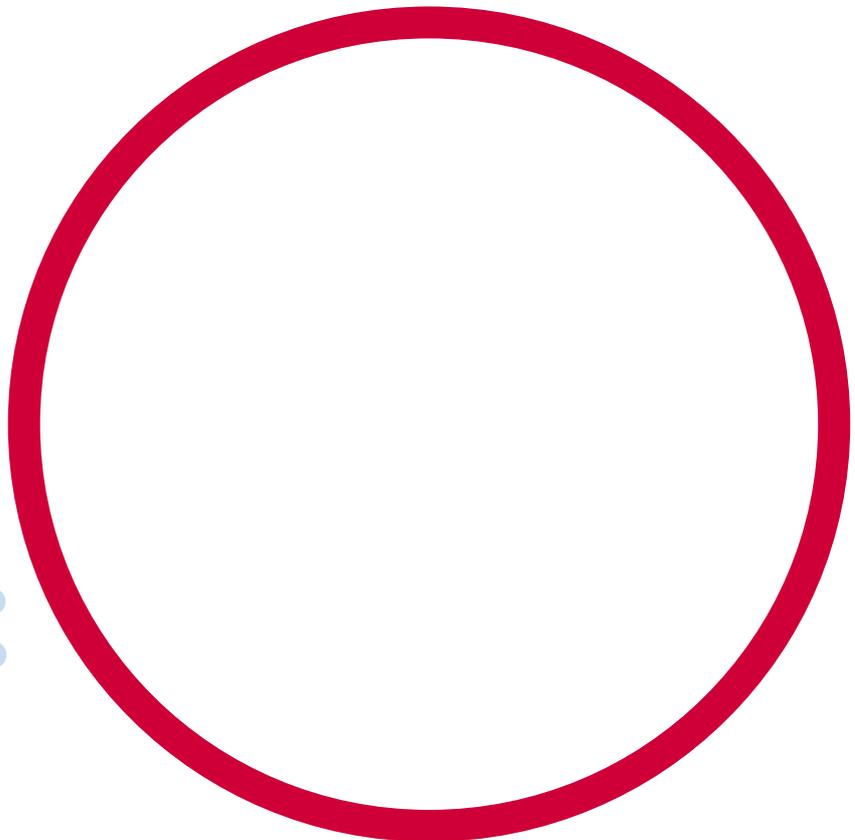
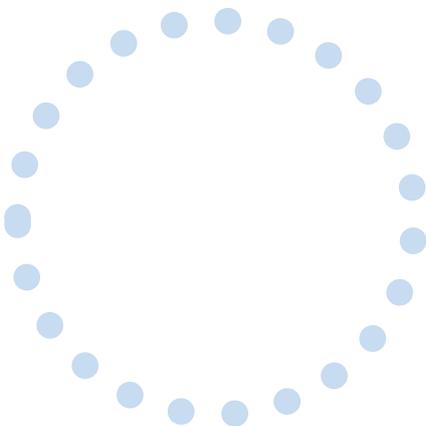
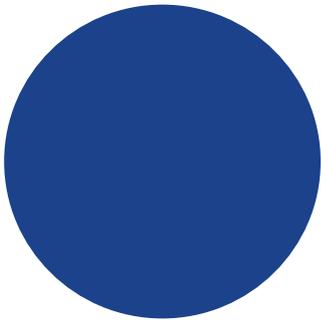


# Guiding Principles for Exercise of Regulatory Authority Powers

## Early Childhood Education

### Quality Assurance and Regulatory Services Directorate



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# 1. Purpose

This document outlines the Regulatory Authority's over-arching principles for implementing its functions under the National Law and National Regulations and the Supplementary Law and Supplementary Regulations. The Guiding Principles for the policies of the Regulatory Authority are shaped by the principles outlined in the National Law as well as the principles of administrative law.

The objective of Guiding Principles is to ensure the Regulatory Authority exercises its regulatory powers in a consistent manner that enhances the intended outcomes of the National Law and NSW's state-based framework. The application of the Guiding Principles also helps to ensure that:

- Correct decisions, which follow all applicable legal requirements, are made in each instance
- The quality, consistency and accountability of the decision-making process is maintained, since decision-makers are required to be able to justify the reasons for their decisions.

## 2. Scope

The NSW Department of Education's Early Childhood Education Quality Assurance and Regulatory Services Directorate is the Regulatory Authority for early childhood education and care services in New South Wales.

The Regulatory Authority exercises its regulatory functions under the following legislation:

### **National Quality Framework (NQF)**

- *Children (Education and Care Services) National Law (NSW) 2010* (the 'National Law')
- [\*Education and Care Services National Regulations \(NSW\) 2011\*](#) (the 'National Regulation')

### **NSW State-based Framework:**

- [\*Children \(Education and Care Services\) Supplementary Provisions Act 2011\*](#)
- [\*Children \(Education and Care Services\) Supplementary Provisions Regulation 2012.\*](#)

Most education and care services for children around Australia are regulated under the National Quality Framework (NQF). Service types covered by the NQF are regulated under the National Law and National Regulations. These services include Family Day Care, Long Day Care, Out of School Hours Care and Preschools.

The NQF also includes the [National Approved Learning Frameworks](#) and the [National Quality Standards](#) (NQS) against which education and care services are assessed and rated.

The [Guide to the National Quality Framework may assist in understanding the NQF.](#)

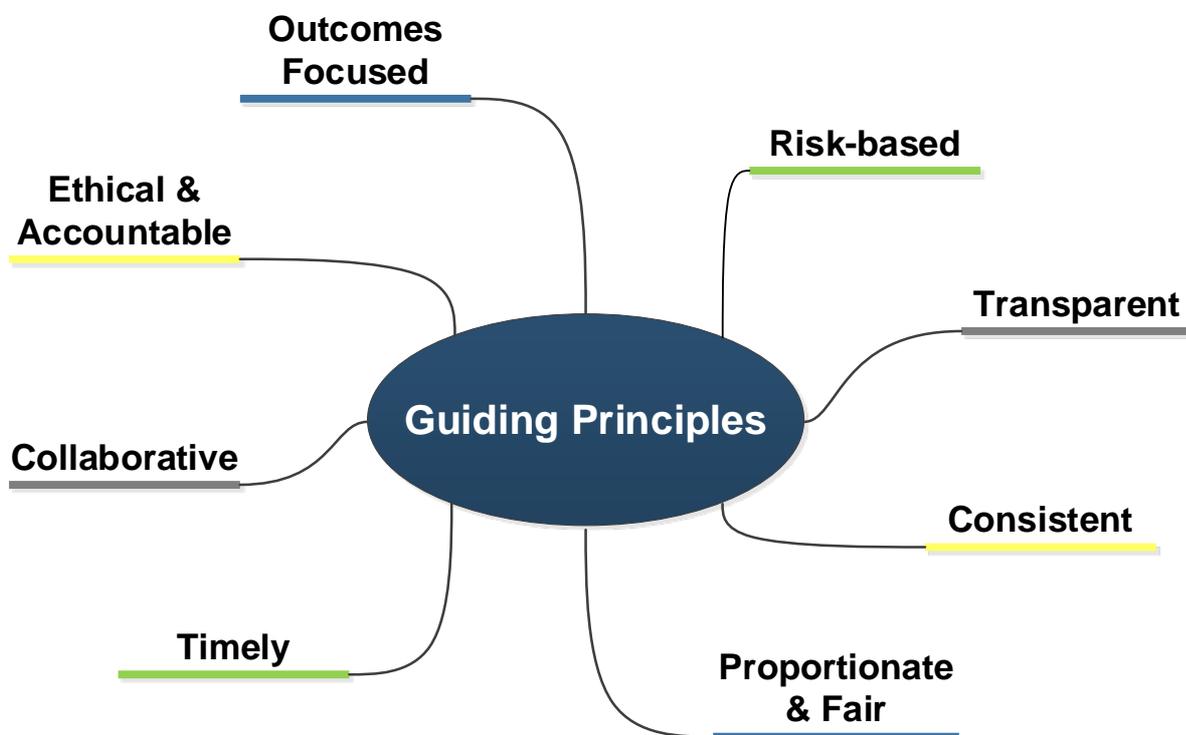
Occasional care services and mobile services are regulated under the state-based framework, rather than the NQF. These types of services are referred to as ‘out of scope’ services.

### 3. Guiding principles

The NSW Department of Education’s Early Childhood Education Quality Assurance and Regulatory Services Directorate is the Regulatory Authority for early childhood education and care services in New South Wales.

The Regulatory Authority’s over-arching principles for implementing its functions are set out in Figure 1 below. Each guiding principle is then explained in more detail below.

Figure 1:



## 3.1 Outcomes focused

The exercise of the Regulatory Authority's powers aims to achieve outcomes that promote the objectives of the National Law. The Regulatory Authority will make decisions and exercise its powers in a way that:

- focuses on outcomes that ensure the safety, health and wellbeing of children attending education and care services;
- drives the continual improvement and provision of quality education and care services.

In exercising its regulatory functions, the Regulatory Authority will critically consider the regulatory tools at its disposal and will choose the most appropriate and proportionate for the circumstances, and which is most likely to achieve the best outcome.

## 3.2 Risk-based

The Regulatory Authority applies a responsive and risk-based approach to its regulatory functions. When assessing the level of overall risk, the Regulatory Authority considers general risks as well as specific risks posed to children in education and care services in NSW.

A risk-based approach allows the Regulatory Authority to make the best use of its resources by identifying and targeting higher risk situations while still monitoring those that have been assessed as lower risk. It also allows the Regulatory Authority to measure and improve on the accuracy of our risk profiling practices, noting that the level of risk may change over time.

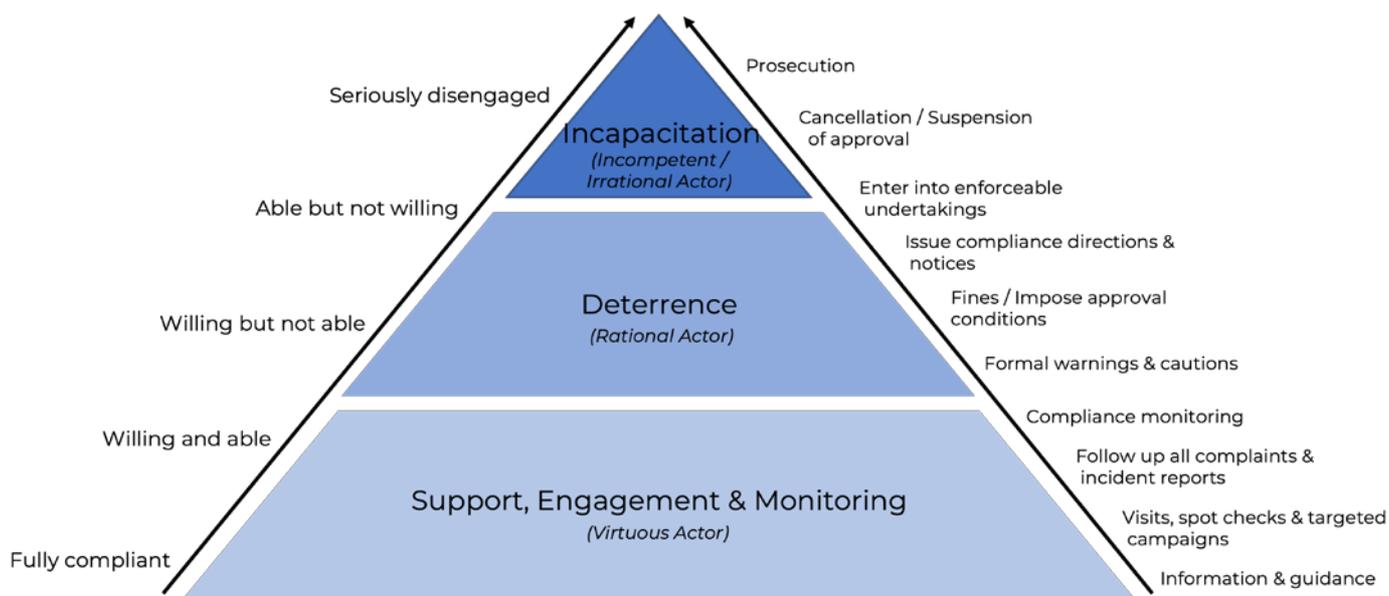
Children, and particularly very young children, are vulnerable members of the community. Under the National Law, the rights and best interests of children are paramount and, as such, only a low level of residual risk to the safety of children will be tolerated with the risk-based model.

By using a risk-based approach, the Regulatory Authority can:

- use an evidence-based approach to planning and decision-making;
- focus our resources on the most significant and important issues;
- ensure our actions and processes are proportionate to the risks posed to children; and
- decrease regulatory burden to the sector.

The Regulatory Authority’s risk-based approach is consistent with the Braithwaite<sup>1</sup> Regulatory Pyramid, which has been adapted in Figure 2. This Regulatory Pyramid shows regulatory response stages that escalate relative to the regulated entities’ behaviour or practices. The Regulatory Authority analyses information and data to understand behaviours and practices which in turn, inform the right type of regulatory response. Each stage is proportionate to the type of behaviour exhibited by a regulated entity (actor).

**Figure 2:**



This Regulatory Pyramid is a framework that supports a proportionate risk-based approach with the aim of upholding consistency, transparency and accountability, and ensuring better evidence-based decisions through all regulatory response stages.

### 3.3 Transparent

The Regulatory Authority will provide clear information and guidance regarding regulatory requirements and the National Quality Framework, and the way in which the Regulatory Authority exercises its powers to assist in understanding the regulatory framework.

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<sup>1</sup> Figure **Error! Main Document Only**. Adapted from Ayres, I., Braithwaite, J. (1992). *Responsive regulation: Transcending the deregulation debate*. Oxford: Oxford University Press

Being clear about the outcomes expected raises awareness of the benefits of complying with the law and the potential consequences of failing to do so. It also helps to remove misconceptions that might foster non-compliance.

The Regulatory Authority has a sound policy framework, based on best practice, the requirements of the National Law and the principles of good decision making. The Regulatory will provide reasons for our decisions and will advise of any appeal rights following a decision.

### **3.4 Consistent**

The decisions and activities of the Regulatory Authority will be consistent with the legislation and within our powers. The Regulatory Authority monitors its processes and maintains a robust system of internal controls. This ensures the Regulatory Authority applies its practices consistently and maintains a predictable delivery of legislative objectives and outcomes.

The Regulatory Authority is committed to ensure that staff have the necessary skills and are appropriately trained and supported through effective internal systems and policies.

### **3.5 Proportionate and fair**

The Regulatory Authority is committed to proportionate and fair actions. While the Regulatory Authority will have regard to the perspectives of the following groups in exercising its regulatory functions:

- The education and care sector in NSW
- Individuals (including companies) who are subject to the regulatory framework in NSW, including out of scope services
- Consumers of education and care services
- The community at large

our primary concern is the rights and best interests of children.

The Regulatory Authority ensures its decisions are informed by evidence and only influenced by relevant factors. The Regulatory Authority will assess each situation according to its own merits, but will also aim to achieve consistency in its decision-making process.

Regulatory Authority staff will maintain contact with affected parties during any regulatory processes, and will clarify or request additional information where needed.

The Regulatory Authority is committed to ensuring the integrity and reliability of its regulatory decisions by conducting activities in accordance with documented policies and procedures.

## 3.6 Timely

The Regulatory Authority is committed to responding in an effective and timely manner to affected parties and, when necessary, to the sector at large. The Regulatory Authority will endeavour to adhere to all relevant statutory timeframes. Where there is a possibility that it may not meet a pending timeframe, the Regulatory Authority will make direct contact with the affected parties as soon as practicable.

## 3.7 Collaborative

The Regulatory Authority works with and, to the extent permitted under legislation, shares information with other regulatory bodies and stakeholders to ensure the best regulatory outcomes.

The Regulatory Authority will engage with the education and care sector, the community, and government to inform and promote legislative objectives and to seek feedback on regulatory reform proposals. The Regulatory Authority will work with the sector in collaboration to support it to improve compliance and quality objectives.

The Regulatory Authority's decisions are informed by a range of sources, including sound research, information from other regulators, feedback from the education and care sector, including peak sector organisations, and families.

## 3.8 Ethical and accountable

The staff of the Regulatory Authority will conduct themselves in accordance with the NSW Department of Education Code of Conduct, these guiding principles, and any other relevant policies and guidelines.

The Regulatory Authority's strategies, approaches and decisions are informed by its regulatory expertise, the evidence before it, and analysis of the information.

The Regulatory Authority will assess each situation based on its merits, and make decisions that are free from bias.

The Regulatory Authority will document and be answerable and accountable for its regulatory decisions and actions. If applicable, affected parties will be informed by the Regulatory Authority of their right to review.

The Regulatory Authority will continually monitor and review its performance to improve how it conducts its activities.

## 4. Guiding principles under the National Law

Section 4 of the National Law requires the Regulatory Authority to exercise its functions having regard to the objectives and guiding principles of the national education and care services quality framework set out in Section 3 of the National Law:

- (1) The objective of this Law is to establish a national education and care services quality framework for the delivery of education and care services to children.
- (2) The objectives of the national education and care services quality framework are—
  - (a) to ensure the safety, health and wellbeing of children attending education and care services;
  - (b) to improve the educational and developmental outcomes for children attending education and care services;
  - (c) to promote continuous improvement in the provision of quality education and care services;
  - (d) to establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the national education and care services quality framework;
  - (e) to improve public knowledge, and access to information, about the quality of education and care services;
  - (f) to reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.
- (3) The guiding principles of the national education and care services quality framework are as follows—
  - (a) that the rights and best interests of the child are paramount;
  - (b) that children are successful, competent and capable learners;
  - (c) that the principles of equity, inclusion and diversity underlie this Law;
  - (d) that Australia's Aboriginal and Torres Strait Islander cultures are valued;
  - (e) that the role of parents and families is respected and supported;
  - (f) that best practice is expected in the provision of education and care services.

## 5. Guiding principles under the Supplementary Law

Section 6 of the Supplementary Law states that the National Law Alignment Provisions provide for the objectives and guiding principles that apply to the provision of State regulated education and care services. This means that the objectives and guiding principles for State regulated education and care services are the same as those set out in section 4 above for services regulated under the National Law.

## 6. Use of Discretionary Power

Discretionary power is the ability of a decision maker to use their judgment in deciding whether or not to take a particular course of action. To ensure discretionary power is exercised fairly, the principles of administrative law must be adhered to.

Some of the general principles around exercising discretion are:

- Discretionary powers must be exercised in good faith and for a proper, intended and authorised purpose
- Decision makers must act reasonably and impartially
- Decision makers must consider only relevant considerations and ignore irrelevant ones
- Decisions must be made based on supporting evidence
- Decision makers must give proper consideration to the merits of the case and provide the person affected by the decision with procedural fairness
- Decision makers must exercise their discretion independently, and not under the dictation of a third person or body.

Where legislation does not specify the matters to be taken into account when exercising a discretionary power, such as the revocation of a waiver, the decision maker should consider the underlying purpose of the decision making power and the factors that may be relevant to achieving that purpose.

## 7. Application of Exceptional Circumstances

There is no absolute definition of exceptional circumstances. Under the National Law, the notion of exceptional circumstances applies to a range of situations, such as family day care venues or temporary relocations. The Regulatory Authority will consider whether or not exceptional circumstances exist on a case-by-case basis. Exceptional circumstances are limited to circumstances that are unusual, not typical, or unable to be foreseen or planned for in advance.

## 8. Timeframes for decisions

Legislated timeframes apply to applications submitted under the National Law and National Regulations. The National Law also provides circumstances where these timeframes may be put on hold. Further information on when these timeframes apply can be found in the relevant policy. Where no legislated timeframes are given, the Regulatory Authority will ensure that action is taken within a reasonable time.

## 9. Version Control

Policy Owner	Version	Approved by	Date last reviewed
Director, Regulatory Strategy and Performance	1.0	Executive Director, Quality Assurance and Regulatory Services	24 July 2020
Director, Regulatory Strategy and Performance	2.0	Executive Director, Quality Assurance and Regulatory Services	26 Oct 2021