may be revoked and is required to be revoked if the Advisory Committee advises that the school is no longer a non-compliant school.

Proposed section 83G requires the Minister to give notice to a school and the proprietor of the school before making a for profit declaration or a non-compliance declaration in respect of the school. The notice must set out the relevant recommendation of the Advisory Committee. The Minister cannot make the declaration until the school or the proprietor of the school has had an opportunity to seek a review of the Advisory Committee's recommendation by NCAT.

Proposed section 83H empowers the Minister to carry out an investigation into a non-government school or the proprietor of the school if the Minister suspects that the school may be operating for profit or may be a non-compliant school. The Minister may defer financial assistance to the school during an investigation. The Minister is to consult with the Advisory Committee before conducting any investigation. The Advisory Committee is to have an overarching advisory role in relation to investigations. Responsibility for the day to day management of an investigation is intended to be delegated by the Minister to the Office of Education in the Department of Education and Communities.

Proposed section 83I permits the Minister to give directions to a non-government school or the proprietor of a school that require the school or proprietor to undergo a financial audit, to provide information or to cease specified conduct that is in breach of the not-for-profit obligations of the proposed Division. The regulations may prescribe additional directions that may be given.

Proposed section 83J provides for the recovery of financial assistance by the Minister from a school that is or was operating for profit or a non-compliant school.

Proposed section 83K provides for the appointment, composition and functions of the Advisory Committee. The members of the Advisory Committee are to be appointed by the Minister and are to be made up of an independent chair, one representative each for the Association of Independent Schools, the Catholic Education Commission, the Board of Studies, Teaching and Educational Standards and the Department of Education and Communities and any other persons who, in the opinion of the Minister, will be of assistance to the Advisory Committee in the exercise of its functions. The functions of the Advisory Committee are to advise the Minister on compliance with the proposed Division and to make recommendations on whether the Minister should make a for profit declaration or a non-compliance declaration.

Proposed section 83L authorises the Minister, with the advice of the Advisory Committee, to publish guidelines relating to the exercise of functions under the proposed Division, including to assist schools and proprietors of schools to comply with the proposed Division.

Schedule 1 [1] and [2] update references in the Act as a consequence of the Director-General of the Department of Education and Communities being renamed the Secretary of the Department.

Schedule 1 [17]–[19] give a right to a non-government school and its proprietor to seek administrative review by NCAT of a recommendation of the Advisory Committee that the Minister make a for profit declaration or a non-compliance declaration.

Schedule 1 [20] permits certificates signed by the Minister and stating certain matters to be used as prima facie evidence of those matters in proceedings under the Act.

Schedule 1 [21] includes a number of savings, transitional and other provisions consequential on the enactment of the proposed Act. Those provisions permit investigations to be carried out and the directions to be given under proposed Division 3 of Part 7 to determine whether a non-government school operated for profit before the commencement of that Division. The provisions also permit payments made before that commencement to be recovered. The provisions also give schools a transition period of 3 months to comply with revised arrangements on what constitutes operating a school for profit. The provisions also provide that a for profit declaration is taken to have been made in respect of a particular non-government school (the Malek Fahd Islamic School at Greenacre) being a declaration that the school operated for profit from 1 January 2010 until 31 July 2012.

Schedule 2 Amendment of Government Information (Public Access) Regulation 2009

Schedule 2 amends the *Government Information (Public Access) Regulation 2009* to provide that the Advisory Committee is taken to be part of the Department of Education and Communities for the purposes of the *Government Information (Public Access) Act 2009*.



New South Wales

Education Amendment (Not-for-profit Non-Government School Funding) Bill 2014

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New South Wales

Education Amendment (Not-for-profit Non-Government School Funding) Bill 2014

No. , 2014

A Bill for

An Act to amend the *Education Act 1990* in relation to the prohibition on the provision of financial assistance to or for the benefit of non-government schools that operate for profit; and for other purposes.

The Legislature of New South Wales enacts:

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1 Name of Act

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This Act is the *Education Amendment (Not-for-profit Non-Government School Funding) Act 2014*.

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2 Commencement

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This Act commences on the date of assent to this Act.

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Schedule 1	Amendment of Education Act 1990 No 8	1
[1]	Whole Act (other than section 3 and Schedule 3)	2
	Omit “Director-General” and “Director-General’s” wherever occurring.	3
	Insert instead “Secretary” and “Secretary’s” respectively.	4
[2]	Section 3 Definitions	5
	Omit the definition of <i>Director-General</i> from section 3 (1).	6
	Insert in alphabetical order:	7
	<i>Secretary</i> means the Secretary of the Department.	8
[3]	Part 4, heading	9
	Omit the heading. Insert instead:	10
	Part 4 Functions of the Minister and the Board	11
[4]	Section 19 General functions of the Minister	12
	Omit section 19 (c). Insert instead:	13
	(c) to exercise the functions in connection with registration, and financial assistance to non-government schools, that are conferred or imposed on the Minister under Part 7,	14 15 16
[5]	Section 21 Financial and other assistance in respect of non-government school children	17 18
	Transfer the section (renumbered as section 83B) to Part 7 and insert it after section 83A.	19
[6]	Section 21 (6) (renumbered by item [5] as section 83B (6))	20
	Omit the subsection. Insert instead:	21
	(6) Any financial assistance in respect of non-government school children may be paid directly to the school that the children attend or to a system of non-government schools for the benefit of that school.	22 23 24
[7]	Section 21A Financial assistance not to be paid to non-government schools operating for profit	25 26
	Omit the section.	27
[8]	Part 7, heading	28
	Omit the heading. Insert instead:	29
	Part 7 Non-government schools and home schooling	30
[9]	Part 7	31
	Insert after section 37:	32
	Division 2 Registration	33
[10]	Part 7	34
	Renumber existing Divisions 2–7 as Subdivisions 1–6.	35

[11] Sections 41 (2) (c), 60 (3), 65 (1) and (3), 68, 79 and 80 (2) (a)	1
Omit “this Part” wherever occurring. Insert instead “this Division”.	2
[12] Sections 46, 70 and 80–82 (other than section 80 (2) (a))	3
Omit “this Division” wherever occurring. Insert instead “this Subdivision”.	4
[13] Section 76 Consideration by Board of notice of conscientious objection	5
Omit “Division 6” from section 76 (1) (b).	6
Insert instead “Subdivision 5”.	7
[14] Part 7, Division 3	8
Insert after section 83:	9
Division 3 Financial assistance to non-government schools	10
83A Definitions	11
In this Division:	12
<i>Advisory Committee</i> means the Non-Government Schools Not-for-profit Advisory Committee.	13
<i>for profit declaration</i> —see section 83D.	14
<i>non-compliance declaration</i> —see section 83F.	15
<i>school</i> means a non-government school.	16
83B Financial and other assistance in respect of non-government school children	17
Note. Existing section 21 is renumbered and transferred here by item [5].	18
83C Financial assistance not to be provided to schools that operate for profit	19
(1) The Minister must not provide financial assistance (whether under this Division or otherwise) to or for the benefit of a school that operates for profit.	20
(2) A school operates for profit (without limiting the circumstances in which it does so) if the Minister is satisfied that:	21
(a) any part of its proprietor’s assets (in so far as they relate to the school) or its proprietor’s income (in so far as it arises from the operation of the school) is used for any purpose other than for the operation of the school, or	22
(b) any payment is made by the school to a related entity or other person or body:	23
(i) for property, goods or services at more than reasonable market value, or	24
(ii) for property, goods or services that are not required for the operation of the school, or	25
(iii) for property, goods or services that is in any other way unreasonable in the circumstances having regard to the fact that financial assistance is provided to or for the benefit of the school by the Minister, or	26
(c) any payment is made by the school to a person in connection with the person’s activities as a member of the governing body of the school unless it is in reimbursement for a payment made by the person in connection with the operation of the school.	27
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(3)	The regulations may specify whether or not a school operates for profit because of any particular use of assets or income, any particular payment in relation to the school or any other matter. Any such regulation has effect despite anything to the contrary in subsection (2).	1 2 3 4
(4)	The Minister is not obliged to terminate the provision of financial assistance because of this section if, following an investigation under this Division, the Minister is satisfied that:	5 6 7
(a)	termination of financial assistance is not justified because of the minor nature of the relevant conduct, or	8 9
(b)	more appropriate action can be taken under section 83E.	10
83D	Declaration that school operating for profit	11
(1)	The Minister may declare that a school operates for profit or has operated for profit during a specified previous period, or both (<i>a for profit declaration</i>).	12 13
(2)	The Minister may make a for profit declaration only if the Advisory Committee recommends that the declaration be made because the school operates for profit or has so operated for profit (as the case requires).	14 15 16
(3)	A for profit declaration in respect of a school is conclusive evidence that the school operates for profit or has so operated for profit (as the case requires).	17 18
(4)	The Minister may revoke a for profit declaration at any time, and is to do so if the Advisory Committee advises the Minister, or the Minister is satisfied, that the school no longer operates for profit.	19 20 21
(5)	A for profit declaration may specify a period to which it applies that is wholly or partly before the declaration is made (including before the commencement of this section).	22 23 24
(6)	The Minister's obligation under this Division not to provide financial assistance to or for the benefit of a school that operates for profit applies, whether or not a for profit declaration has been made.	25 26 27
83E	Financial assistance to schools may be suspended, reduced or made subject to conditions	28 29
(1)	The Minister may suspend, reduce or impose conditions on the provision of financial assistance (whether under this Division or otherwise) to or for the benefit of a school that is a non-compliant school.	30 31 32
(2)	A school is a non-compliant school if the Minister is satisfied that:	33
(a)	the school or the proprietor of the school has failed to provide reasonable assistance in relation to the conduct of any investigation of the school or proprietor under this Division, or	34 35 36
(b)	the school or the proprietor of the school has failed to comply with a direction of the Minister given under this Division to the school or proprietor, or	37 38 39
(c)	it is a non-compliant school because of any other circumstances set out in the regulations.	40 41
(3)	A school is also a non-compliant school if the school operates for profit, or has operated for profit, but following an investigation under this Division, the Minister is satisfied that:	42 43 44
(a)	termination of financial assistance to the school is not justified because of the minor nature of the relevant conduct, or	45 46

	(b) more appropriate action can be taken in respect of the school under this section.	1 2
	(4) 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.	3 4
83F	Declaration that school non-compliant	5
	(1) The Minister may declare that a school is a non-compliant school (a <i>non-compliance declaration</i>).	6 7
	(2) The Minister may make a non-compliance declaration only if the Advisory Committee recommends that the declaration be made because the school is a non-compliant school.	8 9 10
	(3) Any such recommendation of the Advisory Committee may include a recommendation on any consequent suspension or reduction of, or imposition of conditions on, the provision of financial assistance.	11 12 13
	(4) A non-compliance declaration in respect of a school is conclusive evidence that it is a non-compliant school and that grounds exist for the Minister to suspend, reduce or impose conditions on the provision of financial assistance in respect of the school.	14 15 16 17
	(5) The Minister may revoke a non-compliance declaration at any time, and is to do so if the Advisory Committee advises the Minister, or the Minister is satisfied, that the school is no longer a non-compliant school.	18 19 20
	(6) The Minister's power under this Division to suspend, reduce or impose conditions on the provision of financial assistance to or for the benefit of a non-compliant school applies, whether or not a non-compliance declaration has been made and whether or not the suspension, reduction or imposition is recommended by the Advisory Committee.	21 22 23 24 25
83G	Notice of recommendation of Advisory Committee relating to for profit or non-compliance declarations and administrative review by Tribunal	26 27
	The Minister is not to make a for profit declaration or a non-compliance declaration in respect of a school unless the Minister has given written notice to the school and to the proprietor of the school setting out the relevant recommendation of the Advisory Committee and unless:	28 29 30 31
	(a) 30 days have elapsed since the notice was given and no application has been made to the Tribunal for administrative review of the recommendation, or	32 33 34
	(b) the Tribunal has determined an application for administrative review (made within those 30 days) of the recommendation and the Minister has considered any contrary recommendation of the Tribunal and the reasons for it, or	35 36 37 38
	(c) any such application for administrative review of the recommendation has been withdrawn.	39 40
83H	Investigations in relation to schools	41
	(1) The Minister may 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.	42 43 44
	(2) The Minister is to consult with the Advisory Committee before carrying out an investigation.	45 46

(3)	The Minister may defer all or part of any financial assistance to or for the benefit of the school during an investigation.	1 2
(4)	The Minister is to complete an investigation as soon as is reasonably practicable.	3 4
(5)	The Minister is to have regard to any advice of the Advisory Committee in relation to the investigation.	5 6
83I	Directions to schools and proprietors	7
(1)	The Minister may give any one or more of the following directions in writing to a school or to the proprietor of a school:	8 9
(a)	a direction that the school or proprietor undergo an audit of the financial affairs of the school or proprietor,	10 11
(b)	a direction that the school or proprietor provide specified information to the Minister (or other specified person) relating to the affairs of the school or proprietor,	12 13 14
(c)	a direction that the school or proprietor cease any specified conduct that is in breach of the obligation of the school not to operate for profit in order to be provided with financial assistance,	15 16 17
(d)	a direction of a kind authorised by the regulations.	18
(2)	The Minister may specify in a direction under this section the manner in which, and the time by which, the direction is to be complied with (including that information be verified by statutory declaration).	19 20 21
(3)	The Minister may direct a school or proprietor required under this section to undergo an audit of the financial affairs of the school or proprietor to pay the Minister for the reasonable costs of or associated with the audit.	22 23 24
(4)	The Minister is to seek the advice of the Advisory Committee in relation to any proposed direction under this section (other than a direction under subsection (1) (b)).	25 26 27
83J	Recovery of amounts from schools	28
(1)	The Minister may recover the amount of any financial assistance provided by the Minister to or for the benefit of a school (whether under this Division 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.	29 30 31 32
(2)	Any amount of costs under section 83I (3) that is not paid by a school or the proprietor of a school may be recovered by the Minister as if it were financial assistance provided under this Division to the school when the school was a non-compliant school.	33 34 35 36
(3)	The Minister may recover an amount under this section:	37
(a)	as a debt in a court of competent jurisdiction, or	38
(b)	by reducing future amounts of financial assistance payable by the Minister to or for the benefit of the school concerned,	39 40
	or both.	41
(4)	A school, the proprietor of a school and any system of non-government schools to which an amount recoverable under this section (or part of the amount) was paid are jointly and severally liable for repayment of the amount.	42 43 44

83K Non-Government Schools Not-for-profit Advisory Committee	1
(1) There is to be a Non-Government Schools Not-for-profit Advisory Committee comprised of the following members appointed by the Minister:	2 3
(a) the Chairperson of the Advisory Committee, being a person who, in the opinion of the Minister, is independent of the non-government school sector and the NSW Government,	4 5 6
(b) one person who represents the Association of Independent Schools,	7
(c) one person who represents the Catholic Education Commission,	8
(d) one person who represents the Board,	9
(e) one person who represents the Department,	10
(f) any other persons who, in the opinion of the Minister, will be of assistance to the Advisory Committee in the exercise of its functions.	11 12
(2) The functions of the Advisory Committee are as follows:	13
(a) to provide advice to the Minister on compliance with this Division by schools and proprietors of schools,	14 15
(b) to make recommendations to the Minister for the making of for profit declarations or non-compliance declarations,	16 17
(c) to exercise any other function (not inconsistent with this Act) relating to financial assistance to schools that is conferred by this Division or that is agreed between the Minister and the Advisory Committee.	18 19 20
(3) The regulations may make provision for or with respect to the functions, members and procedure of the Advisory Committee.	21 22
(4) A matter or thing done or omitted to be done by the Advisory Committee or a member of the Advisory Committee does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject the member personally to any action, liability, claim or demand.	23 24 25 26
(5) Legal proceedings by or against the Advisory Committee are to be taken in the name of the Advisory Committee and not by or against the members of the Advisory Committee.	27 28 29
83L Not-for-profit guidelines	30
(1) The Minister may publish guidelines in the Gazette relating to the exercise of functions under this Division (including guidelines to assist schools and proprietors of schools to comply with this Division).	31 32 33
(2) The Minister is to seek the advice of the Advisory Committee before publishing any such guidelines.	34 35
[15] Part 7A	36
Renumber sections 83A–83H as sections 83M–83S.	37
[16] Part 9 Board’s functions	38
Omit the Part and transfer section 102 (renumbered as section 20A) to Part 4 and insert it after section 20.	39 40
[17] Section 107 Applications for administrative reviews of certain decisions	41
Insert after section 107 (1) (e1):	42
(e2) a recommendation of the Non-Government Schools Not-for-profit Advisory Committee under Division 3 of Part 7 that the Minister make	43 44

	a for profit declaration or a non-compliance declaration in respect of a school (including a recommendation on any consequent suspension or reduction of, or imposition of conditions on, the provision of financial assistance),	1 2 3 4
[18]	Section 107 (1) (e2)	5
	Renumber existing section 107 (1) (e2) as section 107 (1) (e3).	6
[19]	Section 108 Determination of application by Tribunal	7
	Omit “or an authorised person” from section 108 (1) (b).	8
	Insert instead “or other person or body”.	9
[20]	Section 123 Evidence	10
	Insert after section 123 (2):	11
	(2A) In any proceedings under this Act, a certificate purporting to be signed by the Minister stating:	12 13
	(a) that an amount of financial assistance has been paid by the Minister to or for the benefit of a non-government school on a specified day, or	14 15
	(b) that a for profit declaration or non-compliance declaration under Division 3 of Part 7 was made on a specified day and the terms of the declaration,	16 17 18
	is admissible in evidence and is prima facie evidence of the matters stated in the certificate.	19 20
[21]	Schedule 3 Savings, transitional and other provisions	21
	Insert at the end of the Schedule with appropriate Part and clause numbering:	22
Part	Provisions consequent on enactment of Education Amendment (Not-for-profit Non-Government School Funding) Act 2014	23 24 25
	Definition of “amending Act”	26
	In this Part:	27
	<i>amending Act</i> means the <i>Education Amendment (Not-for-profit Non-Government School Funding) Act 2014</i> .	28 29
	Meaning of “operate for profit” in relation to period before commencement of amending Act and during transition period	30 31
	For the purposes of this Act, the determination of whether a non-government school operated for profit during any period before the commencement of the amending Act, and during the period of 3 months after that commencement, is to be determined in accordance with section 21A, as in force immediately before the repeal of that section by the amending Act.	32 33 34 35 36
	Investigations and directions in relation to any period before the commencement of amending Act	37 38
	(1) An investigation may be carried out by the Minister under section 83H (as inserted by the amending Act) in relation to a period (and any conduct occurring in a period) before the commencement of the amending Act.	39 40 41

- (2) A direction may be given by the Minister under section 83I in relation to a period (and any conduct occurring in a period) before the commencement of the amending Act. 1
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- Recovery of payments made before the commencement of amending Act** 4
- The Minister may recover under section 83J an amount of financial assistance paid to or for the benefit of a non-government school before the commencement of the amending Act. 5
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- Declaration that particular non-government school operating for profit** 8
- (1) On the commencement of the amending Act, a for profit declaration is taken to have been made under section 83D (as inserted by the amending Act) that the Malek Fahd Islamic School at 405 Waterloo Road, Greenacre, operated for profit from 1 January 2010 until 31 July 2012. 9
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- (2) The Minister may revoke any such declaration in the same way that the Minister may revoke a for profit declaration under section 83D. 13
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Schedule 2 Amendment of Government Information (Public Access) Regulation 2009 1
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Schedule 3 Agencies declared to be part of other agencies 3

Insert in alphabetical order under the columns headed “**Subsidiary agency**” and “**Parent agency**”, respectively: 4
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Non-Government Schools Not-for-profit Advisory Department of Education and Communities
Committee under the *Education Act 1990*