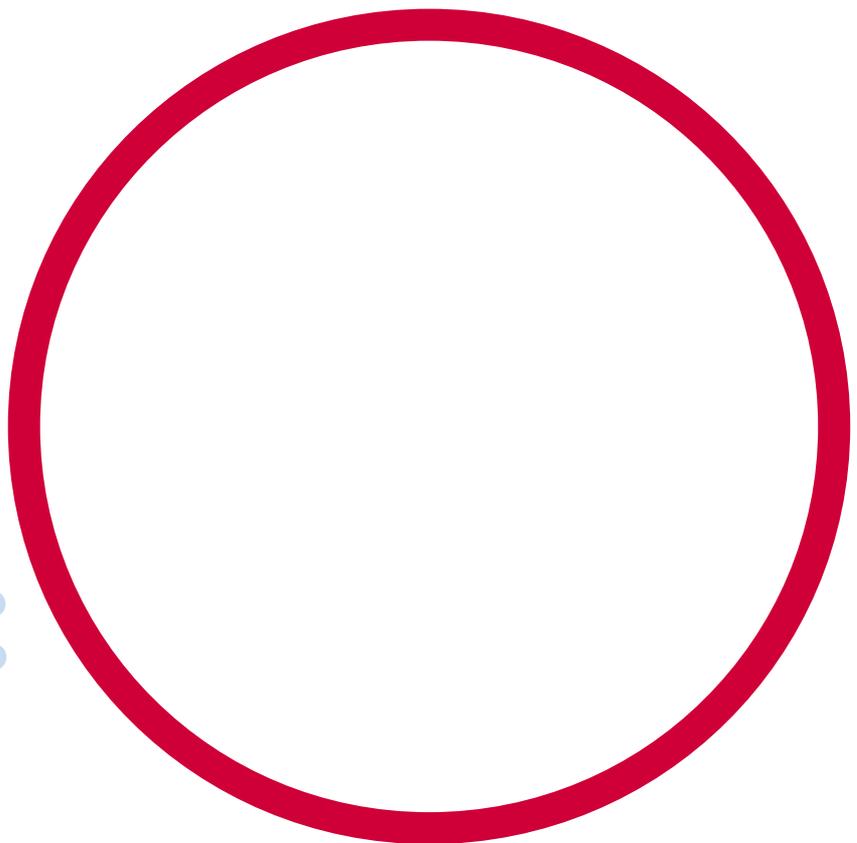
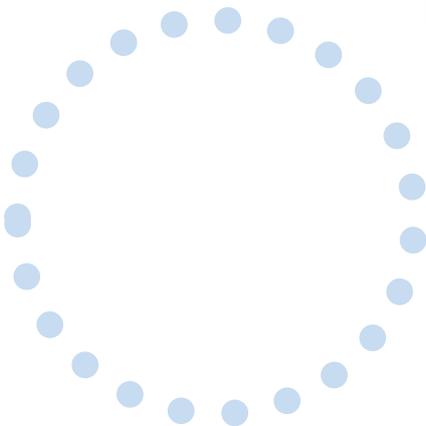
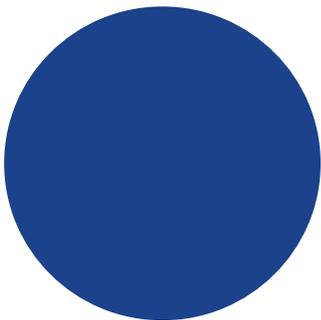


Review of Decisions Policy

Early Childhood Education Quality Assurance and Regulatory Services Directorate



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1. Purpose

This policy outlines the statutory rights of a person affected by a decision made under the National Quality Framework (NQF) to have that decision reviewed. It also explains how the Regulatory Authority manages applications for review of a decision made under the NQF.

Many administrative decisions in the public sector, or the processes used to reach those decisions are open to challenge by persons affected by those decisions.

These challenges are often referred to as 'review' or 'appeal' rights and may include:

- A statutory right to have a decision reviewed;
- A judicial review;
- A review by an Ombudsman.

The *Children (Education and Care Services) National Law 2010* (the National Law), provides for an internal review to be conducted by the Regulatory Authority responsible for the decision and an external review to be conducted by the relevant court or tribunal, which in NSW is the NSW Civil and Administrative Tribunal.

2. Scope

This policy applies to decisions made by the NSW Regulatory Authority that are subject to internal review under section 190 of the National Law.

3. Guiding principles

An internal review under section 190 of the National Law is a merits review, which entails a reconsideration of the facts, law and policy aspects of the original decision and a determination of what is the correct and preferable decision.

The Regulatory Authority will conduct internal reviews in accordance with the principles of procedural fairness and having regard to the objectives and guiding principles of the national education and care services quality framework, as set out in section 3 of the National Law.

The objectives of reviews are to:

- Ensure that the correct and preferable decision has been made
- Improve the quality, accountability and consistency of decision makers.

Ensuring that the correct and preferable decision has been made

To guarantee fair treatment of persons affected by a decision, the objective of a merits review is to ensure that administrative decisions in relation to which review rights are provided are correct and preferable. Correct means that a decision is made according to law and preferable means that, where there is a range of equally lawful decisions, the decision made is the best decision on the basis of the relevant facts and the information available to the internal reviewer at the time of the internal review. This may mean that, although the original decision may have been correct and preferable at the time it was made, it may no longer be the preferable decision at the time of the internal review.

Quality, consistency and accountability

Merits reviews aim to improve the quality, accountability and consistency of decision makers by:

- Prompting them to look closely at the relevant criteria for making decisions and the information that must be considered in reaching that decision;
- Requiring them to properly justify recommendations and decisions;
- Monitoring the quality of decisions by ensuring that legal, policy, and practice requirements have been complied with, and that decisions are able to withstand scrutiny;
- Applying review decisions to future cases by using the reasons as guidance for the assessment or determination of similar issues.

4. Policy statement

This policy sets out:

- Who may apply for a review;
- Which decisions are eligible for internal review under the NQF;
- Which decisions are eligible for external review under the NQF and the process and available outcomes of external reviews;

- Any differences between rights of review for NQF-regulated services and out of scope services.

A person affected by the Regulatory Authority’s decision may have rights to two different types of review:

- **Internal review** – by the Regulatory Authority
- **External review** – by a relevant court or tribunal. In NSW, the relevant court or tribunal for reviews is the NSW Civil and Administrative Tribunal (NCAT).

4.1 Internal Review

Who may apply for internal review of a decision

Any person who is ‘the subject of a reviewable decision’ may apply to the Regulatory Authority for an internal review of that decision (s.191(1)).

Decisions eligible for internal review

The decisions made by the Regulatory Authority which may be subject to internal review are set out at Section 190 of the National Law. They are also displayed in the table below.

Decisions to do any of the following are internally reviewable:

Section of National Law	Decision Type
19(1)	Impose a condition - Provider approval at the time it is granted
51(5)(b)	Impose a condition - Service approval at the time it is granted
15(1)(b)	Refusal of Application – Provider
48(1)(b)	Refusal of Application – Service
22(3)(c)	Refusal of Application – Amendment of Provider Approval
54(6)(c)	Refusal of Application – Amendment of Service Approval
65(1)(b)	Refusal of Consent – Transfer of Service
92(1)	Revoke a Service Waiver
23(1)	Amendment – Provider Approval, including the imposition of a condition after the approval has been granted
55(1)	Amendment – Service Approval, including the imposition of a condition after the approval has been granted
28(1)	Suspend a Provider Approval without a ‘show cause notice’

Section of National Law	Decision Type
73	Suspend a Service Approval without a 'show cause notice'
176(2)	Compliance Action - Issue a Compliance Direction
177(2)	Compliance Action - Issue a Compliance Notice

Under the *Children (Education and Care Services) Supplementary Provisions Act 2011* (the Supplementary Provisions) a person affected by a decision made under the National Law Alignment Provisions has the same rights to a review of decisions as set out under section 190 of the National Law.

Applying for a review

A person who is the subject of a reviewable decision for internal review may apply in writing for a review of the decision under section 191 of the National Law. An application should be submitted online using the National Quality Agenda Information Technology System (NQA ITS) portal for in scope services. An application not submitted through NQAITS will only be accepted in exceptional circumstances. The application must be made:

- Within 14 days of the day on which the person is notified of the decision; or
- If the person is not notified of the decision, within 14 days after the person becomes aware of the decision (s191(2)(b)).

Out-of-scope services may submit an application for internal review via post or email.

Applications made outside of the 14 day timeframe will only be accepted in exceptional circumstances.

The information that must be included in an application for internal review is outlined as follows:

- The name of the applicant;
- Contact details for the applicant, including an address for service of the decision;
- The provider approval number or service approval number to which the reviewable 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 the part of the decision with respect to 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. (Reg 186).

Assessing an application for internal review

When the Regulatory Authority receives an application for internal review, an appropriate officer will check that:

- The Regulatory Authority has the power to conduct a review of the decision, i.e. that the decision is a reviewable decision as stated under section 190 of the National Law.
- The application is complete and includes all of the required information. If the application is not complete the Regulatory Authority will ask the applicant to provide the missing information within a specified timeframe.
- The application has been submitted within the relevant timeframe, or exceptional circumstances exist where an application has been submitted just outside of the relevant timeframe.

Where the Regulatory Authority has requested further information to support the application, but does not receive the information within the relevant timeframe, the Regulatory Authority will conduct the review based on the information available.

Allocating the review

The Regulatory Authority will allocate a valid and complete application for internal review to a suitably delegated staff member to conduct the review.

The requirements for a reviewing officer are:

- They will not be a person who was involved in the assessment or investigation of the person or service to whom or which the decision relates.
- They must act fairly and without bias in making a decision, including ensuring that they do not decide a case in which they have a direct interest.
- They must have access to all relevant information, including information submitted by the applicant in the review application, and all information used by the decision maker in making the original decision.

- They must have relevant knowledge of administrative processes.
- They must have an understanding of the National Law and Regulations.
- They will clearly document their recommendation and the reasons for that recommendation.

Timeframe for conducting the review

The reviewing officer must make a decision within 30 days of an application being made. This time period may be extended by up to 30 days:

- if a request for further information is made; or
- by agreement between the applicant and the reviewer. Any such agreement will be documented in writing.

The timeframe for assessing an application will not commence until the Regulatory Authority has received all prescribed information and has determined that the application is valid.

Conducting a review

The reviewing officer will ensure that their decision is in accordance with the principle of making the correct and preferable decision. This will involve a reconsideration of the entire decision, with full attention given to all relevant law, facts and policies. This may also involve a consideration of new evidence. In some cases this may mean that a decision made during a merits review is based on factors that were not present at the time of the original decision. For this reason, a different decision following a merits review does not necessarily indicate that the original decision was incorrect.

When conducting a review, the reviewing officer will have regard to administrative law principles and will:

- Consider the facts;
- Assess the evidence;
- Ensure the rules of procedural fairness are observed;
- Apply the facts to the relevant law, policy or procedure.

The facts

A consideration of the facts will involve the following:

- Determining the material facts that are necessary for a decision. The legislation itself often sets out the factual matters that must be considered. For example, the material facts in relation to the grant of a provider approval, are that the provider and, where relevant, its persons with management or control, are fit and proper.
- Taking into account the relevant facts, which are facts affecting the assessment of the probability that a material fact exists. For example, to determine whether an applicant for provider approval is fit and proper, the reviewing officer may need to make findings about relevant facts such as the applicant's criminal history.
- Discarding facts which are not relevant to the decision.
- Determining the facts in issue. This is a fact about which there is disagreement or insufficient evidence to satisfy the reviewing officer that the fact exists.
 - To ascertain the facts or to make a decision on facts in issue, the reviewing officer may request further information from the applicant or the staff involved in making the original decision. Generally, this should be done if evidence that is relevant to their decision is available. If the applicant fails to provide the information within the timeframe requested, the assessment will continue but the reviewing officer may be unable to make the findings of material fact that will support a favourable decision.
- Basing findings in relation to facts on evidence that is relevant and logically capable of supporting the findings.

The evidence

Evidence is information in the form of documents such as application forms, emails, photographs and file notes, oral information and other material that can be used to demonstrate the existence of a fact or the truth of something.

Where evidence is provided orally, such as during an interview or phone call, the reviewing officer will make a file note or written record of the interview or call at the time or soon afterwards.

Reviewing officers can accept most forms of evidence as they are not bound by the rules of evidence that govern the admission and evaluation of evidence by courts. However, when assessing the evidence, the reviewing officer will still give consideration to principles of fairness and reliability.

Reviewing officers will:

- Give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance. Assessment of the weight of evidence involves the application of logic, common sense and experience.

- Determine whether the evidence is sufficient to prove a fact in accordance with the standard of proof. For internal reviews, the standard applied is the civil standard, i.e. on the balance of probabilities. A fact is proved to this standard if the reviewing officer is reasonably satisfied it is more likely than not that the fact is true.

Making a decision

After considering the facts, the evidence and the principles of procedural fairness, the reviewing officer will apply the facts to the relevant law and/or policies, procedures and delegations applicable to the matter under review. This will include a consideration of the objectives and guiding principles of the National Quality Framework.

When considering the objectives and guiding principles of the National Quality Framework the reviewing officer will attach a considerable degree of importance to ensuring the safety, health and wellbeing of children attending education and care services. This will be viewed according to the risk to that safety, health, and wellbeing.

Depending on the circumstances and the decision under review, the reviewing officer may also consider a number of other factors. These include, but are not limited to:

- The ages of the children to be educated and cared for;
- The physical space and design of the education and care service premises;
- The condition and location of the education and care service premises;
- The policies and procedures of the provider;
- The compliance history of the applicant;
- The applicant's understanding of the role and responsibilities of an approved provider; including knowledge of the National Law and Regulations;
- The nature of care to be provided, for example, long day care or out of school hours care;
- The demand for education and care services in the area;
- The staffing and supervision arrangements in place;
- Any strategies the provider may have implemented to mitigate a potential risk.

The reviewing officer will also take into account whether:

- The original decision maker had the necessary delegation (or power) to make the decision;

- The original decision was consistent with the application of legislation, policy and procedures;
- The original decision involved a poor interpretation of legislation, policy or procedures;
- The procedures used to reach the original decision were fair and correct;
- There is additional relevant information available that was not present at the time of the original decision.

The scope of the decision

The decision maker may:

- Confirm the original decision, or
- Make any other decision that they think is appropriate.

Documenting the decision

Accounting for a decision is an important part of an internal review and is one of the basic principles of good administration. Full and accurate records must be kept and will help with providing a fuller justification if the decision is later challenged.

The reviewing officer will document the reasons for the decision, which will not be merely a re-statement of the relevant legislation or policy. Reasons will include:

- The original decision under review;
- The decision made as a result of the review;
- The name and designation of the reviewing officer;
- The sources of information/evidence relevant to the decision;
- The material questions of fact which arise from the evidence;
- Findings on questions of facts, including whether or not the evidence was accepted or rejected;
- The reviewing officer's understanding of the applicable law and any issues of law which arise, including opinions or views on such issues of law;
- Conclusions derived from the facts and the law.

Notifying the applicant

The Regulatory Authority will notify the applicant in writing of the outcome of their application for internal review. The contents of the notification will include:

- The identity of the decision maker;
- The date of the decision and, if relevant, the date from which it operates or the period in which it is effective;
- The authority under which the decision was made, for example, a section of the National Law;
- The decision and reasons for the decision. The reasons need not be as full an account as contained in the internal decision document;
- The applicant's right of review and any time periods within which the applicant must exercise those rights.

4.2 External review

Who may apply for external review of a decision

Any person who is 'the subject of a reviewable decision' may apply for external review of that decision. (s193)

Decisions eligible for external review

The decisions of the Regulatory Authority which are externally reviewable are set out in Section 192 of the National Law.

All internally reviewable decisions (for these, see the table above titled 'Decisions that may be internally reviewed') that have gone through an internal review process are eligible for external review **except for** decisions to:

- Issue a compliance direction
- Issue a compliance notice.

In addition, Section 192 of the National Law specifies that the following decisions, which are not internally reviewable, are eligible for external review:

Decisions that may be externally reviewed

Section of the National Law	Decision type
27	Suspend a provider approval (after a show cause process)
33	Cancel a provider approval (after a show cause process)
72	Suspend a service approval (after a show cause process)
79	Cancel a service approval (after a show cause process)
178	Direct the approved provider of a family day care service to suspend the care and education of children by a family day care educator
182	Give a prohibition notice
186	Refuse to cancel a prohibition notice

For out of scope services, the same decisions as those listed in the table above for NQF-regulated services, are externally reviewable.

Decisions suspending or cancelling the service approval of an associated children's service are not eligible for external review under the NQF. An associated children's service is an out of scope service that is on the same premises as an NFQ service, where the approved provider holds one service approval to cover both services.

Grounds for external review

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

Timeframe for submitting application for external review of a decision

A person must apply for an external review of the decision within 30 calendar days after being notified of the decision. (s193(2))

Relevant decision-makers for external reviews

An application for external review must be made to 'the relevant court or tribunal'. (s.193(1)). Under the National Law, in NSW, the 'relevant court or tribunal' for reviews is the NSW Civil and Administrative Tribunal.

The NSW Civil and Administrative Tribunal conducts merits reviews. This means it takes a fresh look at the matter, fully considering all relevant facts, policies and law. New evidence may be considered, if it is relevant. This could mean that a decision made during

the external review is based on factors that were not present at the time of the original decision or internal review.

Outcomes of an external review

Where an external review is conducted under the National Law, section 193(3) of the National Law specifies that the reviewer may:

- confirm the Regulatory Authority's decision
- amend the Regulatory Authority's decision, or
- replace the Regulatory Authority's decision with its own, new decision.

In determining an outcome the reviewer may consider any decision of a tribunal or court in another state or territory, made under the National Law.

5. Version Control

Policy owner	Version	Approved by	Date last reviewed
Director, Regulatory Strategy and Performance	1.0	Executive Director, Quality Assurance and Regulatory Services, Early Childhood Education	24 Aug 2020