

COMPLIANCE

POLICY

EARLY CHILDHOOD

EDUCATION AND CARE

QUALITY

ASSESSMENT AND

REGULATION

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1. Introduction

1.1 About the Early Childhood Education and Care Directorate

The Early Childhood Education and Care Directorate (the Directorate) is part of the NSW Department of Education. The Directorate is responsible for regulating early childhood education and care services and providers in NSW.

The Directorate regulates approximately 5,400 services across NSW to promote high quality early childhood education and care. Service types regulated by the Directorate include:

- Long day care
- Preschool
- Outside school hours care (covers before & after school care and vacation care)
- Mobile services
- Family day care
- Home based care
- Occasional care

Most NSW services are regulated under a national system known as the National Quality Framework. The Directorate collaborates with other State and Territory jurisdictions and the National Authority, the Australian Children's Education and Care Quality Authority (ACECQA), to ensure a coherent approach to compliance under the National Law across Australia.

Some service types operating in NSW are not covered by the National Quality Framework. These services are regulated under a separate NSW State Act and Regulation that are aligned with the national law.

The Directorate aims to be a modern and effective regulator that exercises its statutory authority fairly and reliably. We take diligent and appropriate regulatory action based on the following principles:

- Outcomes focussed
- Risk based
- Transparent
- Consistent
- Proportionate & Fair
- Timely
- Ethical & Accountable
- Collaborative

Full details on the principles that guide the Directorate's compliance operations are provided in Chapter 4.

The Directorate also collaborates with other government agencies and stakeholder groups to maximise its compliance activities. For example, the Directorate has worked with the Office of the NSW Ombudsman to host joint information sessions for the early childhood sector on child protection matters. The Directorate is also working with local planning

authorities to align development application approval processes with the requirements for education and care service premises under the National and State legislation.

The Directorate also works collaboratively with peak education and care sector organisations. The Directorate holds regular meetings with a stakeholder reference group, the NSW Early Childhood Education and Care Reference Group. The Reference Group is comprised of private and community sector representatives, peak sector associations, and peak provider representatives. The Reference Group acts as a forum for discussion and consultation on operational and policy issues affecting the NSW education and care sector and promotes the sharing of information between the Directorate and the sector.

1.2 Purpose of the Compliance Policy

This Compliance Policy summarises the Early Childhood Education and Care Directorate's general approach to compliance and enforcement. The policy explains how the Directorate undertakes activities that achieve compliance and drive continuous improvement within the NSW early childhood education and care sector. The policy guides the Directorate's decision-making to ensure its compliance activities and actions are consistent, fair and proportionate.

This Compliance Policy is relevant to the following legislation administered by the Directorate:

[*Children \(Education and Care Services\) National Law \(NSW\)*](#)

[*Education and Care Services National Regulations*](#)

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

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

Copies of the above legislation are available on the [NSW legislation website](#).

1.3 Authorised officers

The legislation administered by the Directorate provides for the authorisation of individuals to exercise a variety of powers related to assessment and compliance. Authorised officers have power to enter the premises of approved services, identify and question persons, obtain information documents and other evidence, and issue notices. The legislation also allows the Directorate to enter into enforceable undertakings with persons who have contravened a provision of the law.

2. The Directorate's approach to regulation

2.1 Overview

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

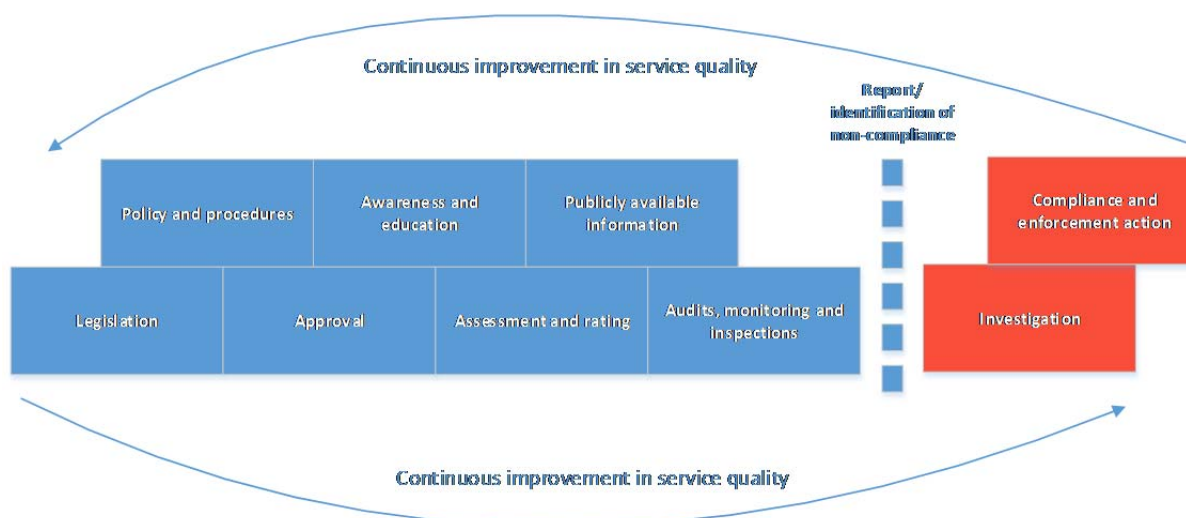
The objectives and guiding principles for the regulation of education and care services are set out in the National and State legislation. These include:

- ❖ to ensure the safety, health and wellbeing of children attending education and care services
- ❖ to improve the educational and developmental outcomes for children attending education and care services
- ❖ to promote continuous improvement in the provision of quality education and care services
- ❖ to improve public knowledge, and access to information, about the quality of education and care services
- ❖ the rights and best interests of the child are paramount
- ❖ children should receive services that meet their individual needs (including the needs of children with a disability) and enhance their physical, emotional, cognitive, social and cultural development
- ❖ children are successful, competent and capable learners
- ❖ services should be planned and operated in a manner that recognises the diversity of the children who attend them and of the communities that they serve
- ❖ the role of parents and families is respected and supported.

To read all the 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*](#).

The Directorate strives to be a best practice regulator and apply contemporary approaches to its regulatory compliance and enforcement strategies. To this end the Directorate will regularly evaluate the effectiveness of its compliance approaches and will improve, change or develop new approaches as required. The Directorate will also be transparent and open in its decision-making and keep the public informed about its regulatory activities and the performance of services through public registers and other means of communication.

Figure 1: Components of the ECEC Directorate’s regulatory framework



2.2 The ECEC Directorate’s regulatory system

The Directorate operates within a comprehensive regulatory framework consisting of an integrated series of components incorporating legislation, policy, education, approval, assessment and rating, monitoring, audit, investigation, and compliance and enforcement actions.

The Directorate 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 Directorate’s regulatory decisions, approaches and strategic directions.
- ❖ **Administrative systems:** processes and procedures that support the Directorate’s statutory functions and financial 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.
- ❖ **Compliance and enforcement:** compliance assurance activities, such as monitoring visits and inspections, and enforcement actions that aim to educate the sector and address non-compliance.

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.

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

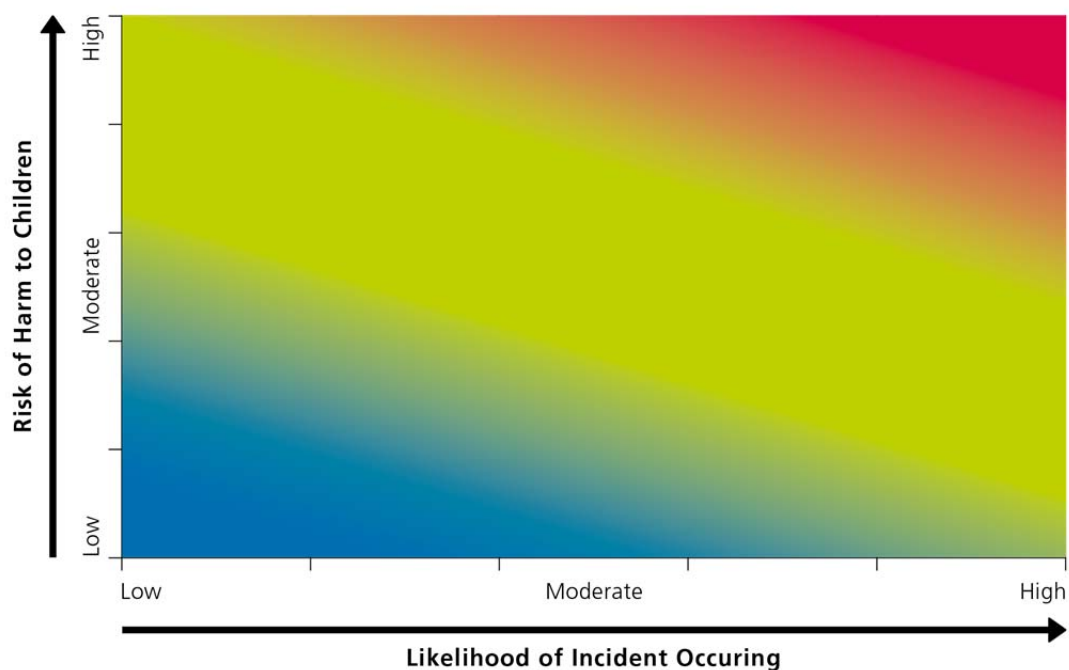
2.3 Risk-based regulation

The Directorate applies a responsive and risk-based approach to its regulatory compliance functions.

In an education and care service context, risk is measured in terms of the likelihood of non-compliance occurring and the level of risk posed to children as a result of that non-compliance.

Applying a risk-based approach helps the Directorate make informed decisions about the best use of resources to 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. As children, and particularly very young children, are vulnerable members of the community their rights and best interests are paramount. Only very low level residual risk to the safety of children attending education and care services in NSW can therefore be tolerated within the Directorate's risk-based model.

Figure 2: The ECEC Directorate's risk model



The Directorate considers the following factors when assessing non-compliance and the likely risks to children:

- ❖ the compliance history of the service and/or service provider
- ❖ the service 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
- ❖ how long the service has been operating

The National Regulations define certain events as 'serious incidents' for the purposes of the National Law. Serious incidents are required to be notified to the Directorate for investigation. The Directorate treats these notifications very seriously and has set up an investigation unit to ensure that timely and appropriate action is taken in regard to all serious incident notifications. Serious incidents include:

- ❖ 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.

2.4 Matching regulatory responses to attitudes and nature of non-compliance

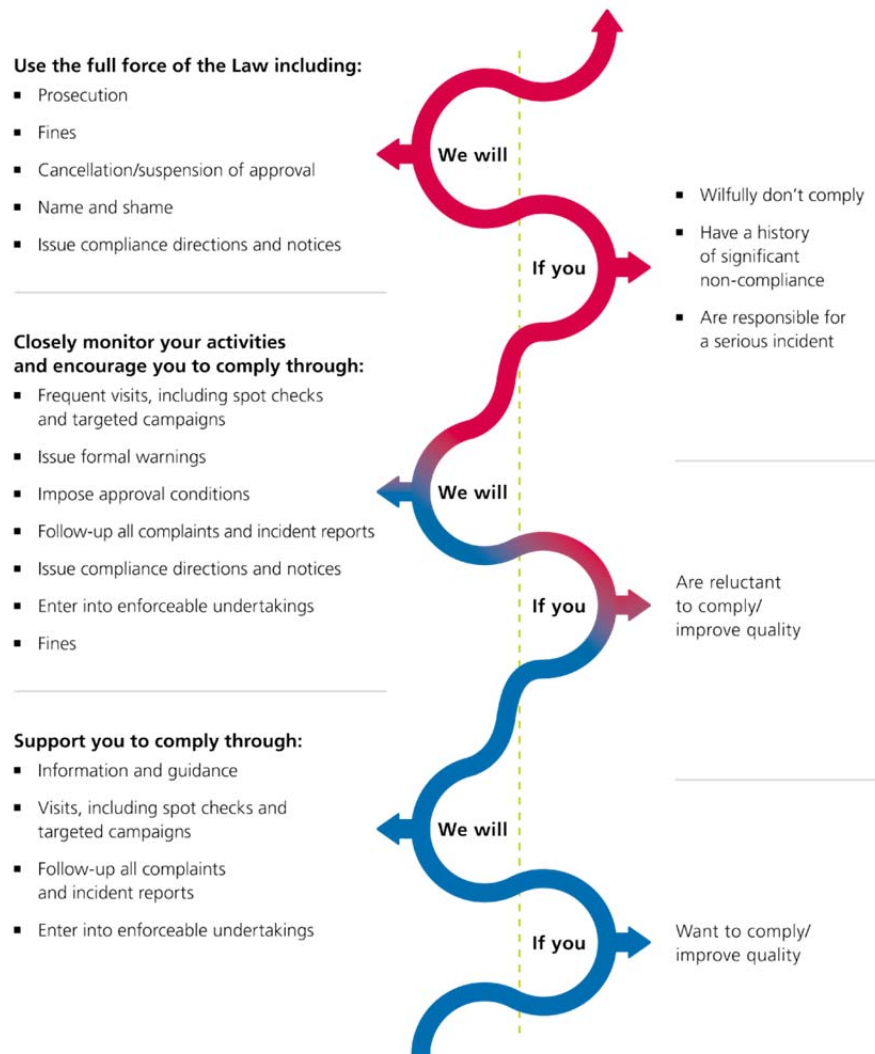
Compliance and enforcement actions are most effective when they raise awareness of legislative obligations and encourage behavioural change, by both the non-compliant party and across the education and care sector. These changes in attitudes and behaviour improve compliance rates and secure long-term improvements to the quality of education and care 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-compliant behaviour. 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-compliance behaviour also helps in deciding the most appropriate regulatory tool to use in addressing the non-compliance.

Figure 3 provides an overview of the types of regulatory tools the Directorate may use in response to instances of non-compliance. The Directorate escalates its regulatory response

according to the level of risk to children, the seriousness of the non-compliance, the attitude of the offender, and the compliance history of the service provider.

Figure 3: ECEC Directorate’s responsive regulation model



3. The ECEC Directorate’s approach to compliance

3.1 Outcomes focussed

The Directorate’s compliance and enforcement strategies are focussed on achieving outcomes, within the regulatory 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 education and care.

3.2 Establishing compliance priorities

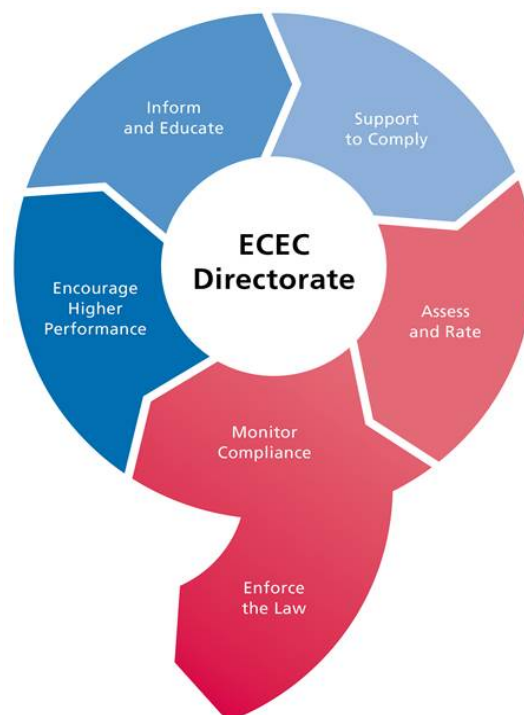
Priorities for the Directorate's compliance efforts are based on achieving the best outcomes for legislated objectives (see section 2.1) within the constraints of available resources. Identifying the greatest potential risks allows the Directorate to decide and plan for the compliance priorities it will focus on. Knowledge about problems and their associated risks is established by collecting and analysing information and data from a range of sources including:

- ❖ notifications and complaints
- ❖ results from sector monitoring and audits
- ❖ results from assessment and rating
- ❖ sharing of information between jurisdictions, including the Australian Government
- ❖ trends in non-compliance
- ❖ engagement with peak sector organisations
- ❖ the National Quality Agenda IT system

3.3 Compliance approach

The Directorate's approach to compliance is aimed at supporting the sector to provide sustainable high quality education and care sector in NSW. Strategies are aimed at assisting providers and services meet legislative objectives and obligations and the Directorate is committed to promoting innovative solutions and creating opportunities to encourage service improvement and higher performance.

Figure 4: ECEC Directorate's strategies



Inform and educate

The Directorate provides information to the sector to promote understanding of legislative obligations and requirements and to encourage voluntary compliance and improved quality. Being clear about the outcomes expected raises awareness about 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.

Tailored information sessions for different sector groups, direct formal and informal advice, the Directorate's regular newsletter (EC Extra) and sector alerts, targeted campaigns and audits are some of the proactive approaches the Directorate uses to assist the sector achieve compliance and improve quality. Campaigns and audits are typically focussed on areas where a lack of understanding about regulatory requirements may exist or where a trend of poor compliance may be emerging. Communications will also focus on these issues as well as topical areas of interest.

The Directorate also works with co-regulators in other jurisdictions to ensure communications relating to the national framework are coordinated and consistent across Australia.

Support to comply

The Directorate will provide practical and constructive advice 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.

The Directorate provides targeted assistance to services. Where an inspection or audit identifies non-compliance 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.

Information and resources are available through the Directorate's website at www.dec.nsw.gov.au/ecec or from the ECEC Information Line – 1800 619113

Assess and rate

The National Quality Standard and 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 rating, along with Quality Improvement Plans, is a cornerstone of the system of continuous quality improvement for education and care services operating under the National Law.

The Directorate 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.

Monitor compliance

A core function of the Directorate is to monitor and determine levels of compliance with the requirements of the legislation and with approval conditions. The aim is to ensure that, where possible, incidents of non-compliance and their impacts do not occur. Various means are used to monitor compliance, these include:

Complaints and notifications

The Directorate receives complaints directly from the public and notifications from service providers. 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 Directorate to identify potential incidents of non-compliance. All complaints and notifications are reviewed and, where necessary, investigated.

Targeted monitoring campaigns and audits

The Directorate undertakes targeted campaigns and audits that focus on a specific, pre-identified aspect of legislated requirements, for example, supervision of children or child protection requirements.

Typically during a targeted campaign or audit the Directorate will select and advise a sample selection of services about the campaign or audit and will then visit (either announced or unannounced) the sample services over a set timeframe to check on compliance with the relevant requirements. This allows the Directorate to gauge overall compliance with the identified requirements and assists in planning for future education strategies. All instances of non-compliance identified during a targeted campaign or audit are followed-up.

Data mining and analysis

The Directorate can draw on data from the national quality agenda IT database to undertake desktop analysis of emerging trends or patterns in compliance issues. This assists the Directorate to plan monitoring compliance activities around those issues where the sector may be experiencing difficulties and to address emerging problems before they escalate.

Rating assessments

Assessments conducted for rating purposes 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.

Investigations

Investigation by authorised officers of the Directorate 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 Directorate policies, such as the *ECECD Procedures Manual for Investigations*.

Enforce the law

There is no 'one-size-fits-all' response to non-compliance. The choice of approaches and regulatory tools used to address non-compliance depend on individual circumstances and context.

The majority of education and care services voluntarily operate in compliance with their regulatory requirements. Instances of non-compliance can often be 'involuntary' and may be attributable to uncertainty about regulatory requirements and obligations.

When compliance monitoring identifies non-compliance, its significance is evaluated to determine the most appropriate response. 'Significance' involves establishing the level of risk to children as a result of the non-compliance as well as other factors, such as the offender's attitude to compliance, the compliance history of the provider and/or service, whether the breach is intentional, opportunistic or unintentional, and what, if any, benefits have been derived by the offender from the non-compliance.

Any action taken by the Directorate will aim to ensure that, where possible, any impacts resulting from the non-compliance are minimised, that the non-compliance is rectified, and that the sanction applied reflects the seriousness of the incident and acts as a deterrent to re-offending by the particular person or the sector generally.

The Directorate uses a variety of approaches and tools to address instances of non-compliance. These include:

Administrative letters

Administrative letters are issued where breaches, typically of a minor nature, are identified and require rectification. An administrative letter advises the service provider of the identified breaches and requires that they be remedied within a specified timeframe.

Caution letters

Caution letters are used where there is evidence of minor levels of non-compliant behaviour at a service. A caution letter advises the person offending that a breach has been identified and provides information about the relevant legislative provisions that need to be complied with.

Compliance directions and notices

Compliance directions and notices are used where either a specific requirement of the regulations or particular provisions of the legislation are not being complied with. A compliance direction requires a service provider to rectify an identified breach within a

specified timeframe and sets out the steps that need to be taken to address the breach. A compliance notice can be more general in nature, requiring a service provider to comply with certain provisions of the legislation. A compliance notice also sets out the steps that need to be taken to remedy the contravention. Penalties can be incurred if a service provider does not comply with a compliance direction or a compliance notice.

Penalty infringement notices

A penalty infringement notice is a monetary penalty issued for non-compliance with a limited number of specific requirements. Penalty infringement notices have an immediate punitive effect and serve as a deterrent against future non-compliance.

Emergency action notices

Emergency action notices are used when the Directorate is satisfied that a service is operating in a manner that poses an immediate risk to the safety, health or wellbeing of children attending a service. An emergency action notice requires a service provider to immediately isolate and rectify the problem that is posing the risk to children.

Prohibition notices

The Directorate can issue a prohibition notice to a person, who is in any way involved in the provision of an approved service, preventing them from remaining on the premises of the service or providing education and care to children. It is the Directorate's policy that any person charged with child assault or inappropriate discipline of a child is issued with a prohibition notice pending a Court outcome.

The Directorate can also direct that any person who is deemed 'inappropriate' be excluded from the premises of a family day care service while children are attending the service. An inappropriate person is anyone who may pose a risk to the safety, health or wellbeing of children attending the service or whose behaviour or state of mind is such that it would be inappropriate for that person to be on the premises while children are present.

The Directorate can also direct a provider of a family day care service to suspend an educator where the Directorate is satisfied that the conduct of that educator, or the inadequacy of the service provided by that educator, may cause a risk to the safety, health or wellbeing of children attending the service, or where the actions of the educator are causing the provider and/or the service to be in breach of the legislation.

Variations, suspensions and cancellations of approvals

The Directorate has the option of placing conditions on the approvals it issues, and varying approval conditions if circumstances change. Conditions can cover a broad range of matters relating to both service premises and/or staff. The use of approval conditions enable services to function with added protections when a potential risk of non-compliance has been identified.

The Directorate can also suspend or cancel approvals in certain circumstances. The grounds for suspending or cancelling approvals are set out in the legislation and include failure to comply with approval conditions, failure to comply with the legislation, and situations where the Directorate believes that it is not in the best interests of children attending the service for that service to continue.

In most cases a service provider will have the opportunity to provide evidence as to why the suspension or cancellation should not proceed. This opportunity is not required in cases where the Directorate is satisfied that there is an immediate risk to the safety, health or wellbeing of children attending the service.

Enforceable undertakings

An enforceable undertaking may be accepted by the Directorate as an alternative to prosecution where there has been a serious breach of legislation. The Directorate is able to accept a written undertaking by a service provider to take action to deal with an alleged breach or breaches. These undertakings are enforceable through the Courts.

A key objective of an enforceable undertaking is to ensure systemic change in the management or operation of an education and care service so as to prevent future breaches of the legislation. When considering whether to enter into an enforceable undertaking the Directorate will choose the approach that is most likely to produce the best results in terms of ongoing compliance, remedial action to address the alleged non-compliance, and obtaining improvements in service quality over time.

Prosecutions

The basic pre-requisite for any prosecution is that the evidence available establishes a *prima facie* case (ie. a legally sufficient level of evidence). The Directorate will also take into account whether it is in the public interest to prosecute in the individual circumstances of a case.

The Directorate will consider prosecution for serious breaches of the legislation or repeat offenders. The Directorate will only proceed with prosecution if it is deemed the most appropriate course of action in the circumstances. Prosecution sends a message to the sector and the wider community that failure to comply with legislative requirements will be enforced through the courts.

4. Guiding principles

The NSW Government is committed to ensuring that regulatory practices and operations in NSW are implemented in accordance with contemporary views of good regulatory practice to ensure the minimisation of regulatory burden and the delivery of predictable and consistent regulatory outcomes.

The ECEC Directorate aims to implement best regulatory practice and has adopted the following principles to guide its compliance and enforcement strategies and help to achieve effective regulatory outcomes.

<p>Outcomes focussed</p>	<p>We will focus our compliance strategies at encouraging a voluntary commitment by service providers to meeting regulatory requirements.</p> <p>We will critically consider the compliance tools at our disposal and choose the most appropriate for the circumstances, and most likely to achieve the best outcome.</p> <p>We will promote continuous improvement in the delivery of quality education and care.</p>
<p>Risk-based</p>	<p>We will use an evidenced based approach to our planning and decision-making.</p> <p>We will focus on the most important and significant issues and problems to achieve the best outcomes for children attending education and care services in NSW.</p> <p>We will target our compliance intervention at poor performers, illegal activities and issues that pose the greatest risk to the safety, health and wellbeing of children.</p> <p>We will consider all alleged non-compliances to determine the necessary action to minimise the potential risk of harm to children.</p>
<p>Transparent</p>	<p>We will provide clear information and guidance to the education and care sector about legislative requirements and the quality standards.</p> <p>We will ensure that families have access to information about the performance of education and care services and about our regulatory activities.</p>
<p>Consistent</p>	<p>Our actions will be consistent with the legislation and within our powers.</p> <p>We will maintain a robust system of internal controls and apply our practices consistently to ensure the predictable delivery of legislative objectives and outcomes.</p> <p>We will ensure that our staff have the necessary skills and are appropriately trained and supported through effective internal systems and policies.</p>

<p>Proportionate and fair</p>	<p>Our actions will be proportionate to the risks posed to children and the seriousness of the non-compliance.</p> <p>We will ensure the integrity and reliability of our regulatory decisions by conducting activities in accordance with documented processes.</p> <p>Our determinations will be informed by evidence.</p> <p>We will ensure affected parties have the opportunity to be heard before final determinations are made.</p>
<p>Timely</p>	<p>We will respond in an effective and timely manner and adhere to all relevant statutory timeframes.</p> <p>We will follow through on all actions to completion.</p>
<p>Ethical and accountable</p>	<p>We will conduct ourselves in accordance with the NSW Department of Education <i>Code of Conduct</i>, these principles and any other relevant policies and guidelines.</p> <p>Our strategies, approaches and decisions will be informed by our regulatory expertise, the evidence we have before us and our analysis of the information.</p> <p>We will document and be answerable and accountable for our regulatory decisions and actions.</p> <p>We will measure and report on our regulatory performance.</p> <p>We will monitor and review our own performance to improve how we conduct our activities.</p>
<p>Collaborative</p>	<p>We will work with and, to the extent permitted under legislation, share information with other regulators and stakeholders to ensure the best regulatory outcomes.</p> <p>We 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.</p> <p>Our decisions will be 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.</p>