

1. Background

Non-government schools in NSW are required to comply with the terms of the NSW Registered and Accredited Individual Non-government Schools Manual, or the NSW Registered and Accredited System Non-government Schools Manual (referred in this paper as the **NSW Registration Standards** or the **Standards**).

The Standards are published by the NSW Board of Studies Teaching Education Services (BOSTES) and are regularly updated. In fact, they have been amended 7 times in the past 4 years, making it incumbent upon all non-government schools in NSW to ensure that not only are they aware of the changes to the Standards but also that they continually comply with the terms of the current Standards.

On 3 October 2014, BOSTES published significant amendments to the Standards relating to the obligation of non-government schools and the 'responsible persons' in these schools to comply with new governance standards.

The purpose of this briefing paper is to explain these changes and the actions schools should be taking now to ensure compliance.

2. Responsible Persons

The NSW Registration Standards provide that 'responsible persons' are accountable for proper governance of their schools and for meeting the requirements as set out in the Standards.

A school's proprietor and, if the proprietor is a corporation, each director or person concerned in the management of the school, members of the school's governing body, the school's principal and any other person or body exercising a function in relation to the management of a school, are considered under the *Education Act 1990* (NSW) (the Act) to be 'responsible persons' of a school.

Each school must clearly identify each corporation and each individual it considers to be a 'responsible person' for the purpose of the Act.

3. New Governance Standards for NSW Schools

The new Standards set out specific obligations for 'responsible persons' to put in place policies and procedures that ensure proper governance of their schools. The new Standards require all non-government schools in NSW to establish and effectively implement a set of governance related structures, policies and procedures including:

- A **Governance Charter** (or similar document) that describes the governance structure of the school and the respective authority, role and responsibilities of each of the school's 'responsible persons'. This document can also be used to meet a school's obligations to document supervisory arrangements and reporting requirements for the school's 'responsible persons'.
- A **Statement of Delegated Authorities** (or similar document) that identifies respective authorities within the governance infrastructure and describes the process for withdrawing the authority.
- A **Code of Conduct** for the school's 'responsible persons'.
- A **Record Keeping Policy** which, from 1 September 2014, provides for the maintenance of minutes of meeting recording governance decisions and actions of a school's board of governors and executive team. Records of these meetings must be maintained for a minimum period of 7 years before archiving.
- A **Compliance Program** that describes how the school facilitates compliance with 'all relevant legislation' and reduces the risk of non-compliance.
- A **Risk Management Program** that describes a school's risk management framework, or plan for developing, implementing and reviewing risk management strategies in relation to the strategic direction, governance, operations and finances for a school. As part of this obligation, non-government schools are required to maintain a risk register.
- A **Conflicts of Interest Policy** that details a school's processes for managing actual, perceived or potential conflicts of interest of 'responsible persons'.
- A **Related Party Transactions Register**, which records any transactions through which a 'responsible person' acting on behalf of a school, provides a benefit to a related party (such as themselves, a relative, related organisations or close associates).
- A **Responsible Persons Professional Learning Policy** that is designed to ensure that 'responsible persons' have relevant qualifications, skills and experience for governing the school properly. All responsible persons are now required to complete a minimum four hours of professional learning about governance issues. This training must be provided by a BOSTES-approved training provider.
- A **Responsible Persons Induction Policy** which, amongst other things, requires each new 'responsible person' to complete an induction training program. As with the professional learning obligation this training must be provided by a BOSTES-approved training provider.

The amended Standards also require each school to have the school's annual financial statements audited and certified by an external independent auditor.

4. Continuous Compliance

Historically, many non-government schools in NSW have only had regard to the obligations set out in the NSW Registration Standards, once every five years or so, in accordance with their re-registration cycle. For many school principals and business managers, re-registration is a major project which often necessitates engaging external consultants, such as a former business manager or principal, to assist in drafting relevant policies and procedures in order to get things up to speed.

For responsible persons reading this briefing paper it is critical to understand that:

- the concept of governance as referred to in the NSW Registration Standards is very broad including structures, policies, procedures for governance, leadership, authority, decision-making, accountability and transparency; and
- the obligation to comply with the NSW Registration Standards is continuous.

Simply put, schools and 'responsible persons' can no longer just pay attention to their registration responsibilities and governance obligations once every five years. The governance systems that 'responsible persons' adopt for their school must be dynamic and responsive to change.

'Responsible persons' should receive regular governance, risk, compliance and incident reports that allow them to make decisions based on meaningful data and to verify that their school's governance systems are working in practice.

5. The New Obligations Within the Previous Registration Framework

The requirement for non-government schools in NSW to have a robust governance infrastructure is not new.

Prior to the recent amendments the Standards set out detailed obligations for all NSW non-government schools to, amongst other things:

- manage their staff and any external education providers;
- manage their curriculum;
- ensure proper maintenance of premises and buildings;
- ensure adequate facilities for the courses of study provided;
- comply with child protection obligations;
- ensure student welfare;
- comply with disability discrimination legislation;
- establish a system for complaints handling;
- establish mechanisms to communicate with key stakeholders;
- discipline students;
- ensure adequacy of enrolment and attendance procedures;
- comply with educational and financial reporting obligations; and
- ensure the quality of their education program.

In addition, of course, non-government schools have a myriad of additional legal and regulatory obligations including the obligation to comply with the new work health & safety laws that commenced on 1 January 2012 and the new privacy laws that commenced on 12 March 2014.

In a sense, the new governance obligations are simply building on the existing requirements. For many schools they will provide no surprises and require little adjustment. However for those schools that have only sought to ensure compliance once every 5 years during their re-registration process, and have not developed meaningful governance, risk, compliance and incident management systems, there is work to do.

Whilst referencing a number of well known existing governance standards (including those published by the Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange (ASX)) in framing the new governance, risk and compliance obligations, BOSTES has not been prescriptive. Rather BOSTES relies on a broad statement that *'in general terms, the requisite policies and procedures for proper governance must be consistent with properly accepted community norms for school governance'*.

The following sections provide some guidance as to what may be considered to be *'properly accepted community norms for school governance'* when considering some of the specific obligations of the new governance obligations.

6. Risk Management

Whilst the new Standards (3.9.3.1) require all non-government schools in NSW to create a document *'describing the school's risk management framework, or plan for developing and reviewing risk management strategies in relation to strategic direction, governance, operation and finance and the associated risk register'*, BOSTES provides no guidance to schools as to how to practically achieve this outcome.

There is no doubt that when it comes to the implementation of risk management frameworks in the corporate sector,¹ the Commonwealth public sector² and certain parts of the not-for-profit sector,³ the International and Australian Risk Management Standard (ISO 31000 – 2009) provides the benchmark.

It also appears that ISO 31000 is rapidly becoming the community accepted governance norm in the non-government schools sector with a recent governance survey conducted through www.schoolgovernance.net.au indicating that 30% of schools currently have in place risk management frameworks that are based on ISO 31000.

¹ Refer to ASIC Regulatory Guides for Financial Services and Credit Licensees, ASX Corporate Governance Principles and Recommendations (3rd edition, 2014).

² Commonwealth Risk Management Policy.

³ National Community Housing National Standards Manual.

7. Compliance

As with risk, BOSTES provides no guidance as to how 'responsible persons' are to *'facilitate the school's compliance with all relevant legislation and reduce any risk of non-compliance'*, or how they are supposed to document this process.

As with risk, there is a recognised Australian standard for compliance programs being AS 3806 – 2006, that sets out in detail the systems and processes an organisation should establish to ensure ongoing compliance. AS 3806 is benchmarked by many of Australia's leading regulators such as ASIC, the ASX, and the Australian Competition and Consumer Commission (ACCC).

Whilst BOSTES's focus is on legal and regulatory compliance 'responsible persons' should note that a properly designed and implemented AS 3806 compliance program will provide significant additional governance benefits including the monitoring and reporting of a school's compliance with;

- its internal policies and procedures;
- key commercial contracts; and
- the controls and treatment plans that a school establishes as part of its risk program.

AS 3806 provides the benchmark for compliance programs in general commerce and should be regarded as the community norm for good compliance practice in NSW non-government schools.

8. Complaints Handling

Whilst the requirement for NSW non-government schools to effectively manage complaints is not new, it is also worth addressing in this context.

The NSW Registration Standards provide that a non-government school must have in place and implement policies and procedures in relation to *'complaints or grievances, with specific reference to processes for raising and responding to matters of concern identified by students and/or parents'*. Each school is then required (Standard 3.10) in its annual report to provide a summary of its policy for managing complaints and grievances including changes made to this policy during the year as well as information on how the policy is disclosed publicly.

There are also specific complaints handling requirements for NSW non-government schools whose students undertake all or a significant part of their courses by means of distance education and, or have boarding facilities.

Unfortunately once again BOSTES provides no guidance as to what non-government schools are actually supposed to do in practice.

It probably won't surprise you to know that there is also an Australian and International Complaints Handling Standard (ISO 10000-2014) which very clearly sets out the principles, systems and processes that should be followed in order to ensure that a complaints handling program works in practice.

Whilst this standard is not referenced by BOSTES it is referenced by regulators of government schools in Queensland, South Australia, Western Australia and the Northern Territory and therefore arguably provides a benchmark for community norms with respect to complaints handling in Australian schools.

For those that are interested, CompliSpace Managing Director James Field recently delivered a paper at the Australian New Zealand Education Law Association (ANZELA) 2014 conference, in Adelaide, which examined the complaints handling regimes of all Australian States and Territories for both government and non-government schools. A copy of this paper is available on request.

9. Conflicts of Interest and Related Party Transactions

3.9.3.2 and 3.9.3.3 of the NSW Registration Standards now provide specific provisions for NSW non-government schools to have systems, policies and procedures in place to manage the conflicts of interest for 'responsible persons' and also to maintain a register of related party transactions.

As most company directors will be aware, the obligation to manage conflicts of interests (and related party transactions in the case of public companies) is a core legal requirement under the *Corporations Act 2001* (Cth), so these new obligations should hopefully not pose too many challenges.

'Responsible persons' must however be aware of the specific obligations under the NSW Registration Standards that include the requirements to:

- clearly define what is considered a 'conflict of interest' within the context of the school's governance infrastructure;
- obtain an annual conflict of interest declaration from each 'responsible person' and maintain records of these declarations for a period of 7 years;
- have conflicts of interest (including any potential related party transactions) as a standing agenda item at formal meetings;
- maintain records of all conflicts in minutes of meeting;
- effectively manage any conflicts of interest that arise in a way that is 'acceptable to the other "responsible persons"';
- arrange for an external audit of the school's related party transactions register on an annual basis; and
- maintain a related party transactions register and records of external audits for the register for a period of 7 years before archiving.

10. Responsible Persons Professional Learning Obligations

Whilst most directors and educators are familiar with the concept of professional learning obligations, again, 'responsible persons' must be aware of the specific obligations under the NSW Registration Standards (3.9.3.4) that include the requirements to:

- undertake a minimum of 4 hours professional learning each school year. This training must be delivered by a BOSTES-approved training provider;
- undertake additional training where appropriate, with a BOSTES-approved training provider, with respect to their particular roles and responsibilities;
- maintain a register of professional learning and training undertaken by each 'responsible person' including the role or position of responsibility the particular person holds; and
- retain records of professional learning for 7 years before archiving or disposing.

When considering this new Standard reference should also be made to the standard articulated in 3.9.3.1 which now requires NSW non-government schools to have a Governance Charter (or equivalent) that specifies the role and responsibilities of each of the school's 'responsible persons'.

Whilst it is clear that BOSTES requires non-government schools to appoint 'responsible persons' with relevant qualifications, skills and experience to govern the school properly, the new Standards fall short of requiring schools to develop nomination processes and/or a skills matrix for their boards to evidence the fact that they have the right balance of skills.

11. Responsible Persons Induction Obligations

The new requirement for newly appointed 'responsible persons' to undergo an induction process which includes the attendance at, and successful completion of a BOSTES-approved training program within 3 months of appointment, complements the new professional learning obligations and is designed to ensure a basic level of knowledge.

Again the Registration Standards create some very specific obligations including the requirement to provide each new 'responsible person' with copies of key documents, maintaining appropriate records and maintaining a 'register of the induction process'.

12. What CompliSpace can do to help?

At CompliSpace we combine governance, risk, compliance and policy management expertise with technology solutions to deliver sustainable governance solutions to non-government schools in every State and Territory in Australia.

Our team of lawyers and industry experts actively monitor changes to relevant laws and registration standards and deliver a full suite of online policies, procedures and governance programs that enable schools to continuously comply with their legal and regulatory obligations.

CompliSpace's suite of content modules and training programs are specifically tailored for non-government schools by jurisdiction. They include:

- ISO 31000 Risk Management Program;
- AS 3806 Compliance Program;
- ISO 10002 Complaints Handling Program;
- AS 5050 Business Continuity Program;
- AS 8004 Fraud and Corruption Control Program;
- AS 8001 Whistleblower Program;
- AS 4804 and AS 4801 Workplace Safety Program;
- a Student Welfare Program;
- a Human Resources Program (tailored to relevant State and Territory laws, and enterprise agreements);
- a Privacy Program; and
- a Boardroom Program.

The content delivered within each module is kept up to date with key legal and regulatory changes and key obligations. Risks, tasks and incidents are managed through CompliSpace's Assurance software.

CompliSpace Media is the publisher of the school governance news site www.schoolgovernance.net.au.