



Australian Education Union

Submission

The National Quality Framework Regulation Impact Statement Consultation

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The Australian Education Union (AEU) represents more than 190,000 educator members employed in the public primary, secondary, early childhood and TAFE sectors throughout Australia.

We welcome the opportunity to provide this response to the COAG Regulation Impact Statement for proposed options for changes to the National Quality Framework. Our early childhood members lay the critical foundation stone for educational outcomes in later life.

INTRODUCTION

High quality Early Childhood Education and Care (ECEC) has been shown repeatedly in national and international studies to have positive effects on childrens' educational, emotional, social, moral and physical development, workforce participation, as well as for society more broadly:

A growing body of research recognises that early childhood education and care (ECEC) brings a wide range of benefits, for example, better child well-being and learning outcomes as a foundation for lifelong learning; more equitable child outcomes and reduction of poverty; increased intergenerational social mobility; more female labour market participation; increased fertility rates and a better social and economic development for the society at large¹.

However, all these benefits are conditional on the provision of high quality ECEC; they are not associated with poor quality ECEC services. The 2012 OECD Starting Strong III: A Toolbox for Early Childhood Education and Care emphasises that poor or low quality services can have long term negative impacts on the development of a child:

Furthermore, research has shown that if quality is low, it can have long-lasting detrimental effects on child development, instead of bringing positive effects.²

Through the implementation of the National Quality Framework (NQF), the federal and state governments have recognised the need for a comprehensive set of policy documents that go to achieving high quality early child education and care services for all Australian children. The AEU is unequivocally supportive of the NQF and the role that it plays in delivering an integrated and unified national system that drives continuous quality improvement for ECEC services.

It is imperative that the proposed options for changes to the NQF within the Regulatory Impact Statement (RIS) contribute to the achievement of high quality ECEC and not undermine or have a detrimental impact on the broader ECEC sector. The AEU is concerned that a number of proposals within the Regulatory Impact Statement will have a negative effect on the ECEC sector.

¹ OECD report Starting Strong III; A Quality Toolbox for Early Childhood Education and Care 2012, executive summary p9

² Ibid, p9

Proposal 1.1 – Reducing the complexity of the National Quality Standard

The AEU believes that reducing the number of standards and elements within the National Quality Standard (NQS), in an attempt to reduce regulatory and administrative burden, is both premature and unnecessary.

The Regulation Impact Statement notes that:

...a widespread perception that the National Quality Standard is contributing to an increase in the quality of service delivery across the sector.

...providers whose services had been assessed and rated perceived a much lower level of administrative burden.

It further noted that only:

...some providers have found the National Quality Standard to be complex and administratively burdensome³;

The AEU is concerned that the ‘administrative burden’ perceived by some providers within the ECEC sector is being given priority over the potential of exposing children to risks or to a lower quality of education and care.

Given that the NQS has only been in place for a relatively short period of time, that less than 50% of services have been assessed and rated and that there is much less concern about the administrative burden for those who have gone through the process, it appears precipitous to propose changes to the NQS at this time.

To alter the NQS part way through the initial assessment and rating process will create confusion for the service providers and workers, and disparity between centres which have and those which have not yet been assessed. Part of the role of the NQF is to provide families and communities with the assurance that their service provider is meeting a National Quality Standard. To alter the NQS prior to all services being assessed will also create doubt and uncertainty for the parents and families of children as to how well their service is performing against those national standards.

It is apparent from our members and from the WoolCott Research⁴ consultation process that much of the concern regarding the complexity and administrative burden that exists, is due to the uncertainty of providers as to what is expected from them in the initial assessment and rating process. The completion of the initial assessment and ratings process by all service providers will afford a better understanding of the requirements and alleviate the perceived administrative burden.

The AEU urges the completion of the initial assessment and rating prior to any further consideration of altering the NQS.

³ COAG Consultation Regulatory Impact Statement 2014 p 25

⁴ Ibid p16

Proposal 1.8 – Length of time between assessments

The AEU is strongly opposed to any extension to the length of time between assessment and ratings for individual services. The current arrangements that provide for an earned autonomy system, should be preserved. The assessment and ratings process is a key factor in achieving and maintaining high quality ECEC services.

The ECEC sector has relatively high turnover rates of educators and coordinators and we know that this turnover rate can be linked to lower quality ECEC services and child outcomes:

High staff turnover is pronounced across studies of child care in various countries, somewhere between 30% and 50% annually. High staff turnover is associated with lower quality service and poorer child outcomes.⁵

Given that five years is a child's entire pre-schooling life, most centres will experience a complete turnover of staff in much less than that time, it is possible, under proposal 1.8, that many children will spend their entire ECEC experience in a service that has not been assessed and rated. It is critical in achieving high quality ECEC, that all centres are reassessed and rated on a frequent time schedule, even those centres that have been rated as Exceeding National Quality Standards.

Maintaining the current assessment and ratings periods will ensure that the quality of care, safety, educational and social development of a child is not undermined.

Proposal 4.1 – Extension of some liability to educators

The COAG Consultation Regulatory Impact Statement at Proposal 4.1 proposes extending liability under the National Law in specified circumstances to educators. The Statement indicates the reason for the proposal is that:

'In some states, there have been instances where staff members at a service have breached Section 167 but the regulatory authority has not been able to prosecute or discipline these staff members as they did not fall under a liable category, even though they were directly responsible for the breach'

and that services:

'..... have provided commentary that without any potential liability or penalty some educators do not take their responsibilities seriously and do not provide adequate supervision of the children in care. This would mean that educators could also be prosecuted for not adequately supervising children under their care or not taking every reasonable precaution to protect the children from harm or hazard that is likely to cause injury, in addition to approved providers, nominated supervisors and FDC educators.'

⁵ OECD Encouraging quality in Early Childhood Education and Care, Research Brief: Working Conditions Matter p4

Before moving to an examination of the legal framework concerning liability, the AEU questions the evidence-base or justification for this extension-of-liability proposal.

The Statement points only to ‘some’ states where there have been ‘instances’ of a breach and notes that ‘services have provided commentary’ that ‘some’ educators do not take their responsibilities seriously.

This description or analysis does not constitute a sound basis for substantial change in the law or for regulatory intervention. Such change requires significant evidence of a serious, widespread or profound problem which is not being addressed by current arrangements. The RIS provides no evidence that this is the case and the AEU is not aware of any significant problem in this area. The issues of inadequate supervision or inadequate precautions against risk of harm are matters which a well resourced and pro-active regulator staffed with field officers can well handle.

Enhancing the prosecutorial function of the regulator could easily reduce resourcing dedicated to its other functions.

Moreover, while the RIS indicates that the policy problem which is being addressed by the extension-of-educator liability proposal is that there is incomplete regulatory coverage, it is noteworthy that in the entire chapter or section of the Statement (chapter 2) which deals with the problems emerging since the commencement of the National Quality Framework, including in a section dealing specifically with ‘incomplete regulatory coverage’ (2.1.3), there is not a single reference to breach of obligations or inadequacy of current regulatory sanctions concerning educators. The extension-of-educator liability proposal therefore sits very oddly with the stated intention of the Statement of addressing significant emerging issues.

In such circumstances the AEU submits the proposal should not be proceeded with. The AEU suggests there is a significant need for further research and analysis to assess the existence, extent and cause of any problem. That research and analysis should also inquire into sources of regulatory or legal liability attaching to service providers and their employees other than the *Education and Care Services National Law*.

The legal framework

The deterrence principle – attaching liability to the source of responsibility

The *Education and Care Services National Law* provides at:

Section 165:

“Offence to inadequately supervise children

(1) The approved provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

Penalty: \$10,000 in the case of an individual. \$50,000 in any other case.

- (2) *The nominated supervisor of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.*

Penalty: \$10,000.

- (3) *A family day care educator must ensure that any child being educated and cared for by the educator as a part of a family day care service is adequately supervised.*

Penalty: \$10,000.”

And at s167:

“Offence relating to protection of children from harm and hazards

- (1) *The approved provider of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury.*

Penalty: \$10,000, in the case of an individual. \$50,000 in any other case.

- (2) *A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury.*

Penalty: \$10,000.

- (3) *A family day care educator must ensure that every reasonable precaution is taken to protect a child being educated and cared for as part of a family day care service from harm and from any hazard likely to cause injury.*

Penalty: \$10,000.”

Already s166 provides:

“Offence to use inappropriate discipline

- (1) *The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to—*
(a) *any form of corporal punishment; or*
(b) *any discipline that is unreasonable in the circumstances.*

Penalty: \$10,000, in the case of an individual. \$50,000 in any other case.

- (2) *The nominated supervisor of an education and care service must ensure that no child being educated and cared for by the service is subjected to—*
(a) *any form of corporal punishment; or*
(b) *any discipline that is unreasonable in the circumstances.*

Penalty: \$10,000.

- (3) *A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to—*
(a) *any form of corporal punishment; or*
(b) *any discipline that is unreasonable in the circumstances.*

Penalty: \$10,000.

- (4) *A family day care educator must not subject any child being educated and cared for by the educator as part of a family day care service to—*
(a) *any form of corporal punishment; or*
(b) *any discipline that is unreasonable in the circumstances.*

Penalty: \$10,000.”

Section 165 deals with protection from inadequate supervision and section 167 deals with protection from harm and other hazards.

The AEU asserts that a basic principle in determining whether parliament should intervene and establish by statute various offences and associated penalty regimes is to ensure that liability attaches directly to where responsibility for the ‘offending’ behaviour lies. To do other than this results in too high a risk of adverse or unintended consequences or in failure to achieve the policy objectives. It is highly unlikely that this would act as a deterrent.

In early childhood education and care services, educators, in the main, are not responsible for the establishment and operations of the service. They do not control or allocate resources. These areas are the responsibility of the approved provider, or the nominated supervisor. The exception is family day care centres, where there is only the educator.

The current statutory provision recognises this principle, acknowledges the areas of responsibility and, in the view of the AEU, apportions liability consistently. This is appropriate.

It must also be recognised that overwhelmingly, educators are employees. The regulatory authority requires the employer – usually the approved provider – to have in place policies and procedures that ensure adequate supervision and which support protection from harm and hazards. Those policies and procedures also involve monitoring and reporting requirements where incidents occur that indicate a breach of the ‘standards’ concerning supervision or protection from harm.

It is simply unacceptable that where an individual educator is not following these policies and procedures that the regulator or the employer can reasonably claim they are powerless to punish for the breach or to prevent further breaches. Employers have the right to discipline and the power to dismiss. Regulators can require changes to the policies and procedures and also to be informed as to what action has been taken concerning the employee. These measures are additional to the current sanctions regime.

This issue indicates that there are other sources of liability which may have been overlooked in the proposal to extend educator liability.

Other sources of liability

Where a child is injured or otherwise suffers harm through the wilful, reckless or knowing failure of an educator to adequately supervise or take the necessary precautions to protect from harm or hazards, then the common law of negligence can apply to provide a remedy. The principle of vicarious liability may operate to ensure that the target of any action is the employer. However, this does not override the principle that primary liability rests with the person committing the breach. The target of any action is a choice exercised by the aggrieved party (usually the parents of the pre-school aged child).

The imposition of a pecuniary penalty for committing a statutory offence will do nothing to compensate for harm to a child incurred because an educator did not adequately supervise or take appropriate precautions against risk of injury.

It is also important to recognise that employers and employees already have statutorily imposed obligations to ensure safe systems of work and to take reasonable precautions to ensure safe and healthy workplaces. The source is the model Work Health and Safety legislation or the specific legislation where states are not subject to the harmonised 'national model'.

There can be little reasonable doubt that early childhood education and care centres are workplaces subject to the WHS legislation and that protection of the health and safety of children as persons affected by the acts or omissions of employers or employees is not covered by that legislation. The relevant legislation already creates offences and a penalty regime and so the proposal concerning the *Education and Care Services National Law* would appear, at the least, to be duplicative.

Comparable occupations

It is instructive to consider the legal and regulatory framework for a cognate occupation – that of school teaching – when considering the proposal to extend liability to educators in the early childhood sector.

The state assumes the responsibility for ensuring school age children attend schools, that schools are registered and subject to regulatory authority, be it an independent statutory authority or a department of the state. For its own employees, the state provides statutory regimes for the management of employee conduct and performance. For both its own employees and for employees in the 'non-government' sector, the state establishes a separate

registration and professional standards regulatory regime for the professional occupations (principally teaching but also extending to associated allied health professionals in schools) working directly with children. The profession itself plays a significant role itself in these functions.

The employer therefore exercises directly a conduct and performance management function and another regulator exercises a professional standards setting and monitoring and management role.

In the school sector, in respect of the teaching workforce, the state has intervened to require registration and oversight of the profession presumably on the principle of protecting the public interest.

The *Education and Care Services National Law* as its name implies was established to regulate service providers and only to a very limited extent, where protection of the public interest indicated its necessity, to regulate the activities of the employees of, or even volunteers at, those providers. For example, section 166 prohibits the use of corporal punishment or other unreasonable forms of punishment by service providers, nominated supervisors and staff members including volunteers.

It is not appropriate to propose the simple extension of liability to individual educators in specified circumstances without also inquiring into and establishing the basis of and mechanisms for standards setting, codes of conduct and management of performance. For example, legislation establishing ‘government teaching services’ usually provide an exemption (or indemnity) from liability for acts done in good faith. This is particularly important where the obligation to be imposed appears to be one of strict liability and where the nature of that obligation, say of adequate supervision or reasonable precaution, is not statutorily defined or specified in detail.

Proposal 8.4.2 Educator breaks

The COAG Consultation Regulatory Impact Statement at 8.4.2 proposes that guidance on educator breaks is amended to make clear that service providers must comply with their legal obligations and must meet prescribed ratio entitlements at all times, subject to jurisdiction-specific transitional arrangements.

As a principle the AEU supports the maintenance of ratios at all times and finds it deeply regrettable that this was not the initial guidance provided by the Regulatory Authorities.

However in this case we must oppose the proposal.

The advice of the Regulatory Authorities, as provided at page 89 of the Guide to the National Law and National Regulations

“it is recognised that backfilling educators in Centre-based services while they are on short breaks is difficult. The approach of Regulatory Authorities will be to allow each educator to take up to 30 minutes off the floor per day without being backfilled – for example, for personal hygiene, meal breaks or

to take personal phone calls – without the service being in breach of prescribed ratios. At all times the overarching consideration must be the needs of the children and adequate supervision must be maintained at all times.”

has been utilised by Victorian services and supplemented by advice from DEECD as the principal funding body for preschools in the development of service timetables and staffing, particularly in response to the Universal Access policy.

*“We have been advised that normal meal breaks of up to 30 minutes taken by early childhood teachers **can be included** in the duration of a 15 hour program provided the children are under the supervision of the service provider organisation in accordance with the requirements of the Education and Care Services Law and Regulations.*

The Victorian Regulatory Authority advises:

- *The Guide to the National Law and National Regulations includes provisions for breaks where each educator may take a break of up to 30 minutes per day (refer page 89).*
- *Services utilising this provision must consider meeting the needs of the children, maintaining adequate supervision and ensuring every reasonable precaution is taken to protect children from harm and hazards.*
- *Where an educator has a half hour ‘break’ it would be expected that they be replaced by another educator. The educator replacing a degree qualified educator taking a half hour break would not need to be a degree or diploma qualified educator (Note: services will be required to meet the minimum qualification and related requirements for all educators as outlined in the regulations).*
- *Where a qualified educator is replaced by an unqualified educator, the qualified educator on the break should remain on the premises.*

From 1 January 2013, the Victorian Kindergarten Programs funding criteria for service providers will be updated to reflect this advice.” (Extract from DEECD email to Service Providers 18 July 2012)

In this context we cannot ignore the profound impact such a change in the guidance to services would have in Victoria.

Many services in Victoria operate timetables delivering child attendance periods beyond 5 hours and in some cases up to 7.5 hours. This of course necessitates educator breaks to occur during the children’s attendance time.

These timetables were developed to respond to the Universal Access agenda giving recognition to the available facilities, continuation of operation of 3 year old kindergarten programs, parental preferences for longer attendance periods, and importantly to the availability of staff to cover those rosters (with reference to staffing numbers and industrial provisions regulating their work).

Consistent with the rationale presented by the Regulatory Authorities within the Guide, services are unable to access staff to replace educators (especially early childhood teachers and diploma qualified educators) whilst they are on a short break. This is particularly the case in stand-alone, rural and regional services.

Should the guidance be amended in the manner proposed the consequence in Victoria would include:

- displacement of children from preschool programs (3 year old groups to make way for restructure of 4 year old programs, and reduction of 4 year old programs as the capacity of facilities to accommodate the same number of groups operating shorter attendance periods would be impacted)
- job loss for educators (particularly due to the loss of 3 year old kindergarten programs) but also of 4 year old programs
- great stress on the sector to once again deal with the process of change to accommodate massive restructure of programs, and likely loss of educators from the sector as a consequence.

The capacity to continue to deliver Universal Access in Victoria would be greatly impacted.