

6. REVIEWS

Privacy and Freedom of Information

Reviews





REVIEWS

CONTENTS

1. Reviews	601	2. Privacy and Freedom of Information	610
1. Internal merits review	601	5. Complaints about privacy	611
1.1 Internally reviewable decisions	601	5.1 Addressing privacy breaches	611
1.2 Application for internal review	602	6. Freedom of information	612
1.3 Conducting an internal review	603	6.1 Applications under the FOI Act	612
2. External Review	606	6.2 Review of FOI decisions and complaints about FOI	613
2.1 Externally reviewable decisions	606	6.3 Disclosure of information	613
2.2 Application for external review	606		
2.3 Determining an application for external review	607		
3. Judicial review	608		
4. Review of the administrative process by an Ombudsman	609		

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REVIEWS

This chapter gives an overview of a person's right to challenge a decision made by a regulatory authority which has negatively impacted an individual's rights, interests or legitimate expectations.

The *Good Regulatory Practice* chapter provides regulatory authorities with guidance about ensuring the decisions they make are 'lawful' and, therefore, better able to withstand challenges.

Following most administrative decisions in the public sector, if a person is affected by a decision they can challenge the decision, or the administrative process used to reach it, using one or more mechanisms for review. These mechanisms are generally referred to as 'review rights' and include:

- a statutory right to have a decision reviewed on its merits (also known as 'merits review')
- judicial review
- a review of the administrative process by an Ombudsman.

The National Law provides for both internal review, conducted by the regulatory authority responsible for the initial decision, and external review, conducted by the relevant court or tribunal. A person may also be able to seek judicial review of a decision under state or territory law.

1. INTERNAL MERITS REVIEW

1.1 INTERNALLY REVIEWABLE DECISIONS

An internal review gives a person the opportunity to have a decision reconsidered by the regulatory authority. An internal review is a merits review, which means it allows a new decision-maker to take a fresh look at the matter, with full consideration of all relevant facts, policies and law. This may involve a review of the entire decision, including evidence.

The National Law sets out which decisions made by regulatory authorities are internally reviewable. These are outlined in the table below.

Internally reviewable decisions (section 190)	
Provider approvals	<ul style="list-style-type: none">• Refusal to grant provider approval• Amendment of provider approval• Refusal to amend provider approval• Impose a condition on provider approval• Suspend provider approval without a show cause notice
Service approval	<ul style="list-style-type: none">• Refusal to grant service approval• Amendment of service approval• Refusal to amend service approval• Impose a condition on service approval• Suspend service approval without a show cause notice• Refuse to consent to transfer of service approval• Revoke a servicewaiver
Other	<ul style="list-style-type: none">• Issue a compliance direction• Issue a compliance notice

If the application is not for an internally reviewable decision, regulatory authorities should contact the applicant to inform them that the application is invalid and can be refused.

Regulatory authorities should notify the applicant of any other avenues to have the decision reviewed. In some instances, this may mean an external review. External review includes review of the administrative decision-making process by an ombudsman.

Note: Quality rating decisions are also subject to review. This process is informally referred to as first tier review and second tier review and is set out in sections 141 and 144 of the National Law.

For more information, see *Assessment and Rating* and the *Guidelines for First Tier Review and Second Tier Review* on the ACECQA website at www.acecqa.gov.au.

1.2 APPLICATION FOR INTERNAL REVIEW



National Law & Regulations

Sections 190–191,
141–143
Regulation 186

A person who is the subject of an internally reviewable decision may apply to the regulatory authority for review.

The person must apply in writing to the regulatory authority that made the decision within 14 days after being notified of the decision (or within 14 days of becoming aware of the decision if they are not notified).

Information that must be included in an application for internal review is set out in the table below.

Information that must be included in an application for internal review

The name of the applicant

Contact details for the applicant, including an address for notification of the decision

Provider approval number or service approval number to which the decision relates

The full name of the person to whom the provider approval or service approval was granted

A statement setting out:

- the details of the decision, or part of the decision, for which review is sought
- how the decision affects the applicant
- the grounds for seeking a review of the decision

Any information that the applicant considers relevant to the review.

Applications and notifications can be submitted to the regulatory authority online using the National Quality Agenda IT System at www.acecqa.gov.au.

Incomplete applications

The timeframe for processing an application does not begin until an application is 'valid', meaning complete with all the prescribed information.

If an application does not include all prescribed information the regulatory authority may treat the application as invalid and request missing information be provided within a set timeframe.

The National Law does not specify how much time applicants have to provide this information once requested by a regulatory authority. Regulatory authorities will set timeframes taking into consideration:

- the amount and complexity of the information requested
- the applicant's capacity to provide information in that timeframe
- whether a timeframe applies to when the applicant must submit the application.

If an applicant does not supply the information requested by the regulatory authority, a record of the incomplete application must be retained.



National Law

Section 191

Timeframe for conducting internal review

An internal review must be conducted within 30 days after the application is made. This period may be extended by up to 30 calendar days if the regulatory authority requests more information, or with the agreement of the applicant.

1.3 CONDUCTING AN INTERNAL REVIEW



National Law

Section 191

An internal review must be conducted by a person who was not involved in the assessment or investigation of the person or service.

The person conducting the review may ask the applicant for more information.

How is a review conducted?

An internal review is a merits review, which means it allows a new decision-maker to take a fresh look at the matter, with full consideration of all relevant facts, policies and law (see *Good Regulatory Practice* for more information about what type of information must be included in a decision record).

In a merits review, the new decision-maker is expected to make the 'correct and preferable' decision and may sometimes consider new evidence. New evidence should be considered where it is relevant and will help the decision maker come to the correct and preferable decision. In some cases, this may mean that a decision made during merits review is based on factors that were not present at the time of the original decision. For this reason, a different decision on a merits review does not necessarily indicate that the original decision was 'incorrect'.

Even if there was no error of fact or law when the first decision was made, the decision-maker for the review might exercise their discretion or judgement in a different way, making a different decision.

An internal review is a review of the original decision only, so cannot consider a different application. For example, a review on a decision to reject an increase to the maximum number of children at a centre-based service cannot consider a request for a smaller increase to the maximum number of children. The review can only reconsider the original request. If an applicant wishes to change the nature of an application that has been rejected, the applicant should submit a new application, rather than request an internal review.

Who should conduct a review?

Any person conducting the review must not have been involved in the assessment or investigation of the person or service that was the subject of the decision. This means that the original decision-maker, as well as staff who were involved in collecting evidence, making an assessment or preparing a recommendation for the original decision cannot conduct the review. While the conducting officer will most likely be from the same department, where possible the conducting officer should be from a different team.

The person(s) making the review decision should have:

- access to all relevant information, including information submitted by the applicant in the review application, and all information used by the regulatory authority in making the original decision
- relevant knowledge of administrative processes and requirements
- a solid understanding of the relevant provisions of the National Law and Regulations, in particular the requirements relating to reviews
- effective communication skills
- conflict resolution skills to aid working with the applicant and staff within the regulatory authority.

What is the process for conducting a review?

The process for conducting a review is set out below.

Review process	
Step 1	Receive request for review and decide whether it has been provided within 14 days of the applicant having been notified of the original decision (or within 14 days of the applicant becoming aware of the decision if they were not notified). <i>If the request has not been received in the required timeframe, the application is not valid and must be refused.</i>
Step 2	Register request for review on the NQA IT System. The regulatory authority has 30 days to conduct the review.
Step 3	Acknowledge receipt of the application.
Step 4	Assign request for review to an individual officer or a panel, making sure the officer or panel members were not involved in the original decision.
Step 5	Validate the application by: <ul style="list-style-type: none">• checking the regulatory authority has the power to conduct an internal review of the decision• checking the application form is complete• ensuring all supporting documentation referenced in the application has been included• determining whether the grounds for the review have been satisfied (if the legislation specifies the grounds for requesting a review) and decide if further information is needed. <i>If the request is not for review of a reviewable decision, it is invalid.</i>

Step 6	<p>If required, seek further information from the applicant and staff of the regulatory authority such as:</p> <ul style="list-style-type: none"> • evidence of the grounds for requesting review • notes, evidence or any other information considered in original decision • comment on the grounds of the request for review from those involved in the original decision • any other relevant information required, as determined by examining the information provided by the applicant and/or regulatory authority staff involved in the original decision. <p><i>The timeframe for conducting the review is extended by 30 days if more information is requested from the applicant. The timeframe may also be extended by 30 days with the agreement of the applicant.</i></p>
Step 7	<p>Assess the application. In some situations the regulatory authority may decide to seek legal advice on a request for review.</p>
Step 8	<p>Consistent with the principles of good decision-making (set out in <i>Good Regulatory Practice</i>), determine whether to affirm the original decision or make a new decision.</p> <p><i>The person making the decision must confirm that they have the appropriate delegation to do so under the National Law.</i></p>
Step 9	<p>Prepare a statement of reasons, clearly setting out the basis for the decision.</p>
Step 10	<p>Notify applicant of the decision and provide the statement of reasons. Notification should also include information about the applicant's right to external review by a tribunal or court (if applicable), or by an ombudsman.</p> <p>(Refer to the table of contacts in <i>Review of the administrative process by an ombudsman</i>, below).</p>

2. EXTERNAL REVIEW

2.1 EXTERNALLY REVIEWABLE DECISIONS



National Law

Section 192

The National Law sets out which decisions made by regulatory authorities are externally reviewable. These are outlined in the table below.

Externally reviewable decisions

Made by the regulatory authority as a result of an internal review (other than in relation to the issue of a compliance direction or compliance notice)

To suspend a provider approval or service approval after the show cause process

To cancel a provider approval or service approval after the show cause process

To direct an approved provider of a family day care service to suspend the education and care of children by a family day care educator

To give a prohibition notice or to refuse to cancel a prohibition notice.

A person is not entitled to external review of a decision to suspend or cancel a service approval if that suspension or cancellation relates only to an associated children's service. Any right of review would be under the relevant children's services law.

2.2 APPLICATION FOR EXTERNAL REVIEW



National Law

Section 193

A person who is the subject of an externally reviewable decision may apply to the relevant court or tribunal for a review of the decision (see the *Glossary* for details of the relevant court or tribunal in each jurisdiction).

The application must be in writing within 30 calendar days after being notified of the decision.

The National Law does not stipulate or limit the grounds on which a person can apply for external review.

An external review conducted by a tribunal is typically a merits review, whereas a review conducted by a court is usually a judicial review.

2.3 DETERMINING AN APPLICATION FOR EXTERNAL REVIEW



National Law

Section 193

After hearing the matter, the relevant court or tribunal may:

- confirm the regulatory authority's decision
- amend the regulatory authority's decision, or
- make a new decision.

When determining an application for external review, the tribunal or court may consider any decision of a tribunal or court in another state or territory, made under the National Law.

3. JUDICIAL REVIEW

Judicial review involves the review of a decision by a court. In this process, the court addresses the lawfulness of the decision. The court does not review the case based on its merits. Rather, the court seeks to answer the question: 'Was the decision lawful?'

In general, a judicial review does not allow new evidence to be admitted and does not attempt to determine the 'correct and preferable' decision.

Where regulatory authorities and tribunals may substitute decisions during the merits review process, courts will generally:

- set aside a decision
- direct decision-makers to address the matter again, following any recommendations made by the court
- make a declaration, or
- make an order preventing, or specifically directing, any action.

Generally, an application for external judicial review is sought on the following grounds:

- the decision-making process involved an error of law
- a breach of the rules of natural justice occurred in the decision-making process
- irrelevant matters were taken into consideration (or relevant matters were not taken into consideration)
- the exercise of the decision-making power was unreasonable, or
- a decision-making power was exercised improperly; either by a person unauthorised to make the decision, or for an unauthorised purpose.

See *Good Regulatory Practice* for more information about natural justice.

4. REVIEW OF THE ADMINISTRATIVE PROCESS BY AN OMBUDSMAN



National Law & Regulations

Sections 5, 282
Regulations 218–225

Relevant state and territory ombudsman legislation applies to decisions made by regulatory authorities. The *Ombudsman Act 1976* (Commonwealth) as applied through the National Law applies to decisions made by ACECQA.

The decision-making processes and conduct of regulatory authorities are subject to scrutiny by the relevant state or territory ombudsman and the relevant ombudsman legislation. Decisions made by ACECQA are overseen by the Education and Care Services Ombudsman.

An ombudsman:

- acts independently of governments and their agencies
- has wide ranging powers to require agencies to furnish documents, to enter premises and to seek injunctions, and may make recommendations to government agencies following investigation of a complaint – while governments are not necessarily required to adopt the findings of an ombudsman, it is in the best interests of governments, their agencies and the broader public to implement an ombudsman’s recommendations where possible
- seeks to resolve complaints about conduct and decision-making processes through a process of conciliation
- has the power to conduct investigations and may investigate matters of their own volition
- does not advocate for complainants or governments, but rather may be considered to advocate for best practice decision-making and conduct in government agencies
- does not look at the decision itself but rather the process by which the decision was reached.

Generally, an ombudsman will not accept a complaint before the agency concerned has had a reasonable opportunity to address the complaint and may also refer complaints on to another relevant body for consideration.

Contact details for each ombudsman are set out below.

Jurisdiction	Ombudsman	Website
ACECQA	ECS Ombudsman	necopic.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	ombudsman.tas.gov.au
Victoria	Victorian Ombudsman	ombudsman.vic.gov.au
Western Australia	Ombudsman Western Australia	ombudsman.wa.gov.au

PRIVACY AND FREEDOM OF INFORMATION



National Law & Regulations

Section 263
Regulations 195–203

ACECQA and each of the regulatory authorities are required to comply with the *Commonwealth Privacy Act 1988*, (the Privacy Act) as applied through the National Law), when handling personal information for the purposes of the National Quality Framework (NQF).

The Privacy Act contains 13 Australian Privacy Principles (APPs), which regulate the collection, use, disclosure, storage and accuracy of personal information handled by ACECQA and each of the regulatory authorities.

More information

The Office of the Australian Information Commissioner (OAIC) has published guidelines to the APPs on its website at www.oaic.gov.au. ACECQA and regulatory authorities may refer to these guidelines to assist in complying with the Privacy Act.

The National Education and Care Services Privacy Commissioner website at www.necsopic.edu.au also has information about privacy under the National Law.

5. COMPLAINTS ABOUT PRIVACY

An individual can complain to the relevant agency (ACECQA or a regulatory authority) about the mishandling of their personal information. ACECQA or the regulatory authority should attempt in the first instance to resolve an individual's privacy complaint. If ACECQA or the regulatory authority is not able to resolve the complaint, then the National Law provides individuals with a right to complain to the National Education and Care Services Privacy Commissioner (NECS Privacy Commissioner)

More information

Contact details for the NECS Privacy Commissioner are available at www.necsopic.edu.au.

5.1 ADDRESSING PRIVACY BREACHES

In some circumstances, ACECQA or a regulatory authority may become aware of an interference with an individual's privacy without a complaint. In those circumstances, the best practice response is to address the breach in a manner consistent with the OAIC's data breach response process available on the OAIC website. A brief summary of the process is outlined below.

Addressing privacy breaches		
Step 1	Contain the breach and make a preliminary assessment	<ul style="list-style-type: none">• Take immediate steps to contain breach• Designate person/team to coordinate response
Step 2	Evaluate the risks for individuals associated with the breach	<ul style="list-style-type: none">• Consider what personal information is involved• Determine whether the context of the information is important• Establish the cause and extent of the breach• Identify what is the risk of harm
Step 3	Consider breach notification	<ul style="list-style-type: none">• Risk analysis on a case-by-case basis• Not all breaches necessarily warrant notification
Step 4	Review the incident and take action to prevent future breaches	<ul style="list-style-type: none">• Fully investigate the cause of the breach• Consider developing a prevention plan• Option of audit to ensure plan implemented• Update security/response plan• Make appropriate changes to policies and procedures• Revise staff training practices

6. FREEDOM OF INFORMATION



National Law & Regulations

Section 264
Regulations 204–211

The *Freedom of Information Act 1982* (Cth), as modified by the National Law (the FOI Act), applies to documents held by ACECQA and the regulatory authorities for the purposes of the NQF. It provides individuals with a legally enforceable right to access such documents and to seek to correct or annotate any information about them held in such documents if the information is incomplete, incorrect, out-of-date or misleading.

Under the National Law and Regulations, ACECQA and the regulatory authorities must give an individual:

- access to a document, on request, except to the extent that the document is exempt under the FOI Act
- access to a conditionally exempt document, on request, unless access to the document would, on balance, be contrary to the public interest.

The FOI Act only applies to information contained in a document (including electronic records), and only to documents in existence. The FOI Act does not require ACECQA or the regulatory authorities to create documents to supply information falling within the scope of a request and it does not regulate information that is already available for a fee.

6.1 APPLICATIONS UNDER THE FOI ACT

An application under the FOI Act must:

- be made in writing
- state that the application is made for the purposes of the FOI Act
- provide enough information to reasonably identify the document
- include a postal or email address to which notices may be sent.

The FOI Act imposes strict timeframes on ACECQA and the regulatory authorities in processing FOI requests.

More information

Information on timeframes and other matters relating to the processing of FOI requests is available in the OAIC's Guide to the [Freedom of Information Act 1982](#). The National Education and Care Services FOI Commissioner website at www.necsopic.edu.au also has information about FOI requirements under the National Law.

6.2 REVIEW OF FOI DECISIONS AND COMPLAINTS ABOUT FOI

If an individual disagrees with an FOI access decision, they can seek an internal review of the decision, or apply to the National Education and Care Services FOI Commissioner for review of the decision. If a person is not satisfied with the outcome of an internal review, they can also seek review by the National Education and Care Services FOI Commissioner.

The National Law also provides individuals with a right to complain to the National Education and Care Services FOI Commissioner if they feel that a regulatory authority or ACECQA has mishandled a request for access to a document.

If an individual is unhappy with a review by the National Education and Care Services FOI Commissioner, they may seek a further review through the appropriate administrative tribunal.

6.3 DISCLOSURE OF INFORMATION



National Law

Sections 271–273

Powers and principles

Jurisdictions (including state and territory regulatory authorities) and ACECQA have broad powers to disclose information about an education and care service to each other and other government departments and public authorities. Importantly, efficient, collaborative and streamlined communication between all parties furthers the objectives of the National Law, including to ensure the safety, health and wellbeing of children attending education and care services.

Information is disclosed between regulatory authorities, ACECQA and Commonwealth in accordance with the National Law for the purposes of:

- promoting the objectives of the NQF
- assisting authorities and other government departments to perform or exercise their functions and powers under the National Law
- research or the development of national, state or territory policy with respect to education and care services
- the funding of education and care services
- the payment of benefits or allowances to persons using education and care services
- compliance, monitoring and enforcement, including with respect to working with children laws.

Other disclosure obligations

The National Law requires a regulatory authority to disclose to other regulatory authorities the suspension or cancellation of a working with children check, working with children card or teacher registration of a nominated supervisor. It

also allows a regulatory authority to disclose a prohibition notice issued under the National Law to the head of the government department responsible for administering the working with children law in that jurisdiction.

Information disclosed for the purpose of research or development of policy relating to education and care services must not include information that could lead to the identification of an individual, other than an approved provider, a nominated supervisor, a family day care educator who has been suspended, a person issued with a prohibition notice, or a person being prosecuted for an offence under the National Law.

The National Law also allows a regulatory authority to disclose information to an education and care service where the regulatory authority considers that the approved provider reasonably requires the information to comply with obligations under the National Law. An approved provider may request the regulatory authority to disclose whether a person is subject to a prohibition notice issued under the National Law, or whether a family day care educator has been suspended from providing education and care as part of a family day care service.