IMPORTANT - CHANGES TO THIS SITE

Information and resources about local government in WA are now available on the Department of Local Government, Sport and Cultural Industries website.

The Legislative Framework

The Schedule to the Education and Care Services National Law (WA) Act 2012 (the National Law) and Education and Care Services National Regulations 2012 (the National Regulations) and the Child Care Services Act 2007 and regulations made under it provide the legislative framework for the Department of Communities (the Department) to protect and promote the best interests of children who attend education and care services and licensed child care services (hereafter referred to collectively as services) in Western Australia.

All services must operate in accordance with the relevant Act and in compliance with the relevant regulations and any condition(s) imposed and must also be provided in a way that:

- protects children from harm
- safeguards and promotes children's wellbeing
- respects children's dignity and privacy
- provides positive experiences and stimulates and develops children's creative, emotional, intellectual, physical, recreational and social potential.

In administering the legislation, the Chief Executive Officer (CEO) or delegated officer of the Department will not knowingly allow the wellbeing of children attending a service to be compromised and seeks to:

- protect children from harm or continuing harm
Education and Care - Compliance Enforcement Framework

- stop unlawful conduct
- ensure future compliance with the law
- raise awareness of legislative requirements through publication of enforcement outcomes and use of other compliance tools
- deter and punish serious offences.

Paying particular attention to areas of high risk to children, or that impact on the provision of care, the Department has developed this Compliance and Enforcement Framework (the framework) to ensure a consistent and transparent approach to encourage and enforce compliance with the legislation and associated regulations that:

- implements initiatives that promote and encourage compliance; and
- maintain a strong but flexible enforcement regime.

In order to achieve this, the Department is committed to:

- developing collaborative relationships, both internally and externally, built on trust and respect
- providing effective leadership and direction through planning, setting priorities and managing staff and resources efficiently
- maintaining credibility and accountability by implementing practices that ensure independence and objectivity in compliance measures and including achievements and outcomes in our reports.

Who is Involved in Compliance?

Those involved in the assessment and enforcement of compliance for services within Western Australia include:

- the approved provider of the education and care services or the licensee of the child care service
- the Department (under the National Law the Regulatory Authority is the CEO but in practice it is officers of the Education and Care Regulatory Unit of the Department acting under delegation from the CEO)

Approved provider or licensee of service

Approved providers and licensees have a responsibility to have a working knowledge of the legislation and relevant regulations and be able to interpret and apply them in undertaking the day-to-day activities associated with managing and operating a service. They also have rights and obligations in relation to the compliance which includes the right to due process and an obligation to be truthful.

Education and Care Regulatory Unit

https://www.dlgc.wa.gov.au/Publications/Pages/compliance-enforcement-framework.... 29/08/2018
The Department administers the legislation and relevant regulations and proactively supports the compliance process. Under each Act, officers (known under the National Law as 'authorised officers' and under the Child Care Services Act 2007 as 'licensing officers') have powers to enter, inspect and acquire information from a service and to investigate an allegation of non-compliance.

Officers of the Department visit services to monitor compliance and conduct assessment and rating. Officers also provide support, advice and guidance if required. During a visit should a non-compliance issue be identified they will record this information and it will be managed in line with the framework. In response to minor non-compliance issues officers will provide advice and education.

**Initiatives to Encourage and Promote Compliance**

As services seek to ensure compliance a range of strategies will be implemented by the Department. This includes providing support, advice and guidance to encourage and promote compliance with the Acts and regulations. The Department will provide appropriate information and education to ensure all stakeholders understand their obligations and responsibilities.

1. **Education**

   The Department is committed to undertaking a range of education initiatives to inform approved providers, licensees and other education and care personnel of their obligations and responsibilities.

   - **Publications** – guidelines and email bulletins to support providers/licensee's awareness of their responsibilities.
   - **Information and advice** – the regulatory authority provides information, support and advice about the legislation and regulations to approved providers, licensees, services and other stakeholders.

2. **Focus on high-risk areas**

   As non-compliance in high-risk areas poses a risk to children's safety, health and wellbeing, the Department is committed to:

   - monitoring trends relating to non-compliance in high-risk areas
   - working with services to understand why non-compliance occurs
   - working in collaboration with the education and care sector to develop strategies that address high-risk non-compliance.

   Data and other critical information relating to non-compliance will be evaluated and discussed with stakeholders in order to develop appropriate strategies.
3. Support to sector regarding legislative change

The Department is committed to ensuring that when legislation or regulations change:

- adequate information and advice is provided to approved providers, licensees and the education and care sector
- it works with the sector towards the achievement of common goals
- relevant transitional arrangements are adopted with appropriate phasing-in periods.

4. Natural justice

The Department will not consult with an approved provider or licensee on whether or not the Department will investigate a matter, nor on how the Department will conduct its investigation. However, the Department will:

- ensure that approved providers or licensees are given an opportunity to answer any allegations before any decisions about sanctions are made
- consider any submissions or proposals made by an approved provider or licensee that may have a bearing on the Department's decision
- where a sanction is a form of notice, inform the person receiving the notice of any right of review the person has under the relevant Act
- abide by all requirements of the State Administrative Tribunal Act 2004 or Criminal Procedure Act 2004 with respect to the conduct of any application for disciplinary action or prosecution it undertakes.

5. Continuous evaluation

The Department is committed to ongoing monitoring and evaluation of the framework to identify successes and areas for improvement and revise accordingly.

Strong, but Flexible Enforcement Initiatives

The Department is committed to a strong, but flexible enforcement regime and has a range of initiatives to support this.

1. Risk assessment approach

The Department will undertake a risk assessment of any substantiated
non-compliance to determine whether the continued provision of the service constitutes, or would constitute, an unacceptable risk to the safety, health and wellbeing of the children attending the service. All actions undertaken by the regulatory authority will be based on the outcome of such an assessment and will be proportionate to the level of risk, with high risk non-compliance resulting in the most serious sanctions.

2. Effective investigation procedures

The Department will apply effective investigation procedures that balance maintaining public confidence in the administration of the law with other relevant considerations. This includes considering whether the investigation is in the public interest.

The Department will pay particular attention to non-compliance with the legislation and relevant regulations that jeopardise children's safety, health or wellbeing, including:

- unapproved or unlicensed child care, or contravention of licence/approval conditions
- child abuse and neglect allegations
- unsafe (including insecure) or unhygienic buildings or facilities
- child numbers and staffing levels and qualifications not in accordance with requirements
- failure of a Responsible Person to be present at the service as required
- employment or unauthorised presence of person(s) without a current National Police Certificate or valid Working with Children Card or convicted of a criminal offence
- failure to notify the Department where required and in particular where the health or safety of a child may be affected
- failure to keep records or details that may affect the health or safety of a child, or falsification or unauthorised disclosure of such records.

3. Inspections

Routine monitoring will occur for all services. This will include annual visits and spot checks.

The Department will conduct targeted inspections of services deemed to be high risk, including unannounced or announced visits and will rigorously investigate any non-compliance or complaint.

Targeted campaigns

Evidence based planning for targeted campaigns will rely on intelligence gathered about the nature and level of compliance in the education and care sector and will include a research and analysis process to identify any patterns or trends in compliance with legislation, or poor service quality provision.

Targeted campaigns may range from having a purely educational focus to an intensive compliance assessment approach which assesses compliance with a range of regulations.

4. Appropriate sanctions

Where an investigation discloses a serious breach or breaches of the legislation the Department will
use a consistent approach in deciding on the appropriate sanction/s.

Immediate suspension

Where there is evidence of matters that may reasonably constitute an immediate serious risk to the wellbeing of children enrolled at a service, the Department will immediately suspend the service approval or child care licence.

Suspension of approval on notice

The Department may also suspend a service approval or provider approval on any of a number of grounds set out in the National Law. Prior to suspending an approval, the Department must first issue a "show cause notice" to the approved provider which sets out the reasons for the proposed suspension. The provider will have 30 days to provide a written response. The Department must take the response into account when deciding whether or not to suspend.

Applications to the State Administration Tribunal for disciplinary action

Under both the Child Care Services Act 2007 and the National Law the Department may apply to the State Administrative Tribunal. The Department can ask the Tribunal to impose one or more sanctions against an approved provider, licensee or managerial officer for contraventions of the relevant Act and/or regulations. The sanctions include reprimands, fines, and orders to take certain actions, or refrain from taking certain actions. Under the Child Care Services Act 2007 the Tribunal may suspend or cancel a licence and disqualify persons from being managerial officers.

These sanctions are civil sanctions and do not lead to a person receiving a criminal record, although the sanctions may, in certain circumstances, result in them not being permitted to be involved in the provision of a service. The Department retains the ability to institute criminal prosecutions for contraventions of the legislation and regulations. In practice this would likely only occur where the Tribunal does not have jurisdiction over the matter, or where the misconduct was intentional or reckless, intentionally seeking to mislead the Department, or was otherwise so serious the Department considered it should be the subject of criminal prosecution.

Where a comprehensive investigation reveals evidence of a breach, the Department may apply for disciplinary action where the breach or contravention has, or has potential to have an immediate risk to enrolled children’s health, safety or wellbeing. The Department may also apply for disciplinary action in circumstances where other administrative sanctions have been applied and the contravening behaviour has continued.

Before taking such action the Department considers the public interest, including the following factors:

- whether the alleged conduct caused or could have caused serious harm to the health, safety or wellbeing of a child
- the age and vulnerability of enrolled children affected or potentially affected by the breach
- the degree of the approved provider or licensee’s culpability in connection with the alleged breach
- whether the alleged offender has failed to meet previous undertakings, or refused to address the Department’s directives to rectify non-compliance on this and/or on previous occasions
- the need to ensure consistency in the application of the legislation
the need to clarify the interpretation and application of a provision of the legislation or regulations
the prevalence of the alleged breach and any perceived need for punishment or deterrence, either personal or general
the attitude of the parents of enrolled children to a disciplinary action or to prosecution
the need to maintain public confidence in the approval and licensing regime
whether an application for disciplinary action or prosecution would be perceived as counter-productive to the interests of justice
the prospects of proving the contravention, as discussed in the Director of Public Prosecution Guidelines
whether the likely length and expense of a defended hearing is proportionate to the seriousness of the alleged contravention
the availability or appropriateness of any alternatives to an application for disciplinary action or prosecution
whether the regulatory and/or investigation functions have been obstructed or hindered and/or false information has been provided to the Department.

Compliance tools

The legislation provides the Department with an extensive range of approaches and tools to use when addressing non-compliance. The choice of approaches and tools used will depend on individual circumstances and context. When a non-compliance is identified its significance is evaluated to determine the most appropriate response.

Any action taken by the Department will aim to ensure that any impacts resulting from the non-compliance are minimised, that the non-compliance is rectified and that the sanction applied is proportional to the seriousness of the non compliances.

Under the National Law, the Department may take other administrative actions such as:

- imposing an infringement notice for a breach
- issuing a Direction to exclude
- issuing a notice to suspend a family day care educator
- seeking to enter an enforceable undertaking with the approved provider or other relevant person

Impose a prohibition notice.

Failure to comply with a compliance notice or direction within the specified time frame will result in more serious disciplinary action.

Use of licence conditions and approval conditions

If there are actions or failures to act that constitute an unacceptable risk to the wellbeing of enrolled children, but do not amount to breaches of the Act, the Department may impose a condition or conditions on the licence or service approval or provider approval. A condition would prohibit the
actions or inactions that the Department considers would place children's wellbeing at risk.

Non-compliance with such a condition would lead to further disciplinary action.

5. Communicate enforcement outcomes

The Department will communicate details of enforcement outcomes to the sector to raise awareness of legislative requirements. For example:

- When an approved provider or licensee is convicted of an offence against an Act or regulations, the parents of children attending the service will be notified that the approved provider or licensee has been convicted of that offence.
- When an approved provider or licensee has had disciplinary action taken against it, the details of these actions will be communicated to the general public, including by publishing on the "Enforcement Actions" section of the Department's website. Once published on the Department's website an enforcement action will remain for 24 months from the date of conviction.

6. Standards of practice

The Department will develop and implement appropriate standards of practice for compliance and enforcement activities, and enhance the effectiveness and integrity of compliance staff through training, regular review and accountable decision-making. The Department will:

- appoint staff with relevant experience
- develop and maintain clear guidelines and procedures
- provide ongoing training for staff.

7. Internal/external monitoring and review

The Department will implement an internal and external compliance monitoring and review process to ensure that officers exercise their powers under the legislation appropriately and in accordance with policies and guidelines.

Internal review mechanisms include:

Internal audits of approval and licensing activities and decisions, including those matters that have not been referred for comprehensive investigation.

External review mechanisms include:

- External review of administrative actions by the State Administrative Tribunal.

More information

For more information, please contact: Education and Care Regulatory Unit.
Download a Word version of the Enforcement Framework - Education and Care Services and Child Care Services (Docx 304 KB).