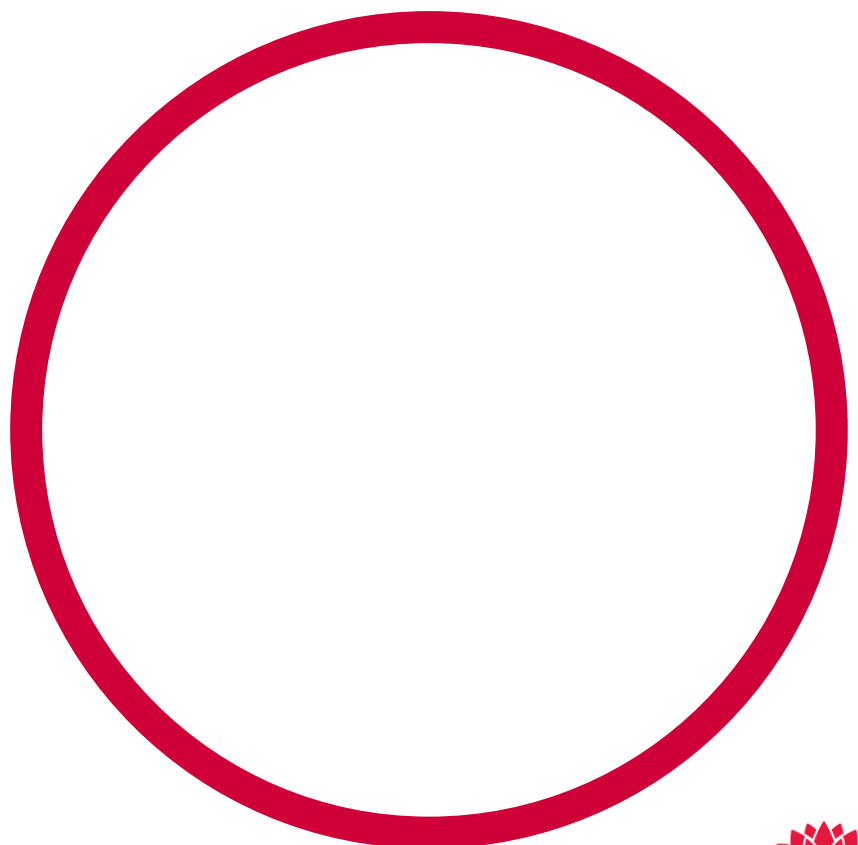
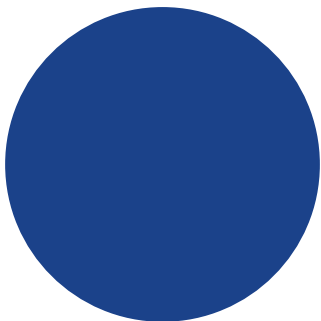


NSW Regulatory Authority's Approach to Monitoring and Compliance Policy

June 2022

Quality Assurance and Regulatory Services



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1 Purpose

This policy outlines the NSW Regulatory Authority's approach to compliance with the National Law and Regulations and enforcement. The policy explains how the NSW Regulatory Authority undertakes activities that promote and uphold compliance and drive continuous improvement within the NSW early childhood education and care (including Outside School Hours Care) (ECEC) sector. The policy guides the NSW Regulatory Authority's decision-making to ensure activities and actions designed to uphold compliance across ECEC are consistent, fair and proportionate.

2 Context

The NSW Department of Education is the NSW Regulatory Authority for ECEC services in NSW. The NSW Regulatory Authority exercises its regulatory functions under the following legislation:

- *Children (Education and Care Services National Law)* (NSW) No 104a ([National Law](#))
- *Education and Care Services National Regulations* (NSW) ([National Regulations](#))
- *Children (Education and Care Services) Supplementary Provisions Act 2011* ([State Law](#))
- *Children (Education and Care Services) Supplementary Provisions Regulation 2019* ([State Regulations](#))

The National Quality Framework (NQF) consists of the National Law and Regulations, approved learning frameworks and the National Quality Standard (NQS). The NQF sets a national benchmark for the quality of ECEC services and aims to raise their quality and drive continuous improvement in the provision and quality of ECEC services. This seeks to enable families to make informed decisions about their choice of service.

One of the functions of the Department, as the NSW Regulatory Authority, is to administer the NQF, including the:

- approval of ECEC providers and services in NSW;
- monitoring and enforcement of compliance with the National Law and Regulations; and
- assessment of approved ECEC services against the NQS and to determine the quality rating of those services.

3 Scope

This policy applies to ECEC services regulated under the National and State legislation. Services that are regulated under the National Law and Regulations include centre-based services, such as long day care, outside school hours care (including vacation care) and preschools; as well as family day care services.

Services that are regulated under the State Law and Regulations include mobile, occasional care and multi-functional Aboriginal children's services. Following changes to the State Law, the National Law provisions apply to these services, with certain modifications to cater for mobile preschools and occasional care services.

Families have an expectation that the NSW Regulatory Authority will actively promote compliance with relevant legislation to ensure the safety, health and wellbeing of children attending education and care services. The NSW Regulatory Authority will achieve this by assisting the NSW ECEC sector to understand and meet its legislative obligations, and by pursuing proportionate compliance actions that target those who fail to comply with the law and regulations.

To read the NQF objectives and guiding principles see the [*Children \(Education and Care Services\) National Law \(NSW\) and the Children \(Education and Care Services\) Supplementary Provisions Act 2011.*](#)

As a regulator, The NSW Regulatory Authority operates on best practice principles, applying contemporary approaches to its regulatory monitoring and enforcement strategies. To this end, the NSW Regulatory Authority will regularly evaluate the effectiveness of its compliance approaches and will improve, change or develop new approaches as required.

3.1.1 Relevant Legislation and Regulations

The legislation and regulations that may be utilised in implementing this Policy include:

Legislation

- *Children (Education and Care Services) National Law (NSW) 2010* ("National Law")
- *Children (Education and Care Services) Supplementary Provisions Act 2011*
- *Children and Young Persons (Care and Protection) Act 1998*
- *Children (Criminal Proceedings) Act 1987* (NSW)
- *Child Protection (Working with Children) Act 2012* (NSW)
- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Children's Guardian Act 2019* (NSW)
- *Government Information (Public Access) Act 2009* (NSW)
- *State Records Act 1998* (NSW)
- *Health Records and Information Privacy Act 2002* (NSW)
- *Crimes Act 1900* (NSW)
- *Freedom of Information Act 1989* (NSW)

- *Work Health and Safety Act 2011* (Cth)
- *Privacy Act 1988* (Cth)
- *Young Offenders Act 1997* (NSW)
- *Teaching Service Act 1980* (NSW)

Regulations

- *Education and Care Services National Regulations 2011* (“National Regulations”)
- *Children (Education and Care Services) Supplementary Provisions Regulation 2019*
- *State Records Regulations 2010* (NSW)

4 Guiding principles

The NSW Regulatory Authority’s over-arching principles for implementing its functions are set out in the [Guiding Principles policy](#). The NSW Regulatory Authority will apply the Guiding Principles in its approach to compliance. Specific principles that apply to compliance include the following:

- In exercising its regulatory functions, the NSW Regulatory Authority will critically consider the regulatory tools at its disposal and will choose the most appropriate and proportionate for the circumstances of non-compliance, and which is most likely to achieve the best outcome for children, in line with, the objectives of the National Law.
- The NSW Regulatory Authority applies a responsive and risk-based approach to compliance. Applying a risk-based approach helps the NSW Regulatory Authority ensure compliance and enforcement activities focus on the biggest risks to children and target the operators who are least likely to comply with the legislation.
- The NSW Regulatory Authority will provide clear information and guidance regarding regulatory requirements and the National Quality Framework, and the way in which the NSW Regulatory Authority exercises its powers to assist in understanding the regulatory framework. 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.
- When non-compliance is identified, the decisions and activities of the NSW Regulatory Authority will be consistent with the legislation and within our powers.
- Any staff involved in identifying and resolving non-compliance will have the necessary skills and will be appropriately trained and supported.
- The NSW Regulatory Authority is committed to proportionate and fair actions. Our primary concern is the rights and best interests of children.
- The NSW Regulatory Authority will ensure its decisions regarding non-compliance are informed by evidence and only influenced by relevant factors. The NSW Regulatory Authority will assess each situation according to its own merits, but will also aim to achieve consistency in its decision-making process regarding compliance.

- The NSW Regulatory Authority is committed to ensuring the integrity and reliability of its regulatory decisions by conducting compliance related activities in accordance with documented policies and procedures.
- The NSW Regulatory Authority will work with the sector in collaboration to support it to improve compliance and quality objectives.
- Any staff involved in identifying and resolving non-compliance will conduct themselves in accordance with the NSW Department of Education Code of Conduct, the Guiding Principles, and any other relevant policies and guidelines.
- The NSW Regulatory Authority will document and be answerable and accountable for its compliance related decisions and actions.

For more information, see Guiding Principles Policy [here](#).

5 Policy

5.1 The Regulatory System

The NSW Regulatory Authority operates within a robust and sound regulatory system that incorporates the following inter-related parts:

- **Legislation and policy:** clear and appropriate National and State legislation and policies that underpin and guide the NSW Regulatory Authority's decisions, approaches and strategic directions.
- **Administrative systems:** processes and procedures that support the NSW Regulatory Authority's statutory functions and resource management.
- **Information and accountability systems:** national and NSW State information systems that provide intelligence and data for problem identification, decision-making and the setting of priorities, and that allow for the measurement of progress against stated objectives.

Communication and engagement with the regulated sector and with other State, Territory and National jurisdictions that operate within the National Quality Framework is an integral part of the regulatory system.

The NSW Regulatory Authority aims to lead communication and engagement in a culturally safe manner and form respectful relationships with Aboriginal peoples, communities and services.

Robust communication and engagement with the sector and other jurisdictions ensure the NSW Regulatory Authority has strong and productive relationships with the regulated community and across government. This enables the NSW Regulatory Authority to effectively communicate its regulatory approaches and actions, including why decisions have been made and what outcomes are expected.

The NSW Regulatory Authority's engagement, compliance and enforcement strategies are focussed on achieving outcomes, consistent with the regulatory and policy aims of the National and State education and care legislation. Approaches are aimed at influencing the behaviours of individuals and organisations in ways that encourage a voluntary commitment to meeting regulatory requirements and promoting continuous improvement in the delivery of quality ECEC services. The NSW Regulatory Authority is committed to ensuring its actions and responses are proportionate with regard to maintaining high levels of public trust and confidence in the performance and regulation of the ECEC sector.

The NSW Regulatory Authority's primary concern is to ensure safety, health and wellbeing of children attending ECEC services. Where relevant to this concern, 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

5.2 Risk Based Regulation

The NSW Regulatory Authority applies a based approach to regulation – this includes both a proactive and responsive risk-based approach to its regulatory compliance functions.

In an ECEC service context, risk is measured in terms of the likelihood of non-compliance occurring or reoccurring, and the level of risk posed to children as a result of that non-compliance. The NSW Regulatory Authority ensures that risks are identified, known, analysed and adequately controlled, to ensure children's safety, health and wellbeing.

Effective risk controls are implemented across the regulatory journey including:

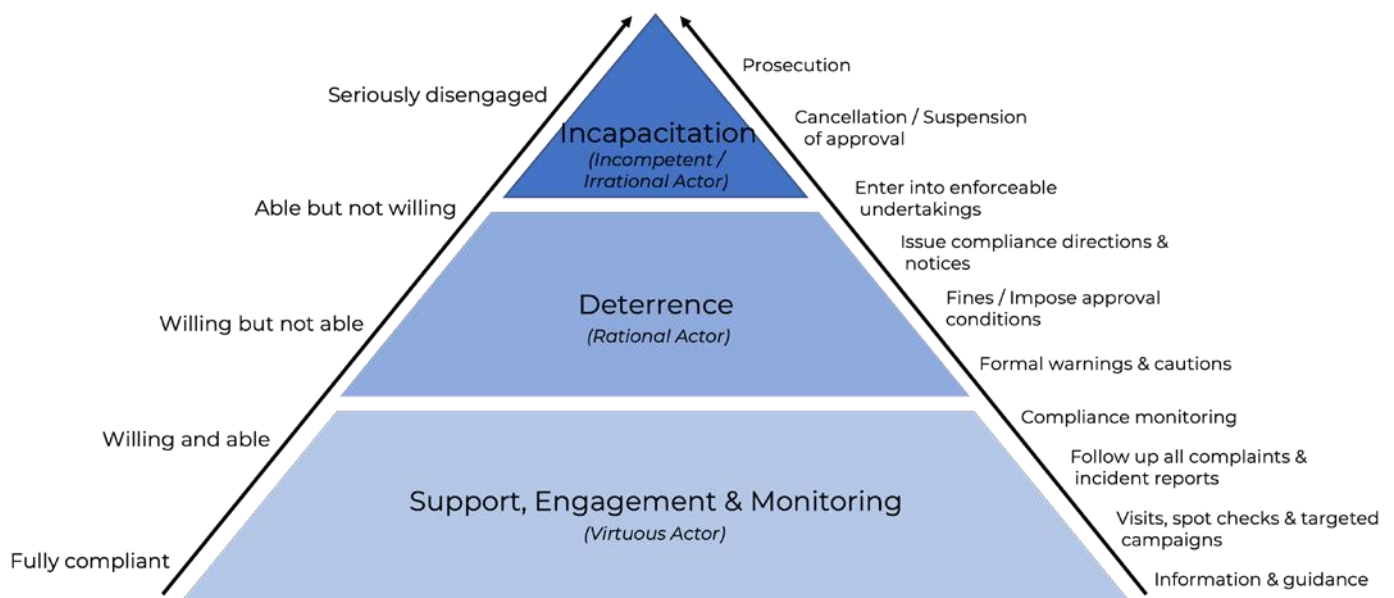
- entry into the regulated scheme - new approved providers and services
- day to day operation of an ECEC service,
- significant changes that impact on a provider or a service,
- exiting the ECEC scheme.

The Regulatory Pyramid is applied to determine what type of regulatory response or tool is required to effectively control the risk and prevent harm to children.

The NSW Regulatory Authority's risk-based approach is consistent with the Braithwaite¹ Regulatory Pyramid, which has been adapted in Figure 1. This Regulatory Pyramid shows regulatory response stages that escalate relative to the regulated entities' behaviour or practices. The NSW 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-approved providers and services (regulatory actor).

Figure 1: The Regulatory Pyramid



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.

Applying a risk-based approach helps the NSW Regulatory Authority make informed decisions about the best use of resources to ensure monitoring, compliance and enforcement activities focus on the biggest risks to children with a focus on operators who are least likely to comply with the legislation. As children, and particularly very young children, are vulnerable members of the community, their safety, health and wellbeing whilst attending ECEC services needs to be assured.

The NSW Regulatory Authority considers the following factors when assessing potential risks to children:

- Patterns of incidents or complaints received about the service or provider
- compliance history of the service and/or service provider;
- the type of non-compliance
- instances where a provider has not remedied the non-compliance
- the service’s quality rating;
- the level and frequency of contact with the service;
- any complaints about the service and/or provider;
- the ages of the children attending the service;

- the service model (e.g. single educator model);
- how long the service has been operating.

The National Regulations define the following events as ‘serious incidents’ for the purposes of the National Law:

- the death of a child;
- an incident involving serious injury, trauma to, or illness of a child requiring urgent medical attention or hospitalisation;
- an incident requiring the attendance of emergency services at the service premises;
- any circumstances where a child appears to be missing from the service or is locked in or out of a service.

Approved providers are required to notify the NSW Regulatory Authority of serious incidents. The NSW Regulatory Authority treats these notifications very seriously and has established investigation and compliance teams to ensure that timely and appropriate action is taken in regard to all serious incident notifications.

5.3 Escalating Approach to Regulatory Monitoring and Compliance

The NSW Regulatory Authority’s regulatory efforts are first and foremost focused on ensuring children attending ECEC services are safe, and that their journey through ECEC provides them with the best start in life and learning. To achieve this overarching objective the NSW Regulatory Authority develops priority regulatory programs and campaigns that focus on areas where ECEC service have the greatest challenges in meeting requirements. These priority programs and campaigns are delivered within the constraints of available resources.

The NSW Regulatory Authority also uses available data effectively to design and deliver proactive and reactive regulatory responses. The NSW Regulatory Authority has prioritised and implemented a range of strategies and activities to support these complementary approaches, as listed below. An escalating regulatory approach is used, consistent with the regulatory pyramid above.

5.3.1 Inform and educate

The NSW Regulatory Authority provides accessible information and education to the sector to promote understanding of the sector’s legislative obligations and transparency of the regulator’s expectations around compliant behaviours and practices. Being clear about regulatory requirements and the function of the NSW Regulatory Authority helps raise awareness about requirements to comply with the law and the potential consequences of failing to do so. It also helps to remove misconceptions that might foster non-compliance.

The NSW Regulatory Authority also provides information to the broader public to ensure they understand what they can expect from services.

5.3.2 Support to comply

It is fundamentally the responsibility of the regulated entities (approved providers and their services) to ensure they understand the relevant laws and regulations and implement compliant practices, policies and behaviours in accordance with them.

Where appropriate and in line with a risk based approach, the NSW Regulatory Authority will also provide practical and constructive regulatory guidance on how to comply with the law, interpret quality standards and, where necessary, how to remedy non-compliance to any person who has a duty or obligation under the legislation. This may include generalised information and education, specific guidance to a service, access to sector development initiatives or referrals to tailored support programs.

Where an authorised officer identifies non-compliance on a visit and action is required to remedy the issue, authorised officers will work with the service provider and staff to determine appropriate actions to address the problem and achieve desired outcomes.

Regulatory guidance may be offered if the safety, health or wellbeing of children is not at unacceptable risk; the quality of the service provided is minimally impacted; rectification can take place quickly and easily; and the change required involves simple, concrete solutions that can be implemented within the specified timeframe (e.g. before the end of the visit so the authorised officer can witness / observe the action taken). The authorised officer will also consider the service's history. While the non-compliance identified will not result in a compliance action, it will still constitute a confirmed breach under the National Law and Regulations and will be recorded on the service's history.

Information and resources on [how we regulate the sector](#) are available via the Department's early childhood education website pages.

5.3.3 Approach to non-compliant behaviour and practices

The NSW Regulatory Authority's approach to monitoring compliance is at all times focused on achieving a safe and high-quality ECEC sector in NSW. The NSW Regulatory Authority ensures its decisions are informed by evidence. The NSW Regulatory Authority will assess each situation according to its own merits. Regulatory tools are applied proportionate to the risks identified with escalation of response to effectively address non-compliant behaviour and practices.

This escalating regulatory approach, outlined in the regulatory pyramid at Figure 1 is a foundational guide to how the NSW Regulatory Authority monitors compliance over time, taking account of a range of data to inform its decisions. The NSW Regulatory Authority is committed to ensuring the integrity and reliability of its regulatory decisions by conducting activities in accordance with documented, approved policies and procedures.

Compliance and enforcement actions are most effective when they raise awareness of legislative obligations and encourage behavioural change, by both the non-compliant party and across the ECEC sector. These changes in attitudes and behaviour improve compliance rates and secure long-term improvements to the quality of ECEC provided to NSW children.

A key consideration in changing behaviour is to identify what motivates providers and educators to comply with the law, as well as factors that lead to non-compliance. This puts the focus on the causes of non-compliance, rather than just focussing on the outcome of non-compliance. Understanding what has led to non-compliant behaviour also helps in deciding the most appropriate regulatory tool to use in addressing the non-compliance.

The NSW Regulatory Authority uses a variety of approaches and tools in response to instances of non-compliance, in accordance with the Regulatory Pyramid at figure 1. The choice of regulatory tool is informed by the type of regulatory behaviour and motivation it is exhibiting, which is informed by data. A non-compliant service may be in any of the following groups at a defined point in time:

- **Willing to comply but unable to do so.** A service wants to comply but struggles to do so, due to lack knowledge or resources, or external factors.
- **Able to comply but unwilling to do so.** A service has access, opportunity and resources to address issues, however, doesn't seriously attempt to address issues, is not engaged with Regulator, which leads to lower levels of trust and heightened risk to children's safety.
- **Unwilling and disengaged.** A service with serious and/or ongoing non-compliance, including those being prosecuted, not engaging with the Regulator to address serious issues, leading to very low levels of trust and very high levels of risk to children's safety.

The NSW Regulatory Authority's response to non-compliance will depend on the above behavioural groups, and may include any of the following:

- Regulatory guidance
- Administrative letters
- Caution letters
- Compliance directions and notices
- Penalty infringement notices
- Emergency action notices
- Prohibition notices
- Variations, suspensions and cancellations of approvals
- Enforceable undertakings
- Prosecutions and exiting the provider and service from the scheme

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

5.3.4 Proactive Regulatory Responses

Proactive regulatory responses are informed by in-depth data analyses to identify regulatory behaviours and patterns of performance by ECEC services and providers. Proactive regulatory responses, focused on harm prevention and reducing the likelihood of repeated non-compliance, include the following:

- Use of data to identify trends in risk and to inform the approach to and frequency of monitoring and visiting services;
- proactive educational programs to respond to sector-wide emerging regulatory issues or trends;
- heightened regulatory visibility with every ECEC service visited at least once every year;
- tailoring and targeting educational content, such as webinars, e-learning, and guidance notes to providers and ECEC services;
- targeted monitoring campaigns as part of a planned priority program focusing on regulations and requirements that uphold children's safety;

5.3.4.1 Data mining and analysis

The NSW Regulatory Authority draws on data from the National Quality Agenda IT System to undertake analysis of emerging trends or patterns in compliance issues. This assists the NSW Regulatory Authority to plan monitoring compliance activities around those issues and to address emerging problems before they escalate.

5.3.4.2 Targeted monitoring campaigns and audits

The NSW Regulatory Authority may undertake targeted campaigns and audits that focus on a specific, pre-identified aspect of legislated requirements, for example, supervision of children or child protection requirements.

These campaigns allow the NSW Regulatory Authority to gauge overall compliance with the identified requirements and assist in planning for future education strategies.

5.3.4.3 Quality Assessment and Ratings

Quality Assessment and Rating of ECEC services afford an opportunity to identify areas of potential non-compliance. Officers conducting assessments can provide advice to service providers on matters that need to be addressed in order to ensure compliance with regulatory requirements. Officers will also work with service providers to examine opportunities for quality improvements at the service. These visits may be a partial or full assessment and rating.

The National Quality Standards and the assessment and rating system is embedded in the National Law. Quality ratings outcomes enable both services and the community to make relative judgements about the quality of a service against the National Quality Standard.

Assessment and ratings processes are a cornerstone of the system of continuous quality improvement for education and care services operating under the National Law.

The NSW Regulatory Authority is committed to implementing an effective and efficient assessment and rating process that supports the integrity of quality rating decisions, and encourages continuous improvements to service quality over time. This is crucial to ensuring parents and families can make informed decisions for their child.

5.3.5 Reactive Regulatory Responses

The NSW Regulatory Authority receives notifications, complaints, intelligence and other data from services, providers and members of the public, which it carefully analyses to ensure the reactive regulatory response is adequate and that risks are controlled. Notifications include any serious incidents occurring at a service and any complaints made about a service to the service provider. These reports play an important role in assisting the NSW Regulatory Authority to identify potential incidents of non-compliance. All complaints and notifications are reviewed and, where necessary, investigated.

Reactive regulatory responses are informed by dynamic identification and analysis of risk across all incoming reports, notifications of incidents, intelligence and complaints. Reactive regulatory responses, tailored to ensure they adequately control risks to children, may include:

- unannounced monitoring visits;
- partial or full re-assessment and rating visits;
- a range of regulatory enforcement measures relative to the type of non-compliance¹;
- formal investigations on more serious incidents and reports where children's safety is compromised.

5.3.5.1 Monitoring visits to services

Visits can be either announced or unannounced and may be initiated in response to an identified risk. Monitoring visits are scheduled as a proactive and reactive regulatory response to control risks and prevent harm to children. Monitoring checklists are utilised to ensure consistency in monitoring activities in different service types and across geographical areas. More information is available in the NSW Regulatory Authority's Approach to ECEC Service Visits Policy.

¹ See 'Approach to non-compliant behaviour and practices' section in this policy

5.3.5.2 Investigations

Investigation by authorised officers of the NSW Regulatory Authority is a key means of assessing reported or detected incidents of risk to children or other breaches of legislation to determine the priority for further compliance and enforcement action. During an investigation, authorised officers gather evidence of the incident or alleged breach in order to establish whether an offence has occurred, the severity of the offence, and the identity of those who may be responsible. Evidence may be gathered in the form of videos, photographs, samples and physical evidence, documents, witness statements and records of interviews. Investigative powers are conducted in line with legislative authority and approved agency policies.

6 Enquiries

If you have any enquiries about this policy, please contact:

Quality Assurance and Regulatory Services ECE
Information and Enquiries team 1800 619 113 (toll free)
ececd@det.nsw.edu.au

7 Document Version Control

Policy Owner	Version	Approved By	Date last reviewed
Director, Regulatory Strategy, Policy and Practice	1.0	Executive Director, Quality Assurance and Regulatory Services	** May 2022