

Submission s.156—4 yearly review of modern awards
4 yearly review of modern awards—Children’s Services Award 2010 and Educational Services
(Teachers) Award 2010—Substantive Issues
(AM2018/18 and AM2018/20)

29 May 2019

- [1] This submission is made with reference to Directions issued on 9 May 2019 and Statement [2019] FWCFB 3514 issued on 23 May 2019 and relates to the *Children’s Services Award 2010* and the *Educational Services (Teachers) Award 2010*.
- [2] This submission sets out the findings that we seek to have made based on the evidence before the Full Bench in relation to the proposed introduction of an Educational Leadership allowance and a Responsible Person allowance in the *Children’s Services Award 2010* and the *Educational Services (Teachers) Award 2010*. This submission contains the relevant extracts from the witness statements/oral evidence upon which the findings sought are said to be based.
- [3] Our claims for the introduction of an educational leadership allowance and Responsible Person allowance are similar to those pursued by United Voice.

Summary of findings

- [4] Summary of findings in relation to the Educational Leader:
- a. The role of the educational leader in practice mirrors the role described in literature
 - b. Educative responsibilities of educators and lead educators differ from the role of the educational leader
 - c. The role of an educational leader is significant, complex and extensive
 - d. Educational leadership is not the same as positional leadership
 - e. Educational leaders have various qualifications
 - f. The proposed educational leadership allowance would provide a “fair and minimum safety net of terms and conditions”
 - g. Paying an educational leadership allowance is not administratively complex

[5] Summary of findings in relation to the Responsible Person:

- a. The Responsible Person has duties and responsibilities
- b. The role of Responsible Person is not diminished by the inapplicability of financial penalties
- c. The Responsible Person is usually a qualified, experienced and capable member of the staff team
- d. Employees who are the designated Responsible Person are not being remunerated fairly or consistently
- e. Paying a Responsible Person allowance is not administratively complex

Evidence in support of proposed substantive change 1

Insertion of an educational leadership allowance for employees with educational leadership responsibilities in early childhood education and care settings.

The role of the educational leader in practice mirrors the role described in literature

[6] The role of educational leaders in the literature¹ is largely mirrored by the witness statements/oral evidence. The role of an educational leader includes:

- Overseeing, enabling and guiding the development and implementation of a quality educational program and curriculum²
- Interpreting the implications for practice of the National Quality Framework³
- Modelling high quality practice⁴
- Mentoring,⁵ supporting⁶ and empowering educators⁷, providing feedback on practice⁸ and facilitating meetings with educators⁹
- Ensuring that educational programming across the service meets requirements¹⁰
- Holding educators accountable for their actions or inactions with respect to their educational program and practice¹¹

¹ See Arrabalde submissions 14 March 2019 at 12, 14 & 26 April 2019 at 5

² PN216, PN667, PN680, PN1273, PN1478, PN1535, PN2792, PN3480, PN3517, PN4029, PN4379

³ PN1262

⁴ PN667, PN680, Maclean statement (15 April 2019) at 113

⁵ PN318, PN516, PN680, PN1324, PN1492, PN2340, PN3517, PN4379, Maclean statement (15 April 2019) at 113

⁶ PN1952, PN3517, Maclean statement (15 April 2019) at 113

⁷ PN680, PN1492

⁸ PN305

⁹ PN516, PN862, PN2792

¹⁰ PN352, PN1487, PN4379

- Leading critical reflection¹²
- Researching current educational theories and utilising findings to enhance program and practice¹³
- Collaborating with members of the “learning community”¹⁴
- Contributing to the development of the centre’s philosophy¹⁵
- Accessing inclusion support¹⁶, leading the development and implementation of an inclusive curriculum and supporting educators to adopt inclusive practices¹⁷ (This means ensuring children of all abilities are able to participate in the educational program and be active members of the learning community.)¹⁸
- Developing a reconciliation action plan¹⁹ (This is a strategic plan designed and implemented by an organisation that recognises the capabilities, contributions, capacity and cultures of Aboriginal and Torres Strait Islander people and is designed to further the reconciliation movement.)²⁰
- Promoting continuous quality improvement²¹

[7] The evidence provided also aligns with the role of an educational leader in a school as described in the *Australian Professional Standards for Teachers*.²²

[8] As the work of educational leaders in early childhood education and care settings is of equal or comparable value to the work of educational leaders in school settings, this role should be remunerated. The omission of the role of educational leader in early childhood education and care settings in the *Children’s Services Award 2010* and the *Educational Services (Teachers) Award 2010* is inconsistent with Modern Awards Objective 1(e) “the principle of equal remuneration for work of equal or comparable value”.

Educative responsibilities of educators and lead educators differ from the role of the educational leader

¹¹ PN352, PN4379

¹² PN1338, PN1492

¹³ PN328-329, PN1344, PN1495-PN1498, PN1516

¹⁴ PN516, PN667, PN680, PN3517

¹⁵ PN2340

¹⁶ PN297

¹⁷ PN299, PN2340

¹⁸ NSW/ACT Inclusion Agency. *About Inclusion*. <https://www.inclusionagency.nswact.org.au/what-is-inclusion>

¹⁹ PN302

²⁰ For more information see, <https://www.reconciliation.org.au/reconciliation-action-plans/>

²¹ PN1492

²² The Australian Professional Standards for Teachers is available at <https://www.aitsl.edu.au/teach/standards>

[9] In early childhood education and care settings more than one person has responsibility for the design and implementation of the educational program.²³ The Wade oral evidence provides a general description of the role of educators in the educational program:

There's observations, there's analysis, there's a valuation [evaluation], there's critical reflection. It's quite extensive what these educators need to do, so it's quite extensive in terms of ensuring that they're meeting each individual needs of the children and some rooms could have up to 36 children which means that they've got 36 portfolios which they have to maintain and ensure that each individual needs and interests of each child is maintained in the service.²⁴

[10] In other words, the role of an educator (or a lead educator) with respect to educational program and practice relates to a specific group of children and a subset of the staff team. An educational leader, on the other hand, has responsibility for the educational program of all of the children attending the centre and the educational practice of the entire team of educators.

The role of an educational leader is significant, complex and extensive

[11] Educational leaders have a significant role²⁵ that goes beyond the work of an educator²⁶ and beyond simply the design and implementation of an educational program.²⁷ This is confirmed by the Fenech oral evidence which describes the work of an educational leader:

the role is a significant one, and it's a significant role of leadership, not a management or - it's above and beyond an educational role²⁸

[12] The role of the educational leader in early childhood education and care is complex²⁹ and “requires intentionality”.³⁰ As the role is not rigorously defined, educational leaders are required to make their own decisions as to what is appropriate for their context.³¹

[13] An emphasis on continuous improvement within the National Quality Framework means that the role of an educational leader is extensive:

²³ PN324, PN1336, PN1477-PN1478, PN3516

²⁴ PN861

²⁵ PN1934, PN2342, PN2579, PN3717, PN4303, PN4381

²⁶ PN1286, PN1326, PN4383

²⁷ PN4380

²⁸ PN512

²⁹ PN3718, PN4019, PN4302

³⁰ PN680

³¹ PN1517, PN2341

it's a leadership role because it requires or it involves bringing educators on board and changing their practises sometimes... looking at how they can be improving their service, because that's one of the tenets of the National Quality Framework. It's not just even if you're doing things okay; it's about how can you keep improving.³²

[14] While educational leadership may be a full-time position,³³ for many educational leaders, the role is additional to the duties within their Award classification.³⁴

so it's embedded in their practice, however the actual role is above and beyond what their practice is.³⁵

[15] The role of educational leader may be so involved that employees perform tasks related to their role of educational leader in their own time, without extra pay.³⁶

Educational leadership is not the same as positional leadership

[16] In the Hennessey oral evidence, the role of educational leader was undertaken by an assistant educator³⁷ whose work directly with children was performed under the supervision and guidance of a lead educator while her role as educational leader was independent and self-directed:

So as educational leader I sort of oversee the programming for the centre, whereas in the room I report to her³⁸

As educational leader I do support all the rooms, so I do get to spend some time in the rooms with the other educators, and also being – with their programming and how they're interacting with the children.³⁹

This is not a contradiction. Rather it emphasises the fact that a positional leadership role (in this case, a room leader) is not equivalent to the role of the educational leader.

[17] The Warner oral evidence also provides a similar distinction between work as a lead educator and work as an educational leader.⁴⁰ Lead educators have responsibility for programming and planning for specific children⁴¹ while the educational leader has responsibility for overseeing the programming and planning in the centre.⁴²

³² PN680

³³ PN4303

³⁴ PN1951, PN4527

³⁵ PN667

³⁶ PN1497-PN1498, PN1506

³⁷ PN213-PN214

³⁸ PN216

³⁹ PN218

⁴⁰ PN1488-1490

⁴¹ PN1488-1490

⁴² PN1477-1478

Educational leaders have various qualifications

[18] Educational leaders have a variety of qualifications⁴³ including Certificate III,⁴⁴ Diploma,⁴⁵ Advanced Diploma⁴⁶ and teaching qualifications.⁴⁷ Inserting the proposed educational leadership allowance in both the *Children's Services Award 2010* and the *Educational Teachers Award 2010* would ensure all educational leaders in early childhood education and care settings are being remunerated for this role.

[19] As being an educational leader permeates every aspect of an educator's practice,⁴⁸ a percentage of the ordinary rate should be paid to educational leaders as an allowance. Basing the allowance on the employee's ordinary rate would mean the allowance is commensurate with the employee's qualification, skill level and experience.

The proposed educational leadership allowance would provide a "fair and minimum safety net of terms and conditions"

[20] Educational leadership requires significant effort and research reveals the overwhelming majority of early childhood educational leaders do not receive any remuneration for this job role.⁴⁹ This is because the role of the educational leader in early childhood education and care settings is not explicitly recognised in the *Children's Services Award 2010*⁵⁰ and specifically excluded from the educational leadership allowance in clause 15.2 of the *Educational Services Teachers Award 2010*.

[21] The evidence before the Full Bench demonstrates that educational leaders are paid according to a wide range of classifications in the *Children's Services Award 2010*.⁵¹ For example, in the Hennessey oral evidence the educational leader is classified at Level 3.1,⁵² in the Warner oral

⁴³ PN531

⁴⁴ PN206

⁴⁵ PN1467-PN1470

⁴⁶ PN2334

⁴⁷ PN533, PN3798-PN3799

⁴⁸ PN667

⁴⁹ Fleet, Alma, Rod Soper, Anthony Semann and Lorraine Madden, "The role of the educational leader: Perceptions and expectations in a period of change," *Australasian Journal of Early Childhood* 40, no. 3 (2015): 29.

⁵⁰ PN1266, PN3469-PN3470

⁵¹ PN235, PN1470, PN3468, PN1933-PN1937, PN1953-PN1956, PN4020-PN4022, PN4305

⁵² PN235

evidence the educational leader is classified at Level 4.2⁵³ and in the Brannelly oral evidence educational leaders are classified as Level 4 or Level 5.⁵⁴ This implies that educational leaders are being paid the same as any other employee within the same classification and do not receive remuneration for this additional role.

[22] The Fraser oral evidence confirmed that educational leaders working at his organisations are classified as Level 5⁵⁵ of the *Children's Services Award 2010* but acknowledges that an assistant director under this classification who is not appointed as the educational leader would also get paid the same amount.⁵⁶ Similarly, Mahony stated that the assistant director working at one centre is the educational leader at both of his centres and does not receive any additional pay.⁵⁷

[23] While some employers are paying educational leaders according to their interpretation of particular Award classifications, educational leaders in other organisations are paid above-Award payments in recognition of their role:

The Knox and Wallaby Centre's Educational Leader is paid under the Teacher's Award and is paid \$2.50 an hour above the Award rate plus an additional 2 weeks of paid annual leave per year ...⁵⁸

The introduction of the proposed Educational Leader allowance would ensure that *all* Educational Leaders are fairly remunerated for their work, consistent with the modern award objective "to provide fair and relevant minimum safety net of terms and conditions."⁵⁹

Paying an educational leadership allowance is not administratively complex

[24] The proposed educational leadership allowance would not be administratively complex to pay.⁶⁰ This is because:

- The role is performed by one employee on a long-term basis.⁶¹ (While educational leaders may have more than one service to lead within an organisation,⁶² assigning more than one person to the role of educational leader⁶³ is not required or recommended.)

⁵³ PN1470

⁵⁴ PN3468

⁵⁵ PN1933-PN1937

⁵⁶ PN1953-PN1956

⁵⁷ PN4020-PN4022

⁵⁸ Tullberg statement (9 April 2019) at 103

⁵⁹ *Fair Work Act 2009*, Section 134(1)

⁶⁰ PN3636

⁶¹ PN3634-PN3635

⁶² PN4020

⁶³ PN3481, PN3485

- Records of the educational leader are required to be kept under Regulation 148 of the *Education and Care Services National Regulations* which requires the staff record to include the name of the person designated as the educational leader in accordance with Regulation 118.
- The proposed allowance is a fixed percentage of an employee's ordinary rate dependent on the number of licenced places of a centre.
- Many approved providers already use electronic payroll systems⁶⁴ and the use of electronic payroll systems will be necessary for all employers from 1 July 2019 to comply with the Australian Taxation Office's Single Touch Payroll requirements.⁶⁵
- Educational leaders in schools are already being paid an allowance in the *Educational Services (Teachers) Award 2010*. The form of the proposed allowance mirrors this existing allowance.

Evidence in support of proposed substantive change 2

Insertion of a responsible person allowance for employees who are the designated responsible person in an early childhood education and care setting

The Responsible Person has duties and responsibilities

[25] The person who is determined to be the Responsible Person has responsibilities and duties.⁶⁶

These include:

- Being placed in charge and responsible for the day-to-day operations of a centre⁶⁷
- Decision-making in relation to immediate issues with children and families⁶⁸
- Consulting with and overseeing the work of staff⁶⁹
- Communicating with families⁷⁰
- Being a point of contact for enquiries and concerns⁷¹ (This may include face-to-face conversations, answering phone calls, replying to emails and text messages and accessing various online portals.)⁷²

⁶⁴ PN1834-PN1835, PN3627, PN3629

⁶⁵ For more details, see <https://www.ato.gov.au/Business/Single-Touch-Payroll/>

⁶⁶ PN4823

⁶⁷ PN794, PN2617, PN3107, PN3454, PN4298, Maclean statement (15 April 2019) at 103

⁶⁸ PN925, PN1525-PN1526, PN2617, PN2807, PN3359, PN3708, PN4296

⁶⁹ PN632, PN1540, PN2752

⁷⁰ PN820, PN928, PN1540, PN2617, PN3696, PN3701, PN4501

⁷¹ PN791, PN803, PN3107, PN3696, Viknarasah statement (11 April 2019) at 115

- Making time-sensitive decisions that require a whole centre or unified staff team approach⁷³
- Contacting the director or nominated supervisor and relaying relevant information⁷⁴
- Being a point of contact for regulatory officers in the absence of the nominated supervisor⁷⁵
- Physically opening⁷⁶ (and closing) centres and overseeing arrivals and departures of children and families⁷⁷
- Writing or verifying incident reports, communicating incidents to families and inputting information about incidents in a database⁷⁸

[26] The person fulfilling this role is required to be made obvious to families⁷⁹ and any other person within the centre.

[27] If owners, directors or persons who are usually the Responsible Person do not have confidence in the designated Responsible Person, this reflects on the work practices and culture within an individual organisation rather than diminishing the role of the Responsible Person.⁸⁰

The role of Responsible Person is not diminished by the inapplicability of financial penalties

[28] According to the Tullberg oral evidence:

the regulations actually don't put any responsibility onto the responsible person. There's no charges or anything that can actually be placed onto the person, it just stated we actually need to have one. There's no fines that can be imposed on the responsible person like there can be on approved provider or nominated supervisor.⁸¹

[29] The monetary penalties associated with infringement notices that Tullberg refers to are associated with non-compliance with specific regulations.⁸² These include *Regulation 98 Telephone or communication equipment*, *Regulation 104(1) Fencing regulation* and *Regulation 112(3) Nappy change facilities*. It is unreasonable to hold a Responsible Person (who may only be the Responsible Person for 23 minutes per day⁸³) legally accountable and financially penalise

⁷² PN804

⁷³ PN3743

⁷⁴ PN812, PN3361, PN4295, PN4368, PN4368, PN4488

⁷⁵ PN632

⁷⁶ PN4814

⁷⁷ PN4287-PN4288

⁷⁸ PN1540

⁷⁹ PN1872, PN2804, PN3032, PN3697, PN4818, PN4820

⁸⁰ See for example, PN2844, PN4363, PN4373

⁸¹ PN3671

⁸² ACECQA (n.d.) *Regulatory Authority Powers: Monitoring, compliance and enforcement, Offences, Good regulatory practice*. https://www.acecqa.gov.au/sites/default/files/2018-10/Guide-to-the-NQF-5-RAP_0.pdf

⁸³ Llewellyn statement (9 April 2019) at 88

them for contraventions of physical requirements particularly in organisations where they may not be afforded a significant degree of autonomy.

[30] A duty of care is common to all staff at a centre⁸⁴ and any educator may be subject to an enforceable undertaking, prosecution or a prohibition notice.⁸⁵ The absence of infringements is not equivalent with diminished responsibility on a day-to-day basis. As Fenech notes in oral evidence:

If something goes wrong they're not legally liable...but they still are responsible for those roles.⁸⁶

The Responsible Person is usually a qualified, experienced and capable member of the staff team

[31] Being a responsible person requires skills and abilities⁸⁷ and those designated as the Responsible Person hold a variety of qualifications.⁸⁸

I tend to look at our staff and work with our directors and assess who is coming along well. Who is ready to take on that mantle of leadership to a small degree for a small part of the day to - and who manages well with families and who is able to be a decision maker. So, you know, there are lots of attributes that we may look for. It doesn't necessarily mean it's the oldest or the most qualified or whatever.⁸⁹

[32] Experience is identified as desirable⁹⁰ and the role is not usually assigned to "junior" staff.⁹¹

[33] The evidence suggests that the role of Responsible Person is often determined in order of seniority:⁹²

If our centre manager leave the premises, which she does every day, the next person of higher level responsibility would be the one person to act as the responsible person.⁹³

⁸⁴ PN1218, PN1523

⁸⁵ ACECQA, op. cit.

⁸⁶ PN639

⁸⁷ PN1909, Maclean statement (15 April 2019) at 103

⁸⁸ PN797, PN1527, PN3800-PN3801

⁸⁹ PN2617

⁹⁰ PN3105

⁹¹ PN2615, PN3106

⁹² PN800, PN3099, PN3102, PN3238, PN3660, PN3671, PN3688, PN3706

⁹³ PN3099

[34] If a Responsible Person had no duties or responsibilities, it is paradoxical that this role is most likely to be allocated to the most capable members of a staff team.

[35] The role and appointment of a Responsible Person is largely contextually specific.⁹⁴ A director can be, but is not necessarily, the Responsible Person.⁹⁵ The introduction of the National Quality Framework significantly changed the nature of work in early childhood education and care⁹⁶ and posed challenges for all those working in the sector.⁹⁷ Directors who choose to be the Responsible Person are no longer able to leave the centre without passing on the mantle of Responsible Person, displaying who the current Responsible Person is and making a record of this change.⁹⁸ In oral evidence Fenech provided an example of an employee who was appointed to the role of Responsible Person for three weeks in the director's absence.⁹⁹

[36] The proposed Responsible Person allowance (paid as a percentage of the standard rate for the time which the employee is the designated Responsible Person) would ensure that all employees who undertake the role of the Responsible Person are remunerated for their work.

Employees who are the designated Responsible Person are not being remunerated fairly or consistently

[37] Employees of any classification may be designated as the Responsible Person.¹⁰⁰ Viknarah's oral evidence provides an example of a cook who is the Responsible Person¹⁰¹ and confirms that any employee working for her organisation who is designated as the Responsible Person does not receive any additional payments for this role.¹⁰²

[38] Employees with positional leadership roles (for example, room leaders) are paid at Level 4 or higher in the *Children's Services Award 2010*. Evidence from witness statements suggests that employees classified as at Level 4 are not being remunerated for their role as Responsible Person:

⁹⁴ PN633

⁹⁵ PN3660

⁹⁶ PN1191, PN1893, PN2534-PN2535, PN2770

⁹⁷ PN1197-PN1200, PN1894, PN2770

⁹⁸ PN1870

⁹⁹ PN637

¹⁰⁰ PN797, PN1527, PN3800-PN3801

¹⁰¹ PN1161-PN1162

¹⁰² PN1234, PN1241

The Room Leaders at Mill Park are currently paid at Level 4 of the Children's Services Award. Being Responsible Person for a few hours a day is already encompassed into the Level 4 classification structure.¹⁰³

All educators who are asked to be the Responsible Person, primarily at opening and closing times, are delegated the responsibility for short periods and are paid at the award rate for level 4 which is reflective of the respective levels of responsibility, keeping in mind that the number of children present is significantly reduced at opening and closing times.¹⁰⁴

[39] Similarly, in oral evidence, Llewellyn admitted that at her centre *all* room leaders get paid the same for "consistency" despite one being the designated Responsible Person¹⁰⁵ and having this additional job role. Likewise, Tullberg stated:

There is no current responsible person allowance, so we currently don't pay anybody.¹⁰⁶

[40] While not remunerating any employee for performing the role of Responsible Person is consistent, it is not fair that employees who are designated as the Responsible Person are being paid the same as employees within the same classification who are not.

[41] At some centres, however, employees who are undertaking the Responsible Person role are being rewarded through above-Award payments.¹⁰⁷

We do not at present pay any extra money for acting in the role of a Responsible Person. However, the employees we select to perform that duty are also likely to be those we pay above award rates¹⁰⁸

[42] Similarly in oral evidence Chemello stated that the *majority* of employees who are designated as the Responsible Person are paid above-Award wages.¹⁰⁹ This suggests above-Award payments may be inconsistent. This is confirmed by Tullberg's oral evidence which acknowledged that Responsible Persons who are classified as Level 4 and Level 5 get paid Award wages¹¹⁰ while Responsible Persons classified as Level 6 get paid significantly above the Award.¹¹¹

The proposed Responsible Person allowance would ensure that all employees covered by the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010* who are

¹⁰³ Llewellyn statement (9 April 2019) at 89

¹⁰⁴ Mahony statement (11 April 2019) at 90

¹⁰⁵ PN4359

¹⁰⁶ PN3664

¹⁰⁷ PN1920-PN1922, PN2613, PN3659-PN3661

¹⁰⁸ Maclean statement (15 April 2019) at 107

¹⁰⁹ PN2821

¹¹⁰ PN3665

¹¹¹ PN3660-PN3661

designated as the Responsible Person would be paid consistently for their work in keeping with the modern award objective “to provide fair and relevant minimum safety net of terms and conditions.”¹¹²

Paying a Responsible Person allowance is not administratively complex

[43] The proposed Responsible Person allowance would not be administratively complex to pay.

This is because:

- There is only one Responsible Person at any one time. (While more than one person may be the Responsible Person during a day, frequent changes do not promote consistency and are seen as undesirable.)¹¹³
- An accurate record of the Responsible Person must be made¹¹⁴ consistent with Regulation 150 and Regulation 177(2) of the *Education and Care Services National Regulations*.
- The Responsible Person record may be used for payroll purposes¹¹⁵ without significant administrative burden being imposed on employers.
- The proposed allowance is a fixed percentage of an employee’s ordinary rate dependent on the number of licenced places of a centre.
- Many approved providers already use electronic payroll systems¹¹⁶ and the use of electronic payroll systems will be necessary for all employers from 1 July 2019 to comply with the Australian Taxation Office’s Single Touch Payroll requirements.¹¹⁷

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¹¹² *Fair Work Act 2009*, Section 134(1)

¹¹³ PN2618-PN2618

¹¹⁴ PN1872, PN4817

¹¹⁵ PN1876

¹¹⁶ PN1834-PN1835, PN3627, PN3629

¹¹⁷ For more information see, <https://www.ato.gov.au/Business/Single-Touch-Payroll/>