



Planning &
Environment

NSW Code of Practice for Part 5 activities

*For registered non-
government schools*

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1. Introduction

1.1 Background

Between 2010 and 2015, the NSW school student population grew by 5.4% and the average enrolment per school grew by 5.9%¹. Non-government schools now make up over 30 percent of the sector. The NSW Department of Education anticipates demand for educational facilities will continue to grow significantly over the next 20 years. To meet this demand, both government and non-government schools will need to expand their facilities to meet future student numbers.

Government schools can currently undertake certain routine or minor development in connection with an existing educational establishment without needing development consent from council under Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Before commencing works, the school (known as the 'determining authority') must undertake an assessment under Part 5 of the EP&A Act to determine whether there will be any potential impacts on the environment caused by the works.

The NSW Government has decided to broaden these provisions to apply to non-government schools (as defined under the *Education Act 1990* (NSW)). Planning legislation has been amended and a new *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (Education SEPP) has been made. These amendments recognise registered non-government schools as 'public authorities' and 'determining authorities' under Part 5 of the EP&A Act for the purposes of assessing and carrying out development without consent under the Education SEPP so that they can assess and carry out this type of school development in the same way as government schools.

This will provide more equitable planning rules for government and non-government schools and assist in the appropriate assessment and efficient construction, operation and maintenance of the education infrastructure required to meet NSW's growing population needs.

1.2 Purpose of the Code

Registered non-government schools (RNS) will be able to undertake certain types of school development without obtaining council consent, but will be required (like other public authorities) to undertake an environmental assessment under Part 5 of the EP&A Act before carrying out the activity. Those school developments are listed in section 2.2 of this Code.

The purpose of this Code is to ensure that the environmental assessment of these school developments is undertaken appropriately, and leads to good on-ground outcomes.

By following this Code, RNSs will:

- **Classify** their activities into the right assessment category
- **Assess** their activities in an appropriate level of detail, including community consultation
- **Document** the assessment process accurately and transparently
- **Determine** the assessment in a clear, practical and enforceable way and
- **Implement** the activity with the best possible measures in place to protect the environment and the community.

¹ Australian Bureau of Statistics Catalogue 4221.0

The Code has been developed in consultation with the peak non-government education bodies and relevant NSW Government Agencies.

1.3 Legal status of the Code

This Code is an approved Code under a clause (clause 244N) of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) and will take effect upon gazettal or a later date specified in the gazettal notice. It will continue to be in force until it is varied or revoked in accordance with the EP&A Regulation.

Compliance with the Code will be required under the EP&A Regulation by an RNS who intends to undertake any activities identified as 'development without consent' under the Education SEPP. A breach of the mandatory provisions of the Code will be an offence under the EP&A Act. The mandatory provisions of the Code are outlined in section 6 (Compliance).

The requirement for the RNS to comply with this Code also applies to any works to be done on their behalf under the Education SEPP (e.g. by a contractor or subcontractor).

Refer to [Appendix A](#) for definitions.

2. School developments

2.1 Approval pathways

There are a number of planning approval pathways for development associated with existing and new schools. This includes development permitted with consent that requires a development application or State significant development application and complying development that will require a complying development certificate. Other minor developments are classified as exempt development and do not require any development consent.

The provisions of this Code apply only to development that is permitted without consent as specified in the Education SEPP.

If a public authority proposes to undertake an activity that is classified as 'development without consent' in an EPI, they do not need to obtain development consent under Part 4 of the Act, but they will need to assess the environmental impacts of the activity under Part 5 of the Act (as a 'determining authority'). The Education SEPP outlines certain school developments that may be undertaken by public authorities (such as a Government School) without development consent.

Registered non-Government schools (RNSs) are prescribed to be 'public authorities' under Part 5 of the EP&A Act only for the purposes of assessing and carrying out development without consent under clause 36 of the Education SEPP, and therefore can also undertake 'development without consent' for this type of development. They are also prescribed to be 'determining authorities' for these purposes and therefore are subject to the environmental assessment requirements of Part 5 of the EP&A Act like other public authorities.

RNSs must follow the assessment process outlined in Section 3 of this Code before carrying out school development proposals that are identified as 'development without consent' in the Education SEPP.

2.2 Part 5 schools development

Clause 36 of the Education SEPP sets out a range of activities that can be undertaken by Government schools and RNSs under the 'development without consent' pathway (also known as the 'Part 5' pathway).

Note. The following provisions are set out in Education SEPP:

1. Development for any of the following purposes may be carried out by or on behalf of a public authority without consent on land within the boundaries of an existing school:
 - (a) construction, operation or maintenance, more than five metres from any property boundary with land in a residential zone and more than one metre from any property boundary with land in any other zone, of:
 - (i) a library or an administration building that is not more than one storey high, or
 - (ii) a short-term portable classroom (including a modular or prefabricated classroom) that is not more than one storey high, or
 - (iii) a permanent classroom that is not more than one storey high to replace an existing short-term portable classroom and that is used for substantially the same purpose as the short-term portable classroom, or

- (iv) a kiosk, cafeteria or bookshop for students and staff that is not more than one storey high, or
 - (v) a car park that is not more than one storey high,
 - (b) minor alterations or additions, such as:
 - (i) internal fitouts, or
 - (ii) alterations or additions to address work health and safety requirements or to provide access for people with a disability, or
 - (iii) alterations or additions to the external facade of a building that do not increase the building envelope (for example, porticos, balcony enclosures or covered walkways),
 - (c) restoration, replacement or repair of damaged facilities,
 - (d) security measures, including fencing, lighting and security cameras,
 - (e) demolition of structures or buildings (unless a State heritage item or local heritage item).
2. However, subclause (1) applies only to development that:
- (a) does not require an alteration of transport or traffic arrangements (for example, a new vehicular access point to the school or a change in location of an existing vehicular access point to the school), or
 - (b) in the case of development referred to in subclause (1) (a)—does not allow for an increase in:
 - (i) the number of students the school can accommodate, or
 - (ii) the number of staff employed at the school, that is greater than 10% (compared with the average of each of those numbers for the 12-month period immediately before the commencement of the development).
3. Nothing in this clause authorises the carrying out of development in contravention of any existing condition of a development consent (other than a comply development certificate) that applies to any part of the school, relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.
4. A reference in this clause to development for a purpose referred to in subclause (1) (a), (b) or (c) includes a reference to development for the purpose of construction works if that development is in connection with the purpose referred to in subclause (1) (a), (b) or (c).

Figure 1. Extract from Education SEPP outlining Development Permitted Without Consent (Part 5 Development)

3. Assessment of School Development

3.1 Introduction

RNSs are prescribed as determining authorities for the purposes of section 111A of the EP&A Act and the definition of “public authority” under section 4(1) of that Act through clause 277(5) of the EP&A Regulation. This allows an RNS to be a Part 5 determining authority for development within the boundaries of an existing school that is permitted without consent under clause 32 of the Education SEPP.

When assessing a Part 5 activity, an RNS must:

- fulfil its duty under section 111 of the EP&A Act; and
- address the environmental factors listed in clause 228(2) of the EP&A Regulation (refer Figure 2).

Note. The following text is an extract from the EP&A Act and EP&A Regulation:

Section 111(1) of the EP&A Act

For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

Clause 228(2) of the EP&A Regulation

[The following factors are listed under clause 228(2) of the EP&A Regulation]

- a. any environmental impact on a community,
- b. any transformation of a locality,
- c. any environmental impact on the ecosystems of the locality,
- d. any reduction of the aesthetic, recreational, scientific or other environmental quality or value of a locality,
- e. any effect on a locality, place or building having aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance or other special value for present or future generations,
- f. any impact on the habitat of protected fauna (within the meaning of the *National Parks and Wildlife Act* (1974)),
- g. any endangering of any species of animal, plant or other form of life, whether living on land, in water or in the air,
- h. any long-term effects on the environment,
- i. any degradation of the quality of the environment,
- j. any risk to the safety of the environment,

- k. any reduction in the range of beneficial uses of the environment,
- l. any pollution of the environment,
- m. any environmental problems associated with the disposal of waste,
- n. any increased demands on resources (natural or otherwise) that are, or are likely to become, in short supply,
- o. any cumulative environmental effect with other existing or likely future activities,
- p. any impact on coastal processes and coastal hazards, including those under projected climate change conditions.

Figure 2. Extracts from the EP&A Act and EP&A Regulation

[Appendix B](#) provides a list of potential triggers that may assist the RNS in identifying whether particular investigations are required as part of its review of the environmental factors listed above (e.g. if working in or near certain sensitive or significant environments).

[Appendix C](#) includes a list of planning principles for schools outlined in the Education SEPP that can be considered by a school when carrying out development under this Code. The principles identify specific features of well-designed school buildings and grounds, and measures to minimise any adverse impacts on the surrounding locality and environment. The RNS can use the planning principles as a reference tool when assessing environmental factors related to the school development, such as impacts on a community, transformation of a locality, aesthetic values of a locality, and other effects on a locality, place or building (such as those of architectural, cultural, historical or social significance). The planning principles also provide some guidance on what mitigation measures might be appropriate for school developments.

This Code provides a five-stage assessment process for RNSs (Figure 3):

- Stage 1 – Classification
- Stage 2 – Assessment
- Stage 3 – Documentation
- Stage 4 – Determination
- Stage 5 – Implementation

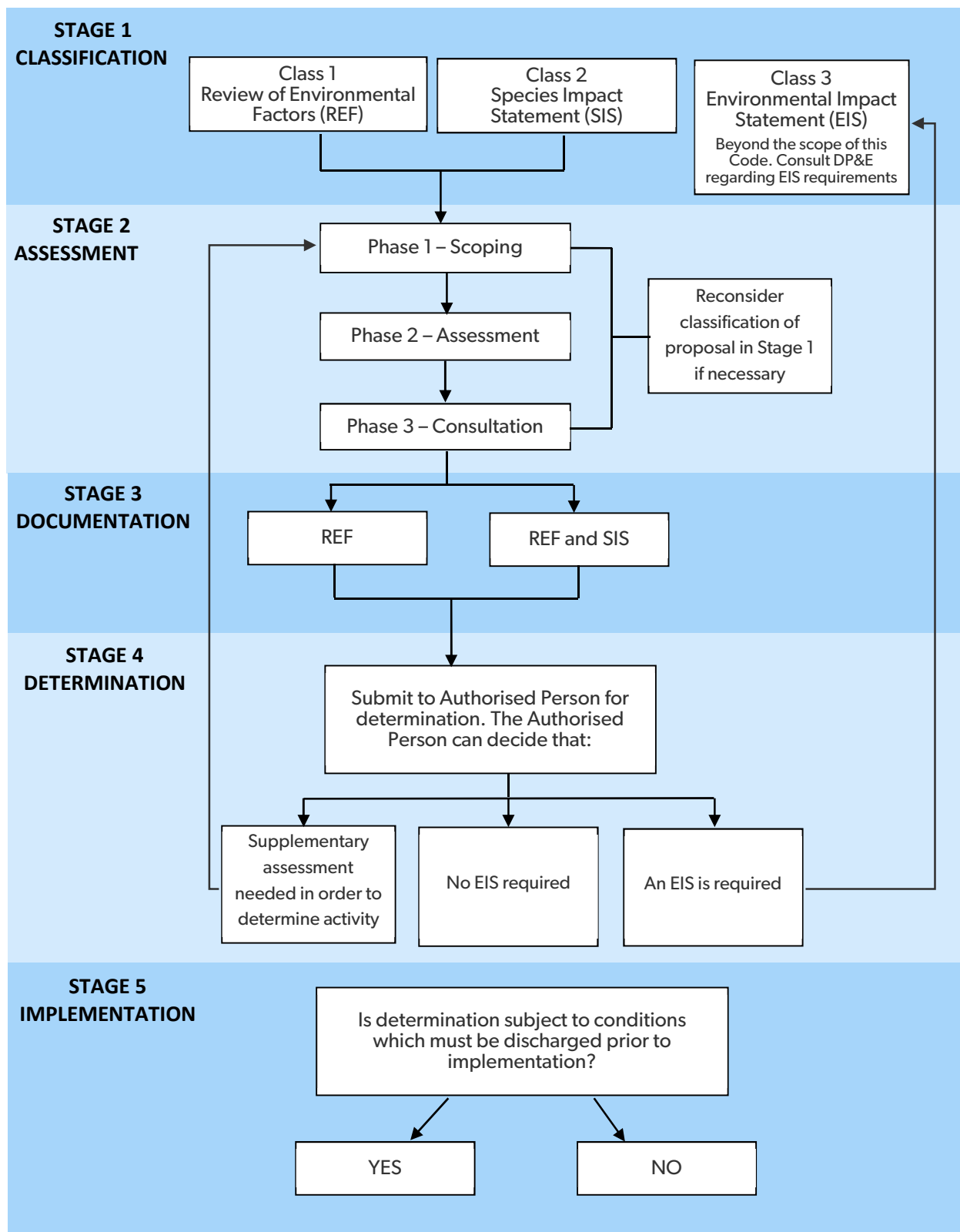


Figure 3. Five stage assessment process for Part 5 determination

3.2 Stage 1: Classification

This Code covers activities that fall under Part 5 of the EP&A Act. It does not cover works that:

- do not amount to 'Development' or an 'Activity' under the EP&A Act
- are exempted activities under section 110E of the EP&A Act, or
- are subject to another part of the EP&A Act, such as:
 - works under existing development consents
 - exempt or complying development under sections 76 and 76A(2)(b) respectively or
 - development that requires consent under Part 4.

If a work falls within one of these categories, the RNS should review the relevant Environmental Planning Instrument (EPI), such as the Council's Local Environmental Plan and (where applicable) consult the relevant consent authority to determine the next steps.

The object of Stage 1 is to classify the proposed activity into one of the following three classes (described in sections 3.2.1 - 3.2.3 of this Code):

1. A Review of Environmental Factors (REF) is required for the proposed activity
2. Species Impact Statement (SIS) is also required for the proposed activity
3. Environmental Impact Statement (EIS) is required for the proposed activity

The classes generally represent increasing levels of potential environmental impact associated with the proposed activity. The degree of assessment and consultation required corresponds to the potential level of impact.

The proposal is to be considered in its entirety, including potential ancillary impacts. An RNS should be open to re-visiting the classification at a later stage in the process if warranted.

If it is not obvious which class applies, consult section 3.3 of this Code to see what further investigations may be required. Section 3.3 also provides guidance about triggers that may move a proposed activity from one class to another.

Figure 1 depicts the five stages of the assessment and determination process and how the Code does or does not regulate Classes 1-3.

3.2.1 Class 1: Review of Environmental Factors

Class 1 works are school development (outlined in the Education SEPP as development permitted without consent) with relatively minor environmental impacts. These Part 5 activities can be broadly categorised into two key types:

- Minor School Development Works
- Other School Development Works

A review of environmental factors (REF) is a document prepared by or on behalf of a proponent that addresses and documents the proponent's consideration of all the factors listed at section 228 of the EP&A Regulation. As outlined, in section 3.4, an RNS must prepare a REF for all Class 1 development. The level of assessment in the REF should reflect the level of environmental impact resulting from the proposed works. For example, minor Part 5 works such as internal building works or routine maintenance will not require the same amount of assessment as other school development, but will still require an REF.

An outline of these categories is detailed in Figure 4 below:

Minor School Development works

Minor School works include minor alterations to school buildings and structures; internal works; fitouts; accessibility works; restoration, replacement and repair works; and security measures such as fencing. These works still require an REF, however, require a less detailed assessment given the likely minimal environmental impact. Due to their minor nature, these works will not require the same level of consultation than other school development works.

Minor Class 1 works require RNSs to place the REF on their website to make the proposal and relevant parts of the assessment publicly available.

Other School Development works

Other School works include construction, operation or maintenance of school buildings and additions to existing buildings, particularly those that are close to residential boundaries, located within bushfire zones or affecting heritage items.

It is likely that the REF for these developments will require more detailed assessment than for minor developments to determine the likely impacts of the activity and whether suitable conditions are proposed to mitigate any impacts on the environment or surrounding locality.

These works will require consultation as set out in Section 3.3.3 of the Code.

Figure 4. Class 1 Works

Each of the factors listed in clause 228 of the EP&A Regulation must also be taken into account, however, the level of detail required in the REF can vary depending on the extent or complexity of the impacts, the nature of the site and the level of community interest in the activity.

It is intended that the bulk of Part 5 activities for schools will be Class 1 activities and will require a REF. This Code provides requirements for the process and content of a REF (refer to Section 3.4).

3.2.2 Class 2: Species Impact Statement

This Code only applies to Part 5 activities under section 111 of the EP&A Act. It is not applicable to any additional assessment requirements that may be required in relation to an SIS required under section 112 of the EP&A Act. However, section 5A of the EP&A Act requires certain factors to be taken into account when deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities or their habitats.

If it is determined that there may be a significant effect, a SIS will be required which is a separate document to the REF, that specifically addresses the impacts of the activity on threatened species, populations and ecological communities. Before preparing a SIS, the proponent must first seek the requirements of the Chief Executive Office of the Office of Environment and Heritage.

A REF must still be prepared for a Class 2 activity to consider and address all other environmental impacts, in addition to the SIS which will focus on the impacts on species and habitats.

Note.

Under section 112 of the EP&A Act the RNS must prepare a SIS if the proposed activity is likely to significantly affect the environment and the scope of this likely impact arises exclusively from:

- the activity being on land that is, or is part of Critical Habitat; or

- is likely to significantly affect a Threatened Species, Population or Ecological Community or their Habitats, (including those in connection with fish and marine vegetation).

Division 2 of Part 6 of the *Threatened Species Conservation Act 1995* lists the form and content required for SISs (or Part 7A of the *Fisheries Management Act 1994* for SISs involving marine vegetation and fish). The RNS is the determining authority for a Class 2 activity. However, the concurrence of the CEO of the Office of Environment and Heritage or, in connection with fish or marine vegetation, the Secretary of the Department of Industry, Skills and Regional Development is required for the SIS under section 112C of the EP&A Act.

Amongst other things, the RNS must comply with the public consultation requirements under section 113 of the EP&A Act.

3.2.3 Class 3: Environmental Impact Statement

This Code applies to Part 5 activities that do not require an EIS or development that is classified as State significant infrastructure (SSI).

Note.

Section 112 of the EP&A Act requires a determining authority (such as an RNS) to prepare an EIS if the proposed activity “is likely to significantly affect the environment”. If the RNS forms the opinion that the environmental impacts of the proposed activity are significant that an EIS is required, then the proposal is no longer subject to Part 5 and is instead classified as SSI under Item 1 of Schedule 3 of *State Environmental Planning Policy (State and Regional Development) 2011*.

The Minister for Planning (or delegate) is the approval authority for SSI. Part 5.1 of the EP&A Act sets out the assessment process for SSI.

It is anticipated that most development undertaken for the purposes of schools will not be of a scale or level of impact that would require the preparation of an EIS. However, it is still the responsibility of RNS to follow and document the process outlined in this Code to form the opinion that an EIS is not required.

Please consult DP&E for advice on assessment procedures for activities requiring an EIS or for SSI development. Further information regarding SSI lodgement and assessment processes can be found on the DP&E [website](#).

3.3 Stage 2: Assessment

The object of Stage 2 is for the RNS to assess the nature, scale and extent of the proposed activity’s impact on the environment. There are three phases to this assessment, which are often interrelated or simultaneous:

1. Scoping
2. Assessment
3. Consultation.

3.3.1 Phase 1 – Scoping

In this phase, the RNS should:

- describe the proposed activity, including its geographic location, current land use, landowners, neighbours and environmental characteristics

- justify the need for the proposed activity
- begin to gather information on potential environmental factors relevant to the development ([Appendices B and C](#) may be useful reference tools to assist in identifying relevant factors)
- consider the need for early community consultation and the resources required to conduct the environmental impact assessment.

Consideration of recent similar projects may be useful. The RNS should also be prepared to reconsider the classification of the proposal from Stage 1 if necessary.

This stage should inform whether the potential environmental impacts of the proposal can be reasonably classified as minor or more significant and, consequently, the level of assessment required for the proposal.

3.3.2 Phase 2 – Assessment

In this phase, the RNS should:

- draw together the necessary data, resources and expertise required to conduct a rigorous and structured assessment of the activity’s environmental impacts
- confirm the appropriate assessment and approvals process (i.e. whether the Activity falls within Class 1, 2 or 3 under this Code)
- confirm any other licences or approvals (State or Commonwealth) that are required (see [Appendix B](#) for guidance on legislative triggers)
- provide an adequate assessment of the extent and nature of all environmental and community impacts associated with the proposed activity, using best available information
- identify mitigation measures or conditions to address any identified impacts
- provide evidence that the assessment has been prepared by a person suitably qualified in environmental impact assessment.

The identification and analysis of an activity’s likely environmental impacts is the key goal of this phase.

The RNS should be prepared to reconsider the classification of the proposal from Stage 1 if necessary. For example, the assessment may conclude that the proposal will have a significant environmental impact and therefore require an EIS and assessment under Part 5.1 of the EP&A Act.

Note.

Section 111 of the EP&A Act requires a determining authority (such as an RNS) in considering an activity, to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

A failure to undertake an assessment of the proposed activity in accordance with section 111 of the EP&A Act could potentially be a breach of section 125 of the EP&A Act.

3.3.3 Phase 3 – Mandatory consultation

The level of consultation undertaken by the RNS should reflect the level of potential environmental impact, including impacts on surrounding properties and the community, and the anticipated level of community interest in a particular development proposal.

It is a mandatory requirement under this Code for the RNS to make the REF available on its website for [Class 1 Minor School Development Works](#).

For all [Class 1 Other School Development Works](#), it is a mandatory requirement for the RNS to:

- Write (by letter or email) to:
 - the Government agencies the RNS considers relevant
 - the local council of the area within which the school is located
 - all neighbours the RNS considers relevant, to:
 - describe the proposed activity, including its location
 - describe the environmental impacts the RNS reasonably considers the proposed activity may have
 - invite submissions to the RNS on the proposed activity within no less than 21 business days of the date of the correspondence and
 - provide the contact details of the RNS's nominated representative to receive submissions in writing
- Consider all submissions received during the 21 business days stipulated in the correspondence, including an assessment of the issues raised and how they have been addressed in the assessment of the proposed activity.
- Keep written records of all consultation undertaken pursuant to this Code:
 - for five years after the consultation took place
 - in a way that the records can be produced to a third party within 21 business days and
 - to a standard where a reasonable person could understand the essential nature of the consultation without extrinsic material.

This Code regulates only those public consultation obligations of an RNS which relate to assessments as a Part 5 Determining Authority for development in connection with an existing school that is permitted without consent under clause 32 of the Education SEPP.

Note.

The Education SEPP requires that a RNS consult with councils and other public authorities in relation to certain school development undertaken without consent under the Education SEPP (Division 1, Part 2 of the SEPP). These consultation requirements are intended to address matters such as impacts on council infrastructure and services, impacts on heritage, development on flood liable land, and development in or near certain government land or sensitive areas. The SEPP also includes a requirement to notify council and occupiers of adjoining land before carrying out works that are permitted as development without consent (clause 33).

Nothing in this Code limits any public consultation obligations arising from other aspects of an RNS's business or that may arise under the EP&A Act and regulations or any other Act or regulations.

3.4 Stage 3: Documentation

The object of Stage 3 is for the RNS to prepare a REF that enables the person determining the assessment (see Stage 4) to discharge the RNS's duty to comply with this Code.

As a general rule, Part 5 assessment follows a risk based approach, requiring a more detailed assessment to be made for activities that:

- are expected to have complex environmental issues
- affect a large number of people
- have a number of likely environmental impacts or a single significant impact, and/or
- have environmental impacts that are medium to high risk.

This Code is not intended to prescribe the structure of a REF, but rather to provide minimum standards that will satisfy the purpose of the Code.

3.4.1 Mandatory assessment documentation

It is a mandatory requirement under this Code that a REF document be prepared outlining the assessment of all Class 1 development (see section 3.2.1) and the REF must include the following elements:

Proposed activity	The REF must clearly describe the proposed activity, including its nature and purpose and the sites where it is to take place. All aspects of the proposed activity should be described in sufficient detail to demonstrate the Activity's potential for impacts on the environment.
Certification	The REF must contain a statement signed and dated by the person with principal responsibility for preparing the REF (being an employee or agent of the RNS) that <i>"I certify that I have prepared the contents of this REF and, to the best of my knowledge, it is in accordance with the Code approved under clause 244N of the Environmental Planning and Assessment Regulation 2000, and the information it contains is neither false nor misleading"</i> .
Proponent, determining authorities and any required approvals	The REF must identify the proponent and all determining authorities and required approvals for the activity.
Environment of the activity	The REF must include a description of the environment of the site and the surrounding area, with a focus on aspects of the environment that are of particularly high value, sensitive to impacts of the type the activity will have, or of importance to the community.
Impacts of the activity	The REF must identify and describe any Threatened Species, Populations and Ecological Communities that are likely to occur in the area affected by the activity.
	The assessment of the potential impacts of the activity is the most important part of a REF. The REF must document likely direct and indirect environmental impacts for all phases of the activity and describe their extent, size, scope, intensity and duration. As a minimum, the REF must document consideration of each of the factors listed in clause 228(2) of the EP&A Regulation and document consideration of each of the factors listed in section 5A of the EP&A Act in relation to any Threatened Species, Populations and Ecological Communities (including fish and marine vegetation), and their Habitats. This section must also detail the sources and data the RNS relied on when preparing the REF.
Mitigating measures that will apply to the Activity	In the development of the REF, an RNS may conclude that the activity should be modified or adapted so that certain measures designed to mitigate the environmental impacts of the Activity are observed. These mitigating measures or conditions must be documented in the REF.

Summary of impacts	The REF must include a section that summarises the impacts of the activity and the proposed mitigation measures.
Consultation	The REF must record the consultation undertaken for the purposes of preparing the REF in accordance with Section 3.3.3 of this Code.
Conclusions (whether an EIS and/or a SIS is required)	<p>The REF must describe: (1) whether the activity is likely to significantly affect the environment, in which case an EIS is required; and (2) whether the Activity is likely to significantly affect Threatened Species, Populations, Ecological Communities or their Habitats, in which case a SIS is required.</p> <p>The REF must describe the reasons for these conclusions and may reference the more detailed impact assessments in the body of the REF in support. In instances where the REF has been prepared by a third party it is important to note that irrespective of the conclusion of the REF, an RNS is ultimately responsible for deciding whether a proposed activity is likely to significantly affect the environment.</p> <p>As noted in Section 3.2, if the RNS forms the opinion that an EIS is required, then the proposal is no longer subject to Part 5 and is instead classified as SSI, which requires the approval of the Minister for Planning and Environment.</p> <p>Where it is unclear whether the proposed activity is likely to significantly affect the environment, preparing a REF can assist in determining whether an EIS and/or a SIS should be prepared. In this sense, a REF can be a precursor to an EIS, or a precursor and adjunct to a supplementary REF and SIS.</p> <p>Where it is clear that the proposed activity is not likely to significantly affect the environment, or where the RNS decides on the basis of the contents of a REF that a proposed activity is not likely to significantly affect the environment, the REF serves as the primary document showing that the RNS has examined and taken into account the activity's environmental impacts.</p>

Figure 5. Elements of an REF

It is a mandatory requirement under this Code that the REF document is made available on the RNS's website prior to the commencement of the activity.

3.5 Stage 4: Determination

The object of Stage 4 is for a person authorised by the RNS to discharge the RNS's duty to comply with this Code and produce a Decision Statement.

An authorised person is an individual authorised by the RNS to determine the proposal, and cannot be the same person who conducted the assessment. Their determination is to be based on the assessment and evaluation conducted by the RNS in Stage 2.

During Stage 3 the RNS should document the steps it took throughout the assessment process, and must produce a final REF document. In Stage 4, these documents form the evidentiary basis of a determination.

In considering a REF, the authorised person may decide on behalf of the RNS:

- that no EIS or SIS is required to be prepared. Such a decision may be conditional or unconditional. If the decision is conditional, the conditions must be recorded in the Decision Statement. If a decision of this type is made, the activity may proceed in accordance with the decision
- that either an EIS or a SIS or both is or are required. If an EIS is required, the proposed activity cannot be assessed under this Code as it becomes SSI which requires the approval of the Minister for Planning and Environment, or
- that there is insufficient information contained in the REF for the authorised person to discharge the duty under section 111 of the EP&A Act such that a supplement to the REF should be prepared.

The determination should occur after the assessment and evaluation phase and after any consultation required to inform the determination has been conducted. This does not limit ongoing community consultation and communication that may be required throughout Stage 5 (implementation).

3.5.1 Mandatory determination documentation

It is a mandatory requirement under this Code that the determination of the activity (Stage 4 of the process) be documented in a written statement (the Decision Statement) signed by the authorised person on behalf of the RNS. The Decision Statement must:

- state the decision
- expressly state if it is a conditional decision
- state the conditions (if any) and the reasons for these conditions and
- be made available on the RNS's website prior to the commencement of the activity.

3.5.2 Notification of determination

In addition to placing the REF and Decision Statement on the RNS's website, the RNS should notify the council and adjoining neighbours of its intention to proceed with the development proposal.

The RNS should also consider whether it is appropriate and feasible to write to each organisation/person who made a submission during the consultation phase (see Section 3.3.3) to state:

- when the RNS expects to commence the activity and
- how the organisation/person can obtain a copy of the REF, Decision Statement and related documentation.

3.6 Stage 5: Implementation

The object of Stage 5 is to ensure that the RNS implements the activity only after a determination in accordance with Part 5 of the EP&A Act and any conditions of that determination.

3.6.1 Other approvals required

This Code operates under the EP&A Act and applies to development that does not require a planning approval. Approvals and permits may also be required under other State legislation, such as the Local Government Act 1993, the Heritage Act 1977 or the Roads Act 1993, or under any relevant Commonwealth legislation. Nothing in this Code allows an RNS to undertake an activity without first obtaining all licences and approvals required under any other legislation.

3.6.2 Certification of building works

It is a requirement of the EP&A Act that all works carried out by RNSs under the Code must also be undertaken in accordance with any relevant provisions of the National Construction Code (NCC) (previously known as the Building Code of Australia). Section 109R(2) requires that building work cannot be commenced unless it has been certified by or on behalf of the RNS that the works comply with the technical provisions of the State's building laws. There are no specific requirements as to the type of certifier that may grant certification under section 109R(2), however it is recommended that an appropriately qualified person provide the certification of the building works.

3.6.3 Management plans

An RNS should document how environmental impacts will be managed during and after implementation and how any relevant provisions of the NCC will be complied with. The documentation allows the RNS to ensure that the following are observed during and after implementation:

- measures adopted during Stage 3 to mitigate environmental impacts
- conditions of the determination made during Stage 4
- building requirements of the NCC.

The degree of detail required for the implementation documentation will depend on the scope of the activity and the nature of its impacts. For example, the RNS may choose to prepare a Construction Environmental Management Plan (CEMP) or appoint an Environmental Management Representative (EMR) to monitor the implementation. A CEMP describes how construction works will be managed at the site including what actions are required to implement mitigation measures, erosion and sediment control measures that may be required, access routes for construction vehicles, site entry and exit points and the like. An EMR is a suitably qualified person who monitors the works to ensure compliance with relevant legislation, and manage day to day issues related to environmental management onsite including any unexpected issues that may arise during construction that were not previously identified. Implementing a CEMP and appointing an EMR is industry best practice for management of construction sites, and is particularly recommended for larger and more complex projects.

If conditions apply to an activity, the RNS should record how those conditions were met during implementation. If any conditions were not met, the RNS should document the reasons for not complying.

If any organisation/person requested in their submission during the consultation phase (see Section 3.3.3) to be notified of the completion of construction, the RNS should notify them in writing within 21 business days of the construction being completed.

4. Changes to a proposal

Sometimes a proposed activity may need to be altered or modified to respond to new information, issues raised by stakeholders, or some other consideration.

4.1 Prior to determination

If a proposed activity is altered or modified before Stage 4 (determination) and the RNS reasonably believes that the changes to the proposal would increase the environmental impacts of the activity, the RNS should repeat stages 1-3 of the assessment.

Only the aspects of the activity which are proposed to be changed in a material way are required to be the subject of further assessment and consultation.

The RNS should be prepared to reconsider the classification of the proposal from Stage 1 if necessary. If the classification remains the same, the RNS may produce an addendum to the REF or a new REF.

4.2 After determination

A determination made under this Code can be altered by an authorised person via the issue of a further Decision Statement.

If the proposed change to the activity would have increased environmental impacts compared to the activity the subject of the original Decision Statement, the RNS should repeat stages 2 and 3 of the assessment before issuing a further Decision Statement. Only the aspects of the activity which are proposed to be altered or modified in a material way are required to be the subject of further assessment and consultation.

A Decision Statement altering a determination should state the reasons for the change and any conditions required as a result of those changes.

5. Record keeping

Government schools are subject to the *Government Information (Public Access) Act 2009* (GIPA Act) which requires them to either proactively release and/or provide access to documents related to their functions.

As RNSs operate under private management, an RNS is not subject to the GIPA Act. However, an RNS's new role as a determining authority for certain school development under Part 5 of the EP&A Act and its delivery of an essential service to NSW means there is an ongoing public interest in the public having access to an RNS's Part 5 assessment documents.

5.1 Mandatory record keeping requirements

It is a mandatory requirement under this Code for an RNS to keep the following documents:

- if a determination has been made, the REF and other documents that form part of the REF, excluding:
 - a draft version of the REF
 - a version of the REF never submitted to the authorised person
 - REFs where a determination has been made that the activity cannot proceed, or requires an SIS or EIS.
- if a determination has not been made, the most current version of a REF
- all Decision Statements issued by an authorised person
- all records of consultation undertaken by an RNS for an assessment
- all implementation documents produced for an activity, including documents identifying how conditions of a determination were met and how NCC compliance has been achieved.

It is a mandatory requirement under this Code for an RNS to:

- make REFs and Decision Statements publicly available on the RNS's website prior to the commencement of the activity, and ensure they remain publicly available on the website for five years from the date of the Decision Statement
- keep REFs for which a determination has not been made for five years from creation or until they are replaced by a new version
- keep records of consultation for five years after the consultation occurred
- keep implementation documents for five years after implementation has been completed.

5.2 Mandatory public access to records

Any member of the public may apply to an RNS for access to any documents required to be kept under section 5.1.

It is a mandatory requirement under this Code for the RNS to provide the applicant with a copy of the document/s sought by the application within 21 business days, except in the following circumstances:

- the application is not a valid application because it does not meet the following requirements:
 - it must be in writing sent to or lodged at an office of the RNS
 - it must clearly indicate that it is an application under this Code
 - it must be accompanied by payment of \$30 as an application fee

- it must state a postal address as the address for correspondence in connection with the application
- it must include such information as is reasonably necessary to enable the document/s applied for to be identified.
- the application seeks a document other than a document which the RNS to which the application is addressed is required to retain under this Code, or a document which, to the best of the RNS's knowledge after making reasonable attempts to investigate the matter, does not exist.
- the application seeks a document to which Schedule 1 of the GIPA Act would apply, if the RNS in question was subject to that Act.
- the RNS has written to the applicant within 21 business days of receiving the application to advise that the RNS expects that the application will take more than one hour to process, and that the RNS has decided to impose a processing fee on the applicant based on a reasonable estimate of how long it will take for the RNS to process the application. In such a case:
 - the RNS is only obliged to provide the applicant with the applied for document/s if the applicant pays the imposed processing fee within 20 business days of the RNS giving notice in writing of the imposition of the processing fee. If the applicant pays the imposed processing fee, the RNS must produce the applied for document/s within 20 business days of payment, and
 - the correspondence advising the applicant of the imposition of a processing fee must contain an explanation as to how the processing fee has been calculated including an estimate of how the RNS employee who processes the request will spend his or her time in processing the request, and
 - a processing fee imposed by an RNS is not to exceed \$30 for each employee-hour or part thereof required to process the application beyond the first hour.
- the RNS believes on reasonable grounds that the application is frivolous or vexatious, or
- the RNS is unable to contact the applicant.

It is a breach of this Code for the RNS to cease to retain a document which is sought by a member of the public in accordance with this Code after the RNS receives the application seeking that document.

It is a mandatory requirement under this Code for an RNS to respond to a request for access to a document within 21 business days of the application being made by:

- providing a copy of the applied for document/s to the applicant by any reasonable means
- writing to the applicant to impose a processing fee or
- writing to the applicant to decline to provide the applied for document/s, briefly explaining why it has declined.

The RNS is deemed to have declined access to a document or documents if it fails to respond to a request for access in a manner required by this Code within 21 business days of an application for access being made.

A person who is dissatisfied with the RNS's decision to decline access can request DP&E to direct the RNS to provide access.

The request to DP&E must:

- be in writing addressed to DP&E
- attach:
 - the original application to the RNS and
 - any response from the RNS, and

- contain such further information as is necessary for DP&E to understand the reasons why the person applying for the direction considers that DP&E should make the direction.

DP&E may direct the RNS to provide any person with a copy of a document. Such a direction must be in writing, and must also be sent to the person who applied for the direction. It is a breach of this Code for an RNS to fail to comply with the direction.

6. Compliance with this Code

6.1 Compliance with Code and EP&A Act

Compliance with the mandatory requirements of this Code is required under the EP&A Regulation. A breach of a mandatory requirement will therefore be an offence under section 125(2) of the EP&A Act.

The mandatory requirements of this Code are:

- Consultation requirements under section 3.3.3
- REF documentation requirements under section 3.4.1
- Determination documentation requirements under section 3.5.1
- Record keeping requirements under section 5.1.1
- Public access to records requirements under section 5.1.2
- Reporting procedures outlined in section 6.2 below
- Audit obligations outlined in section 6.3.1 below

It will therefore be an offence under the section 125(2) of the EP&A Act to breach or otherwise fail to address these mandatory requirements under this Code.

DP&E will be responsible for monitoring and enforcing compliance with this Code.

Note.

In addition to the mandatory requirements under this Code, under the EP&A Act RNSs must comply with the relevant provisions of the National Construction Code (previously Building Code of Australia) when undertaking school developments.

Any person can commence proceedings against an RNS under sections 123 and 125 of the EP&A Act for a failure to exercise their duty under section 111 of the Act to consider environmental impacts before undertaking an activity or for non-compliance with the Code as required by clause 244N(2) of the EP&A Regulation.

6.2 Procedures for reporting breaches

It is a mandatory requirement under this Code for an RNS to report a breach of the mandatory requirements of this Code to DP&E in accordance with following procedures:

- the RNS must report a breach in writing as soon as reasonably practicable after the RNS becomes aware of the breach
- written reports must record:
 - the nature of the breach
 - the RNS's explanation for the breach and
 - a description of measures implemented to avoid a recurrence of the breach.
- serious breaches must first be reported by telephone, followed by a more detailed written report unless otherwise agreed by DP&E. A serious breach includes a breach which has, or is likely to have, a material adverse impact on the environment.

6.3 DP&E Auditing

The Secretary of DP&E may audit an RNS's compliance with this Code by either:

- conducting an audit itself or
- requiring an RNS to nominate a suitably qualified person who will conduct the audit and provide a report to DP&E at the RNS's expense.

6.3.1 Audit obligations of RNS

The following obligations of an RNS are a mandatory requirement under this Code:

- if instructed by the Secretary of DP&E, the RNS is to nominate a suitably qualified person who will conduct the audit and provide an audit report to DP&E. The RNS must first seek DP&E's approval of the auditor nominated by the RNS, before the audit commences.
- the RNS must cover the costs of the audit, including the expenses of the auditor (if nominated by the RNS).
- the RNS must cooperate fully with an auditor, whether the auditor has been nominated by the RNS or DP&E. This mandatory requirement to cooperate includes a duty to facilitate access to premises, to provide access to documents requested by an auditor, and to make personnel available for interview by an auditor. This includes access to all documents listed under section 5 (Record keeping) of this Code.

7. Appendices

7.1 Appendix A: Definitions

In this Code, except in so far as the context or subject-matter otherwise indicates or requires:

Activity has the same meaning as that prescribed by section 110(1) of the EP&A Act.

Construction Environmental Management Plan (CEMP) means a document that outlines how activities undertaken during the construction phase of development will be managed to avoid or mitigate negative environmental impacts on site and how those environmental management requirements will be implemented.

Code means the NSW Code of Practice for Approved Education Providers, approved under clause 224N of the EP&A Regulation as in force from time to time.

Decision Statement means a document which formally records a determination made by an authorised person on behalf of an RNS during Stage 4 of the EIA process required under this Code.

Determining Authority has the same meaning as that prescribed by section 110(1) of the EP&A Act.

Development has the same meaning as under the EP&A Act.

DISRD means the Department of Industry, Skills, and Regional Development.

DP&E means the Department of Planning and Environment.

Education Act means the *Education Act 1990*.

Education SEPP means the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*.

EIS means Environmental Impact Statement.

Environmental Management Representative (EMR) is a suitably qualified person appointed by the proponent of the development who monitors the works to ensure compliance with relevant legislation, and manage day to day issues related to environmental management onsite including any unexpected issues that may arise during construction that were not previously identified.

EPI means Environmental Planning Instrument and has the same meaning as under the EP&A Act.

EP&A Act means the *Environmental Planning & Assessment Act 1979*.

EP&A Regulation means the *Environmental Planning and Assessment Regulation (2000)*.

GIPA Act means *Government Information (Public Access) Act 2009*.

Government Agency means:

- a public authority constituted by or under an Act
- a government Department
- a statutory body representing the Crown
- a statutory State owned corporation (and its subsidiaries) within the meaning of the *State Owned Corporations Act 1989*

- a person, not being an RNS, prescribed by the EP&A Regulation for the purposes of the definition of “public authority” under the EP&A Act.

Habitat and Critical Habitat have the same meaning as under the EP&A Act.

Minister has the same meaning as under the EP&A Act.

NDA means Nominated Determining Authority, a determining authority nominated by the Minister in accordance with section 110A of the EP&A Act.

NCC means National Construction Code, previously known as the Building Code of Australia (BCA).

NSW means New South Wales.

OEH means the NSW Office of Environment and Heritage.

REF means a Review of Environmental Factors and, depending on context, can refer to a type of documentation of an EIA process, or the process itself.

RNS means a Registered non-government School within the meaning of the *Education Act 1990* other than one to which a current certificate of exemption applies under that Act.

Secretary, where that term is used in section 2.3.6 of this Code, has the same meaning as under the EP&A Act.

SIS means Species Impact Statement has the same meaning as under the *Threatened Species Conservation Act 1995*.

SSI means State Significant Infrastructure and has the same meaning as under the EP&A Act.

Threatened Species, Populations and Ecological Communities and related terms have the same meaning as under the EP&A Act.

7.2 Appendix B: Legislative and Environmental Triggers

In discharging its duty as a Determining Authority under section 111 of the EP&A Act an RNS must examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity in question.

This Appendix contains a list of potential triggers which, if relevant to a particular case, may require that an RNS carries out particular investigations and assessment to discharge the duty under section 111.

This list may also be helpful to RNSs in determining whether an Activity is regulated by other State or Commonwealth legislation.

This list is non-exhaustive and is intended as a guide only.

- Principles of Ecological Sustainable Development
- Proximity to items of national environmental significance
- Precautionary Principle
- Potentially effects on threatened species, populations or ecological communities, or their habitats, including fish and marine vegetation
- Working near marine vegetation (mangroves, seagrass beds, etc.) or dredging a water body
- Impacting State, Local or section 170 register (Non-Aboriginal) heritage
- Potential impacts on Aboriginal cultural heritage including Aboriginal objects or Aboriginal places declared under the *National Parks and Wildlife Act 1974*, a Potential Aboriginal Deposit (PAD) or native title
- Working near protected wetlands and rainforests
- Working within a drinking water catchment area
- Working within State forests/area subject to forest agreement
- Altering ground water, water bodies, etc
- Discharging to stormwater or sewer
- Siting oil filled equipment within 40m of a sensitive area or within 5m upstream of a drain
- Working within areas with potential or actual contaminated land
- Impacting hollow bearing trees
- Impacting high value Habitat
- Koala Habitat
- Clearing native vegetation
- Electric and Magnetic Fields (EMF) and Prudent Avoidance
- Bushfire risk and vegetation management.

7.3 Appendix C: Education SEPP Planning Principles

Creating and maintaining safe, functional and well- designed schools is the responsibility of all RNSs. This Code provides the following seven planning principles to guide RNSs in their assessment of new school development proposals:

- context
- built form
- adaptive learning spaces
- sustainability
- landscape
- amenity
- health and safety.

RNSs will need to demonstrate that they have considered these principles in their REF assessment and that school development approved under this Code is consistent with the Planning Principles as detailed below.

Principle 1—context, built form and landscape

Schools should be designed to respond to and enhance the positive qualities of their setting, landscape and heritage, including Aboriginal cultural heritage. The design and spatial organisation of buildings and the spaces between them should be informed by site conditions such as topography, orientation and climate.

Landscape should be integrated into the design of school developments to enhance on-site amenity, contribute to the streetscape and mitigate negative impacts on neighbouring sites.

School buildings and their grounds on land that is identified in or under a local environmental plan as a scenic protection area should be designed to recognise and protect the special visual qualities and natural environment of the area, and located and designed to minimise the development’s visual impact on those qualities and that natural environment.

Principle 2—sustainable, efficient and durable

Good design combines positive environmental, social and economic outcomes. Schools and school buildings should be designed to minimise the consumption of energy, water and natural resources and reduce waste and encourage recycling.

Schools should be designed to be durable, resilient and adaptable, enabling them to evolve over time to meet future requirements.

Principle 3—accessible and inclusive

School buildings and their grounds should provide good wayfinding and be welcoming, accessible and inclusive to people with differing needs and capabilities. Schools should actively seek opportunities for their facilities to be shared with the community and cater for activities outside of school hours.

Principle 4—health and safety

Good school development optimises health, safety and security within its boundaries and the surrounding public domain, and balances this with the need to create a welcoming and accessible environment.

Principle 5—amenity

Schools should provide pleasant and engaging spaces that are accessible for a wide range of educational, informal and community activities, while also considering the amenity of adjacent development and the local neighbourhood.

Schools should include appropriate, efficient, stage and age appropriate indoor and outdoor learning and play spaces, access to sunlight, natural ventilation, outlook, visual and acoustic privacy, storage and service areas.

Principle 6—whole of life, flexible and adaptive

School design should consider future needs and take a whole-of-life-cycle approach underpinned by site wide strategic and spatial planning. Good design for schools should deliver high environmental performance, ease of adaptation and maximise multi-use facilities.

Principle 7—aesthetics

School buildings and their landscape setting should be aesthetically pleasing by achieving a built form that has good proportions and a balanced composition of elements. Schools should respond to positive elements from the site and surrounding neighbourhood and have a positive impact on the quality and character of a neighbourhood.

The built form should respond to the existing or desired future context, particularly, positive elements from the site and surrounding neighbourhood, and have a positive impact on the quality and sense of identity of the neighbourhood.