

5. REGULATORY AUTHORITY POWERS

Monitoring, compliance and enforcement
Offences
Good regulatory practice



ICONS LEGEND

National Laws and Regulations



Sections of the Education and Care Services National Law (National Law) or regulations from the Education and Care Services National Regulations (National Regulations).

Offence



Offences against the National Law that attract a penalty, for example a fine.

Sight



Authorised officers will sight documentation provided as evidence to support particular practices at the service (for example, records of attendance, enrolment records, policies and procedures, meeting minutes, safety checklists, newsletters, photos, collections of children's work and documentation of child assessments or evaluations).

Centre-based service



An education and care service other than a family day care service which includes most long day care, preschool and outside school hours care services that are delivered at a centre.

Family day care service



An education and care service that is delivered through the use of two or more educators to provide education and care to children and operates from two or more residences.

Observe



Authorised officers will observe what children, families, educators, co-ordinators and staff members are doing (for example, engaging in caring, friendly and respectful interactions).

Birth to three



Children birth to three years of age.

School age children



Includes children attending school in the year before grade 1, and above.

Discuss



Authorised officers will discuss why and how particular practices occur at the service, with the approved provider, nominated supervisor, educators, co-ordinators, family day care educators, assistants or staff members.

REGULATORY AUTHORITY POWERS

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REGULATORY AUTHORITY POWERS

State and territory regulatory authorities are responsible for the administration of the National Quality Framework (NQF), including monitoring and enforcing compliance with the National Law and Regulations.

Consistent with the objectives of the NQF, the approach to enforcement and compliance is to:

- ensure the safety, health and wellbeing of children
- improve children's educational and developmental outcomes
- promote continuous quality improvement in education and care services.

Regulatory authorities have a range of approaches and tools to facilitate these objectives and consistently reinforce the requirements of the NQF.

Regulatory authorities will educate and inform providers and services and empower them to understand and meet their obligations.

Regulatory authorities will endeavour to take action that is proportionate to the issue and is most likely to achieve improved outcomes for children. When deciding how to respond to an incident or issue, regulatory authorities will consider the circumstances of each case and the risk to children (both short and long term). They may also take into account the compliance history of the approved provider or approved service.

MONITORING, COMPLIANCE AND ENFORCEMENT

1. MONITORING

1.1 WHAT IS MONITORING?

Monitoring is a proactive way of assessing and influencing compliance with the National Law and Regulations. Monitoring activities can provide a strong incentive for providers to comply with their regulatory obligations and to improve the quality of education and care at their services.

Monitoring is a compliance tool regulatory authorities may apply to an individual person, a single service or service type as part of deciding whether further regulatory action is needed.

There are several forms of monitoring activities, set out in the table below.

Monitoring activities		
Type	Description	Benefits
Targeted campaigns	Monitoring for a specific compliance issue, location or service type.	Encourages providers and others to ensure they are complying with a specific issue of concern to the regulatory authority. Focuses the regulatory authority's resources on addressing a specific problem.
Assessment and rating	The process of assessing and rating a service against the NQS, including by conducting a service visit.	Encourages continuous improvement by engaging the approved provider and the service in a process of self-evaluation, as well as providing a detailed report of their performance against the NQS.
Unscheduled visits	Visiting services without prior notice	Encourages providers and others to comply with their obligations at all times. Unscheduled visits are particularly useful when there is reason to believe the provider may be non-compliant and misrepresenting its self-reported data, or is likely to destroy evidence if an inspection is announced.
Scheduled visits	Visiting services with prior notice	Encourages providers and others to comply with their obligations and provides preparation time for compliance visits, for example, ensuring certain paperwork is readily available or particular staff members are present.

Choosing a monitoring activity

Regulatory authorities determine the frequency and focus of monitoring activities based on risk and with reference to the principle of earned autonomy (see *Good Regulatory Practice* for more information about these concepts).

To help assess risk, regulatory authorities may need to collect and analyse information about a service or a service type. Some of the sources of information to assess risk are set out in the table below. Many will come from existing regulatory actions.

Sources of information to help assess risk
The service's quality improvement plan
The provider and the service's history of compliance
The service's quality rating
Characteristics of the provider (length of time in the industry, service types, etc.)
Information obtained from other sources, such as complaints or notifications
Information gathered from other monitoring activities or regulatory activities, including investigations
Analysis of broader sector or regional compliance trends
Other regulatory systems with relevant or overlapping requirements and/or compliance monitoring.

Regulatory authorities should obtain the required information at the least possible cost or burden to the regulatory authority and the service provider.

Regulatory authorities must comply with the National Law when undertaking any monitoring activities (see *Powers of authorised officers* and *Powers of regulatory authorities* below).

Intelligence gathered through monitoring activities may lead to further compliance action. This information can also be used to identify strengths, weaknesses, opportunities, concerns, map sector development and understand broader regulatory trends or issues.

2. COMPLIANCE TOOLS

There are a wide range of methods and tools regulatory authorities may use when addressing non-compliance. This section sets out the tools that are available under the National Law and provides guidance on which tool to use, based on the specific circumstances.

These tools should be used in context of the *Good Regulatory Practice* section, which sets out the objectives of the National Law and the best practice principles of regulation listed below.

Best practice principles of regulation
Outcomes focus
Proportionality and efficiency
Responsiveness and flexibility
Transparency and accountability
Independence
Communication and engagement
Mutual responsibility
Consistency and predictability.

Regulatory authorities:

- take a responsive regulatory approach when choosing the methods used to manage non-compliance, considering all the risks
- are mindful of their administrative law obligations and keep records of compliance activities (see *Good Regulatory Practice*). The *NSW State Records Act 1998* applies to all jurisdictions for the purposes of the National Law and Regulations (section 265).

Summary of National Law compliance tools

Person	Compliance tools available	Description
Approved provider	Infringement notice	A fine for minor breaches of the National Law or the National Regulations (section 291)
	Emergency action notice	Direction to remove an immediate risk to children (section 179)
	Compliance direction	Instruction to comply with prescribed regulation (section 176)
	Compliance notice	Instruction to comply with any section or regulation (section 177)
	Enforceable undertaking	Agree to an undertaking from a person to take certain actions or refrain from certain actions to comply with the National Law and the National Regulations (section 179A–181)
	Direction to exclude inappropriate persons from service premises	Instruction to exclude a person from education and care service premises (section 171)
	Amendment of a service approval to include a condition	A requirement in respect of a specific service that the approved provider must comply with to avoid committing an offence under the National Law (section 51)
	Amendment of a provider approval	A requirement that the approved provider must comply with to avoid committing an offence under the National Law (section 19)
	Prosecution	Bringing any offence against the National Law or the National Regulations for decision by a court or tribunal
	Notice to suspend education and care by family day care educator	Prevent a family day care educator from providing education and care to children as part of a family day care service (section 178)
	Suspension of service approval	Temporarily prevent a provider from operating a specific service (section 70)
	Cancellation of service approval	Permanently prevent a provider from operating a specific service (section 77)
	Suspension of provider approval	Temporarily prevent a provider from operating any services (section 25)
	Cancellation of provider approval	Permanently prevent a provider from operating any service (section 31)

Summary of compliance tools

Person	Compliance tools available	Description
Nominated supervisor	Infringement notice	A fine for minor breaches of the National Law or the National Regulations (section 291)
	Enforceable undertaking	Agree to an undertaking from a person to take certain actions or refrain from certain actions to comply with the National Law and the National Regulations (section 179A–181)
	Direction to exclude a person from education and care service premises	Direction to exclude inappropriate persons from service premises (section 171)
	Prosecution	Bringing any offence against the National Law or the National Regulations for decision by a court or tribunal
Family day care educator	Infringement notice	A fine for minor breaches of the National Law or the National Regulations (section 291)
	Enforceable undertaking	Agree to an undertaking from a person to take certain actions or refrain from certain actions to comply with the National Law and the National Regulations (section 179A–181)
	Direction to exclude a person from education and care service premises	Direction to exclude inappropriate persons from service premises (section 171)
	Prosecution	Bringing any offence against the National Law or the National Regulations for decision by a court or tribunal
Staff member, educator or volunteer	Enforceable undertaking	Agree to an undertaking from a person to take certain actions or refrain from certain actions to comply with the requirement not to use inappropriate discipline (section 179A–181)
	Prosecution	Bringing an offence to use inappropriate discipline under the National Law for decision by a court or tribunal
Any person in any way involved in an education and care service	Prohibition notice	Prohibit a person from being involved in an education and care service in any way (sections 182–188A)
	Prosecution	Bringing any offence against the National Law or the National Regulations for decision by a court or tribunal

2.1 INFRINGEMENT NOTICES



National Law

Section 291



What is an infringement notice?

An infringement notice is a monetary penalty for non-compliance with specific requirements of the National Law and Regulations. An infringement penalty is 10 per cent of the maximum penalty that could be imposed on the person for that offence. Infringement offences are typically for minor offences that are clear and unambiguous. They are used to give a person an immediate minor penalty to deter future non-compliance.



National Law

Section 291



When can it be used?

An infringement notice can only be served on a person for a contravention of the requirements set out in the table below.

Once satisfied that this tool can be used, a regulatory authority may consider the following in deciding whether an infringement notice is appropriate:

- Is there no serious risk to the safety, health and wellbeing of children being educated and cared for at the service?
- Is the penalty proportionate to the seriousness of the offence?
- Is the penalty likely to serve as a deterrent to committing the offence again?

Requirements for which an infringement notice may be used

Law/Regulation	Requirement	Person
Section 172	Display prescribed information	Approved provider
Section 173	Notify certain circumstances to the regulatory authority	Approved provider
Section 176	Comply with a compliance direction	Approved provider
Section 269	Keep a register of family day care educators, co-ordinators and assistants	Approved provider
Regulation 77(1), (2) and (3)	Health, hygiene and safe food practices	Approved provider, nominated supervisor, family day care educator
Regulation 80(1)	Weekly menu	Approved provider, nominated supervisor and family day care educator
Regulation 83(1), (2) and (3)	Use of alcohol or drugs	Approved provider, nominated supervisor, family day care educator
Regulation 86	Notification of incidents	Approved provider
Regulation 88(1)	Infectious diseases	Approved provider
Regulation 89(1) and (2)	First aid kits	Approved provider, family day care educator

Regulation 97(4)	Display of emergency and evacuation plan	Approved provider
Regulation 98	Telephone or communication equipment	Approved provider
Regulation 104(1)	Fencing regulation	Approved provider
Regulation 112(3)	Nappy change facilities	Approved provider
Regulation 177(2) and (3)	Enrolment and other documents to be kept by approved provider	Approved provider
Regulation 178(2) and (3)	Enrolment and other documents to be kept by family day care educator	Family day care educator

How can it be used?

An infringement notice may be served in accordance with the requirements of the National Law (see *Serving notices*).

An infringement notice must be in the form prescribed and contain the information prescribed by the infringements law of the specific state or territory. Regulatory authority staff should seek advice about what the law in their state or territory requires when using an infringement notice.

Can it be appealed?

The decision to serve an infringement notice is not a reviewable decision under the National Law. However, a person may seek to dispute the infringement notice in a court or tribunal (see *Reviews*).

What happens after it has been issued?

Once an infringement penalty has been paid:

- the infringement cannot be considered when assessing if a person is fit and proper to be involved in the provision of, or to be supervisor of, an education and care service
- the infringement notice cannot be considered when assessing and rating a service.

Payment of a fine does not mean that an approved provider or approved service is not required to take necessary actions to become compliant with the National Law and Regulations. If the identified non-compliance continues, the regulatory action will escalate to more serious sanctions.

Failure to pay an infringement penalty

If it is not paid, the rules of the relevant state or territory about enforcing infringement notices will apply.

2.2 EMERGENCY ACTION NOTICES



National Law

Section 179

What is an emergency action notice?

An emergency action notice is a written notice setting out steps the approved provider must take to remove or reduce an immediate risk to the safety, health or wellbeing of a child or children being educated and cared for by the service. An emergency action notice can only be given to an approved provider.

When can it be used?

A regulatory authority can only issue an emergency action notice if it is satisfied a service is operating in a manner that poses, or is likely to pose, an immediate risk to the safety, health or wellbeing of a child or children being educated and cared for by the service.

A regulatory authority may consider the following in deciding whether an emergency action notice is appropriate:

- Is it possible for the regulatory authority to set out clear steps which, if followed, would reduce or remove the risk?
- Will it be possible for the approved provider to remove or reduce the risk in less than 14 calendar days?
- Is the action proportionate to the seriousness of the offence?
- Is the action likely to serve as a deterrent?

How can it be used?

An emergency action notice may be given in accordance with the requirements of the National Law about serving notices (see *Serving notices*).

The notice must set out how long the approved provider has to comply. This period cannot be more than 14 calendar days.

Can it be appealed?

The decision to give an emergency action notice is not a reviewable decision under the National Law.

What happens after it has been issued?

An approved provider must comply with an emergency action notice within the period set out in the notice. The period cannot be more than 14 calendar days.

Failure to comply with an emergency action notice

If the approved provider does not comply with the emergency action notice, the regulatory authority may consider taking further compliance action.

The maximum penalty which may be imposed by a court for not complying is \$6,000, in the case of an individual; \$30,000, in any other case.

The regulatory authority cannot prosecute for non-compliance with the emergency action notice and the original offence.

2.3 COMPLIANCE DIRECTIONS



National Law

Section 176

What is a compliance direction?

A compliance direction must be in writing and requires an approved provider to take steps set out in the direction to comply with a specific provision of the National Regulations. A compliance direction can only be given to an approved provider.

A compliance direction is different from a compliance notice because it can only be used for a breach of certain provisions of the National Regulations. It also carries a lower maximum penalty for non-compliance.



National Regulations

Schedule 3

When can it be used?

Compliance directions are intended to compel approved providers to comply with straightforward legislative obligations. They are particularly useful when it is appropriate to give the provider some time to take a specific action to comply with a requirement, but the regulatory authority wants to use a strong lever to make sure the provider complies.

A compliance direction can be given to the approved provider if the regulatory authority is satisfied that a service has not complied with one of the regulations set out in the table below.

A regulatory authority may consider the following in deciding whether a compliance direction is appropriate:

- Is it possible for the regulatory authority to set out clear steps which, if followed, would result in the approved provider complying with the regulation?
- What is the immediacy and seriousness of any risk to the safety, health and wellbeing of children being educated and cared for at the service, caused by the breach?
- Is the action proportionate to the seriousness of the offence?
- Is the action likely to serve as a deterrent to committing the offence again?

Requirements for which a compliance direction can be given to the approved provider

Regulation	Requirement
55(1)	Quality improvement plan
72(1), (2)	Offences in relation to giving false or misleading statements about ratings
74(1)	Documenting child assessments or evaluations for delivery of educational program
75	Information about educational program to be kept available
76	Information about educational program to be given to parents
77(1)	Health, hygiene and safe food practices
78(1)	Food and beverages
79(1)	Service providing food and beverages
80(1)	Weekly menu
81(1)	Sleep and rest
82(1)	Tobacco, drug and alcohol-free environment
83(1)	Nominated supervisors, staff members and volunteers not to be affected by alcohol or drugs
84	Awareness of child protection law
89(1)	First aid kits
91	Medical conditions policy to be provided to parents
97(2), (3), (4)	Emergency and evacuation procedures
98	Telephone or other communication equipment
103(1)	Premises, furniture and equipment to be safe, clean and in good repair
104(1)	Fencing
105	Furniture, materials and equipment
106(1), (2)	Laundry and hygiene facilities
107(2)	Indoor space
108(2)	Outdoor space
110	Ventilation and natural light
111	Administrative space
112(3)	Nappy change facilities

Requirements for which a compliance direction can be given to the approved provider

Regulation	Requirement
113	Outdoor space – natural environment
114	Outdoor space – shade
115	Premises designed to facilitate supervision
116(1)	Assessments of family day care residences and approved family day care venues
117(1)	Glass
118	Educational leader
119	Family day care educator and educator assistant to be at least 18 years old
120	Educators who are under 18 to be supervised
136(1)	First aid qualifications
156(1)	Relationships in groups
157(1)	Access for parents
163(1), (2)	Residents at family day care residence and family day care educator assistants to be fit and proper persons
164	Requirement for notice of new persons at residence
168(1)	Education and care service must have policies and procedures
169(1)	Additional policies and procedures – family day care service
170(1), (2)	Policies and procedures to be followed
171(1), (2)	Policies and procedures to be kept available
172(1)(b)	Notification of change to policies or procedures affecting ability of family to utilise service
177(2), (3)	Prescribed enrolment and other documents to be kept by approved provider
183	Storage of records and other documents
185	Law and Regulations to be available

How can it be used?

A compliance direction may be issued in accordance with the requirements of the National Law about serving notices (see *Serving notices*).

The notice must set out how long the approved provider has to comply. The period cannot be less than 14 calendar days.

The compliance direction should be accompanied by information about the approved provider's right to an internal review of the decision, under section 190 of the National Law (see *Reviews* for more information).



National Law

Section 190

Can it be appealed?

A decision to give a compliance direction is subject to review under the National Law (see *Reviews*).

What happens after it has been issued?

An approved provider must comply with the requirements in a compliance direction within the period set out in the direction.

Failure to comply with a compliance direction

If the approved provider does not take the steps set out in the compliance direction, or does not take those steps within the required timeframe, the regulatory authority may consider taking further compliance action, including serving an infringement notice.

The maximum penalty which may be imposed by a court for not complying is \$2,000, in the case of an individual; \$10,000 in any other case.

The regulatory authority cannot prosecute for non-compliance with the compliance direction and the original offence.

2.4 COMPLIANCE NOTICES



National Law

Section 177

What is a compliance notice?

A compliance notice is a written notice requiring the approved provider to take the steps set out in the notice to comply with any provision of the National Law and Regulations. A compliance notice can only be given to an approved provider.

A compliance notice is different from a compliance direction because it can be used for a breach of any part of the National Law or Regulations. It also carries a higher maximum penalty for non-compliance.

When can it be used?

A regulatory authority can give a compliance notice if satisfied a provision of the National Law or Regulations is not being complied with.

Compliance notices are intended to compel approved providers to comply with their legislative obligations. This tool is particularly useful when it is appropriate to give the provider some time to take a specific action to comply with a requirement, but the regulatory authority wants to use a strong lever to make sure the provider complies.

Once satisfied that this tool can be used, a regulatory authority may consider the following in deciding whether a compliance notice is appropriate:

- Is it possible for the regulatory authority to set out clear steps which, if followed, would result in the approved provider complying with the regulation?

- What is the immediacy and seriousness of any risk to the safety, health and wellbeing of children being educated and cared for at the service, caused by the breach?
- Is the action proportionate to the seriousness of the offence?
- Is the action likely to serve as a deterrent to committing the offence again?

How can it be used?

A compliance notice may be issued in accordance with the requirements of the National Law about serving notices (see *Serving notices*).

The notice must set out how long the approved provider has to comply. The period cannot be shorter than 14 calendar days.

The compliance notice should be accompanied by information about the approved provider's right to an internal review of the decision, under section 190 of the National Law (see *Reviews*).

Can it be appealed?

A decision to give a compliance notice is subject to review under the National Law (see *Reviews*).

What happens after it has been issued?

Disclosure

The regulatory authority may publish specific information about compliance notices (see *Publication of enforcement actions*).

Failure to comply with a compliance notice

An approved provider must comply with a compliance notice within the period set out in the notice.

If the recipient of the compliance notice does not take the steps set out in the notice, or does not take those steps within the required timeframe, the regulatory authority may consider taking further compliance action.

The maximum penalty that may be imposed by a court for not complying is \$6,000, in the case of an individual; \$30,000, in any other case.

The regulatory authority cannot prosecute for non-compliance with the compliance notice as well as the original offence.



National Law

Section 190

3. ENFORCEABLE UNDERTAKINGS



National Law

Sections 179A, 179B
and 180

What is an enforceable undertaking?

An enforceable undertaking is a written undertaking from a person, in which the person sets out what they will do or refrain from doing, to comply with the National Law and Regulations.

When can it be used?

If a person has contravened, or the regulatory authority alleges that a person has contravened, a provision of the National Law, an enforceable undertaking from the person can be accepted.

An enforceable undertaking is a useful tool where there is evidence of a breach or potential breach of the National Law or Regulations which may justify enforcement action, but voluntary action by the offender is most likely to encourage ongoing compliance.

For example, where health and hygiene practices are not being followed, a regulatory authority might request an approved provider to agree to train staff in health and hygiene practices, rather than issuing a compliance notice. This is consistent with the principle of an 'outcomes focus' in regulatory actions.

Enforceable undertakings are designed to address non-compliance through prevention and remediation. Their purpose is to reduce risk by having the person in question voluntarily modify their practices, behaviour or skills to ensure they comply with the National Law and Regulations. As an enforceable undertaking is voluntary, it should only be accepted in circumstances where the person is willing to abide by their undertaking.

An enforceable undertaking may also be considered in circumstances when a prohibition or suspension notice under the National Law might be issued. This gives more flexibility to the regulatory authority in addressing issues when a less severe alternative to a prohibition or suspension notice is more suitable for the issue.

For example, a regulatory authority may consider an enforceable undertaking rather than a prohibition notice for the presence of a hazard that could potentially cause a child unacceptable harm or injury, but does not pose an immediate risk to the safety, health or wellbeing of a child, such as an educator who has used any form of discipline that is inappropriate in the circumstances. This gives the service the opportunity to provide a written undertaking setting out the action it will take to eliminate or mitigate the risk.

How can it be used?

The National Law allows a regulatory authority to accept an enforceable undertaking from a person who has contravened, or who the regulatory authority alleges has contravened, a provision of the National Law. A regulatory authority does not have to accept an enforceable undertaking.

A regulatory authority cannot require a person to enter into an enforceable undertaking. However, the regulatory authority may suggest to a person that they give an enforceable undertaking.

Content of an enforceable undertaking

- An enforceable undertaking must be in writing. It should set out each specific undertaking in plain language.
- Each undertaking must be assessable, so the regulatory authority can check it has been fulfilled.
- An enforceable undertaking needs to address the contravention, or alleged contravention, of the National Law, and set a timeframe for the undertaking to be fulfilled.
- An enforceable undertaking needs to include the name and signature of the person giving the undertaking, and the date it was accepted by the regulatory authority.

When negotiating the content of an enforceable undertaking with the person, the regulatory authority may seek to include the matters listed below.

Examples of matters in an enforceable undertaking

A commitment to comply with a particular requirement or requirements of the National Law and to remain compliant in the future

An acceptance of responsibility for the non-compliance

Details of the non-compliance being addressed by the enforceable undertaking

Arrangements for the person to monitor compliance with the undertaking

Arrangements for the regulatory authority to monitor compliance with the undertaking

Arrangements for publishing the details of the undertaking.

An enforceable undertaking should not include the below matters.

Matters an enforceable undertaking should not include

A denial that the person giving the undertaking breached the National Law (although they do not have to admit a breach)

Obligations on the regulatory authority which are not already obligations, independent of the undertaking

Attempts to limit the regulatory authority's discretion, or to require the authority to exercise its discretion in a particular way

Obligations on people other than the person giving the undertaking (although it is acceptable to include a requirement for the person to be mentored, monitored, audited, etc. by a third party, and requirements which affect the person's employees in their capacity as employees)

Confidentiality or non-disclosure requirements

An undertaking to pay an infringement notice penalty.

Deciding whether to accept an enforceable undertaking

Enforceable undertakings must not be unduly burdensome or disproportionate to the breach or alleged breach of the National Law. The obligations imposed by the undertaking should not be more intrusive, expensive or damaging than obligations which may result from other enforcement action, such as cancellation of an approval or prosecution.

Regulatory authorities should not accept enforceable undertakings which will cause loss or damage to a third party, unless that loss or damage is unavoidable to properly address the breach.

Factors which the regulatory authority may consider when deciding whether or not to accept an enforceable undertaking include:

- Is it likely the enforceable undertaking will be fulfilled?
- Does the undertaking address the non-compliance?
- Is the regulatory authority able to monitor compliance with the enforceable undertaking?
- Is the person willing to comply with the undertaking?

While an undertaking is in force or being complied with, proceedings cannot be brought for any directly related offence. Similarly, if a regulatory authority has accepted an undertaking in relation to a proposed suspension of provider approval (see section 27(a)), proposed suspension of service approval (see section 72(a)) or proposed prohibition (see section 184(3)), the regulatory authority must not suspend the provider or service approval, or give the prohibition notice.

The regulatory authority should consider whether the offence for which an enforceable undertaking is entered into would lead to prosecution if not complied with.

It is at the discretion of the regulatory authority whether it will accept an enforceable undertaking from a person. The acceptance of an enforceable undertaking does not establish a precedent that would bind the regulatory authority to accept an enforceable undertaking in similar circumstances or to accept an enforceable undertaking from a person who has previously entered into one.

What happens after it has been accepted?

Disclosure

The regulatory authority may publish on its website an enforceable undertaking it has accepted (see *Publishing information about enforcement actions*).

By agreeing to, and complying with, an enforceable undertaking, proceedings cannot be brought against the person for the offence.

Changing or withdrawing acceptance of an enforceable undertaking

A person may withdraw or change the enforceable undertaking with the agreement of the regulatory authority.

The regulatory authority may withdraw its acceptance of the undertaking at any time, and the undertaking ceases to be in effect on that withdrawal.



National Law

Section 181, 284

Combining an enforceable undertaking with other compliance action

An enforceable undertaking may be combined with other action, such as:

- education about how to comply
- action to amend or suspend the person's provider approval (sections 23, 25) or service approval (sections 55, 70), if the person is an approved provider
- an infringement notice (section 291).

Failure to comply with an enforceable undertaking

If the regulatory authority considers the person who gave the enforceable undertaking has failed to comply with any of its terms, the regulatory authority may seek an order from the relevant tribunal or court to enforce the undertaking.

The tribunal or court may order the person to:

- comply with the undertaking
- take a specific action to comply with the undertaking, or
- any other order appropriate to the circumstances.

If the tribunal or court determines that a term of the undertaking has been breached, legal action can be taken for any offence related to the breach of the undertaking or the original non-compliance.

If a regulatory authority accepted an undertaking in relation to a proposed suspension of provider approval (see section 27(a)), proposed suspension of service approval (see section 72(a)) or proposed prohibition (see section 184(3)), and the tribunal or court determines that a term of the undertaking has been breached, the regulatory may without further notice suspend the provider or service approval or give a prohibition notice.

Where a person has breached a term of an undertaking, legal action can be taken either within two (2) years of the date on which the offence is alleged to have occurred, or within six (6) months of the determination of the court or tribunal, whichever occurs last.

The regulatory authority is not required to seek an order. The regulatory authority may choose to withdraw the enforceable undertaking and address the non-compliance through other statutory action, for example, an infringement notice or prosecution. The action would be based on the original breach of the National Law or Regulations, not on failure to fulfil the enforceable undertaking.

Seeking orders from the relevant tribunal or court may be an expensive process, and there are no guarantees either an order can be sought in the timeframe required to address the breach, or that the tribunal or court will grant the order sought by the regulatory authority.

When deciding whether or not to seek an order, the regulatory authority should take into account all options available to address the breach.

3.1 PROHIBITION NOTICES



National Law

Sections 182–183

What is a prohibition notice?

A prohibition notice is a written notice given to a person which states the person is prohibited from doing any of the following:

- Providing education and care to children for an education and care service
- Being engaged as a nominated supervisor, educator, family day care educator, employee, contractor or staff member, or being a volunteer at, an education and care service
- Carrying out any other activity relating to education and care services.

Who does it apply to?

A prohibition notice may be given to any person who is in any way involved in the provision of an approved education and care service.

A prohibited notice may be given to a person in any of the following roles.

People involved in the provision of an approved education and care service

An approved provider

A nominated supervisor

An educator

A family day care educator

An employee

A contractor

A volunteer

A person who was formerly one of the above people in this table or in any other capacity.

When can it be used?

A regulatory authority may give a prohibition notice to a person in the following circumstances:

- If the regulatory authority considers there may be an unacceptable risk of harm to a child or children, if the person were allowed to remain on the education and care service premises, or to provide education and care to children (section 182(1)).
- To prohibit a person from being nominated as a nominated supervisor, if the regulatory authority considers the person is not a fit and proper person to be a nominated supervisor (section 182(3)(a)).
- To impose one or more conditions on the nomination of a nominated supervisor if the regulatory authority considers the person is a fit and



National Law

Section 182

proper person to be a nominated supervisor of a service, subject to those conditions (section 182(3)(b)).

The National Law does not limit the type of conditions. A regulatory authority may consider it appropriate to prohibit a person from being a nominated supervisor entirely or subject to conditions. For example, a person may be restricted by a condition that they can only work as a nominated supervisor for:

- one particular service
- a centre-based service and not a family day care service
- a service that primarily educates and cares for children over preschool age if the person's qualification or experience is specifically related to school age children. In such cases, the regulatory authority may inform the person of the factors taken into consideration when determining whether a service primarily educates and cares for children over preschool age.

For example:

- the percentage of children who are enrolled and, if the information is available, who attend, the education and care service who are over preschool age – for example, 60 per cent is a persuasive factor, 70 per cent would be more persuasive whereas 51 per cent would be less so
- the operating hours of the service – operating mostly or solely out of school hours may indicate the service 'primarily' educates and cares for school age children
- service advertising – advertising education and care for school age children may indicate the service primarily provides education and care to school age children.

See *Monitoring, Compliance and Enforcement – Conditions* for more information about using a prohibition notice to impose a condition on a nominated supervisor.

To issue a prohibition notice under section 182(1), the regulatory authority must:

- identify the reason there may be an unacceptable risk of harm to a child or children
- have sufficient evidence to support the view there may be unacceptable risk of harm (for more information about evidence gathering, see *Investigations and evidence-gathering*).

The National Law does not define unacceptable risk of harm. The risk of harm may be direct (for example, causing harm to children) or indirect (for example, wilful failure to act to prevent harm to children), but it must be unacceptable.

Regulatory authorities can refer to the risk matrix when assessing this risk (see *Good Regulatory Practice*).

In considering whether or not a person is fit and proper to be a nominated supervisor for the purposes of giving a prohibition notice under section 182(3), regulatory authorities consider the same types of fit and proper tests that apply to applicants for provider approval and people with management or control of an education and care service. These tests are listed at section 13 and include compliance history, working with vulnerable people checks and other matters (excluding whether a person is bankrupt (section 13(1)(d)), as this is not relevant to a regulatory authority's consideration of whether a person is fit and proper to be a nominated supervisor under section 182(3)).

See *Quality Area 4 – Staffing requirements* for more information on responsible persons including responsibilities of the approved provider and nominated supervisor, and minimum requirements for responsible persons.

How can it be used?

Show cause notice

Before giving a person a prohibition notice, the regulatory authority must give the person a show cause notice which:

- tells the person the regulatory authority is going to give the person a prohibition notice and the reasons for the proposed prohibition
- invites the person to make a written submission within a set time (at least 14 calendar days) about the proposed prohibition.

The purpose of a show cause notice is to give the recipient an opportunity to explain why they should not receive the prohibition. The show cause notice should clearly set out the reasons for the proposed prohibition, so the person fully understands the regulatory authority's rationale and can respond appropriately.

Prohibition without a show cause notice

If the regulatory authority is satisfied that it is necessary, in the interests of the safety, health or wellbeing of a child or children to give the prohibition notice immediately, the regulatory authority may choose not to give a show cause notice.

Regulatory authorities should exercise caution if they are considering issuing a prohibition notice without first issuing a show cause notice, because the show cause notice is a means of giving natural justice (see *Good Regulatory Practice – Good decision-making* for more information about natural justice).

Considering the response to a show cause notice

If the regulatory authority has given a person a show cause notice and the person gives a written response in the specified timeframe, the regulatory authority must have regard to the response before deciding whether to give the person a prohibition notice.

If the regulatory authority decides not to give the person a prohibition notice, it needs to notify the person in writing.



National Law

Section 183



National Law

Section 184

The regulatory authority may accept an enforceable undertaking from a person instead of giving a prohibition notice.



National Law

Section 185

Content of a prohibition notice

A prohibition notice given under section 182(1) must state the person is prohibited from doing any of the following:

- providing education and care to children for an education and care service
- being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service
- carrying out any other activity relating to education and care services.

A prohibition notice given to a person under section 182(3) must state that either:

- the person is prohibited from being nominated as a nominated supervisor, or
- the person may only be nominated as a nominated supervisor on the condition or conditions specified in the notice.

A prohibition notice must also state the person may apply for cancellation of the notice, and how to apply for cancellation.

The prohibition notice should be accompanied by information about the approved provider's right to an external review of the decision under section 192 of the National Law (see *Reviews*).

Serving a prohibition notice

A prohibition notice may be given in accordance with the requirements of the National Law about serving notices (see *Serving notices*).



National Law

Section 192

Can it be appealed?

The recipient of a prohibition notice can seek external review of the decision to give the prohibition notice, or a decision to refuse to cancel a prohibition notice (see *Reviews*).

What happens after it has been issued?

Disclosure

The National Law and Regulations do not give regulatory authorities the power to publish information which discloses who is the subject of a prohibition notice. However, if asked by an approved provider, the regulatory authority can say whether the person named in the request is the subject of a prohibition notice.

Cancelling the notice

The regulatory authority must cancel the prohibition notice if it is satisfied that there is not a sufficient reason for the prohibition notice to stay in force. The regulatory authority must notify the person that the prohibition notice is cancelled.

The recipient of a prohibition notice may apply to the regulatory authority to have it cancelled. The application must be in writing and include:



National Law

Section 272



National Law & Regulations

Section 186
Regulation 189

- the applicant's name
- their contact details, including an address for service of the decision
- a statement setting out the grounds for the application to cancel the prohibition
- the signature of the person.

The applicant may include the following additional information in their application:

- anything the person considers relevant to the regulatory authority's decision about whether:
 - there would be an unacceptable risk of harm to children if they were to remain at the service premises, or to provide education and care to children
 - the person is a fit and proper person to be nominated as a nominated supervisor (with or without conditions)
- any change in the person's circumstances since the prohibition notice was given, or since they last applied for cancellation of the notice, that would warrant cancellation of the notice.



National Law

Sections 187–188

Failure to comply with a prohibition notice

An approved provider must not engage a person, or allow a person to volunteer, or nominate a person as a nominated supervisor, if the provider knows or ought reasonably to have known that there is a prohibition notice in place for this person or that their nomination to be a nominated supervisor would contravene a condition of the prohibition notice.

The regulatory authority can take further compliance action if a prohibited person contravenes the notice, or if a provider engages or allows a person who is subject to a prohibition notice to volunteer at the service.

The maximum penalty which may be imposed by a court for non-compliance with a prohibition notice is \$20,000. The maximum penalty for approved providers who knowingly employ or engage a person who is subject to a prohibition notice is \$20,000, in the case of an individual; \$100,000, in any other case.

When considering whether to prosecute for employing or engaging a person who is subject to a prohibition notice, the regulatory authority may consider whether there is evidence that the approved provider:

- was aware of the prohibition notice
- intentionally or recklessly disregarded the responsibility to not employ or engage a person subject to a prohibition notice.



National Law

Section 188A

Giving false or misleading information about a prohibition notice

A person who is subject to a prohibition notice must not give an approved provider false or misleading information about the content or existence of the notice. The maximum penalty which may be imposed for non-compliance is \$6,000.

3.2 DIRECTION TO EXCLUDE INAPPROPRIATE PERSONS FROM SERVICE PREMISES



National Law

Section 171

What is a direction to exclude inappropriate persons?

A direction to exclude an inappropriate person is an instruction to an approved provider, nominated supervisor and/or family day care educator to exclude a person from a service. The inappropriate person can be excluded for as long as the regulatory authority considers appropriate.

When can it be used?

A direction to exclude an inappropriate person can be given in relation to a person:

- who may pose a risk to the safety, health or wellbeing of any child or children being educated and cared for by the service, or
- whose behaviour or state of mind, or whose pattern of behaviour or common state of mind, is such that it would be inappropriate for him or her to be on the premises. For example, a person who is under the influence of drugs or alcohol.
- The regulatory authority should be able to identify why it would be 'inappropriate' for this person to be at the service premises.

How can it be used?

Deciding whether to issue a direction to exclude inappropriate persons

Before issuing a direction to exclude an inappropriate person, the regulatory authority should consider all available information about the person to be excluded and judge whether this information is credible. The regulatory authority may investigate further if there is not enough information to make a decision.

The regulatory authority may choose to give the person the opportunity to make submissions about the available information and the proposed direction to exclude the person. This may be particularly appropriate in situations where a long period of exclusion is being considered. For more information about a regulatory authority's obligations to give procedural fairness, see *Good Regulatory Practice – Good decision-making*.

Content of a direction to exclude inappropriate persons

A direction to exclude an inappropriate person should be in writing, except where the direction is given in the case of an emergency. In an emergency, a verbal direction may be appropriate.

The direction should identify:

- the approved provider, nominated supervisor or family day care educator to whom the direction is made
- the inappropriate person who is the subject of the direction

- the education and care service premises that the inappropriate person is to be excluded from while children are being educated and cared for at the premises
- the length of time it applies for
- any other terms of the direction.

Can it be appealed?

A decision to give a direction to exclude inappropriate persons is not a reviewable decision under the National Law.

What happens after it has been issued?

If the recipient of the direction is unable to persuade the inappropriate person to stay away from the premises, the person may need to obtain assistance from an authority, such as the police.

If the recipient does not comply with the direction, the regulatory authority may consider taking further compliance action.

The maximum penalty which may be imposed by a court for not complying is \$10,000, in the case of an individual; \$50,000, in any other case.

3.3 PROSECUTION

What is prosecution?

Prosecution involves instituting legal proceedings in a court or tribunal against a person who has allegedly committed an offence. If the offence is proven, then a fine or other form of penalty such as a suspension or prison sentence can be imposed. Prosecution aims to punish the offender, encourage future compliance and deter others from committing an offence.

Who does it apply to?

Any person who has allegedly committed an offence against the National Law can be prosecuted. Where an offence is committed by an approved provider that is a separate legal entity, such as a corporation, the entity may be prosecuted. If a body corporate commits an offence against the National Law, any person with management or control of the body corporate who failed to exercise due diligence to prevent the contravention also commits the offence. They may be subject to the penalty for an individual who commits that offence.

When can it be used?

A person may be prosecuted for any offence under the National Law, however there is no obligation to prosecute.

When deciding to prosecute for an offence against the National Law, regulatory authorities should consider the matters listed below.

Considerations when deciding whether to prosecute

Whether there is enough admissible evidence to make it likely the offence will be proved, including whether there are available, credible and reliable witnesses

The seriousness of the offence and any mitigating circumstances

Actual or potential harm caused by the non-compliance

Whether there are any alternative sanctions that might achieve a similar or better outcome

The cost of prosecution

Whether prosecution will act as a deterrent

The effect on public confidence in the regulatory system

Whether it is in the public interest

The person's history of non-compliance

The likelihood the person will re-offend.

How can it be used?

The process for deciding when and how to prosecute varies in each state and territory. Regulatory authority staff should consult closely with their legal team or equivalent for advice on prosecution.

4. AMENDMENT OF APPROVAL – CONDITIONS

What is a condition?

While the National Law and Regulations do not specifically define ‘condition’, a useful definition is ‘a legally enforceable constraint or limitation on an approval in addition to those already found in the legislation’. The requirement to publish conditions on the copy of the service approval ensures transparency for families using the service.

A condition cannot waive a requirement of the National Law or Regulations. A waiver gives an approved provider greater flexibility to operate a service. For example, the regulatory authority might grant a waiver allowing a service to meet a requirement in ways other than those set out in the National Regulations, or to operate without meeting certain requirements.

In contrast, a condition usually involves setting an extra requirement that must be met in a certain way. For information on temporary or service waivers, see *Applications and Approvals*.

A service approval may include additional information, such as the details of any associated children’s services. This information is not a condition, and does not bind or limit the approved provider.

Who does a condition apply to?

The regulatory authority can put a condition on a provider approval or service approval certificate (see *Applications and Approvals*).

An approved provider must comply with the conditions on their provider or service approval. The maximum penalty that may apply for failing to comply is \$10,000, in the case of an individual; \$50,000, in any other case.

The regulatory authority may also give a person a prohibition notice to impose one or more conditions on the nomination of the person as a nominated supervisor, if the regulatory authority considers the person is a fit and proper person to be a nominated supervisor of a service, subject to compliance with the relevant conditions. For more information on conditions on prohibition notices, see *Prohibition Notices*.

While a condition on provider or service approval might refer to people other than the approved provider, such as a nominated supervisor at the service, the condition applies only to the approved provider. The regulatory authority cannot take action against a person other than the approved provider for failure to comply with a condition on provider approval or service approval.

See the *Glossary* for definitions of key terms, including ‘approved provider’ and ‘person with management or control’.



National Law

Sections 19, 51, 182

When can a condition be used?

The regulatory authority can impose a condition when it grants an approval, or at a later time, by amending the approval. See *Applications and Approvals* for information on amending an approval.

A regulatory authority has the power to use prohibition notices to restrict a person from being the nominated supervisor either entirely, if it considers the person is not suitable to be appointed as a nominated supervisor of a service, or subject to such conditions as it considers appropriate where the person is considered suitable to be appointed as a nominated supervisor of a service subject to one or more conditions (see *Prohibitions*).

Unenforceable conditions

The National Law does not place any specific limits on the regulatory authority's power to impose a condition on a provider approval or service approval.

Reasons a condition might be unenforceable are listed below. The regulatory authority should therefore avoid using these types of conditions.

When deciding whether to impose a condition, the regulatory authority should only take relevant considerations into account. Taking irrelevant considerations into account may lead to an unlawful decision (see *Good Regulatory Practice – Good decision-making*).

Reasons a condition might be unenforceable

Goes beyond the regulatory authority's power in administering the National Law and Regulations

Contradicts the intent of the National Law

Seeks to waive, completely or partially, a requirement of the National Law or Regulations

Imposes an unreasonable requirement, for example, a requirement that unnecessarily constrains supply or affects the provider's financial viability

Replicates a requirement of the National Law or Regulations

Replicates a requirement of other legislation such as health or building legislation.

Condition on provider approval

The regulatory authority can use a condition on a provider approval to address issues that affect, or potentially affect, all the provider's services. For example, if the regulatory authority has concerns about an applicant's management capacity, it might impose a condition limiting the number, or size, of services the provider can operate.

For issues that do not affect all the provider's services, the regulatory authority may decide to use a condition on service approval.

Condition on service approval

A condition on service approval must be relevant to the particular service.

In some instances, the regulatory authority might decide to grant an approval subject to a time-limited condition to allow a provider to start operating the service. For example, a regulatory authority might grant a service approval with a condition

limiting the age of children that may attend, pending further information to satisfy the regulatory authority that the service premises are suitable for very young children. Using a condition in this way enables the provider to start operating the service, although in a limited way, while ensuring the provider satisfies the regulatory authority all relevant requirements are met.

Condition on a nominated supervisor

A regulatory authority may give a prohibition notice to a person to impose conditions on the nomination of the person as a nominated supervisor. Examples of conditions the regulatory authority might consider appropriate to impose include that the person:

- may only be the nominated supervisor of one particular service, or
- may only be the nominated supervisor of a particular type of service. For example, if the applicant's qualification or experience is specifically related to school age children, the regulatory authority may impose a condition limiting the person's nomination as nominated supervisor to services that primarily educate and care for children over preschool age.

See *Approvals – Monitoring, Compliance and Enforcement – Prohibition notices* for more information on conditions that may apply to a nominated supervisor.

How is a condition used?

To help the approved provider or individual easily understand the conditions that apply to them, the regulatory authority should use language consistent with the National Law and Regulations.

Conditions should always be expressly stated as conditions. Information included on the service approval is not necessarily a condition.

Because the regulatory authority may publish information about a condition as part of a compliance action, it should avoid using people's names in the condition. Instead, if required, the condition should refer to the position at the service.

The National Law does not require the regulatory authority to give a show cause notice before amending an approval. However, regulatory authorities should exercise caution if they are considering imposing a condition without first issuing a show cause notice, because a show cause notice is a means of giving natural justice. See *Good Regulatory Practice – Good decision-making* for more information about natural justice.

The purpose of a show cause notice is to give the proposed recipient an opportunity to explain why they should not be subject to the condition. The show cause notice should set out very clearly the reasons for the proposed condition, so the person fully understands the regulatory authority's rationale and can respond appropriately.

Advising the approved provider before the condition is imposed is also a useful way to encourage compliance.

When giving a notice of the decision to impose a condition, the regulatory authority should make sure to include information about the right to internal or external review of the decision (see *Reviews*).

After a condition is imposed

Unless the duration is expressly indicated in the condition, it remains in place until removed by the regulatory authority. The regulatory authority can remove or vary a condition at any time by amending the provider approval. An approved provider can also apply for amendment or removal of a condition. See *Applications and Approvals* for more information.

The regulatory authority's decision to impose a condition is reviewable. The regulatory authority's decision to impose conditions on a nominated supervisor's nomination is also reviewable. See *Reviews* in *Applications and Approvals* for more information.

The regulatory authority should monitor those people and services that are subject to a condition. The level of monitoring will depend on the nature of the condition. See *Monitoring* for more information about monitoring activities.

The regulatory authority should regularly review conditions to ensure only relevant conditions remain active in the National Quality Agenda IT System.

Breaching a condition on approval

If an approved provider breaches a condition on approval, the regulatory authority may take further action. See *Compliance tools* for information on tools available to regulatory authorities to compel compliance with the National Law and Regulations.



National Law

Sections 19, 51

5. SUSPENSIONS AND CANCELLATIONS

5.1 NOTICE TO SUSPEND EDUCATION AND CARE BY A FAMILY DAY CARE EDUCATOR



National Law

Section 178

What is a notice to suspend education and care by a family day care educator?

A notice to suspend education and care by a family day care educator is an instruction to an approved provider to cease engaging or allowing a family day care educator to be registered with their service.

A notice to suspend can only be given to an approved provider. However, a show cause notice (given before the notice to suspend) may be given to the approved provider, nominated supervisor and family day care educator. Information about show cause notices is under *How can it be used?* below.

When can it be used?

A notice to suspend education and care by a family day care educator can be given if the regulatory authority is satisfied that due to the conduct of, or inadequacy of, the service provided by a family day care educator:

- the approved provider or nominated supervisor is not complying with any provision of the National Law or Regulations, or
- there is a risk to the safety, health or wellbeing of children being educated and cared for by the family day care educator.

Unlike a prohibition notice, a notice to suspend education and care by a family day care educator is issued to the approved provider, does not prevent the educator from any involvement with a service, and only applies to a specific education and care service.

The grounds for issuing a notice to suspend education and care by a family day care educator are broader than the grounds for issuing a prohibition notice or a direction to exclude an inappropriate person. The grounds for suspension focus on the conduct of, or inadequacy of, the service provided by the family day care educator. This means a notice to suspend a family day care educator can be used to address a wider range of non-compliance. In addition, a prohibition notice can be issued immediately if necessary, without a show cause notice process.

How can it be used?

Show cause notice

The regulatory authority may give a show cause notice to the approved provider, nominated supervisor (if applicable) and educator of a family day care service

stating it intends to direct the approved provider to suspend the provision of education and care by the educator.

- The show cause notice must also give the reasons for the proposed direction, and inform the approved provider, nominated supervisor and educator they have 14 calendar days to make submissions to the regulatory authority about the proposed direction.
- The show cause notice must be served by delivering it personally to the family day care educator.

The regulatory authority must consider any submissions from these parties during the timeframe, and may consider any other submissions and matters it considers relevant.

The regulatory authority may give the approved provider a notice directing the provider to suspend the provision of education and care to children by the family day care educator.

The regulatory authority must notify the approved provider of its decision, either way.

The purpose of a show cause notice is to give the recipient an opportunity to explain why they should not receive the notice to suspend. The show cause notice should set out very clearly the reasons for the proposed notice, so the person fully understands the regulatory authority's rationale and can respond appropriately.

Regulatory authorities should exercise caution if they are considering issuing a notice without first issuing a show cause notice because the show cause notice is a means of giving natural justice. See *Good Regulatory Practice – Good decision-making* for more information about natural justice.

Content of a notice to suspend

The National Law does not specify what needs to be included in a notice to suspend education and care by a family day care educator.

Regulatory authorities should make sure the notice includes, as a minimum, the following information set out below.

Information that must be included in a notice to suspend

The date the notice is given and the date it takes effect (if they are different)

The name of the approved provider to whom the notice is being given

The name of the family day care educator who is the subject of the notice

The name of the regulatory authority giving the notice

The signature of the person issuing the notice

Information about the right to external review of the decision under section 192 of the National Law (see *Reviews*).

Serving a notice to suspend

A notice to suspend education and care by a family day care educator may be given in accordance with the requirements of the National Law about serving notices (see *Serving notices*).



National Law

Section 192

Can it be appealed?

The decision to give a notice to suspend education and care by a family day care educator is a reviewable decision under the National Law.

What happens after it has been issued?

Disclosure

An approved provider may ask the regulatory authority whether a specific family day care educator has been suspended. The regulatory authority may disclose this information about whether a family day care educator has been suspended, subject to the *Commonwealth Privacy Act 1988* as applied by the National Law and any protocol approved by ACECQA.

Failure to comply with the notice

If the approved provider does not suspend the educator, the regulatory authority may consider taking further compliance action.

The maximum penalty which may be imposed by a court for failure is \$6,000, in the case of an individual; \$30,000, in any other case.



National Law

Section 272

5.2 SUSPENSION OF SERVICE APPROVAL

What is suspension of service approval?

Suspension of service approval is a way of preventing a service from operating for a specific period of time. A person cannot operate an education and care service if the service approval has been suspended.

When can it be used?

The regulatory authority may suspend a service approval for any of the reasons set out below.

Section 70 of the National Law suggests a regulatory authority may suspend service approval if the approved provider has contravened the National Law and Regulations as they apply in any state or territory where the approved provider operates a service. This should be taken to mean the National Law and Regulations as they apply in the jurisdiction where the service that is the subject of the proposed suspension operates.

Where the regulatory authority is concerned that an approved provider no longer has the right to occupy the service premises, it may ask the approved provider for evidence, such as a current lease agreement.



National Law

Section 70

Reasons a regulatory authority may suspend a service approval

The regulatory authority believes it is not in the best interests of children at the service for the service to continue operating

A condition of the service approval has not been complied with

The service is not managed in accordance with the National Law or Regulations

The service has operated at a rating level that does not meet the National Quality Standard, a service waiver or temporary waiver does not apply in relation to the non-compliance and there has been no improvement in the rating level

The approved provider has contravened the National Law or Regulations, as they apply in any state or territory where the approved provider operates a service

The approved provider failed to comply with a direction, compliance notice or emergency order under the National Law or Regulations, as they apply in any relevant state or territory

The approved provider ceased to operate the service at the premises for which the service approval was granted, and did not transfer the service to another approved provider within six months

The approved provider did not commence ongoing operation of the service within six months from when service approval was granted

The approved provider has not paid the prescribed annual fee for service approval.



National Law

Section 101

How can it be used?

If the service is a family day care service, the regulatory authority must consult the regulatory authority of each jurisdiction in which the approved family day care service operates before suspending the service approval (see *Applications and Approvals – Exercise of powers by another regulatory authority*).



National Law

Section 75

Suspension of service approval for associated children's service only

If the regulatory authority considers a service approval should be suspended only in relation to an associated children's service, it must refer the matter to the relevant children's services regulator to determine appropriate action under children's services law.

The children's services regulator must notify the regulatory authority if it proposes to conduct any investigation or inquiry into an associated children's service.

A children's services regulator must advise the regulatory authority if it determines a service approval in relation to the associated children's service should be suspended. If this occurs, the service approval in relation to the associated children's service is suspended in accordance with the determination of the children's service regulator.



National Law & Regulations

Sections 71–72
Regulation 39

Show cause notice

If the regulatory authority is considering suspending a service approval, it must first give the approved provider a show cause notice. The notice must advise the approved provider of the intention to suspend the service approval, the reasons, and the proposed period of suspension.

The notice must also inform the approved provider that they may, within 30 calendar days of the notice being given, provide a written response to the regulatory authority.

After considering any written response from the approved provider (that is received within 30 calendar days), the regulatory authority may:

- accept a written undertaking (under section 179A) from the approved provider to take or refrain from taking certain actions, if:
 - the suspension was proposed because the regulatory authority reasonably believes that the continued operation of the service would not be in the best interests of children
 - the service is not being managed in accordance with the National Law
 - the service is rated Working Towards and has not improved its rating level (and a waiver does not apply to the service in respect of the non-compliance)
- suspend the service approval for up to 12 months
- decide not to suspend the approval.



National Law

Section 73

Suspension without show cause notice

The regulatory authority may suspend a service approval without giving the approved provider a show cause notice if it is satisfied there is an immediate risk to the safety, health or wellbeing of a child or children at the service.

The purpose of a show cause notice is to give the proposed recipient an opportunity to explain why they should not receive the suspension. The show cause notice should set out very clearly the reasons for the proposed suspension, so the person fully understands the regulatory authority's rationale and can respond appropriately.

Regulatory authorities should exercise caution if they are considering suspending approval without first issuing a show cause notice, because the show cause notice is a means of giving natural justice. See *Good Regulatory Practice – Good decision-making* for more information about natural justice.



National Law & Regulation

Section 74
Regulation 39

Content of suspension notice

The regulatory authority must give the approved provider written notice of its decision to suspend service approval. The notice must set out the period of suspension and when the suspension takes effect. The period of suspension cannot exceed 12 months.

The National Law and Regulations do not say what else needs to be included in a notice of suspension of service approval. However, the regulatory authority should make sure the notice includes the following additional information:

- the name of the approved provider to whom the notice is being given
- the name of the approved service to which the notice relates
- the name of the regulatory authority giving the notice
- the signature of the person issuing the notice
- information about the right to internal review (if no show cause notice was given) or external review (if a show cause notice was given). See **Reviews**.



National Law

Section 74

When the suspension takes effect

If a service approval is suspended without a show cause notice, the decision to suspend takes effect when the notice is given to the approved provider.

If a service approval is suspended after a show cause notice process, the decision to suspend takes effect 14 calendar days after the date of the decision, or at the end of another period specified by the regulatory authority.

A regulatory authority may specify a suspension takes effect less than 14 calendar days after the date of the decision. However, the regulatory authority should ensure it has strong evidence this is necessary before deciding on a shorter period.



National Law

Sections 190, 192

Can it be appealed?

A person can seek internal and external review of a decision to suspend a service approval (see to **Reviews**).

What happens after it has occurred?

Notice to parents

The regulatory authority may require the approved provider, whether or not a show cause notice was given, to give parents of children enrolled at the service (and any associated children's service) written notice of the suspension and its effect.

If a show cause notice is given, the regulatory authority may require the approved provider to supply contact details for parents of all children enrolled at the service within seven (7) calendar days. The regulatory authority may notify parents of the suspension, and cannot use this information for any other purpose.

The powers of the regulatory authority are intended to make sure parents will always be notified if service approval is suspended, because this automatically results in the closure of the service.

Generally, the regulatory authority should only need to require the approved provider to give written notice to parents if they are concerned that this may not occur otherwise. If the regulatory authority is concerned that, even with a direction to the approved provider, parents may not be notified, the regulatory authority should exercise its power to request the approved provider to give the regulatory authority the details, so it can contact the parents.



National Law

Sections 83–84

Failure to comply with the notice

If the approved provider does not comply with the notice, the regulatory authority may consider taking further compliance action.

The maximum penalty which may be imposed by a court for this offence is \$3,000, in the case of an individual; \$15,000, in any other case.

Disclosure

The regulatory authority may publish specific information about suspension of service approval (see *Publication of enforcement actions*).

Operating a service with a suspended service approval

A person who operates a service which is the subject of a suspended service approval is committing an offence under the National Law and the regulatory authority may consider taking compliance action. The maximum penalty that may be imposed by a court for this offence is \$20,000, in the case of an individual; or \$100,000 in any other case.



National Law

Section 103

6. CANCELLATION OF SERVICE APPROVAL

What is cancellation of service approval?

Cancellation of service approval is a significant compliance action which permanently prevents an approved provider from operating a specific education and care service. Cancellation of a service approval includes any associated children's services.

When can it be used?

The regulatory authority may cancel a service approval if:

- there is an unacceptable risk to the health, safety or wellbeing of a child being educated and cared for by the approved provider
- the approved provider is no longer considered fit and proper to operate an education and care service
- the service approval has been suspended and the reason for the suspension is not rectified by the end of the suspension
- the service approval was obtained improperly, a condition of the service approval has not been complied with, or
- the approved provider has been found guilty of an offence.

Along with prosecution, cancelling a service approval is a severe way to address non-compliance at the service level. When considering cancelling service approval under the National Law, the regulatory authority should consider the matters below.

Considerations when deciding whether to cancel service approval

If this form of regulatory action will best achieve the objectives of the legislation

The principles of best practice regulation (see *Good Regulatory Practice*), including the Ayres and Braithwaite enforcement pyramid. Cancellations are at the top of the pyramid.

Whether there are any alternative sanctions that might achieve a similar or better outcome, such as a condition on service approval

Seriousness of the non-compliance and any mitigating circumstances

Cost of regulatory action

Effect on public confidence in the regulatory system

Actual or potential harm caused by the non-compliance

The impact on the community and families using the service

Whether it is in the public interest

History of non-compliance

Cooperation of the person and the likeliness they will continue to be non-compliant

Whether it will act as a deterrent to other providers.



National Law

Sections 31, 77



National Law

Section 101

How can it be used?

If the service is a family day care, the regulatory authority must consult the regulatory authority of each jurisdiction in which the family day care service operates before cancelling the service approval (see *Applications and Approvals – Exercise of powers by another regulatory authority*).

Cancellation of service approval for associated children’s service only

If the regulatory authority considers a service approval should be cancelled only in relation to an associated children’s service, it must refer the matter to the relevant children’s services regulator to determine appropriate action under children’s services law.

The children’s services regulator must notify the regulatory authority if it intends to conduct any investigation or inquiry into an associated children’s service.

The children’s service regulator must notify the regulatory authority if it determines the service approval in relation to the associated children’s service should be cancelled.

Show cause notice

If the regulatory authority is considering cancelling a service approval, it must first give the approved provider a show cause notice stating its intent to cancel the service approval and the reasons.

The notice must also inform the approved provider that they may, within 30 calendar days after the notice is given, provide a written response to the proposed cancellation.

After considering any written response from the approved provider (that is received within 30 calendar days) the regulatory authority may decide to:

- cancel the service approval
- suspend the service approval for up to 12 months, or
- take no further action.

The purpose of a show cause notice is to give the proposed recipient an opportunity to explain why they should not receive the cancellation. The show cause notice should set out very clearly the reasons for the proposed cancellation, so the person fully understands the regulatory authority’s rationale and can respond appropriately.



National Law

Section 78



National Law & Regulations

Section 79
Regulation 39

Content of cancellation notice

The regulatory authority must give the approved provider written notice of its decision. The notice must set out the date on which the cancellation takes effect.

The National Law and Regulations do not say what else needs to be included in a notice of cancellation of service approval. However, the regulatory authority should make sure the notice includes the following additional information:

- The name of the approved provider to whom the notice is being given
- The name of the approved service to which the notice relates
- The name of the regulatory authority giving the notice



National Law

Section 79

- The signature of the person issuing the notice
- Information about the right to external review (see *Reviews*).

When the cancellation takes effect

Cancellation takes effect at the end of 14 calendar days after the date of the decision, or at the end of another period specified by the regulatory authority.

The regulatory authority may specify a cancellation takes effect less than 14 calendar days after the date of the decision. However, the regulatory authority should ensure it has strong evidence this is necessary before deciding on a shorter period.

Can it be appealed?

A person can seek external review of a decision to cancel a service approval (see to *Reviews*).

What happens after it has occurred?

Notice to parents

The regulatory authority may require the approved provider, whether or not a show cause notice was given, to give parents of children enrolled at the service (and any associated children's service) written notice of the cancellation and its effect.

If an approved provider fails to comply with the notice, the regulatory authority may consider taking further compliance action.

The maximum penalty which may be imposed by a court is \$3,000, in the case of an individual; \$15,000, in any other case.

If a show cause notice is given, the regulatory authority may require the approved provider to supply contact details for parents of all children enrolled at the service within seven (7) calendar days. The regulatory authority may notify parents of the cancellation, and cannot use this information for any other purpose.

The power of the regulatory authority to give notice to parents is intended to make sure parents will always be notified if service approval is cancelled, because this automatically results in the closure of the service.

Generally, the regulatory authority should only need to require the approved provider to give written notice to parents if they are concerned that this may not occur otherwise. If the regulatory authority is concerned that, even with a direction to the approved provider, parents may not be notified, the regulatory authority should exercise its power to request the approved provider give the contact details to the regulatory authority, so it can contact the parents.

Disclosure

The regulatory authority may publish specific information about cancellation of provider approval (see *Publication of enforcement actions*).



National Law

Section 192



National Law

Sections 35, 84



National Law

Sections 35, 83



National Law

Section 103

Operating a service with cancelled service approval

A person who operates an education and care service without service approval is committing an offence under the National Law and the regulatory authority may consider taking compliance action. The maximum penalty that may be imposed by a court for this offence is \$20,000, in the case of an individual; \$100,000 in any other case.

6.1 SUSPENSION OF PROVIDER APPROVAL



National Law

Section 30

What is suspension of provider approval?

Provider approval is required to operate an approved education and care service under the National Law. A person whose provider approval is suspended is not considered an approved provider for the period of the suspension, and all service approvals held by the person are suspended for the same period. This includes any associated children's services.

Suspension of provider approval is a way of preventing a person from operating any education and care service for a specific period of time.



National Law

Section 25



When can it be used?

A regulatory authority may suspend a provider approval if one of the below matters applies to the approved provider.

The regulatory authority may also suspend a provider approval if they are taking compliance action (other than a compliance direction) in relation to more than one service operated by the approved provider.

The approved provider must notify the regulatory authority of any changes affecting their fitness and propriety (see *Operational Requirements – Governance and leadership*).

Grounds to suspend a provider approval

Being charged with an indictable offence (or an offence that if committed in the regulatory authority's jurisdiction would be an indictable offence), or any other circumstance that indicates the approved provider may not be a fit and proper person to be involved in the provision of an education and care service

Failure to comply with a condition of the provider approval

Failure to comply with the National Law

Not having operated any education and care service for more than 12 months (including any period of suspension)

Purporting to transfer or receive a transfer of an approved education and care service without the regulatory authority's consent

Failure to pay any outstanding prescribed fees.

How can it be used?

The regulatory authority must consult the regulatory authority of each jurisdiction in which the approved provider operates an approved education and care service before suspending the provider approval (see *Applications and Approvals – Exercise of powers by another regulatory authority*).



National Law

Section 21

Reassessing fitness and propriety

The regulatory authority may reassess an approved provider's fitness and propriety to provide an education and care service at any time. This includes assessment of a person with management or control. If a person is no longer a fit and proper person to be involved in the provision of an education and care service, the regulatory authority may then consider suspending the provider approval. This information is also included in *Applications and Approvals – Provider approval* for information on assessing fitness and propriety.



National Law & Regulations

Sections 26–27
Regulation 18

Show cause notice

The regulatory authority must give the approved provider a show cause notice before suspending provider approval. The notice must advise that the regulatory authority intends to suspend the provider approval for a specified length of time and include the reasons for the proposed suspension.

The show cause notice must also inform the approved provider that they have 30 calendar days to give a written response to the regulatory authority.

After considering any written response to the show cause notice, the regulatory authority may:

- accept a written undertaking (under section 179A) from the approved provider to take or refrain from taking certain actions, if the suspension was proposed because the approved provider has been charged with an indictable offence or may not be a fit and proper person to be involved in the provision of an education and care service
- suspend the provider approval for up to 12 months
- decide not to suspend the approval.

Suspension without a show cause notice

The regulatory authority may suspend a provider approval without giving a show cause notice if it is satisfied there is an immediate risk to the safety, health or wellbeing of a child or children at a service operated by the approved provider.

The suspension cannot exceed six (6) months.

The purpose of a show cause notice is to give the proposed recipient an opportunity to explain why they should not receive the suspension. The show cause notice should set out very clearly the reasons for the proposed suspension, so the person fully understands the regulatory authority's rationale and can respond appropriately.

Regulatory authorities should exercise caution if they are considering suspending approval without first issuing a show cause notice, because the show cause notice is a means of giving natural justice. See *Good Regulatory Practice – Good decision-making* for more information about natural justice.



National Law

Section 28



National Law

Section 29

Content of a suspension notice

The regulatory authority must give the approved provider written notice of a decision to suspend provider approval.

The written notice must set out the period of suspension and when it takes effect. The suspension cannot exceed 12 months.

The National Law and Regulations do not say what else needs to be included in a notice of suspension of provider approval. However, regulatory authorities should make sure the notice includes the following additional information:

- the name of the approved provider to whom the notice is being given
- the name of the regulatory authority giving the notice
- the signature of the person issuing the notice
- information about the right to internal review (if no show cause notice was given) or external review (if a show cause notice was given). See **Reviews**.

When the suspension takes effect

If a provider approval is suspended without a show cause notice, the decision to suspend takes effect when the notice is given to the approved provider.

If a provider approval is suspended after a show cause notice process, the decision to suspend takes effect at the end of 14 days after the date of the decision, or at the end of another period specified by the regulatory authority.

The regulatory authority may specify that a suspension takes effect less than 14 calendar days after the date of the decision. However, the regulatory authority should ensure it has strong evidence this is necessary before deciding on a shorter period.

Death of approved provider

A service approval is not suspended during any period that a person is approved to manage or control the education and care service in the event that the approved provider dies or becomes incapacitated. See **Applications and Approvals – Approval of executor, representative or guardian as approved provider**.



National Law

Section 30

Can it be appealed?

A person can seek internal and external review of a decision to suspend a provider approval (see **Reviews**).



National Law

Sections 190, 192

What happens after it has occurred?

Notice to parents

The regulatory authority may require the approved provider to give written notice of the suspension of their provider approval and its effect to parents of children enrolled at any or all services operated by the approved provider. The regulatory authority may require this whether or not a show cause notice was given prior to the suspension.



National Law

Section 36



National Law

Section 35

If the approved provider does not give the required notice to parents, the regulatory authority may decide to escalate the matter. The maximum penalty a court may impose is \$3,000, in the case of an individual; \$15,000, in any other case.

If a show cause notice is given, the regulatory authority may also request the approved provider supply the contact details of parents of all children enrolled at a service operated by the approved provider within seven (7) calendar days. The regulatory authority may notify parents of the suspension. The regulatory authority cannot use the contact details for any other purpose.

The powers of the regulatory authority on giving notice to parents are intended to make sure parents will always be notified if provider approval is suspended, because this automatically results in suspension of service approval and, consequently, their closure.

Generally, the regulatory authority should only need to require the approved provider to give written notice to parents if they are concerned that this may not occur otherwise. If the regulatory authority is concerned that, even with a direction to the approved provider, parents may not be notified, the regulatory authority should exercise its power to request the approved provider give the contact details to the regulatory authority, so it can contact the parents.



National Law

Section 30

Transfer of suspended service approval

The regulatory authority may give permission for transfer of a service approval that is suspended. The suspension of the service approval ceases when the approval is transferred, unless the regulatory authority imposes a condition on its consent for transfer specifying a later date. See *Applications and Approvals – Transfer of service approval*.

Disclosure

The regulatory authority may publish specific information about suspension of provider approval (see *Publication of enforcement actions*).

At the end of the suspension

Once the period of suspension has concluded, the provider approval will be effectively reinstated.

Operating a service with suspended provider approval

A person who operates an education and care service without provider approval is committing an offence under the National Law and the regulatory authority may consider taking further compliance action. The maximum penalty that may be imposed by a court for this offence is \$20,000 for an individual; or \$100,000 in any other case.



National Law

Section 103

7. CANCELLATION OF PROVIDER APPROVAL

What is cancellation of provider approval?

Provider approval is required to operate an approved education and care service under the National Law. If a provider approval is cancelled, all service approvals held by the person who was the approved provider are also cancelled. This includes associated children’s services.

Cancellation of provider approval is a significant compliance action which permanently prevents a person from operating any approved education and care service.

When can it be used?

The regulatory authority may cancel a provider approval for the reasons set out below.

If a person is found guilty of an indictable offence, the regulatory authority should consider the extent this affects their suitability to provide an education and care service.

Grounds to cancel a provider approval

The regulatory authority is satisfied that the approved provider or a person with management or control of a service operated by the approved provider is not a fit and proper person to be involved in the provision of an education and care service

The regulatory authority is satisfied that the continued provision of education and care services by the approved provider would constitute an unacceptable risk to the safety, health or wellbeing of any child or class of children being educated and cared for by an education and care service operated by the approved provider

The approved provider has been found guilty of an indictable offence (or an offence that if committed in this jurisdiction would be an indictable offence)

The approved provider has been found guilty of an offence under the National Law as it applies in any participating jurisdiction

The approved provider has breached a condition of their provider approval

The approved provider has not operated any education and care service for a period of more than 12 months (including any period of suspension).



National Law

Section 31



National Law

Section 21

The regulatory authority may reassess an approved provider’s fitness and propriety to provide an education and care service at any time. This includes assessment of a person with management or control of the service. If a person is no longer a fit and proper person to be involved in the provision of an education and care service, the regulatory authority may then consider cancelling the provider approval. The approved provider is required to notify the regulatory authority of any changes affecting their fitness and propriety (see *Operational Requirements – Governance and leadership*).

Regulatory authorities should also consider the principles of best practice regulation (see *Good Regulatory Practice*), including the Ayres and Braithwaite enforcement pyramid.

Cancellations are at the top of the pyramid. Usually, cancellation would be the final course of action, after a graduated response moving up the regulatory pyramid, depending on the willingness and ability of the provider to comply and the seriousness of the offence.

Along with prosecution, cancelling a provider approval is a severe way to address non-compliance at the service level. In some circumstances, it may be appropriate to use cancellation in conjunction with prosecution.

Cancelling a provider approval means that all approvals for services operated by that approved provider will also be cancelled, unless the regulatory authority consents to a transfer of service approvals. This would have a significant impact on the families using these services.

Where a provider operates one service only, the regulatory authority may consider whether there are grounds to also cancel the provider approval. Note that section 31 of the National Law allows a provider approval to be cancelled if the provider has not operated a service for a period of more than 12 months.

When considering under the National Law, the regulatory authority should consider the below matters.

Considerations when deciding whether to cancel provider approval

Whether there are any alternative sanctions that might achieve a similar or better outcome, such as a condition on provider approval

Seriousness of the non-compliance

Cost of regulatory action

Effect on public confidence in the regulatory system

Actual or potential harm caused by the non-compliance

The impact on the community and families using the service

Whether it is in the public interest

History of non-compliance

Cooperation of the person and the likeliness they will continue to be non-compliant

Whether it will act as a deterrent to other providers.

How can it be used?

The regulatory authority must consult the regulatory authority of each jurisdiction in which the approved provider operates an approved education and care service before cancelling the provider approval (see *Applications and Approvals – Exercise of powers by another regulatory authority*).



National Law

Section 32

Show cause notice

If the regulatory authority is considering cancelling a provider approval, it must first give the approved provider a show cause notice advising of its intention to cancel the provider approval and the reasons for the proposed cancellation.

The notice must advise the approved provider they have 30 calendar days to respond in writing.

The regulatory authority must consider any written response from the approved provider within 30 calendar days before making its decision.

The regulatory authority may decide to cancel the provider approval, suspend the provider approval for up to 12 months, or to take no further action.

The purpose of a show cause notice is to give the proposed recipient an opportunity to explain why they should not receive the cancellation. The show cause notice should set out very clearly the reasons for the proposed cancellation, so the person fully understands the regulatory authority's rationale and can respond appropriately.



National Law & Regulations

Section 33

Regulation 18



National Law

Section 33

Content of cancellation notice

The regulatory authority must give the approved provider written notice of its decision. The notice of the decision must specify the date the cancellation takes effect.

The National Law and Regulations do not say what else needs to be included in a notice of cancellation of provider approval. However, the regulatory authority should make sure the notice includes the following additional information:

- the name of the approved provider to whom the notice is being given
- the name of the regulatory authority giving the notice
- the signature of the person issuing the notice
- information about the right to external review (see *Reviews*).



National Law

Section 33

Taking effect of cancellation

If the regulatory authority decides to cancel the provider approval, cancellation takes effect at the end of 14 calendar days after the date of the decision, or at the end of a period specified by the regulatory authority.

A regulatory authority could specify that a cancellation takes effect less than 14 calendar days after the date of the decision. However, the regulatory authority should ensure it has strong evidence this is necessary before deciding on a shorter period.



National Law

Section 34

Application to transfer service approval if provider approval is going to cancelled

An approved provider whose approval is to be cancelled may apply to the regulatory authority for consent to transfer a service approval to another approved provider.

Application for consent to transfer must be made within 14 calendar days after the date of the decision to cancel the provider approval. In this case, the service approval is suspended until the regulatory authority has determined the application for consent to transfer.

If the regulatory authority consents to the transfer, suspension of the service approval ceases on the date transfer takes effect, unless conditions of transfer specify a later date.

If the regulatory authority decides not to consent to the transfer, the service approval is cancelled from the date of its decision.



National Law

Section 192

Can it be appealed?

A person can seek external review of a decision to cancel a provider approval (see *Reviews*).



National Law

Sections 34, 36

What happens after it has occurred?

Notice to parents

The regulatory authority may require the approved provider to give written notice of the cancellation of their provider approval and its effect to parents of children enrolled at any or all services operated by the approved provider.

If the approved provider fails to comply with the notice, the regulatory authority may decide to escalate the matter. The maximum penalty a court may impose for not giving the required notice to parents of enrolled children is \$3,000, in the case of an individual; \$15,000, in any other case.

If a show cause notice is given, the regulatory authority may also request that the approved provider supply within seven (7) calendar days the contact details of parents of all children enrolled at a service operated by the approved provider. The regulatory authority may notify parents of the suspension. The regulatory authority cannot use the contact details for any other purpose.

The powers of the regulatory authority on giving notice to parents are intended to make sure parents will always be notified if provider approval is cancelled, because this automatically results in the cancellation of the related service approvals and, consequently, the closure of those services.

Generally, the regulatory authority should only need to require the approved provider to give written notice to parents if they are concerned that this may not occur otherwise. If the regulatory authority is concerned that, even with a direction to the approved provider, parents may not be notified, the regulatory authority should exercise its power to request the approved provider give the contact details to the regulatory authority, so it can contact the parents.



National Law

Section 35



National Law

Section 103

Disclosure

The regulatory authority may publish specific information about cancellation of provider approval (see *Publication of enforcement actions*).

Operating a service with cancelled provider approval

A person who operates an education and care service without provider approval is committing an offence under the National Law and the regulatory authority may consider taking further compliance action. The maximum penalty that may be imposed by a court for this offence is \$20,000, for an individual; \$100,000 in any other case.

If, prior to the cancellation of the provider approval, a person is approved to manage or control an education and care service due to death or incapacity of the approved provider under section 41 of the National Law, the service approval is not cancelled. However, the service approval is cancelled if the person ceases to manage or control the service.

8. SERVING NOTICES



National Law

Section 293

The table below sets out notices that are required or permitted to be served on an individual or an entity, under the National Law.

Individuals	Person other than an individual
Delivering it personally to the individual	
Posting or delivering it to the address provided by the individual for the purpose of accepting notices, or the last known address of the residence or business of the individual	Posting or leaving it at the address provided by the person for the purpose of accepting notices, or the address of the head office, a registered office or the principle place of business of the person
Faxing it to a number provided by the individual for the purpose of accepting notices	Faxing it to a number provided by the person for the purpose of accepting notices
Emailing it to an address provided by the individual for the purpose of accepting notices.	Emailing it to an address provided by the person for the purpose of receiving the notice.



National Law

Section 294

A tribunal or court may authorise a different way of serving a notice.

Where a notice is authorised or required to be served by post, service of the notice:

- may be effected by properly addressing, prepaying and posting a letter containing the document
- in Australia or an external Territory, is taken to have been effected on the fourth day after the letter was posted (unless there is sufficient evidence to create doubt)
- in another place, is taken to have been effected at the time when the letter would have been delivered in the ordinary course of the post (unless there is sufficient evidence to create doubt).

If a notice is served by post, the regulatory authority must allow enough time for delivery.

The regulatory authority should keep evidence of postage, such as a receipt or tracking number. Using registered post which requires the recipient to sign upon receipt is recommended.

9. PUBLISHING INFORMATION ABOUT ENFORCEMENT ACTIONS



National Law & Regulations

Section 270
Regulation 227



What information can be published?

Regulatory authorities may publish prescribed information about the following enforcement actions taken under the National Law:

- compliance notices
- emergency action notices
- prosecutions
- enforceable undertakings
- suspension or cancellation of approvals or certificates (other than voluntary suspension or surrender)
- amendments to approvals or certificates for enforcement purposes.

Additional enforcement actions may be prescribed under the National Regulations in future.

This published information must not identify or lead to the identification of an individual other than:

- an approved provider
- a person who is being prosecuted for an offence under the National Law
- a person with management or control of an education and care service (if the regulatory authority is satisfied that it is in the public interest to do so).

The published information must not identify or lead to the identification of a child.

The general information which may be published about these actions is set out below.

Information that may be published

Type of enforcement action

Name and provider approval number of the approved provider subject to the enforcement action

Information that identifies a person with management or control of an education and care service (if the regulatory authority is satisfied that it is in the public interest to do so)

For a centre-based service:

- address of the service
- name of the service

For a family day care service:

- the address of the service, unless this is the home address of a family day care educator
- the name of the service
- the service approval number

For an individual subject to the enforcement action, their name if relevant

The reason for the enforcement action, including details of the breach or alleged breach and the provision that was breached or alleged to be breached.

The details of each enforcement action that may be published are set out below.

Enforcement action	What can be published
Prosecution for an offence under the National Law or Regulations leading to a conviction or finding of guilt or plea of guilt	The provision of the National Law or Regulations that the person was convicted, or found guilty of, or pleaded guilty to breaching
	The date of the conviction, the finding or the plea of guilt for the offence
	Any penalty imposed for the offence
	Information about any steps taken to remedy the subject of the prosecution and the date the steps were taken.
Enforceable undertaking	The terms of the enforceable undertaking
	The date of the enforceable undertaking
	Information about any steps taken to remedy the subject of the enforceable undertaking and when the steps were taken.
Compliance notice	The steps specified in the compliance notice that the person must take to comply with the National Law or Regulations
	The date by which the steps must be taken
	Information about any steps taken to remedy the subject of the compliance notice and the date on which the steps were taken.
Amendment to approval or certificate	Details of the amendment
	The date on which the amendment took effect
Suspension of approval or certificate (non-voluntary)	The date of the start of the suspension
	The date of the end of the suspension
Cancellation of approval or certificate	The date on which the cancellation took effect

Regulatory authorities do not have powers under the National Law to publish information about the below matters.

Enforcement actions the regulatory authority cannot publish
Infringement notices
Compliance directions
Direction to exclude inappropriate persons from service premises
Notice to suspend education and care by family day care educator
Prohibition notices.

Courts and tribunals typically publish details of their decisions.

The approved provider must keep a record of the service's compliance (see *Operational Requirements – Governance and leadership* for further information).

9.1 TIMING OF PUBLICATION



National Law & Regulations

Sections 191, 193
Regulation 228

Where a person is eligible to apply for an internal or external review of an enforcement action, information may be published after the end of the period for requesting a review, if no request for a review is made. For an internal review, this period is 14 calendar days after the person is notified of the enforcement action or after they become aware of the decision if they are not notified. For an external review, this period is 30 calendar days after the person is notified of the enforcement action or outcome of an internal review.

If an application for internal or external review is made and withdrawn before a decision is made, the regulatory authority may publish the information on or after the day on which the application is withdrawn.

If an application is made for an external review, the regulatory authority may publish the information on or after the day on which the review is decided, if the enforcement action is confirmed or amended or another enforcement action is substituted.

10. POWERS OF REGULATORY AUTHORITIES

10.1 GENERAL POWERS



National Law

Section 261

A regulatory authority has the power to do anything necessary or convenient to carry out its functions under the National Law and Regulations including those set out in the table below.

Powers of regulatory authorities

Collect, hold and use information obtained under the National Law by the regulatory authority or ACECQA about the provision of education and care to children, including information about outcomes for children and information about providers of education and care services

Collect, hold and use information about providers of education and care services, family day care educators, subject to the *Commonwealth Privacy Act 1988*

Maintain and publish registers of approved providers and approved education and care services

Publish information about the National Quality Framework, including ratings and prescribed information about compliance

Collect, waive, reduce, defer and refund fees (including late fee payments) and enter into agreements in relation to fees

Enter into agreements relating to fees and funding with ACECQA

Exercise any other powers conferred on it under the National Law.

10.2 POWER TO OBTAIN INFORMATION, DOCUMENTS AND EVIDENCE BY NOTICE



National Law

Section 215

What is the power?

This power enables the regulatory authority to require a person to provide information, produce documents or appear before the regulatory authority and give evidence.

What can be done using the power?

If a regulatory authority reasonably believes an offence has been committed, it may write to a specified person and require the person to:

- provide any relevant information, within the time and in the matter specified in the notice, and signed by the person (or if the person is not an individual, by a competent officer)



- produce to the regulatory authority (or any person identified in the notice as acting on its behalf) any relevant document set out in the notice
- appear before the regulatory authority (or a person identified in the notice as acting on its behalf), at a specified time and place, to give evidence or produce any relevant document set out in the notice.

A specified person means a person who is or was an approved provider, staff member or volunteer at a service or a family day care educator.

The regulatory authority may require the evidence to be given on oath or affirmation. Evidence may be given by telephone or electronic means, unless the regulatory authority requires, on reasonable grounds, the evidence be given in person.

The notice must warn the person:

- it is an offence to fail or refuse to comply with a notice under section 217
- it is an offence to hinder or obstruct a regulatory authority under section 218
- self-incrimination is not an excuse under section 219.

Self-incrimination not an excuse

Regulatory authorities should be aware that a person is not excused from complying with the notice on the grounds information being provided could incriminate the person.

Information disclosed is not admissible in evidence against the individual in any criminal proceedings (other than as an offence to hinder or obstruct a regulatory authority or provide false or misleading information or documents) or in any civil proceedings. Disclosed information means the answer or information given by an individual to any requests under a power of regulatory authorities to obtain information, documents and evidence by notice or at a service, or any information obtained directly or indirectly because of that answer or information.

Despite this, any information obtained from documents required to be kept under the National Law and Regulations that is produced by a person is admissible in evidence against the person in criminal proceedings under the National Law.

Disclosed information which is not admissible under section 219 may be used to support an alternative action, such as a compliance direction or emergency action notice. It may also be used to support a decision to impose a condition on an approval.

A regulatory authority may also obtain information, documents and evidence by notice as part of an investigation.



National Law

Section 219



10.3 POWER TO OBTAIN INFORMATION, DOCUMENTS AND EVIDENCE AT AN EDUCATION AND CARE SERVICE



National Law

Section 216



What is the power?

This power enables the regulatory authority to require a specified person at an education and care service to supply information if it reasonably suspects an offence against the National Law has been committed.

What can be done using the power?

The regulatory authority may require a specified person to:

- provide the regulatory authority (or a person acting on its behalf) with any specified information relevant to the suspected offence
- produce to the regulatory authority (or a person acting on its behalf) any specified document relevant to the suspected offence.

A specified person means a person who is or was an approved provider, staff member or volunteer at a service, or a family day care educator.

The regulatory authority must warn the person it is an offence to fail or refuse to comply with the requirement, specifically that:

- it is an offence to fail to comply with a notice or requirement
- it is an offence to hinder or obstruct the regulatory authority
- self-incrimination is not an excuse.

The regulatory authority must not require the person to remain at the service more than a reasonable time when providing information or documents.

Self-incrimination not an excuse

Regulatory authority staff should be aware that a person is not excused from complying with a requirement on the grounds information being provided could incriminate the person.

Information disclosed is not admissible in evidence against the individual in any criminal proceedings (other than as an offence to hinder or obstruct a regulatory authority or provide false or misleading information or documents) or in any civil proceedings. Disclosed information means the answer or information given by an individual to any requests under a power of regulatory authorities to obtain information, documents and evidence by notice or at a service, or any information obtained directly or indirectly because of that answer or information.

Despite this, any information obtained from documents required to be kept under the National Law and Regulations that is produced by a person is admissible in evidence against the person in criminal proceedings under the National Law.



National Law

Section 219



Disclosed information which is not admissible under section 219 may be used to support an alternative action, such as a compliance direction or emergency action notice. It may also be used to support a decision to impose a condition on an approval.

When can the power be used?

The regulatory authority must not require a person to remain at the education and care service for more than a reasonable time for the purpose of providing information or producing documents.

10.4 EMERGENCY REMOVAL OF CHILDREN



National Law

Section 189

What is the emergency removal of children?

The power to remove or cause the emergency removal of children enables the regulatory authority to protect children from an immediate danger at an education and care service premises.

What can be done using the power?

If the regulatory authority considers on reasonable grounds there is an immediate danger to the safety or health of a child or children being educated and cared for by a service, it may remove or cause the removal of the child or children from the premises.

Another party (for example, police officers) may assist the regulatory authority to remove a child or children in an emergency, if required. The regulatory authority or person assisting may enter the service premises without a warrant and use reasonable force as necessary.

If a child is removed from a service, the regulatory authority must ensure that the child's parents are immediately notified of the situation and the child's current location.

'Reasonable force as necessary' is not defined in the National Law, but should be taken to mean using no more force than is needed in the circumstances. 'Reasonable force' refers to the broad range of actions that involve a degree of physical contact with another person.

Force is usually used either to control or restrain. It ranges from passively blocking a person (including a child) or guiding them by the arm to safety, through to more extreme circumstances such as restraining a person to prevent violence or injury. In all cases, an authorised officer should endeavour to make sure the use of reasonable force does not result in injury.

When can the power be used?

The power can be exercised at any time children are being educated and cared for by the service.

11. POWERS OF AUTHORISED OFFICERS

11.1 AUTHORISED OFFICERS



National Law

Section 195

Who is an authorised officer?

An authorised officer is a person who has been authorised by the regulatory authority to carry out specific functions under the National Law. Regulatory authorities may authorise anyone who they consider appropriate.

A defect in the authorisation of an authorised officer does not affect the validity of any action taken or decision made by the officer under the National Law.



National Law & Regulations

Section 196
Regulation 187

Identity cards

The regulatory authority must issue each authorised officer an identify card which states:

- the full name of the authorised officer
- that the officer is authorised under section 195 of the National Law
- the date of the officer's authorisation
- the card must be issued by the regulatory authority that authorised the person.

An authorised officer must carry the card whenever he or she is exercising functions under the National Law.

If the identity card does not have a photograph of the authorised officer, the officer must carry another form of photographic identification and a letter authorising the use of the photographic identification from the regulatory authority. The photographic identification and letter must be presented along with the identity card.

The card must be presented before exercising a power of entry and, if requested, during the exercise of any other power under the National Law. The officer is not authorised to exercise the power unless the card is produced when required.

When an officer's authorisation ceases, they must return their identity card to the regulatory authority.

An authorised officer may be prosecuted for failing to carry, show or return the identity card as required. The maximum penalty that may be imposed by a court is \$1,000.

11.2 AUTHORISED OFFICER'S POWERS OF ENTRY



National Law

Sections 197, 199, 200, 200A, 201

Authorised officers have powers to enter, inspect and search an education and care service premises or any other business premises to carry out the following:

- assess and monitor the service
- investigate the service
- search for documents and evidence at the principal office or any other business office of the approved provider
- enter any premises without a search warrant to determine if a service is operating without a service approval
- enter any premises with a search warrant, to determine whether a service is operating without a service approval or in contravention of the National Law, or to search for documents and evidence.

Each power of entry has specific requirements that must be met for the entry to be considered lawful. The guidance below provides information about these requirements. Note that some requirements apply to more than one power of entry, such as:



National Law

Section 212

Giving warning

Before requiring a person to answer a question or provide information under the relevant powers of entry, an authorised officer must:

- produce their identity card
- warn the person that a failure to comply with the officer's requirement or to answer the question, without reasonable excuse, is an offence
- in the case of an individual, warn the person about protection against self-incrimination.

This requirement does not prevent an authorised officer from obtaining and using evidence given to the officer voluntarily. This requirement also does not apply to requests made under section 197 (powers of entry for assessing and monitoring approved services).



National Law

Section 211

Protection against self-incrimination

An individual may refuse or fail to give information or do anything that is required under the National Law that may incriminate the individual, except for:

- producing a document or part of a document that is required to be kept under the National Law, or
- giving their name or address when required, or
- doing anything required under sections 215 and 216 (information, documents and evidence required under the powers of regulatory authorities).

Documents or parts of documents produced by an individual, that are required to be kept under the National Law, are not admissible in evidence against the individual in any criminal proceedings (other than under the National Law) or in any civil proceedings. However, information disclosed by an individual may be used to support an alternative action, such as a compliance direction or emergency action notice. It may also be used to support a decision to impose a condition on an approval.



National Law

Section 213

Occupier's consent to entry and search

Where an occupier's written consent to entry and search is required and the occupier provides this, the occupier must be given a copy of the signed consent immediately.

If a written consent is not produced in court, it is presumed the occupier did not consent to the entry and search, until the contrary is proved.



National Law

Section 197

Powers of entry for assessing and monitoring an approved education and care services

What is the power?

An authorised officer may enter any education and care service premises to:

- monitor compliance with the National Law
- conduct a rating assessment of a service
- collect contact details of the parents of all enrolled children due to the suspension or cancellation of a service or provider approval (see ***Suspension and Cancellations***).

The authorised officer may enter the premises with any assistants reasonably required.

When considering how many assistants are 'reasonably required', authorised officers should examine whether there is a genuine need. Authorised officers should not bring more assistants than are necessary to perform the functions listed under section 197. Assistants might include a translator to ensure clear communication with educators or police, if there is a risk to the safety of the people involved.

When can the power be used and what consent is required?

An authorised officer may enter the education and care service premises at any reasonable time.

An authorised officer may not enter a family day care residence unless the service is operating at the time of entry or the occupier has given written consent to the entry and inspection.

What can be done using the power?

An authorised officer may enter the service premises and take any of the actions listed below.

Actions the authorised officer may take

Inspect the premises and any plant, equipment, vehicle or other thing

Photograph or film or make audio recordings or sketches of any part of the premises or thing at the premises

Inspect and make copies of, or take extracts from, any document kept at the premises

Take any document or thing from the premises

Ask a person at the premises to answer a question to the best of the person's knowledge, information and belief, or to take reasonable steps to provide information or produce a document

A document or thing in this context means something that is used or likely to be used in the provision of the education and care service.

If a document or thing is taken away, the authorised officer must tell the person apparently in charge of it or an occupier of the premises. It must then be returned to that person or to the service within seven (7) calendar days.

National Authority representative may enter service premises in company with Regulatory Authority

What is the power?

A representative from the National Authority may enter an approved education and care service with an authorised officer.

When can the power be used?

The National Authority representative, in company with an authorised officer, may enter the premises within the service's usual hours of operation.

What can be done using the power?

The entry is solely for the purpose of informing the National Authority of a regulatory authority's rating assessment processes, to assist the National Authority to promote consistency across jurisdictions.



National Law

Section 198



National Law

Section 199

Powers of entry for investigating approved education and care service

What is the power?

An authorised officer may investigate an approved education and care service if the officer reasonably suspects an offence has been or is being committed against the National Law.

The authorised officer may enter the service premises with any necessary assistants.

When can the power be used and what consent is required?

An authorised officer may enter the education and care service premises at any reasonable time, with or without the consent of the occupier of the premises.

An authorised officer may not enter a family day care residence unless:

- the authorised officer reasonably believes that a service is operating at that time, or
- the register of family day care educators indicate that the service is operating at that time, or
- the occupier of the residence has consented in writing to the entry and inspection.

A 'reasonable belief' that an education and care service is operating might include hearing or seeing signs that children are present.

What can be done using the power?

An authorised officer may enter the service premises and take any of the actions listed below.

Actions the authorised officer may take

Search any part of the premises

Inspect, measure, test or record any part of the premises or anything at the premises

Take a thing or a sample of a thing for analysis, measurement or testing

Copy or take an extract from a document at the premises

Bring any person, equipment and materials the authorised officer reasonably requires for exercising this power

Require information from the occupier of the premises, or any person present, to help with the investigation

A document or thing in this context means something that is used or likely to be used in the provision of the education and care service.

A regulatory authority may also choose to exercise its power to obtain information, documents and evidence by notice as part of an investigation. See *Powers of regulatory authorities* for more information.



National Law

Section 200

Powers of entry to business premises

What is the power?

An authorised officer may enter the principal office or any other business office of the approved provider if they reasonably suspect it holds documents or other evidence that are relevant to a possible offence against the National Law.

When can the power be used and what consent is required?

The authorised officer must not enter and search the premises without consent from the occupier.

Before obtaining the occupier's consent, the authorised officer must:

- present their identity card
- inform the occupier of the purpose of the search and the powers that may be exercised
- inform the occupier that they may refuse to give consent to:
 - the entry and search or the taking of anything
 - the taking of any copy or extract of any documents.

What can be done using the power?

If the occupier consents, the authorised officer may enter the premises and take any of the actions listed below.

Actions the authorised officer may take

Search any part of the premises

Inspect, measure, test or record any part of the premises or anything at the premises

Take a thing or a sample of a thing for analysis, measurement or testing

Copy or take an extract from a document at the premises

Bring any person, equipment and materials the authorised officer reasonably requires for exercising this power

Require information from the occupier of the premises, or any person present, to help with the investigation



National Law

Section 200A

Entry to premises without a search warrant

What is the power?

An authorised officer may enter any premises (including residential or business premises) to determine whether an education or care service is operating without a service approval, if:

- the authorised officer reasonably believes a person is operating a service in contravention of section 103 at the premises, and
- the occupier of the premises has consented in writing to the entry and inspection.

When can the power be used and what consent is required?

The authorised officer must not enter and search the premises without written consent from the occupier.

Before obtaining the occupier's consent, the authorised officer must:

- present their identity card
- inform the occupier of the purpose of the search and the powers that may be exercised
- inform the occupier that they may refuse to give consent to:
 - the entry and search or the taking of anything
 - the taking of any copy or extract of any documents.

What can be done using the power?

If the occupier consents, the authorised officer may enter the premises and take any of the actions listed below (see clause 5(2)(a) to (e) of Schedule 2 of the National Law).

Actions the authorised officer may take

Search any part of the premises

Inspect, measure, test or record any part of the premises or anything at the premises

Take a thing or a sample of a thing for analysis, measurement or testing

Copy or take an extract from a document at the premises

Bring any person, equipment and materials the authorised officer reasonably requires for exercising this power



National Law

Section 201

Entry to premises with a search warrant

What is the power?

An authorised officer may enter any education and care service premises with a search warrant, if they reasonably believe that:

- a person is operating an education and care service from the premises without service approval (see section 103 of the National Law)
- an approved education and care service is operating from the premises in contravention of the National Law.

An authorised officer may also enter the principal office or any other business office of the approved provider, if they reasonably believe that the premises holds documents or other evidence relevant to a possible offence against the National Law.

When can the power be used and what consent is required?

An authorised officer must obtain a search warrant before entering the premises.



National Law

Clause 1, Schedule 2

Applying for a warrant

An authorised officer may apply to a magistrate for a search warrant if they reasonably believe that:

- a person is or has been operating a service at the premises in breach of the National Law, or
- documents or other evidence relevant to a possible offence against the National Law are on the premises.

The authorised officer must prepare a sworn, written application that sets out the grounds on which the warrant is sought. The magistrate may refuse to consider the application until the authorised officer gives the magistrate all the information the magistrate requires, and in the manner specified.

In urgent or special circumstances (for example, remote location), an authorised officer may apply for a warrant electronically by phone, fax, email, radio, video conferencing or another form of communication. The application can be made after the authorised officer prepares the written application and before it is sworn.

An authorised officer should refer to their regulatory authority's internal guidelines or protocols for information about when the regulatory authority will consent to the authorised officer seeking a warrant.

Receiving the warrant

The magistrate may issue the warrant only if they reasonably believe that the grounds for applying for a warrant (set out above) are met.

The warrant must state:

- the named authorised officer may, with necessary and reasonable help and force, enter the premises and any other premises necessary for entry, and exercise the officer's powers under the warrant
- the matter for which the warrant is sought
- the evidence that may be seized
- the hours when the premises may be entered
- the end date of the warrant (within 14 days of issue).

Where an application was made electronically, the magistrate may issue the warrant if they are satisfied that it was necessary to apply electronically, and the application was appropriate.

If the warrant is issued, the magistrate must immediately give a copy of the warrant to the authorised officer, where reasonably possible (for example, sending by email or fax). If this is not possible, the magistrate must tell the authorised officer the date and time the warrant is issued and the other terms of the warrant. The authorised officer must complete a form of warrant containing the magistrate's name, the date and time of issue, and other terms of the warrant. In either case, this warrant is referred to as a duplicate warrant and can be used the same way as an original warrant.

If the authorised officer completed a form of warrant, they must send the written application for the warrant and the form of warrant to the magistrate at the first reasonable opportunity. The magistrate must file these documents along with the original warrant.



National Law

Clause 2, Schedule 2



National Law

Clause 3, Schedule 2



National Law

Clause 4, Schedule 2

If there is an issue about whether an exercise of power was authorised by the duplicate warrant and the original warrant is not produced in evidence, the onus of proof is on the person relying on the lawfulness of the exercise of power to prove that it was authorised.

Before entering the premises

Before entering the premises with a warrant, an authorised officer must or make a reasonable attempt to:

- show their identity card to an occupier of the premises
- give the person a copy of the warrant
- tell the person the authorised officer is permitted by the warrant to enter the premises
- give the person an opportunity to allow immediate entry without the officer using force.

The authorised officer does not need to follow this procedure if they reasonably believe that immediate entry is necessary to ensure effective execution of the warrant.



National Law

Clause 5, Schedule 2

What can be done using the power?

An authorised officer entering the premises with a search warrant may take any of the actions listed below.

Actions the authorised officer may take

Search any part of the premises

Inspect, measure, test or record any part of the premises or anything at the premises

Take a thing or a sample of a thing for analysis, measurement or testing

Copy or take an extract from a document at the premises

Bring any person, equipment and materials the authorised officer reasonably requires for exercising this power

Require information or reasonable help from the occupier of the premises, or any person present, to help with the investigation



National Law

Section 202

Seized items

If an authorised officer has taken an item under the powers of entry for investigating approved education and care services, entering business premises or entering premises with or without a search warrant (sections 199, 200, 200A, 201), they must take reasonable steps to return the item if there is no reason to retain it.

While an authorised officer holds a seized item, they must provide the owner of the item with reasonable access while it is being held.

If the seized item is not returned within 60 calendar days, the authorised officer must take reasonable steps to return it unless:

- proceedings (including any appeal) have commenced within the 60 day period and are not completed, or
- a court order states that the item can be retained.



National Law

Section 203

An authorised officer may apply to a court within 60 calendar days of seizing an item, to request permission to hold the item for an extended period. The court may extend the period if it considers it necessary:

- for an investigation into whether an offence has been committed, or
- to allow evidence of an offence to be obtained for a prosecution.

The court may adjourn an application for extension to enable notice of the application to be given to any person.

An authorised officer may apply to a court within a period of extension to request permission to hold the item for a further extended period.

Summary table – Powers of entry

This table is a brief overview of the powers of entry available to authorised officers.

Power of entry	Purpose of entry	When can the power be used?	Occupier's consent required?
Section 197 Powers of entry for assessing and monitoring approved education and care service	Enter service premises to: <ul style="list-style-type: none"> • assess and monitor the service • collect contact details of parents of enrolled children 	Centre-based: At any reasonable time FDC: Service is operating at time of entry or occupier has given written consent	Centre-based: No FDC: Written consent required if service is not operating at time of entry
Section 198 National Authority representative may enter service premises in company with Regulatory Authority	Inform ACECQA of a regulatory authority's rating assessment processes	Within the service's usual hours of operation	No
Section 199 Powers of entry for investigating approved education and care service	Enter service premises to investigate the service if reasonably suspect commission of offence	Centre-based: At any reasonable time FDC: Service is operating at time of entry (either reasonable belief or indicated in register of FDC educators), or occupier has given written consent	Centre-based: With or without consent FDC: Written consent required if service is not operating at time of entry
Section 200 Powers of entry to business premises	Search for documents and evidence reasonably suspected to be held at the principal office or any other business office of the approved provider that are relevant to possible offence	Must follow disclosure procedures (see section 200) and obtain consent before entering	Yes

Power of entry	Purpose of entry	When can the power be used?	Occupier's consent required?
Section 200A Entry to premises without a search warrant	Enter any premises (including residential or business) to investigate reasonable belief that a service is operating without a service approval	Must follow disclosure procedures (see section 200A) and obtain written consent before entering	Yes, written consent
Section 201 Entry to premises with a search warrant	Enter service premises to investigate reasonable belief that the service is operating without a service approval or in contravention of the National Law (at the service premises) Search for documents and evidence reasonably believed to be held at the principal office or other business office of approved provider that are relevant to possible offence	Must obtain search warrant and follow disclosure procedures before entering (see Clause 4, Schedule 2), unless reasonably believe that immediate entry is necessary	No

11.3 AUTHORISED OFFICER'S POWERS TO OBTAIN INFORMATION

Authorised officers have powers to obtain the following types of information:

- a person's name and address in relation to offences or suspected offences against the National Law (section 204)
- evidence of a person's age, name and address to check if minimum age requirements are met (section 205)
- information, documents and evidence for monitoring compliance, a rating assessment, or notifying parents of children enrolled at a service about the suspension or cancellation of a service or provider approval (section 206).

Each power to obtain information has specific requirements that must be met for the exercise of power to be considered lawful. The guidance below provides information about these requirements. Note that some requirements apply commonly across the powers, such as:



National Law

Section 212

Giving warning

Before requiring a person to answer a question or provide information under these powers, an authorised officer must:

- produce their identity card
- warn the person that a failure to comply with the officer's requirement or to answer the question, without reasonable excuse, is an offence
- in the case of an individual, warn the person about protection against self-incrimination.

This requirement does not prevent an authorised officer from obtaining and using evidence given to the officer voluntarily.



National Law

Section 211

Protection against self-incrimination

An individual may refuse or fail to give information or do anything that is required under the National Law that may incriminate the individual, except for:

- producing a document or part of a document that is required to be kept under the National Law, or
- giving their name or address when required, or
- doing anything required under sections 215 and 216 (information, documents and evidence required under the powers of regulatory authorities).

Documents or parts of documents produced by an individual, that are required to be kept under the National Law, are not admissible in evidence against the individual in any criminal proceedings (other than under the National Law) or in any civil proceedings. However, information disclosed by an individual may be used to support an alternative action, such as a compliance direction or emergency action notice. It may also be used to support a decision to impose a condition on an approval.



National Law

Section 204

Power to require name and address

An authorised officer may require a person to state their name and residential address if the authorised officer:

- finds a person committing an offence against the National Law
- finds a person in circumstances that lead the officer to reasonably suspect the person is committing or has committed an offence against the National Law
- has information that leads the officer to reasonably suspect the person is committing or has committed an offence against the National Law.

If the authorised officer reasonably suspects the person gave a false name or residential address, the officer may require evidence of the name or address.

Evidence of a person's name could include a driver's licence, birth certificate, change of name certificate, bank card or passport.

Evidence of a person's residential address could include a driver's licence, utility bill, or a lease agreement or contract of sale for a residential property.



National Law

Section 205

Power to require evidence of age, name and address of person

If an authorised officer reasonably suspects that a staff member, family day care educator or a volunteer employed or engaged at a service is not of the minimum age required by the National Regulations, the authorised officer may require the person to:

- state their correct date of birth
- provide evidence of their date of birth either immediately (if, in the circumstances, it would be reasonable to expect the person to have evidence of their date of birth) or within 14 calendar days
- state their name and residential address if the person refuses to, or is unable to, state their correct date of birth or provide evidence of their date of birth, or if the person is not of the required minimum age.

Evidence of a person's date of birth could include a birth certificate, driver's licence or passport.



National Law

Section 206

Power of authorised officers to obtain information, documents and evidence

An authorised officer may write to a specified person to request that they provide relevant information in the manner requested and in writing, signed by the person or a competent officer of that person (if the person is not an individual).

The officer may exercise this power for:

- monitoring compliance with the National Law
- a rating assessment of a service
- collecting contact details of the parents of all enrolled children due to a suspension or cancellation of a service or provider approval (see *Suspensions and Cancellations*).

The person must be given at least 14 calendar days to respond to the request.

A specified person means a person who is or was an approved provider, nominated supervisor, staff member or volunteer at an approved education and care service, or a family day care educator.

12. CONDUCTING AN INVESTIGATION

What is an investigation?

An investigation is a formal and systematic inquiry to establish facts about an incident, complaint or alleged non-compliance by collecting, documenting, examining and evaluating evidence. An investigation is not an end in itself. Throughout an investigation, the investigator should keep an open mind about the possible outcomes of the investigation, such as education, compliance action, or a decision not to pursue the matter. The regulatory authority must ensure the safety, health and wellbeing of all children at the service. This may mean addressing immediate risks before the investigation has been completed.

The investigator must remain impartial throughout the investigation.

The investigator should also be mindful of the best practice regulation principles outlined in the section on good decision-making when conducting the investigation.

When to investigate

An investigation may be initiated where there is reason to believe that an offence against the National Law has been or is being committed.

A regulatory authority may decide to investigate an issue after receiving a notification of a serious incident, a complaint, or becoming aware of potential or apparent contravention. An investigation might also be initiated if a pattern of non-compliance across a particular group of services or roles in a service leads a regulatory authority to suspect an offence may have been, or is being, committed. The potential or apparent contravention may be identified during an assessment and rating or monitoring visit to a service or through other intelligence.

For information on conducting monitoring activities, see *Monitoring, Compliance and Enforcement – Monitoring*. For information about receiving and responding to complaints, see *Monitoring, Compliance and Enforcement – Complaints*.

Power to investigate

Regulatory authorities can investigate incidents and alleged contraventions of the National Law and Regulations, using the powers of regulatory authorities and authorised officers detailed in the National Law. The term ‘investigator’ is used in this guide to refer to a person with the appropriate powers given to them in the National Law or through delegation. See *Monitoring, Compliance and Enforcement – Powers of regulatory authorities* and *Monitoring, Compliance and Enforcement – Powers of authorised officers*.

Where a regulatory authority becomes aware of potential or apparent contravention of a different law, the relevant authority should be contacted. The disclosure of information to other authorities is permitted in particular circumstances by section 271 of the National Law.

See *Operational Requirements – Other regulatory frameworks*.

The role of the investigator

The role of the investigator is to:

- define the focus and scope of the investigation
- collect evidence
- establish and document the facts
- prepare a report on the findings.

An investigator should always ensure they have the necessary delegation to use the powers given to them under the National Law to conduct an investigation. Authorised officers may exercise their specific powers under the National Law, while other powers are given to the regulatory authority. See *Monitoring, Compliance and Enforcement – Powers of regulatory authorities* and *Monitoring, Compliance and Enforcement – Powers of authorised officers* for more information.

Collaboration with other agencies

At times more than one regulatory agency will be involved in investigating an issue. This could include the police, child protection, environmental protection, or a regulatory authority from another jurisdiction. If another agency is involved, the regulatory authority should identify the appropriate channels of communication with the agency as soon as possible. This is likely to be through senior management and must be in accordance with any protocols in place. Agencies should exchange information about their investigative and compliance powers and the direction and scope of their investigations to get the best outcome by avoiding overlap and identifying any gaps. An investigation conducted by the approved provider in question does not relieve the regulatory authority of its power to investigate a potential non-compliance.

Regulatory authorities should be mindful that while they can share information with other agencies, the extent to which they can share some information gathered in an investigation can be restricted by the National Law (see Part 13 of the National Law).

The regulatory authority should liaise closely with the other agency to avoid taking any action that jeopardises the other agency's investigation. This is particularly important when a police investigation is being carried out. In some circumstances, a regulatory authority might consider deferring its investigation while another agency is investigating.

Communicating with children, families, and educators

Children, families and educators cannot always be made aware of the details and particulars of the notification that prompted the investigation, however, if possible the regulatory authority should help those affected to understand why an investigation is occurring and how this might impact on the education and care of children attending the service. The regulatory authority may detail the potential outcomes of the investigation including the possibility that the investigation may find no evidence to support a contravention. The investigator must remain impartial about the outcomes of the investigation.

The regulatory authority must consider confidentiality requirements in meeting the needs of children, families and educators for information about the investigation. It can be helpful to nominate a specific contact person who can address any questions or concerns.

Where the subject of an investigation has caused distress or anger, the regulatory authority might consider additional resources to support people who are affected. For example, taking along assistants, as permitted by section 199 of the National Law (see *Powers of entry for investigating approved education and care service*), or providing details for counselling services.

Record keeping

The investigator must thoroughly and objectively document the investigation, mindful that it may need to be used to support a future compliance action, including prosecution. Investigators should take thorough notes of phone calls, discussions and observations related to the investigation. Records should indicate the date, time and author. Calls and discussions held at the office should also be noted on a running sheet.

The running sheet is a chronological list that records the actions and tasks completed as part of the investigation along with details such as date, time, responsible person and comments. Running sheets give a clear overview of the investigation and may be helpful for reviews or as a reference when giving evidence in court.

See *Good Regulatory Practice* for information on keeping records of investigations and decisions. The *State Records Act 1998* (NSW) applies to all jurisdictions for the purposes of the National Law and Regulations except to the extent that the National Law applies to a regulatory authority and the records of a regulatory authority (section 265).

Planning an investigation

Planning an investigation is essential to ensure that:

- the focus or reason for the investigation is clearly identified
- the investigation addresses any immediate and ongoing risks to children being educated and cared for at the service
- the investigation is carried out methodically and professionally
- resources are used effectively
- appropriate sources of evidence are identified and opportunities for people to remove, destroy or alter evidence are minimised.

When planning an investigation, the investigator should remember the aim of the investigation is to establish facts, and consider the below matters.

Considerations when planning an investigation

Any perceived or real conflicts of interest

Allegations that have been made

Possible sources of information and evidence

The investigation timeframe

Any cultural sensitivities or special needs and what resources are needed to address these

Any other regulatory bodies involved

Resources required, including staff (both on the visit and in the office for immediate inquiries), cameras, travel, laptops, printers, scanners, specialist consultants

Communication protocols between teams, particularly if multiple visits are conducted simultaneously.

Closing an investigation

Once an investigation has concluded, the investigator should compile a report that details the findings of the investigation. Regulatory authorities should be mindful of the good decision-making principles set out in *Good Regulatory Practice* when making a decision on what action, if any, to take as a result of the investigation. Investigators should close the investigation in the National Quality Agenda IT System.

The investigator might recommend a particular course of action in the report, however in most cases, it is good practice for a person other than the investigator to decide what, if any, action should be taken as a result of the investigation. Appropriate action may be compliance focused or it may be educative. In some cases, the regulatory authority might notify the parties to the investigation, including families, of the outcome, where appropriate and within the confidentiality requirements of the National Law. Compliance actions and prosecutions must be initiated by the relevant delegate.

12.1 GATHERING EVIDENCE

What is evidence?

Evidence is gathered to establish facts which prove or disprove whether an offence has been committed. The manner in which the evidence is gathered is important and evidence to be relied upon for an enforcement action must be sufficient to prove each and every element of the alleged offence or breach. In an investigation, the main sources of evidence are:

- oral evidence (recollections) including witness statements
- documentary evidence (records)
- real evidence (physical evidence or objects)
- expert evidence (technical advice)

- site inspection and the resulting investigator statements, video or photographs.

In some circumstances, one piece of evidence might be enough to prove a fact. However it is best to collect supporting evidence where possible. Evidence may be either direct or circumstantial. Direct evidence establishes a fact directly, for example a confession statement or security footage of a person contravening the law. Circumstantial evidence may lead an investigator to deduce a particular fact, for instance forensic evidence that indicates a person was present in a particular location.

Characteristics of evidence	
Authentic	The evidence is factual and real
Valid	The evidence is relevant to the facts it is used to prove
Reliable	The evidence is trustworthy and may be supported by other evidence
Current	The evidence is relevant to the time period in question

When collecting evidence for legal proceedings, it is particularly important to ensure that it is gathered correctly so it can be used in court. Investigators should seek advice from the relevant area of the regulatory authority about satisfying the rules of evidence in their jurisdiction. It is also important any evidence seized or copied is kept in a secure location with a clear process that will ensure continuity and eliminate any claims of misconduct.

Records of the recovery, storage and movement of evidence should be kept.

Standard of proof

The standard of proof is the amount and type of evidence that is required to prove something. In some jurisdictions, it is best practice to always operate at a standard of proof of beyond reasonable doubt. If unsure of the applicable standard of proof, seek advice from the regulatory authority’s legal team, or equivalent.

Depending on the purpose of the investigation then there may be different standards of proof. For civil prosecutions, the evidence will need to show that on ‘the balance of probabilities’ something occurred. However, for criminal prosecutions, the proof must be ‘beyond reasonable doubt’.

Conducting interviews

In some circumstances, people involved in an incident, including witnesses to an incident, may need to be interviewed as part of the investigation. People being interviewed should be informed of the investigation, any confidentiality requirements and that they may be asked to give evidence in person at a later point. Different requirements apply when interviewing persons of interest, including the giving of a warning under section 212 of the National Law.

If unsure, seek advice from the regulatory authority’s legal team, or equivalent. The investigator may take a written witness statement to record facts established in an interview.

A statement should set out the relevant facts in chronological order. Statements should be specific, detailed and accurate. The statement should set out:

- where the incident occurred
- when the incident occurred
- who was present
- what the person observed.

If possible, the statement should specify the exact words that were used. If the person does not remember the exact wording, the statement should make this clear, for example 'she said words to the effect of'. Where a person provides an opinion, the statement should include the reason that the person formed that opinion. The statement should reflect the person's account of the incident, rather than conclusions drawn by the investigator.

Using photographs or film

An authorised officer may photograph or film at an education and care service or business premises when exercising their powers under sections 197 (powers of entry for assessing and monitoring approved education and care service), 199 (powers of entry for investigating approved education and care service), and 200 (powers of entry to business premises). When entering business premises that are not an education and care service premises, an authorised officer must have consent from the occupier of the premises to take photographs or film.

Using photographs or film as evidence

The regulatory authority may sometimes need to take photographs or film when investigating a service, including possible contravention of the National Law or Regulations or circumstances surrounding a serious incident. For instance, if a provider has failed to maintain fixtures at the service premises and there is a risk to children's safety, the authorised officer might photograph the fixture. The images may be used as evidence to support a compliance action, or to support a prosecution if the contravention is serious.

State or territory based legislation may include requirements for the collection and storage of photos or film to be used as evidence for a prosecution. Other jurisdictional or national legislation may also apply to the use and storage of photographs and film of children, such as privacy, child protection and copyright legislation and criminal codes. Regulatory authority staff should consult their legal team as required about relevant legislation and the proper collection and maintenance of photos and film to be used as evidence. For information on privacy, 'Information Sheet 1 (Public Sector) on Information Privacy Principles' is available on the Office of the Australian Information Commissioner website: www.oaic.gov.au.

The regulatory authority may also be required to show continuity of custody for photographs or film used as evidence for court proceedings. For instance, if photos are taken on a digital camera and stored electronically, the regulatory authority may be required to provide a record of who has accessed the file. It might also need to demonstrate it has measures in place to ensure a reliable framework for storing digital records, including:

- policies and procedures to guide digitisation processes

- training programs and support for staff about collecting and storing photos and film
- documented security controls for digital images
- documented monitoring and review mechanisms.

In general, where a photograph or film is taken, it is recommended that a minimum of three photographs are taken or 'aspects' covered:

- a close up of any identifying features
- a close up to show the whole subject
- a wide shot to show the context.

An authorised officer should record in their notebook any photos taken as part of monitoring and compliance activities. This should include details of the direction the camera is facing, a brief description of the image, the time and the photographer's name.

As soon as practicable after taking the photograph or recording the film, an authorised officer should upload the photographs or film from the device onto a computer belonging to the regulatory authority and follow relevant labelling conventions. For video recordings, an authorised officer should record the date, time and location verbally as part of the audio recording, and log the video in their notebook.

Photographs or film should only be recorded on a camera (or other device) belonging to the regulatory authority, rather than a privately-owned camera, mobile phone or other device.

Photographing or filming children

An authorised officer should avoid taking photographs or film of children unnecessarily in the exercise of their powers. When deciding whether to take photographs or film of children in the exercise of their powers, an authorised officer should consider if evidence could be gathered effectively without taking photographs or filming children, for example, by moving children out of the frame, or by using another means of recording the information.

An authorised officer should explain to any person who is or appears to be concerned about the photographing or filming of children that they are only taken and used for purposes directly related to the regulatory authority's function, which is to monitor education and care services.

They should also advise the person that the regulatory authority is bound by the Information Privacy Principles set out in the *Commonwealth Privacy Act 1988*.

Disruption to the service program should be minimised.

Wherever possible, an authorised officer should avoid taking photographs of children:

- in toileting areas
- in nappy changing areas
- when they are in any state of undress or exposure.

OFFENCES

13. OFFENCES RELATING TO ENFORCEMENT



National Law

Section 207

Offence to obstruct an authorised officer

A person must not obstruct an authorised officer in exercising powers under the National Law and Regulations.

The regulatory authority may seek to prosecute a person for obstructing an authorised officer. The maximum penalty which may be imposed by a court is \$8,000, in the case of an individual; \$40,000 in any other case.



National Law

Section 208



Offence to fail to assist an authorised officer

A person must not, without reasonable excuse:

- refuse to answer a question asked lawfully by an authorised officer
- refuse to provide information or produce a document lawfully required by an authorised officer
- fail to comply with a request made by an authorised officer entering premises under a warrant to:
 - require the occupier of the premises or any person present to help with the investigation
 - require the occupier of the premises or any person present to give information to help the investigation.

The regulatory authority may seek to prosecute a person for failing to assist an authorised officer. The maximum penalty which may be imposed by a court is \$8,000, in the case of an individual; \$40,000 in any other case.

Offence to destroy or damage notices or documents

A person must not, without lawful authority, destroy or damage any notice or document given, prepared or kept under the National Law.

The regulatory authority may seek to prosecute for destroying or damaging notices or documents under the National Law. The maximum penalty which may be imposed by a court is \$8,000, in the case of an individual; \$40,000 in any other case.



National Law

Section 209



National Law

Section 210

Offence to impersonate authorised officer

A person must not impersonate an authorised officer.

The regulatory authority may seek to prosecute a person for impersonating an authorised officer. The maximum penalty which may be imposed by a court is \$8,000.



National Law

Section 217

Offence to fail to comply with notice or requirement

A person must not refuse or fail to comply with a requirement under the power of regulatory authorities to obtain information, documents and evidence by notice or at a service, to the extent that the person is capable of complying with the requirement.

The regulatory authority may seek to prosecute a person for refusing or failing to comply with a notice or requirement. The maximum penalty which may be imposed by a court is \$8,000, in the case of an individual; \$40,000 in any other case.



National Law

Section 218

Offence to hinder or obstruct regulatory authority

A person must not hinder or obstruct the regulatory authority in exercising a power to obtain information, documents and evidence by notice or at a service.

The regulatory authority may seek to prosecute a person for hindering or obstructing a regulatory authority. The maximum penalty which may be imposed by a court is \$8,000, in the case of an individual; \$40,000 in any other case.



National Law

Section 295

False or misleading information or documents

A person must not give the regulatory authority or authorised officer any information or document that the person knows is false or misleading unless, when giving the document, the person:

- informs the regulatory authority or authorised officer how the document is false or misleading, to the best of their ability
- gives the correct information to the regulatory authority or authorised officer, if the person has or can reasonably get the correct information.

The regulatory authority may seek to prosecute for providing false or misleading information or documents. The maximum penalty which may be imposed by a court is \$6,000, in the case of an individual; \$30,000 in any other case.

ATTACHMENT A – SUMMARY OF OFFENCES UNDER THE NATIONAL LAW

Offence	Reference	Approved provider	Nominated supervisor	Family day care educator	Staff member	Infringement notices
Provide an education and care service without service approval	Section 103	✓				
Provide a family day care service from a place that is not a residence or approved venue, unless otherwise permitted	Section 103A	✓				
Advertise a service without service approval	Section 104	✓				
Operate a service without nominated supervisor	Section 161	✓				
Fail to ensure nominated supervisor meets prescribed minimum requirements	Section 161A	✓				
Operate a service without responsible person present (centre-based service only)	Section 162	✓				
Fail to employ or engage the prescribed minimum number of co-ordinators (family day care service only – see <i>Staffing Arrangements in Operational Requirements</i>)	Section 163	✓				
Fail to provide support to family day care educators	Section 164	✓				
Education and care at a family day care service not to be provided by person other than a family day care educator, except as prescribed in regulation	Section 164A	✓				
Inadequate supervision	Section 165	✓	✓	✓		
Inappropriate discipline	Section 166	✓	✓	✓	✓	
Fail to protect children from harm and hazards	Section 167	✓	✓	✓		
Fail to provide required program	Section 168	✓	✓			
Fail to meet minimum staffing requirements, including ratios and qualifications	Section 169	✓	✓	✓		
Allow unauthorised person to remain on premises	Section 170	✓	✓	✓		

Offence	Reference	Approved provider	Nominated supervisor	Family day care educator	Staff member	Infringement notices
Fail to comply with direction to exclude inappropriate person	Section 171	✓	✓	✓		
Fail to display prescribed information	Section 172	✓				✓
Fail to notify circumstances to the regulatory authority	Section 173	✓				✓
Fail to notify information to the regulatory authority	Section 174	✓				
Fail to notify information to the approved provider (family day care educator)	Section 174A			✓		
Fail to keep enrolment and other documents	Section 175	✓		✓		
Compliance directions	Section 176	✓				✓
Engage person to whom prohibition notice applies	Section 188	✓				
False or misleading information about prohibition notice	Section 188A	Any or all persons				
Obstruct an authorised officer	Section 207	Any or all persons				
Fail to assist an authorised officer	Section 208	Any or all persons				
Destroy or damage notices or documents	Section 209	Any or all persons				
Impersonate an authorised officer	Section 210	Any or all persons				
Fail to comply with notice or requirement	Section 217	Any or all persons				
Hinder or obstruct regulatory authority	Section 218	Any or all persons				
Register of family day care educators	Section 269	✓				

ATTACHMENT B – SUMMARY OF OFFENCES UNDER THE NATIONAL REGULATIONS

Offence	Approved provider	Nominated supervisor	Family day care educator	Infringement notice	Compliance direction	Maximum penalty
Quality Improvement Plans (Regulation 55)	✓				✓	
Offences in relation to giving false or misleading statements about ratings (Regulation 72)	✓				✓	\$2,000
Location of principal office of a family day care service (72A)	✓					\$2,000
Record of child assessments or evaluations for delivery of education program (Regulation 74)	✓				✓	
Information about education program to be kept available (Regulation 75)	✓				✓	
Health and hygiene practices and safe food practices (Regulation 77)	✓	✓	✓	✓	✓	\$2,000
Access to safe drinking water and regular food and beverages (Regulation 78)	✓	✓	✓		✓	\$2,000
Service providing food and beverages (Regulation 79)	✓	✓	✓		✓	\$2,000
Weekly menu (Regulation 80)	✓	✓	✓	✓	✓	\$1,000
Sleep and rest (Regulation 81)	✓	✓	✓		✓	\$1,000
Tobacco, drug and alcohol free environment (Regulation 82)	✓		✓		✓	\$2,000
Staff members not to be affected by alcohol or drugs (Regulation 83)	✓	✓	✓	✓	✓	\$2,000
Awareness of child protection law (Regulation 84)	✓				✓	\$1,000
Notification to parents of incident, injury, trauma and illness (Regulation 86)	✓			✓		\$2,000

Offence	Approved provider	Nominated supervisor	Family day care educator	Infringement notice	Compliance direction	Maximum penalty
Infectious diseases (Regulation 88)	✓			✓		\$2,000
First aid kits (Regulation 89)	✓		✓	✓	✓	\$2,000
Medical conditions policy to be provided to parents (Regulation 91)	✓				✓	
Administration of medication (Regulation 93)	✓	✓	✓			\$2,000
Emergency and evacuation procedures (Regulation 97)	✓			✓	✓	\$2,000
Telephone or other communication equipment (Regulation 98)	✓			✓	✓	\$1,000
Children leaving the education and care service premises (Regulation 99)	✓	✓	✓			\$2,000
Risk assessment must be conducted before excursion (Regulation 100)	✓	✓	✓			\$2,000
Authorisation for excursions (Regulation 102)	✓	✓	✓			\$1,000
Premises, furniture and equipment to be safe, clean and in good repair (Regulation 103)	✓				✓	\$2,000
Fencing and security (Regulation 104)	✓			✓	✓	\$2,000
Access to sufficient furniture, materials and developmentally appropriate equipment (Regulation 105)	✓				✓	
Laundry and hygiene facilities (Regulation 106)	✓				✓	
Space requirements – indoors (Regulation 107)	✓				✓	\$2,000
Space requirements – outdoor space (Regulation 108)	✓				✓	\$2,000
Ventilation and natural light (Regulation 110)	✓				✓	\$2,000
Administrative space (Regulation 111)	✓				✓	
Nappy change facilities (Regulation 112)	✓			✓	✓	\$1,000
Outdoor space – natural environment (Regulation 113)	✓				✓	
Outdoor space – shade (Regulation 114)	✓				✓	\$1,000
Premises designed to facilitate supervision (Regulation 115)	✓				✓	
Assessments of family day care residences and approved venues (Regulation 116)	✓				✓	\$2,000
Glass (Regulation 117)	✓				✓	
Educational leader (Regulation 118)	✓				✓	
Family day care educator to be at least 18 years old (Regulation 119)	✓				✓	\$1,000

Offence	Approved provider	Nominated supervisor	Family day care educator	Infringement notice	Compliance direction	Maximum penalty
Educators who are under 18 to be supervised (Regulation 120)	✓				✓	\$1,000
Minimum requirements for a family day care educator (regulation 143A)	✓					\$2,000
Ongoing management of family day care educators (Regulation 143B)	✓					\$2,000
Relationships in groups (Regulation 156)	✓				✓	
Access for parents (Regulation 157)	✓	✓	✓		✓	\$1,000
Residents at family day care residence and family day care educator assistants to be fit and proper persons (Regulation 163)	✓				✓	\$2,000
Requirement for notice of new persons at residence (Regulation 164)	✓				✓	\$2,000
Children not to be alone with visitors (Regulation 166)	✓		✓			\$2,000
Policies and procedures in place (Regulation 168)	✓				✓	\$1,000
Additional policies and procedures for family day care (Regulation 169)	✓				✓	\$1,000
Policies and procedures to be followed (Regulation 170)	✓				✓	\$1,000
Policies and procedures to be available (Regulation 171)	✓				✓	\$1,000
Notification of change to policies and procedures (Regulation 172)	✓				✓	
Prescribed enrolment and other documents to be kept by approved provider (Regulation 177)	✓			✓	✓	\$2,000
Prescribed enrolment and other records to be kept by family day care educator (Regulation 178)			✓	✓		\$2,000
Confidentiality of records kept by approved provider (Regulation 181)	✓					\$2,000
Confidentiality of records kept by family day care educator (Regulation 182)			✓			\$2,000
Storage of records and other documents (Regulation 183)	✓				✓	
Law and regulations to be available (Regulation 185)	✓				✓	
Prescribed form of identity card (Regulation 187)	Applies to an authorised officer					\$1,000
False or misleading documents (Regulation 191)	Applies to an authorised officer					\$2,000

14. COMPLAINTS

14.1 COMPLAINTS TO THE REGULATORY AUTHORITY



National Law

Section 260

Regulatory authorities are responsible for investigating complaints that have come directly to them about approved providers and services. A complaint is a communication stating something about a provider or service is unacceptable or unsatisfactory.

Regulatory authorities may receive complaints from:

- a parent, authorised nominee or child
- a staff member or volunteer at an education and care service
- a nominated supervisor
- another person.

A person may not expressly state that they are making a complaint.

Complaints may be made in a variety of ways, such as email, mail, fax and phone or in person.

Regulatory authorities should only accept complaints about centre-based services if the service is operating in their jurisdiction. When a complaint is about a family day care educator, the regulatory authority should liaise with the relevant regulatory authority where the educator's service is located.

If a complaint should have been directed to another jurisdiction, the regulatory authority should immediately notify the approved provider or redirect the complaint, or both.

Regulatory authorities will receive notifications about certain complaints received by approved providers, as required by section 174 of the National Law (see *Operational Requirements – Governance and leadership* for more information about notifications).

Other internal departmental policy or protocols may be in place for responding to complaints.

See the Australian Standards on complaints handling or the Commonwealth Ombudsman's *Better Practice Guide to Complaint Handling* at www.ombudsman.gov.au for more detailed guidance.

Referring a complaint to the approved provider

Where a complaint (and any relevant background information) does not indicate a real and serious or immediate risk to the safety, health or wellbeing of a child or children, the regulatory authority may refer the complaint to the approved provider.

This is most likely to be appropriate for low risk complaints that have been directed to the regulatory authority in the first instance and the approved provider has not yet had an opportunity to try and resolve the issue.

Where this occurs, the regulatory authority should advise the complainant of the intended process and advise that they may contact the regulatory authority again if they are not satisfied with the provider's response.

An approved provider's response to a complaint can be examined during a monitoring visit, and at an assessment and rating visit when looking at Quality Area 7 of the National Quality Standard. An approved provider must have policies and procedures about dealing with complaints and must ensure they are followed (regulations 168, 170). This applies to complaints received directly from parents or other people, and those referred to the approved provider by the regulatory authority (see *Operational Requirements – Governance and leadership*).

14.2 ONCE A COMPLAINT HAS BEEN RECEIVED

Once a complaint has been received, the regulatory authority will generally conduct a risk assessment to determine the appropriate response.

Regulatory authorities may have their own guidance or framework for managing complaints.

Risk assessment

When conducting a risk assessment in response to a complaint about an education and care service or approved provider, a key thing to consider is the nature of the complaint itself. For example, whether the subject of the complaint suggests a real and serious or immediate risk to the health, safety and wellbeing of a child or children and whether it alleges that the safety, health or wellbeing of a child or children may have been compromised or there may have been a contravention of the National Law. In addition, the regulatory authority should consider:

- the compliance history of the approved provider
- the nature of any previous complaints against the service or provider.

High

Where the risk assessment indicates that there is a high risk to children and a high likelihood of harm eventuating, investigation into the complaint is a priority. Regulatory authorities should also consider whether other regulatory bodies need to be notified, such as the police or a child protection agency.

Medium

Where the risk assessment indicates a moderate risk to children and a moderate likelihood of harm eventuating, the complaint should be investigated as soon as reasonably practicable.

Low

Where the risk assessment indicates a low risk or no risk to children and a low likelihood of the harm eventuating, the complaint should be investigated in the normal course of the regulatory authority's work.

See *Good Regulatory Practice* for more information about how to conduct a risk assessment.



National Law

Section 263

Complaints about privacy

The National Law provides individuals with a right to complain to the National Education and Care Services Privacy Commissioner (NECS Privacy Commissioner) if they feel that a regulatory authority or ACECQA has mishandled their personal information. Contact details for the NECS Privacy Commissioner are available at www.necsopic.edu.au.



National Law

Section 264

Complaints about freedom of information

The National Law also provides individuals with a right to complain to the National Education and Care Services Freedom of Information Commissioner (NECS FOI Commissioner) if they are not satisfied with how their freedom of information request has been handled by a regulatory authority or ACECQA. Contact details for the NECS FOI Commissioner are available at www.necsopic.edu.au.



National Law

Section 282

Complaints about administrative actions

People with complaints about the administrative actions of ACECQA and regulatory authorities may complain to the Education and Care Services Ombudsman (about ACECQA) or the state or territory ombudsman of that jurisdiction (about regulatory authorities). It is important to remember that an ombudsman will not look at the decision itself but rather the process by which the decision was reached.

Contact details for each ombudsman are set out below.

Jurisdiction	Ombudsman	Website
ACECQA	ECS Ombudsman	necsopic.edu.au
Australian Capital Territory	ACT Ombudsman	ombudsman.act.gov.au
New South Wales	NSW Ombudsman	ombo.nsw.gov.au
Northern Territory	Ombudsman NT	ombudsman.nt.gov.au
Queensland	Queensland Ombudsman	ombudsman.qld.gov.au
South Australia	Ombudsman SA	ombudsman.sa.gov.au
Tasmania	Ombudsman Tasmania	www.ombudsman.tas.gov.au
Victoria	Victorian Ombudsman	ombudsman.vic.gov.au
Western Australia	Ombudsman Western Australia	ombudsman.wa.gov.au

Responding to a complaint

Once the regulatory authority has investigated a complaint, it should determine and implement an appropriate response. See *Good Regulatory Practice* for more information on how to determine a response and on keeping records of investigations and decisions.

Regulatory authorities should endeavour to communicate actions and outcomes to the complainant and the person who is the subject of the complaint taking into account the requirements of the *Commonwealth Privacy Act 1988* as modified by the National Regulations. Outcomes should also be recorded on the National Quality Agenda IT System.

Complaints outside the scope of the National Quality Framework

In some instances, complaints to the regulatory authority will be about matters outside the scope of the National Law and Regulations. For example, complaints about racial discrimination, fees and charges, or lack of available parking near an education and care service. Where the regulatory authority finds a complaint is out of scope of the National Law and Regulations, it should notify the complainant immediately and explain to the person that:

- the complaint is out of scope of the National Quality Framework
- who the complaint should be directed to (if known).

See *Operational Requirements – Other regulatory frameworks* for more information.

GOOD REGULATORY PRACTICE

15. GOOD REGULATORY PRACTICE

15.1 WHY ARE REGULATORY AUTHORITIES REGULATING?

Regulatory authorities and the Australian Children's Education and Care Quality Authority (ACECQA) are regulating to:

- further the objectives of the National Law
- influence the behaviour of providers, nominated supervisors and educators in ways that are consistent with these objectives, and improve outcomes for children
- fulfil their obligations under the National Law and Regulations.

Objectives of the National Law

The National Law's objectives are shared by regulatory authorities and ACECQA and underpin regulatory actions and decisions.

The objectives are set out below.

- ensure the safety, health and wellbeing of children attending education and care services
- improve the educational and developmental outcomes for children attending education and care services
- promote continuous improvement in the provision of quality education and care services
- establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the NQF
- improve public knowledge, and access to information, about the quality of education and care services
- reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.

Best practice regulation principles

Regulatory authorities and ACECQA are guided by best practice regulation principles in the day-to-day implementation of the National Law.

The nine principles below apply to all regulatory work, from education and information giving, to investigation and enforcement.

1. Outcomes focused

Regulatory actions should not be seen as ends in themselves. They should promote improved quality outcomes for children and families, and further the objectives of the National Law.

All activities of regulatory authorities should:

- be clearly focussed on the underlying regulatory objectives
- represent the course of action(s) that is likely to achieve these objectives in the most effective and efficient manner
- be integrated and aligned, that is, they work towards common purposes and objectives
- be flexible and innovative, achieving the best regulatory outcome in the particular circumstances of each case.

Regulatory authorities should be guided by evidence and the objectives of the National Law to regularly review the effectiveness of regulatory actions.

2. Proportionality and efficiency

The design and application of regulation should be proportionate to the problem or issue it is seeking to address. Proportionality involves ensuring that regulatory measures do not 'overreach', or extend beyond achieving an identified objective or addressing a specific problem. The scope and nature of regulatory measures should match the benefits that may be achieved, by improving outcomes for children or families, or reducing risk of harm.

Regulatory effort should also be focussed where it will generate the greatest benefits from the resources employed. Actions should be targeted at areas where the largest gains can be made. Regulatory authorities should prioritise effort and resources to areas where, based on the available evidence, the potential benefits and risks are more significant.

3. Responsiveness and flexibility

Regulatory authorities should be responsive and flexible by:

- considering the full range of options available to them
- tailoring their approach to account for the circumstances of each individual case
- focusing on consistency of outcome
- regularly reviewing their practice and operational policy to ensure it is evidence based, remains relevant and appropriate to changes in the sector.

Regulatory authorities should be responsive to the particular circumstances of each region, location and provider. Regulatory authorities may adopt different approaches to the same or similar issues, owing to, for example, the prevalence of that issue, compliance history, the particular importance of the issue or other relevant differences across jurisdictions, or within a jurisdiction.

Regulatory authorities should encourage and not constrain appropriate and desirable innovation by education and care providers, within the bounds of regulatory requirements.

4. Transparency and accountability

Regulatory actions should be open and transparent to encourage public confidence and provide certainty and assurance for regulated entities.

Legislation should be fairly and consistently administered and enforced and, where relevant, regulatory authorities should explain the reasons for their decisions.

Regulatory authorities should also be accountable for the actions they take, and welcome public and sector scrutiny, including the regular reporting of performance information.

In general, the design and administration of regulation should provide for transparent and robust mechanisms to appeal against decisions made by regulators.

5. Independence

Regulatory authorities should ensure the integrity and objectivity of regulatory actions. Where regulatory authorities exercise powers or make decisions, this should be done in the absence of actual or perceived conflicts of interest or other relationships, measures or influences that may impinge, or be seen to impinge, upon their objectivity.

Abiding by this principle should not jeopardise having constructive working relationships between regulators and regulated entities.

6. Communication and engagement

Regulatory authorities operate in a dynamic context made up of a broad range of stakeholders, including:

- government agencies (for example, policy agencies, other regulators)
- the regulated sector (including providers, supervisors and educators)
- peak bodies
- service users (i.e. children and families)
- the broader community.

Engaging appropriately with each stakeholder group makes regulatory activities more efficient and effective, for example:

- exchanging operational information with other government agencies can inform better policy development, and mutually improve regulatory decision-making
- appropriate relationships with the regulated sector can facilitate more effective educative and advisory regulatory approaches, as well as enabling the

regulator to obtain valuable feedback and information that improves its own performance

- outward communication of performance and outcomes to service users and the broader community supports better information and decision-making, as well as greater transparency and public accountability.

7. Mutual responsibility

Regulatory authorities should acknowledge the primary responsibility of education and care providers, their owners, managers and staff, for maintaining and improving the quality of their services.

Providers, supervisors and educators are responsible for meeting their obligations under the National Law and Regulations, for ensuring the safety, health and wellbeing, and improving the educational and developmental outcomes of children in their care.

The role of regulatory authorities is to administer the National Law and Regulations, promoting quality improvement through exercising the powers and functions given to them by the legislation.

8. Consistency and cooperation across jurisdictions

Cooperation and coordination between the jurisdictions is critical to ensure efficiency, consistency and predictability of regulatory systems. It can also ensure that scarce public resources are employed efficiently, reducing duplication of regulatory effort and improving effectiveness.

Central to achieving cooperation across regulatory authorities is agreement on the sharing of data and information to the greatest extent possible within the limits of the law.

Regulatory authorities should also share evidence, experimentation, experience and policy initiatives to facilitate the adoption of best practice across jurisdictions.

9. Awareness of the broader regulatory environment

Regulatory authorities should be aware of the existence of other relevant and overlapping regulatory schemes, the role these schemes perform and the obligations they impose on businesses and other organisations.

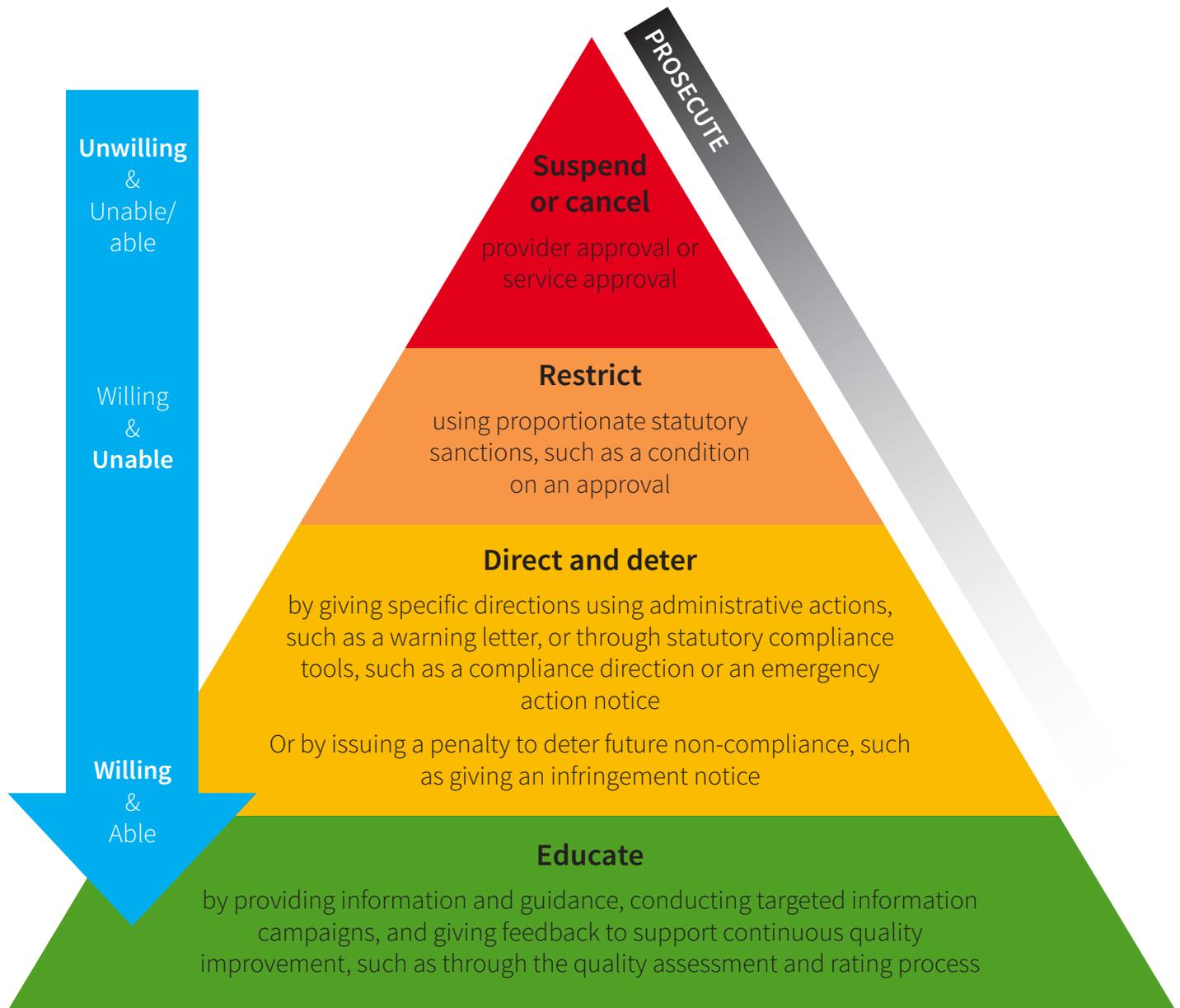
Regulatory authorities should:

- minimise the duplication of regulatory obligations, impositions and effort
- cooperate and coordinate information sharing.

For those jurisdictions where some or all preschool services are delivered through the government school system, regulatory action should be cognisant of the policy and regulatory environment in that system.

Other relevant regulatory systems could include those relating to:

- child protection
- occupational health and safety
- planning
- food safety.



15.2 REGULATORY PRACTICE DIAGRAMS

Ayres and Braithwaite enforcement pyramid

In their book, *Responsive Regulation: Transcending the deregulation debate*, Ian Ayres and John Braithwaite suggest a responsive compliance model. This model can be depicted as a pyramid, its shape indicating the:

- number of entities (i.e. service providers and others with liabilities under the legislation) likely to be found at each level of the model
- hierarchical and escalating nature of regulatory engagement
- increasing focus towards the top of the pyramid on the small minority of entities that appear to deliberately not comply.

The responsive compliance model is dynamic and allows versatility in managing non-compliance. The model's strength is that it allows regulatory authorities to identify the best remedy for the particular situation. This includes taking into account an entity's efforts to comply. Having a set of graduated responses enables the regulatory authority to:

- respond in a way that is proportionate to the risk
- escalate regulatory action
- de-escalate regulatory action
- minimise costs associated with a response.

The diagram above is adapted from a version of the regulatory compliance pyramid published in the *Australian National Audit Office Better Practice Guide*. The vertical arrow demonstrates the range of responses to regulation. Providers and other people with obligations under the legislation who are willing and able to respond to regulation comply most of the time. Those who are unwilling and/or unable to respond require more persuasive deterrents and remedies. The responsive compliance pyramid model is also consistent with the principle of earned autonomy, where regulatory intervention is focussed towards those who are unwilling and/or unable to comply.

Prosecutions: Bring an offence against the National Law or Regulations for decision by a court or tribunal.

Statutory sanctions: Cancellations, suspensions, conditions, infringement notices, compliance notices, compliance directions, enforceable undertakings, emergency action notices, prohibition notices, direction to exclude an inappropriate person.

Administrative actions: Additional monitoring, meetings, warning letters or cautions.

Information and guidance: Factsheets, newsletters, FAQs, helplines, campaigns, capacity-building, practice notes and guidelines.

15.3 ASSESSING RISK TO CHILDREN



National Law

Sections 3–4

When exercising functions under the National Law, regulatory authorities must consider the Law’s objectives and guiding principles. These include ensuring the safety, health and wellbeing of children attending education and care services, and improving their educational and developmental outcomes. They also include promoting continuous improvement in the provision of quality education and care services.

To fulfil this responsibility, regulatory authorities often need to assess the level of risk to children at education and care services. The guidance below is to help regulatory authorities carry out a risk assessment and determine appropriate follow up action.

What is risk?

The National Law and Regulations do not define ‘risk’. A common tool used to analyse the level of risk is a risk matrix (see below). This tool helps identify the level of risk by looking at how likely it is a negative event may occur, and the severity of the consequence should it occur.

Risk can arise:

- through any part of the environment where education and care is provided to children including the physical environment, staff members and other people at the service
- from an action or through a failure to act
- from systemic failure, such as a provider not having adequate systems in place to control for risk.

Risk Matrix

		Likelihood					
		Rare	Unlikely	Possible	Likely	Almost Certain	
Consequences	Major	Moderate	High	High	Critical	Critical	
	Significant	Moderate	Moderate	High	High	Critical	
	Moderate	Low	Moderate	Moderate	High	High	
	Minor	Very low	Low	Moderate	Moderate	Moderate	
	Insignificant	Very low	Very low	Low	Moderate	Moderate	

Likelihood

The risk matrix includes five levels of likelihood, which are described below. When thinking about likelihood, regulatory authorities should take into account factors such as history of compliance, as well as readiness, willingness and ability to comply. It is also important to consider how soon an event might occur, as this will help decide the most suitable action for responding to the risk.

Likelihood	Description
Rare	Very unlikely – the event may occur only in exceptional circumstances
Unlikely	Improbable – the event is not likely to occur in normal circumstances
Possible	Potential – the event could occur at some time
Likely	Probable – the event will probably occur in most circumstances
Almost certain	Very likely – the event is expected to occur in most circumstances

Consequence

The risk matrix includes five levels of consequence: insignificant, minor, moderate, significant and major. This takes into account the impact, or potential impact, of an event including its scale and duration. A consequence might affect the safety and wellbeing of children at the service, their family or the wider community.

When analysing the consequences of a potential event, regulatory authorities should consider the vulnerability of people who might be affected. For instance, very young children or children with a disability may be particularly vulnerable, because they are less able to act to protect their wellbeing.

Harm to children might arise as the result of a single incident or from several incidents that occur over time. This is known as cumulative harm.

Risk prioritisation

A risk matrix helps work out the priority of a particular risk. This can help regulatory authorities determine which risks to address first. The priorities in the above risk matrix are: very low, low, moderate, high and critical.

Monitoring, Compliance and Enforcement has information about tools available to regulatory authorities, which can be used to compel providers to reduce risks to children.

Once the regulatory authority has taken action to compel the approved provider to reduce the risk, it can reassess the level of risk to children using the risk matrix. If it considers the risk to children is still moderate or greater, the regulatory authority should consider further options for compelling the provider's compliance. The aim is to reduce the level of risk to very low or low. However, depending on the circumstances, regulatory authority may decide to act to address a low or very low level risk, as there may be ways of further reducing the risk or removing it entirely.

Unacceptable risk

The term 'unacceptable risk' appears in a number of provisions in the National Law and Regulations (see table below). The National Law and Regulations do not define 'unacceptable risk'. This is because the nature and degree of risk to children will vary depending on the particular circumstances.

The National Law allows regulatory authorities to prevent a provider or service from operating if the regulatory authority is satisfied there is an unacceptable risk to the health, safety or wellbeing of children at the service. In the case of a prohibition notice, the regulatory authority can prevent a person from having any involvement with any service if they are satisfied there is an unacceptable risk.

The regulatory authority may consider there is an unacceptable risk if the operation of the service has resulted in harm to children, and there are no options for effectively reducing the risk to children. For example, the regulatory authority may have made previous attempts to ensure the provider reduces or eliminates risk to children, without success.

Because risk includes analysing potential consequences, the regulatory authority might also be satisfied there is an unacceptable risk to children even where no child has been harmed.

Regulatory authorities can use the risk matrix to help determine whether a risk is unacceptable. It is likely that a risk that falls into the 'critical' category will be unacceptable, but regulatory authorities should always use their judgement and take into account the specific circumstances when determining appropriate action.

Provisions with reference to unacceptable risk to children

S 31	Grounds for cancellation of provider approval	<p>The regulatory authority may cancel a provider approval if it is satisfied that the continued provision of education and care services by the approved provider would constitute an unacceptable risk to the safety, health or wellbeing of any child or class of children being educated and cared for by an education and care service operated by the approved provider.</p> <p><i>See Applications and Approvals for more information on cancelling a provider approval.</i></p>
S 49	Grounds for refusal to grant service approval	<p>The regulatory authority must refuse to grant a service approval if it is satisfied that the service, if permitted to operate, would constitute an unacceptable risk to the safety, health or wellbeing of children who would be educated or cared for by the education and care service.</p> <p><i>See Applications and Approvals for more information on refusing to grant a service approval.</i></p>
S 77	Grounds for cancellation of service approval	<p>A regulatory authority may cancel a service approval if it reasonably believes that the continued operation of the education and care service would constitute an unacceptable risk to the safety, health or wellbeing of any child or class of children being educated and cared for by the education and care service.</p> <p><i>See Applications and Approvals for more information on cancelling a service approval.</i></p>
S 182	Grounds for giving prohibition notice	<p>The regulatory authority may give a prohibition notice to a person who is in any way involved in the provision of an approved education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed to remain on the education and care service premises or to provide education and care to children.</p> <p><i>See Monitoring, Compliance and Enforcement for more information on issuing a prohibition notice.</i></p>
R 25	Additional information about proposed education and care service premises	<p>An application for a service approval for a centre-based service must include a statement made by the applicant that states that, to the best of the applicant's knowledge the site history does not indicate that the site is likely to be contaminated in a way that poses an unacceptable risk to the health of children.</p> <p><i>See Applications and Approvals for more information on service approval applications.</i></p>

15.4 GOOD DECISION-MAKING

Good decision-making refers to the lawful and proper exercise of public power. Public power is the power vested in government agencies to make decisions which impact on the rights, interests and legitimate expectations of individuals. Administrative law regulates the exercise of public power by defining the extent of the power and by giving individuals the right to challenge decisions made by government.

Preparing to make the decision

Before making a decision, decision-makers must ensure they have prepared appropriately. This involves identifying and recording key issues, creating and maintaining a document trail, checking any legal requirements and identifying the limits of the available decision-making power.

Checking delegation

Decision-makers must check they are authorised to make the decision. If the decision-maker does not have the power to make the decision, the decision may not be lawful. If the law does not give the decision-maker the power to make the decision themselves, they need to check if this power has been delegated to them. When a person with the authority to make a decision passes the power to someone else, it is called a delegation. Delegations are often specific to a position and are generally outlined in an operational document.

Authorised officers should check which decisions they are authorised to make and be aware that sometimes the authority to make a decision will rest with someone else within the regulatory authority.

The person with the authority to make the decision is responsible for ensuring the decision is made properly.

Power under the law

The power to make a decision, and the limits on that power, are set by acts of parliament (for example the National Law), associated instruments (for example the National Regulations) and case law (law made by courts).

For example, the National Law sets out the types of decisions regulatory authorities can make about applications for provider or service approval, or for an amendment to, or suspension of, an approval.

Guidelines and policies

Government agencies, generally, have guidelines and policies to help guide decision-makers. However, decision-makers must remember that policy cannot override the law. Although relevant policy should be considered when making a decision, policy must be applied reasonably and consistently with the law. Decision-makers must not make a decision without considering the merits of the particular case.

Timeframes

When a timeframe for making a decision is included in the legislation, for example, ‘30 days after receiving an application’, these timeframes must be adhered to. The National Law specifies that for provider and service approval applications, failing to make a decision within the set timeframe, including timeframes extended under the legislation, will automatically result in a ‘deemed refusal’ of the application.

A deemed refusal gives the applicant the right to apply for a review as if the regulatory authority had made a decision to refuse the application. Where a regulatory authority is aware that it will not meet (or is not likely to meet) the timeframe set out in the legislation, it should notify the applicant and, wherever possible, give an indication of when the decision will be made.

For applications without a ‘deemed refusal’ provision, if the regulatory authority does not make a decision within the legislated timeframe, an applicant may follow up the decision in a range of ways, including by involving the relevant ombudsman. In any case, best practice is to inform applicants of any delays or potential delays in deciding an application.

Considering the decision

Decision-makers must consider all relevant documents and information to ensure a fair and informed decision. They must not take any irrelevant documents or information into account.

Decision-makers must ensure they have fully considered all available evidence, particularly when the decision-maker did not personally collect the evidence.

The National Law sets out what the regulatory authority must consider when deciding an application and, generally, does not limit the regulatory authority from considering any other relevant matter.

To ensure accountability and transparency, decision-makers should always maintain accurate and complete records of the information that informs their decision.

Natural justice

The terms ‘natural justice’ and ‘procedural fairness’ are often used interchangeably.

Natural justice means that any person who may be affected by the decision is given a chance to a fair hearing, with full knowledge of their rights and responsibilities, before a decision is made.

Natural justice must be given when the rights, interests or legitimate expectations of individuals may be affected by the exercise of power (i.e. when a decision may not be in favour of the person). However, it is best practice to always give natural justice even when a decision may appear to be in favour of an affected person.

Natural justice has three main elements:

- the notice requirement
- the hearing rule
- the bias rule.

The notice requirement

A person affected by the decision must be notified of any issues in enough detail to allow them to participate or respond in a meaningful way. This may require the decision-maker to present the person with material that may be unfavourable to them.

The National Law includes a number of ‘show cause’ provisions that underline the principles of natural justice. ‘Show cause’ provisions aim to ensure affected individuals are aware of the decision-maker’s intention, the reasons why the decision-maker is considering making the decision, and give an opportunity to respond.

‘Show cause’ provisions apply to prohibition notices and the suspension or cancellation of provider and service approvals.

A ‘show cause’ provision also applies to the suspension of education and care by a family day care educator. However, this ‘show cause’ provision is discretionary. Regulatory authorities should still consider natural justice obligations, despite the discretion.

The hearing rule

Decision-makers must provide any affected person with a reasonable opportunity to respond to material provided by the decision-maker. The hearing rule ensures the decision-maker has taken any responses into account in making the decision. The hearing rule does not require a formal ‘hearing’ – the affected person could be provided with an opportunity to respond in writing.

The bias rule

Decision-makers must act impartially and not in their own interests. To maintain public confidence in the integrity of the system, the rule also requires that the decision-maker is not perceived as being biased.

Bias may arise from a conflict of interest or from the impression that the decision-maker has made a judgment on the issue without considering all relevant factors or by considering irrelevant factors.

While a conflict of interest does not always demonstrate a decision-maker’s inability to make an impartial judgment, it is generally considered best practice to employ a different decision-maker to avoid the perception of bias.

Making the decision

Once the relevant information and documents have been collected and all affected people have been afforded natural justice, decision-makers need to establish the facts. In establishing the facts, decision-makers must consider all available evidence before deciding which facts are relevant to the decision and which should be discarded due to irrelevance. It is crucial that decision-makers establish facts based on clear evidence.

Decision-makers can consult with other officers and refer to policies and guidelines to help them make a decision, but they must act independently, not at the direction of others, when making a decision. See **Reviews** for more information about best practice decision-making when conducting reviews.

After determining the relevant facts, the decision-maker must apply the relevant legislation to the facts. Where there is uncertainty about the interpretation of the law, the decision-maker should take into account the objectives and purpose of the legislation. Decisions made under the National Law should consider the objectives and guiding principles.

When a decision is made under a power granted by legislation, it is important that the relevant legislation is correctly interpreted and applied. If the decision-maker is in doubt about the interpretation, they should seek legal advice.

Once the decision is made, the decision and all supporting evidence should be kept on record. The decision-maker should also document all matters that were taken into account when making the decision. Decision records must generally include the information outlined below, and should be accompanied by a statement of reasons explaining the decision.

Explaining, recording and communicating the decision

Decisions in the public sector are recorded in a variety of ways. The record of a decision must be a standalone record that can be read without reference to a file and should include the following information:

- the date
- who the decision is about
- what the decision is
- who the decision-maker is
- the signature of the decision-maker.

A statement of reasons isn't always required for a decision, however, an affected person may request reasons; sometimes a long time after the decision has been made. For this reason, it is best practice to record a statement of reasons at the time the decision is made.

Individuals may access information, including decision-making documentation, from government agencies under Privacy and Freedom of Information legislation.

A statement of reasons should be clear, unambiguous, jargon-free and easily read and understood by the affected persons.

Generally, statements of reasons should include the following information:

- the decision-maker's findings on the facts
- reference to, or copies of, documents, evidence and relevant information considered in making the decision
- a meaningful statement of reasons addressing all the critical issues and any adopted recommendations, clearly explaining the decision-maker's understanding and application of the law
- the identified grounds for review.