

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)

Response to Background Document 2 dated 2-5 July 2019

19 July 2019

Q.1 N/A

Q.2 Which of the findings sought by the ECEC Employers (at [4] above) are contested?

With reference to [4]7(a)-(d), the National Quality Framework is complex and expansive. The NQF refers to the entire early childhood education and care regulatory and quality assessment system. It consists of:

- The legislative framework - *The Education and Care Services National Law* and the *Education and Care Services National Regulations*.
- The National Quality Standard (NQS)
- The Assessment and Rating system
- Two nationally approved learning frameworks - *Being, Belonging and Becoming: The Early Years Learning Framework* (EYLF) and *My Time, Our Place: Framework for School Aged Care in Australia* (MYOP)
- State and territory based regulatory bodies
- ACECQA

The NQF is underpinned by six principles relating to children, families and practice and was effective from 1 January 2012.¹

Given the volume of material included in the NQF, it is unrealistic to expect that every ECEC participant has precise and accurate knowledge of the specifics without access to documents for reference.

¹ For more information, see <https://www.acecqa.gov.au/sites/default/files/2018-02/ACECQA-AnnualReport-20152016.pdf>

Q.3 Other interested parties are invited to comment on the findings sought by IEU (at [5] above) and UV (at [6] above).

We agree with the findings sought by United Voice at [6]. Following the introduction of the NQF in 2012, the nature of work in early childhood education and care changed dramatically with increased administration, regulation and accountability.² These changes are consistently associated with perceptions of burden.³ As this reform package was introduced two years after the introduction of the Modern Awards, the *Children's Services Award 2010* and the *Educational Services (Teachers) Award 2010* do not accurately reflect the roles and responsibilities of employees in the sector.

Q.4 Which of the findings sought by the ECEC Employers (at [8] above) are contested?

The findings sought by the ECEC Employers for an extension in ordinary hours are not underpinned by sufficient evidence to support the assertion that this substantive change would help ECEC providers to better meet the needs of working families or that extending the ordinary hours of employees is desired by any persons who cannot generate a profit from such a change.

For example, with reference to [8]5(a), Ms Wade acknowledges that some of her employees who are working parents feel pressure to collect their children on time.⁴ However, rather than wanting an increase in the hours of their care arrangements⁵ her staff have expressed a desire that the centre closes earlier.⁶ This demonstrates that employees do not want to work longer hours, they would rather collect their children earlier.

Q.5 N/A

Q.6 Which of the findings sought by the ECEC employers (at [11] above) are contested?

While we do not contest the findings sought, given the evidence presented we do not quite understand the practicalities of the rostering claim. While changes to rosters with little notice may be useful in some circumstances, there has been limited discussion as to how an employee's acceptance of an additional shift would impact on the employee's already rostered shifts. Would a rostering variation within 7 days be hours worked in addition to the employee's already rostered hours or in lieu of

² Cumming, Tamara, Jennifer Sumsion and Sandra Wong, "Rethinking early childhood workforce sustainability in the context of Australia's early childhood education and care reforms," *International Journal of Child Care and Education Policy* 9, no. 1 (2015): 2.

³ Arrabalde submission (26 April 2019) at [58]-[59]

⁴ PN884

⁵ PN887

⁶ PN885

working another shift? Could the total number of hours an employee has been rostered to work in a week be reduced by the introduction of this clause?

It should be noted that the decision of employers to reduce their staffing in relation to the ratios of children attending on a particular day may be a commercial decision. Most children attend centres on regular days as per their enrolment agreement. In many services, families still pay for their child's place even if they are absent for example, because a child is ill. In this circumstance, some services may choose to reduce the number of staff to reflect the number of children in attendance. If this clause were to be introduced, could its operation allow this?

Q.7 N/A

Q.8 N/A

Q.9 Which of the findings sought by the ECEC Employers (at [17] above) and the AFEI (at [18] above) are contested?

[17] The ECEC Employers seek the following findings:

1. A Responsible Person who is not an Approved Provider or a Nominated Supervisor (an educator in day to day charge) does not have any additional legal responsibilities:

(a) See Dr Fenech (TN at [624]) – Do you agree that an educator in day-to-day charge doesn't bring with it any additional legal responsibilities?---Correct.'

(b) Mr Fraser's statement (Exhibit 18) at [115]:

'... there is not any additional legal requirements and responsibilities as the ultimate responsibility of the centres falls on the Approved Provider. It is important to note that it is the Approved Provider who has liability of the centre, never the Responsible Person.'

(c) Ms Viknarash's Statement (Exhibit 13) at [115]:

'In my Centres, the "Responsible Person" will only not be the Director or Assistant Director for a short amount of time that day. During that short amount of time there will be a "Responsible Person" who will just be a point of call for the Centres for a short amount of time. This person has no practical additional work such as creating rosters, buying equipment or furniture or programming and planning for the Centres as the UV suggests. The "Responsible Person" is not responsible legally at any point for the other educators or staff members as this is still the ultimate responsibility of the Nominated Supervisor.'

(d) Ms Tullberg (TN at [3671]) provided evidence that:

'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.'

With reference to [17]1(a)-(d), there is no dispute that Responsible Persons do not have the same legal responsibilities as Approved Providers or Nominated Supervisors. This does not devalue the role of the Responsible Person or their work as the person appointed in day-to-day charge of the service.⁷

2. The duties and responsibilities of a Responsible Person are already captured in the Children's Services Award classifications Levels 4-6. It is submitted that this can be established through a review of the awards but was also dealt with in the evidence:

(a) Ms Tullberg provided evidence that "Level 4, 5 and 6 have classifications in there which do sort of cover off the same areas as responsible people." Ms Tullberg did concede that it is 'technically' possible for a responsible person to be a Level 3 (that is a Certificate III employee that performs no duties associated with being responsible).

(b) Ms Mravunac identified (TN at [4511]) that her duties as Responsible Person were already captured in her role as Director.

(c) When asked about the difference between her responsibilities as responsible person and a nominated supervisor, Ms Wade's evidence (TN at [824]) indicated that her role as a nominated supervisor was broader than her responsibility as a responsible person, not vice versa.

The statements at [17]2(a)-(c) imply that an employee designated as the Responsible Person would get paid the same as any other employee with the same Award classification despite taking on this role and performing its associated duties as the person appointed in day-to-day charge. This is not fair.

3. The evidence suggests that employees who are assigned to be Responsible Person while the Approved Provider or Nominated Supervisor are absent do not make strategic decisions or act with autonomy:

With reference to [17]3, being a Responsible Person is an additional role for employees and an organisational hierarchy remains in place. This is confirmed in Ms Farrant's evidence.⁸ In most organisations, strategic decision-making is usually reserved for management.

(a) Ms Farrant provides evidence (TN at [3361]):

'It's always my practice to make sure that if there are any difficulties that arise, or problems or queries, that my staff who are certified supervisor is now that they can always ring me; or if they can't get on to me, they can always ring our assistant director to get some guidance or some clarity around any situation that may arise.... Any difficulties, they call you? Yes, anything that they don't feel confident about.'

Ms Farrant also provides evidence that Responsible Persons make decisions in her absence⁹ and that she chooses the most senior¹⁰ and capable¹¹ members of the staff team for this role.

⁷ Arrabalde submission (27 May 2019) at [29]-[30]

⁸ PN3361

⁹ PN3359

(b) Ms Lllewellyn gave evidence that a Responsible Person in her absence:

(i) did not have any additional duties (TN at [4365]);

(ii) would never be required to resolve staffing issues (TN at [4366]-[4372]); and

(iii) does not make any independent decisions (TN at [4376]).

(c) Ms Mravunac acknowledged receiving calls from Responsible Persons when she was absent from her centre (TN at [4488]) and that before any decisions were made about the centre, she was informed (TN at [4498]). Ms Mravunac's evidence was that:

(i) these calls sometimes required her to organise replacement staffing (TN at [4492]-[4494]);

(ii) complaints would not be dealt with by 'replacement' Responsible Persons (TN at [4499]);

(iii) no changes to policies would be implemented by 'replacement' Responsible Persons (TN at [4500]);

(iv) formal meetings with parents would not be held by 'replacement' Responsible Persons (TN at [4501]).

Ms Mravunac also states that she is the only early childhood teacher at her centre¹² and she believes that as an early childhood teacher her work is “of a higher quality or an expectation...”¹³ Therefore, Ms Mravunac's evidence of her role from [17]3(c)(i)-(iv) may be indicative of a sense of personal obligation rather than substantiating a finding that Responsible Persons lack autonomy in general.

(d) Ms Wade acknowledged (TN at [814]) that should feedback be received by another Responsible Person while she was not at the centre, she would become involved in making a decision about it and Ms Wade (at TN [723]) admits to contacting the centre on her days off regarding critical incidents and debt collecting.

[17]3(d) demonstrates that the Responsible Person has a role in receiving feedback in Ms Wade's absence which they then communicate to other members of the staff team.

At PN809 Ms Wade provides evidence that Responsible Persons deal with issues independently as they arise which contradicts the finding sought at [17]3 that a Responsible Person does not “act with autonomy”:

I'm really asking you, you are not the responsible person at all times at the centre, because you do not work all the time. What I'm asking you is are there any inquiries or questions that are asked when you are not there that you subsequently attend the meeting for or answer yourself? No, because my responsible people there deal with those matters quite frequently and any complaints that come

¹⁰ PN2328

¹¹ PN3363

¹² PN4432

¹³ PN4449

through. We haven't had - we really haven't had any complaints because our issues that are brought up straight away are dealt with with the responsible person in a timely manner, so that families are satisfied with the service that we provide for children, and for the families.

(e) Ms Warner (TN at [1519]) acknowledged that she had contacted her director when there had been any incidents, any staffing issues, any parent inquiries and that she was required to implement her directors instructions if instructions are provided (TN at [1520]- [1521]).

At PN1525-PN1527, Ms Warner also provides evidence of her role and responsibilities as the Responsible Person in the event of an incident:

PN1525 At 40 you say you have responsibility if an incident or issue were to occur while you were responsible person?---Yes.

PN1526 What do you mean by having responsibility?---Well, I am the most senior staff member that's there. It's my responsibility to handle that situation.

PN1527 You don't mean legal responsibility, do you?---As responsible person I am in charge during those times.

4. The evidence suggests that the duties of a Responsible Person claimed by UV are not necessarily unique to Responsible Persons in an ECEC Centre.

(a) Communication with parents is not a responsibility limited to Responsible Persons:

(i) Evidence of Ms Tullberg (TN at [3704]):

'[If] an incident happened in the toddler room it wouldn't be the kindergarten teacher that would ring the parent, it would be the room leader in the toddler room, so that person would be the responsible person at the time. So it's not always going to be the responsible person. Would the responsible person have some role in the management of the incident? Maybe, during that time. They may or may not, it depends on the circumstances.'

(ii) The evidence at 7.3 above concerning the autonomy of Responsible Persons is also relevant to this finding.

(b) Ensuring safety is also not a responsibility limited to Responsible Persons:

(i) Ms Warner acknowledges that she is "responsible for ensuring a safe environment in maintained for staff and children" even when she is not the responsible person.115

(ii) Ms Chemello states that Responsible Persons have no additional involvement in relation to critical incidents at her centre. She says: 'all my staff have got first aids, so anyone can attend an accident within the service, then the protocol is to call the co-ordinator'.116

(iii) Ms Viknarasah states 'any educators duties are similar to a responsible person in terms of their duty of care to the children'.117

(iv) Ms Mravanuc (at TN [4505]) states that all staff are required to ensure a safe environment is maintained.

(v) Ms Tullberg's evidence was that responsible persons do not interact with parents in relation to an incident anymore than a room leader would (at TN [3699]).

'The responsible person would have some involvement in ensuring that the child was going home with the right person, you'd agree with that proposition? Parents all have to sign in and out their own children. They have key code access to the service. As long as the parent's been identified by a staff member and knows who that parent is, again I wouldn't necessarily say that the responsible person at the time is the person who identifies that parent. I see where you're going. In general, yes, the responsible person would be the person that would deal with an incident in the service but it's not always going to be the case.'

5. The duties and responsibilities of the Responsible Person role are not new and were not created as a result of the National Laws and Regulations. See Tullberg Statement (Exhibit 35) at [93], Maclean Statement (Exhibit 25) at [102]-[103]; Brannelly Statement (Exhibit 34) at [41]-[42].

In oral evidence Brannelly at PN3458 acknowledges that there was no requirement to have a Responsible Person prior to 2012:

Thank you. Now in relation to - if you go to paragraph 41 of your statement, and its title Responsible Person Role Existed Prior to 2012. You'd agree that prior to the National Quality Framework, there was no uniform standard in relation to what a responsible person was?---There was no legislated requirement for a responsible person to be placed in charge.

6. The creation of a Responsible Person Allowance would be difficult to administer.

This is contested.¹⁴

In addition, the findings sought by AFEI at [18]1-5 and 7 are contested and have been discussed in previous submissions.¹⁵

With reference to [18]6, this statement is incorrect. Evidence was provided in the proceedings that teachers are designated as the Responsible Person.

Ms Farrant provides evidence of teachers being designated as the Responsible Person at PN3237-PN3238:

Do you know how many would?---Yes. All of our teachers are certified supervisors.

How many of them act as responsible people, though?---In my absence and in the absence of my assistant director, all of them, according to seniority.

Ms Frennd states that only teachers are designated as the Responsible Person at her centre at PN3800-PN3801:

¹⁴ Arrabalde submission (27 May 2019) at [43]

¹⁵ A discussion of findings [18]1-5 is in our Response to Background Document (5 July 2019) at Q.25-Q.26.

Are they the responsible person when you're absent?---She is, along with the other two teachers who have degrees.

So you don't use any non-teacher as a responsible person?---No.

Q.10 N/A

Q.11 Which of the findings sought by the ECEC Employers (at [21] above) and AFEI (at [22] above) are contested?

[21] ACA, ABI and NSWBC seek the following findings:¹⁵⁰

1. The NQF does not identify what qualifications, experience or skills are required for a person to be the Educational Leader. There is also no job or role description in the NQF identifying what an Educational Leader is required to do.¹⁵¹

There is a template for an “Educational Leader Position Description” on p.147 of the Educational Leader Resource (Exhibit 5). As this is a document produced by ACECQA, it forms part of the NQF.

2. The only duty of Educational Leaders imposed by the National Law is to “lead the development and implementation of educational programs in the service”, however what this responsibility actually entails is unclear:

- *ACECQA Resources (including the Educational Leader Resource (Exhibit 5) and the Role of the Educational Leader document (Exhibit 2) provide guidance as to the duties of an Educational Leader but these guides do not determine legal responsibilities or entitlements.*

There is no instance of ‘educational leader’ in the National Law. This would confirm that the confusion arising from the complexity of the NQF as described in Background Document 2 at [4]7 is also shared by others.

While the National Regulations (at 118) prescribes the role of the educational leader without the imposition of specific duties, it does not impose comprehensive duties on any employee. For example:

early childhood teacher means a person with an approved early childhood teaching qualification¹⁶

If a similar logic is applied as has been used when considering the role of educational leaders, the role of an early childhood teacher is to simply possess a relevant qualification. This is clearly not the case.

The description of the responsibility of an educational leader within the National Regulations is not “unclear”, rather it is purposefully broad to afford professional autonomy and contextually-specific application. ACECQA resources have been developed to clarify the role in practice.

¹⁶ Regulation 4, *Education and Care Services National Regulation*.

3. The 'skill-set' identified by Dr Fenech as being required by Educational Leaders is not required in any legal or practical sense,:

Dr Fenech (TN at [538]-[544]) made a claim that Standard 7.2.2 could not be fulfilled with a requisite skill-set identified in the Guide to the National Quality Framework, notwithstanding that those skills were not itemised anywhere (TN at [545]), not all educational leaders possessed those skills (TN at [557]) and that she was unaware of any ECEC centre not meeting the quality standards on the basis that its Educational Leader did not possess those skills (TN at [567]).

Dr Fenech presented a list of skills that characterise effective Educational Leaders. Desirable skills (as well as knowledge and attributes) are also listed from p.65-67 in the Educational Leader Resource (Exhibit 5).

4. Given the lack of definition of the duties of an Educational Leader, the role of an Educational Leader is not clear, with several union witnesses providing evidence of 'Educational Leader duties' which were either not performed by them or also performed by others,:

(a) Ms Warner listed "preparing observations and photos for each child as a responsibility of the educational leader in her statement (Exhibit 17) at [19(a)]. Under cross-examination, Ms Warner admitted that this was actually the job of the lead educator of each room.¹⁵²

(b) Notwithstanding that Ms Hennessy's evidence at 18(f) of her statement (Exhibit 6) was that as educational leader she was required to observe interactions between educators and children and provide feedback (TN at [305]-[308]) she acknowledged that "almost anyone" in a centre did this and that it was a 'team effort'.

(c) Ms Hennessy also acknowledged that most educators at the centre communicate with parents about educational programs and children's progress (TN at [291]-[294]) and that this wasn't confined to educational leadership. This is consistent with Ms Viknarasah's evidence which confirmed that every educator has a role in considering and monitoring how children are going from day to day and week to week.¹⁵³

The evidence presented at 4(a)-(c) does not diminish the role of the Educational Leader. Rather, it highlights the work of all educators who routinely observe children, plan for their learning and communicate with families about children's learning. As Ms Tullberg stated in oral evidence:

All educators bring quality and value to a service. Without educators we wouldn't have a service.¹⁷

(d) Ms Warner provided evidence that her educational leader role under the NQS required her to undertake research (TN at [1495]) however stated that the quantity of that research was not specified (TN at [1514]). It was unclear where this responsibility was derived from.

This responsibility derives from Standard 7.2 of the NQS:

To lead effectively, leaders need current, in-depth content knowledge as well as a deep understanding and appreciation of children's learning and development.¹⁸

¹⁷ PN3748

To maintain current knowledge to meet (or exceed) this standard, research must be conducted by the educational leader. The quantity of research is unspecified because it would be dependent on advancements in the particular area of inquiry, the ease of finding relevant documents and the depth of knowledge of the individual. In our experience, finding the answer to one question can lead to more questions, requiring more research to be undertaken.

(e) Ms Mravunac provided evidence that, despite not being an Educational Leader, she developed, planned and assessed programming, ensured it was implemented and determined the educational direction of the centre (TN at [4467]-[4472]). Ms Mravunac acknowledged that, despite not being an educational leader, she was the driving force behind educational leadership at her centre (TN at [4484]).

While Ms Mravunac is involved in the educational program at her centre, this may be because she has been an educational leader in the past¹⁹ and is currently mentoring the designated educational leader.²⁰ Ms Mravunac also acknowledges that educational leaders perform work in addition to duties captured in the Award classifications.²¹

5. The duties of an Educational Leader are already included in the classifications under the relevant Awards:

(i) Ms Hennessey's current duties as a Level 3 under the Children's Services Award included the implementation of the children's program under supervision.¹⁵⁴

(ii) Ms Warner admitted that she is "responsible in consultation with the assistant director or director for the preparation of implementation and evaluation of a developmentally appropriate program for individual children or groups" which is a duty specifically itemised in level 4 of the Children's Services Award.¹⁵⁵ Ms Warner who is an educational leader also admitted that "to a degree" she already mentors educators in relation to their educational practice in her role as 2IC.¹⁵⁶

(iii) Mr Mahony confirmed orally that he pays his educational leader (who is also the assistant director at one centre but the educational leader at both centres) as a level 5 under the Children's Services Award.¹⁵⁷ He acknowledges that he does this because, "I believe the award in fact covers that additional work that is related to the educational role".¹⁵⁸

The Award classifications do not adequately reflect the duties of educational leaders and so educational leaders are not being paid fairly or consistently.²²

¹⁸ Australian Children's Education and Care Quality Authority (ACECQA). 2018. *Guide to the National Quality Framework*. p. 298. https://www.acecqa.gov.au/sites/default/files/2019-06/Guide-to-the-NQF_0.pdf

¹⁹ PN4519-4520

²⁰ PN4523-PN4524

²¹ PN4527

²² Arrabalde submission (27 May 2019) at [20]-[23]

6. *Even if the duties of Educational Leader were additional to those already found in the relevant awards (which is denied), Educational Leaders are already compensated for this work in that they are provided with non-contact time to perform these duties under the relevant awards.*

(a) *As Ms Viknarasah explains:*

*'In terms of what extra work they would do, it would be in lieu of what - the hours that they'd spend in their work. So if I'm doing the vegetable garden I'm doing that for an hour a week instead of sitting with the children and educating them. If I'm being an educational leader I'm doing that an hour a week instead of sitting with the children and educating them.'*¹⁵⁹

(b) *This appears to be the design of the NQF, with Dr Fenech providing evidence that 'To be effective, the role of an educational leader requires time allocation in addition to and quarantined from other responsibilities.'*¹⁶⁰

There is no current requirement to provide educational leaders with additional non-contact time to perform their role. Further, not all of the duties of the educational leader can be performed “in lieu” of other duties. Dr Fenech’s evidence confirms that being an educational leader permeates an educator’s practice and requires working directly with children and other educators at the centre:

So the educational leader needs to actually model what they're expecting of the other educators in the centre. So they should be modelling high quality practice in terms of the development of curriculum that is responsive to individual children and that meets the outcomes of the approved learning frameworks. So I think it's part - it's also a modelling for other staff. So it's embedded in their practice, however the actual role is above and beyond what their practice is, because as I mentioned before, inherent in the role is working with other educators in the centre.²³ (Emphasis added)

7. *There is no explicit academic support for the introduction of additional remuneration for Educational Leaders (TN at [612]-[613]), nor is there any support for additional remuneration within the NQF (TN at [614]).*

There is academic evidence suggesting that the lack of remuneration for leadership positions discourages employees from accepting these positions.²⁴

[22] *AFEI seeks the following findings:*

1. *A person designated as an educational leader exists within a hierarchy whereby it is the nominated supervisor/approved provider who has overall responsibility for ensuring the Centre’s compliance with the Education and Care Services National Regulations.*

Organisational hierarchies are independently defined. This statement may not accurately describe the hierarchy in all early childhood education and care settings.

²³ PN667

²⁴ Arrabalde submission (14 March 2019) at [26]-[27]

- 2. An educational leader may exercise limited independent judgement and limited discretion in identifying the tasks which are appropriate/expected by the employer/expected by the regulator in order to perform their function.*

If an educational leader's judgement and discretion is limited, this is a result of workplace design rather than the nature of the role.²⁵

- 3. Certain aspects of an educational leader's responsibilities are inherent responsibilities of an educator or senior educator.*

Certain responsibilities of an educational leader (for example, communicating with families) are common to other roles. However, the work of an educational leader goes above and beyond the work of an educator or senior educator.²⁶

- 4. The designation of tasks associated with leading development and implementation of educational programs in a service, whilst codified in the Regulations from 2012, is not a new feature of the industry.*

While the concept of an educational program in early childhood education and care settings is not new, the role of the educational leader is new to the Australian context.²⁷

- 5. The quantum of the educational allowance sought is disproportionate to the level of responsibility required of a person appointed to that role-*

The allowance sought is not disproportionate to the level of responsibility.²⁸

Q.12 N/A

Q.13 N/A

Q.14 N/A

Q.15 N/A

Q.16 N/A

Q.17 N/A

Q.18 N/A

Q.19 N/A

Q.20 N/A

²⁵ Arrabalde submission (27 May 2019) at [12]

²⁶ Arrabalde submission (27 May 2019) at [9]-[10]

²⁷ Arrabalde submission 26 April 2019 at [4]-[9].

²⁸ Arrabalde Response to Background Document (5 July 2019) at Q.23-Q.24

Q.21 N/A

Q.22 N/A

Isabelle Arrabalde and Elizabeth Arrabalde

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