

## Insurance Insights

### Regulation of Education and Care Providers: the Department of Communities in WA takes a stricter approach to compliance actions

#### Key takeaways

- The Education and Care Regulatory Unit of the Department of Communities (**Department**) is displaying a stricter approach in implementing compliance actions.
- Specifically, the Department is seeking penalties under both sections 165(1) and 167(1) of the *Education and Care Services National Law (WA) Act 2012* (**National Law**) in compliance actions involving inadequate supervision and failure to protect children from hazards likely to cause injury.
- The approach is in line with other jurisdictions such as New South Wales and Queensland and will result in higher pecuniary penalties when services fail to ensure children being cared for by the service are adequately supervised.

#### The regulatory framework

The National Law and the *Education and Care Services National Regulations 2012* (**National Regulations**) provide the legislative framework for the regulation of education and care services for children. The National Law allows the Department to take enforcement actions when services fail to comply with the provisions of the National Law and National Regulations.

Further to section 188AB of the National Law, the Department may apply to the State Administrative Tribunal for disciplinary action where a service's breach or contravention has, or has potential to, have an immediate risk to 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.

The Department must 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 Department are 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.

Section 165(1) of the National Law deals with an approved provider's failure to adequately supervise children. In particular, a service commits an offence if it fails to ensure that all children being cared for by the service are adequately supervised at all times that the children are in the care of that service.

Section 167(1) of the National Law deals with an approved provider's failure to protect children from harm/ from any hazard likely to cause injury. In particular, a service commits an offence if it fails to ensure that every reasonable precaution is taken to protect children being cared for by the service from harm and from any hazard likely to cause injury.

## The Department's approach

In Western Australia, seeking penalties under both sections 165(1) and 167(1) was previously not an approach commonly used by the Department. Further, the Department has historically only pursued breaches of both sections section 165(1) and 167(1) in circumstances where *actual* harm has occurred.

Over recent months, however, the Department has indicated that pursuing penalties under both sections 165(1) and 167(1) of the National Law is in line with other states. Further, the Department has shown an intention to pursue alleged breaches under s 167 (1) even in cases where no *actual* harm has occurred but where an approved provider has failed to take 'every reasonable precaution' to protect children from a 'hazard *likely* to cause injury'.

## Implications

Penalties resulting from enforcement actions where children are able to escape from childcare centres are only going to increase. Approved providers and childcare/education employees should take proactive steps to ensure their supervision policies and procedures are sufficient to ensure that there will not be situations where children are inadequately supervised or are not protected from hazards likely to cause injury.

In circumstances where an approved provider owns and operates multiple childcare centres, management at those centres should ensure that lessons and learnings from incidents and near misses at one centre, are applied and disseminated to other centres owned by that approved provider.

Approved providers will likely be pursued for higher penalties if multiple centres run by that approved provider are involved in compliance actions.

**This article was written by Principal [Shannon Mony](#). Our team has experience in managing and advising on a range of matters falling within national childcare laws and regulations, including the provision of commercial advice provided by Principal [Georgina Odell](#).**

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