

CHAPTER THREE

A NEW BREATH FOR CHILD CARE LAWS AND REGULATIONS IN MALAYSIA

3.1 Introduction

From evaluation that has been made on the existing Malaysian laws and regulations in Chapter Two, it is established that there are essential elements of child care laws and regulations that need to be further enhanced in the Malaysian legal landscape particularly on introductory features, terms and condition and enforcement.

This chapter starts with the establishment of three essential elements of laws and regulations that should be strengthened in building a better legislative framework of quality child care settings. The analysis will give insights into the vital elements that are needed to build a strong legislative framework in ensuring quality child care settings. The three essential elements of child care laws and regulations are then explored, which are clearer statute, effective legal requirements and robust enforcement. The aim and purpose of the statute, the introductory features, definitions and provisions for exemptions are the aspects discussed under the requirements of the clearer statute element. The element of effective legal requirements focuses on the structural quality features that should be included and enhanced in laws and regulations on child care centres are also analysed as the second vital element of child care laws and regulations. The important determinants of quality child care from structural features are examined in order to evaluate the features which have a greater impact towards protection and positive outcome of the children. Adult to children

ratio, group size, child care provider's training and education, health and safety requirements, physical environment requirements and educational programme are highlighted in this chapter to be the important traits of legal requirements that should be included and reinforced in the laws and regulations of child care. The final element of robust enforcement focuses on the strategies used in enforcing child care laws and regulations is discussed, ranging from positive strategies to sanctions available for any non-compliance.

This chapter therefore discusses the improvements of Malaysian laws and regulations governing child care. Thus, this chapter answers the question on how the *lacunas* in Malaysian laws and regulations on child care may be improved based on international research and best practices as exemplified by developed countries. The question as to what are the needed improvements to be made to achieve a clearer statute, effective legal requirements, and robust enforcement will be answered.

An examination of the foundation of the statute which is the objectives and purpose of the child care statute is discussed. It is essential for Malaysia to upgrade the philosophy behind the enactment of the laws and regulations of child care. The scope of the purpose of the Act should be widened from merely focusing on licensing or registering the centres to include protection and safety, quality, education and continuous improvements. The best practices of other developed countries which have reformed their legislations may be set as an example for Malaysia. In addition, the scope of child care centres which need to be registered should also be revised in Malaysia. The discussion in this part also explores the need to require child care providers, especially home-based child care centres, to register even when the numbers of children are below four. Unfortunate incidents involving small-home-based

child care centres may be a pushing factor for Malaysia to ensure that exemptions from registration should only be given in special cases.

This chapter also discusses on the improvements needed in the set-up of effective legal requirements of child care laws and regulations. These legal requirements are derived from structural qualities that give significant impact towards safety and children's development. Nevertheless, the degree on how far these features or legal requirements impact the quality of child care need to be further analysed. This is because the inclusion of these features as part of the legal requirements in child care laws and regulations may cause economic impact in terms of increasing the cost of child care. Therefore, this study proposes six important features to be revised and included in Malaysian child care laws and regulations. The detailed analyses of these six features are further discussed in Chapter Four and Five.

The final part of this chapter explores the requirement to enhance the enforcement forces in Malaysian child care. The focus is given to upgrade the prevention approach rather than the reactive approach of enforcement. The prevention approach focuses on the positive strategies in educating and assisting the child care operators and providers in complying with the requirements stipulated by laws and regulations. This preventive approach should be instilled in the Malaysian enforcement forces in enforcing child care laws and regulations. The aim should always be to ensure that the laws and regulations are better complied. To materialise this aim assistance and education should always be at hand. The negative strategy in terms of sanctions or punishments meanwhile should not be left out. However, sanctions should only be judiciously implemented after positive strategies through

education and technical assistance have been offered and received by the child care operators and providers.

3.2 The Essential Elements of Child Care Laws and Regulations

Basically, the statute on child care covers the areas of licensing or registration and the monitoring process of child care centres. Tracing back the history of legislation on human care licensing, it began in the early 1800s in the United States of America, in response to the numerous abuse cases involving children (National Center on Child Care Quality Improvement, 2014). Licensing is known by different names depending on the country. In some countries, licensing is known as ‘certification’ or ‘registration’. Generally, licensing is defined as the baseline, a set of minimum requirements or standards, which, people involved should not fall below of (National Center on Early Childhood Quality Assurance, 2015).

The National Association for Regulatory Administration (NARA) of the United States, which is one of the prominent repositories for expertise in the field of child care licensing, has made suggestions on the essential elements that child care centres should strengthen, in order to have quality child care. These principles are proposed in order to assist the law makers, policy drafters and those involved directly with child care, in having an integrated set of models or laws, regulations and policies to boost the quality of child care settings (Lapp Payne, 2011). In the preparation of this research which explores the essential elements of child care, a child development consultant was hired by NARA, who went on to form a National Advisory Committee. This committee analyses evidence-based studies, best practices and policy papers related to child care settings, with the aim of providing better quality child care

for the children, especially in terms of their protection and developmental growth. There are essentially three components in establishing strong and adequate licensing principles, which are clearer statute, effective legal requirements and robust enforcement.

3.3 Clear Statute: Improving the Aim, Purpose and Introductory Features of the Statute

Reviews on the statute should be done periodically. This will have the advantage of allowing the legislation to be updated according to current studies and other jurisdictions' experiences, thereby making them more relevant and meaningful. This is to remedy the weaknesses and ambiguities discovered, so that the statute will remain a strong and acceptable form of guidance for the child care industry. However, revising the statute does not always mean adding details to the statute. It is recommended to avoid details which are unnecessary (National Center on Child Care Quality Improvement, 2014). This is to allow for flexibility, especially when there are unexpected incidents.

In a structure of child care statute, the basic introduction provisions shall include title, intent and purpose, definitions and exemptions. The statute should also highlight the prohibitions, details on licensing agencies, rulemaking delegations and areas covered. This may be of special relevance to countries like USA, where states legislate their statutes on their own (Lapp Payne, 2011).

The body of the statute should touch on the provider, criminal and abuse records, statutory advisory bodies, inspections and licensing issues. The enforcement part should include the sanctions, injunctions and the appeal process. The statute

should also include provisions on liability protection, consultation services and information for parents. The inclusion of the elements of consultation services and information to parents as elements of the statute shall provide good support to the child care operators. These elements play an important part in initiating performance-based approaches or preventive approaches, where the performance of the child care settings are not evaluated or improved when unwanted incidents happen. When any incidents occur, the blame is usually placed on the operators and child care providers, and this may eventually ruin the system. Instead, adequate support, consultation services, information and knowledge should be provided to the parents. This will ensure that the child care centres are delivering a quality service that not just meets the minimum standard, but also goes beyond the standard specified in the legislations.

Furthermore, the exemptions should be limited. The exemptions should not include services which regularly offer care services. The authority must also have clear guidelines and provisions, conferring them the power to investigate and shut down centres which operate without licenses. Nevertheless, the element of appeal should always be available in case there are adverse actions conducted by the authority concerned in enforcing the statutes. These appeal provisions act as a balance to the rights of the authorities as well as the operators. In addition, there should be a systematic process in ensuring that the staffs, especially the child care providers, are free from any convictions of abuse or neglect or any criminal offences. Additionally, enforcements must be commensurate with the violations, ranging from positive interventions to suitable sanctions (Lapp Payne, 2011).

3.3.1 Child Care Centre Act 1984: A Clearer Statute in the Making

The root of the act is the purpose of the act itself. It is interesting to look at the purpose that has been drafted in the 2017 Early Childhood Development Centres Act of Singapore (ECDCA 2017) where it is clearly stated that the purpose is to protect safety, promote quality and continuous improvement. It is clearly stated in Section 4 of the newly passed Act that the purpose of the Act is firstly *'to protect the safety, wellbeing and welfare of children at early childhood development centres'*, and the second purpose is to *'promote the quality, continuous improvement in the quality, of early childhood development services at early childhood development centres'*. Accordingly, this may be an example for Malaysia to move on to a more quality-focused goal rather than just to lay down all the requirements and aim merely for compliance. The preamble of CCCA 1984 states that the Act is *'to provide for the registration, control and inspection of child care centres and for purposes connected therewith'*. Therefore apart from the preamble of CCCA 1984 to regulate child care centres, this may be extended further with the introduction of a section on the purposes of the Act which is to safeguard the safety and proper growth of the children, as well as for continuous quality enhancement. Therefore, every effort made in improving the quality of child care in Malaysia should be based on materialising the purposes stated in the Act.

Meanwhile in Australia, the Act specifies the objectives and guiding principles in a specific section under Section 1 and Section 3 of the Australia's Education and Care Services National Law Act 2010 (ECSNLA 2010). This is important as these objectives will guide how the laws are enacted and implemented. Section 1 states that *'the purpose of this Act is to create a National Law to regulate education and care services for children'*.

The objective stated in Section 3 (1) of the ECSNLA 2010 is to have a quality framework which is the important structure of early education and care services in Australia. The quality framework which is known as National Education and Care Services Quality Framework consists of the Australian Education and Care Services National Law, the national regulations, the National Quality Standard, and the rating system. Therefore, it is a comprehensive framework that comprises laws and regulations to assessment system.

The objectives of the framework are mentioned in Section 3 (2). The objectives of the framework, amongst others, are to ensure the safety, health and good development of the children, to encourage continuous efforts in enhancing the quality of services, and for an Australian context to have an integrated national system as the respective states have different statutes. The framework also aims to assist the public to gain information and knowledge on early child care and education.

Correspondingly, this Act lists down the guiding principles of the framework in Section 3 (3) where the first one is the paramount consideration for the best interests of the child. Other guiding principles are the principle to instil the faith that children have the ability to learn and that they are competent. The concept of equity, inclusion and diversity must also be maintained. It is interesting to note that Australia highlights the principle to preserve the culture of the Aboriginal and the Torres Strait Islander. Torres Strait Islanders are the indigenous people in Australia who are different from other Aboriginals in Australia as they have their own distinct culture and identity (Department of Foreign Affairs and Trade of Australia, 2006). This may be exemplified by Malaysia as an approach to preserve the unique multi ethnic cultures in the students. Besides that, the parents and families are given a place in their role, in

supporting the system, and the final principle is the expectation of best practices that are to be implemented in the system. Malaysia, in building a national quality framework should underline the objectives and guiding principles according to Malaysia's traits and localities. These objectives and guiding principles therefore will guide other enhancement efforts regarding legal requirements and enforcements.

Apart from the issue of having clearer purposes and objectives of the statute, another preliminary part that should be improved is the definition of child care centre, the requirement for the centre to be registered with SWD. Section 2 of CCCA 1984 defines child care centres as '*any premises at which four or more children under the age of four years from more than one household are received to be looked after for reward*'.

Thus, CCCA 1984 only requires child care centres with four or more children to register with SWD. Section 2 of CCCA 1984 clearly states that the definition of child care centres include centres taking care of four or more children aged four years and below. The children must also be from more than one household and the children are looked after for a reward. This definition therefore exempts child care providers especially those operating from home, and who only take care of one, two or three children. This matter has been raised by the Deputy Minister of MWFCD, Hannah Yeoh in the Parliament who has pointed out that the Ministry is currently reviewing the legislation in finding ways on how to supervise child care providers who take care of less than four children (Parliament, 2018).

Malaysia may take the example from United Kingdom's definition of Childcare Act 2006 which takes into account child care of any form including education, even for only one child. It is stipulated in Section 18 of the United

Kingdom Childcare Act 2006 that the meaning of child care includes care even for only a child. It is clearly stated that “childcare” means *‘any form of care for a child and, subject to Section 18 subsection (3), care includes (a) education for a child, and (b) any other supervised activity for a child’*. The wording used here is “for a child” to illustrate that the child care provider who looks after only one child is also subjected to the laws and regulations of child care in the Act.

Meanwhile, in Australia, in defining education and care services, the Act does not stipulate any number of children for the premises to be governed under the Education and Care Services laws and regulations. The definition of education and care services in Section 5 of ECSNLA 2010 states that the services include *‘any service providing or intended to provide education and care on a regular basis to children under 13 years of age’*. Therefore, from the definition, there is no minimum number that has been stipulated in defining education and care services.

The effort in reviewing the definition of child care to include even premises taking care of one child is in line with the recommendation by United States of America National Association for the Education of Young Children, on the principles of effective regulation (National Association for the Education of Young Children (NAEYC), 1993). The first principle highlighted by NAEYC is that no exemptions should be given to any programs which provide care and education for children.

Nevertheless, the registration process of these small home-based child cares should not be too meticulous. For instance, on-site inspection prior to operation of the child care may not be required. NAEYC underlined four conditions in regulating small home-based child care: first special standards must be developed, second any violations of laws and regulations may deregister the centre from operating, third

parents know about the standards, and finally there is monitoring process in safeguarding the safety of the children.

In correlation, looking at the negligence cases involving child care providers who only take care of less than four children, these incidents should trigger the authority to accelerate the effort in requiring these child care providers to register with SWD. For instance, the case of Adam Rayqal who has been found to be hidden in the freezer of the child care provider's house (BERNAMA, 2018c) has involved a child care provider who takes care of less than four children. The same goes to the tragic incident of baby Zara who has been physically and sexually abused by the husband of the babysitter who has inserted his finger in the private parts of the baby and has caused her death (Farah Marshitah, 2018). Although child care providers are looking after less than four children they should be regulated and should obtain proper training and skills involving quality child care. Furthermore, what is more important is a background check to determine whether they are qualified and free from any mental health problems or criminal cases.

3.4 Effective Legal Requirements: Raising the Bar of Standards of Key Quality Indicators

As this thesis adopted the definition of quality to be based on process and structural quality, it is important that the vital structural quality features which provide high impact towards children's development are strengthened in the legislation of child care. Licensing requirements or legal requirements are built from key quality indicators. Quality indicators here are structural features of quality which may be

regulated such as ratio, group size, physical environment, qualification, training, and so on.

In order to have strong legal requirements to ensure quality child care centres, the key structural quality indicators that can be evaluated as having good high quality need to be identified. Structural qualities refer to features of child care settings that can be regulated. Besides that, structural aspects of child care are amenable to be translated in regulatory forms and policies (Cryer et al., 1999; Phillipsen, Burchinal, Howes, & Cryer, 1997) due to their quantitative nature (Phillips et al., 2000; Victorian Government Department of Human Services, 2007).

Strong structural features may produce positive outcome of process quality (Zaslow & Tout, 2010). Structural aspect of quality cover certain aspects such as child to adult ratio, group class size, qualification of the child care providers, training programmes taken by the child care providers and health and safety features. The common aspects described as structural quality are adult to child ratio, group size and child care provider's education and training, which are often collectively referred to as the 'iron triangle'. A recent research however added the element of continuous in-service professional development and the use of educational programmes to this traditional 'iron triangle' feature of structural qualities (Slot et al., 2015).

However, in ascertaining what the core features of quality child care are, it is claimed that there is a significant consensus on certain aspects which create high quality child care. Among them are child care settings which stress on safety measures and healthy practices, spaces that can encourage learning and education, good relationship between child care providers and children, and an environment which encourages children's emotional growth and interactions between peers (Vermeer et

al., 2016). Moreover, knowledge on levels of child care quality across countries is limited. Therefore, cross-country comparisons on respective regulatory systems may be helpful in determining the core dimension of quality child care (Vermeer et al., 2016).

From the scholars' point of view and with reference to best practices of developed countries, this thesis evaluates the structural quality that should exist in the laws and regulations of having high quality child care. These features are taken as the main elements of structural qualities that should be translated into laws and regulations. This research then presents and evaluates whether Malaysian laws and regulations on child care centres adequately legislate these main structural features as the legal requirements.

Findings from a research revealed that for infant classrooms to be considered as good quality ones, they should have lower adult to child ratio, smaller group sizes, higher qualification of child care providers, extensive training for child care providers, higher staff salaries, experienced child care providers, and loyal staff who will remain with the centre for an extended period of time (Kreader, Ferguson, & Lawrence, 2005). Adult to child ratio has proven to be a significant predictor of process quality. Therefore, it was suggested by Phillipsen et al. (1997) that the regulations in United States on the adult to child ratio be stricter. Group size is also a good determinant of quality. These two aspects, i.e., ratio and group size shall be taken as the factors to be scrutinised in this research. In addition to the fact that they are strong predictors of quality, they are also measurable, and can be included in comparison studies across different countries (Vermeer et al., 2016). As far as Malaysia is concerned, the stipulated adult to child ratio is quite low compared to other countries. However, the

problem lies in the implementation of and adherence to the regulations. As for group size, Malaysian regulations are silent on this. As such, the possibility to insert this feature in the legislation needs to be scrutinised.

While looking into the factors of child care provider's education and training, findings from a study in Portugal were discovered. The study highlighted the significance of teachers' education and group size towards process quality in the Portuguese child care landscape. The authors therefore highlighted the importance of the requirement of teachers' education and training to be included in the blue print of quality improvement strategies (Sílvia Barros et al., 2016).

Staff wages also carry weight in determining quality child care. It was found to be the strongest predictor in process quality. Although the child care providers' wages may not be regulated, other aspects that are directly associated to wages can be regulated, such as the qualification of the care provider. It is worth noting that, unlike the United States, German and Australian governments have control over child care providers' salaries, besides that of the wages of public school teachers (Phillipsen et al., 1997). In the Malaysian landscape, as most of the child care centres are dominated by the private sector, the minimum wages may be set by the government, for the child care providers to be given a considerable amount of salary according to their qualification. Child care providers in Malaysia are often seen as mere custodial carers who may not warrant the high payment structure. Thus there is a need to intensify the professional development programme in paving towards professionalism of the career of child care providers.

For quality improvements in child care in Malaysia, this study proposes a reform in several aspects of structural features, which make up the 'iron triangle'; namely, adult to child ratio, group size and child care providers' education and

training. Health and safety measures and physical environment should also be considered as complimenting factors in paving a way towards higher quality child care. The element of educational programmes in addition, is proposed to be an extension of the common features of quality indicators such as ratio, group size and staffing issues.

There are certain considerations need to be given attention by law makers in raising the bar of standards of legal requirements as highlighted by Lapp Payne (2011). The benefit of the children should always be the primary consideration in underlining the licensing requirements. Hence, the requirements are not biased to parents or providers or operators. Strong licensing requirements should have these indicators incorporated. These must be reviewed periodically, i.e., every three to four years. Additional reviews may be conducted in cases where incidents might occur, that necessitate quick revisions or changes in requirements. Furthermore, participation from the public is also important through avenues such as public consultation. Such involvement from a range of stakeholders shall inculcate a sense of belonging towards the regulations and might also have the added benefit of collecting ideas and responses from different viewpoints.

In addition to the above, these requirements should be based on research which is up to date. The regulations should not contrary any other laws and regulations. These requirements also need to be enforceable and measurable by the enforcement officers and operators, so that they can check whether the centres have met the conditions stipulated or not. The requirements must also take into consideration the importance of the relationship between care providers and children, by including elements of qualification of child care providers and training programmes that should

be taken by them. The prime focus of the overall requirements is the well-being of the children. The requirements should build an environment which is safe, healthy and stimulating in developing skills of the children across various fields. On top of that, parents' participation should also be included. Besides that, the requirements must inculcate features that are enforceable and cost effective. This must be taken into consideration especially before inserting new requirements. Finally, there should be enough guidance in fulfilling the requirements for both the providers and the enforcement authorities.

3.4.1 The Six Vital Features of Legal Requirements

In CCCA 1984, the Act highlighted six requirements to be fulfilled by the operator in order to obtain a licence for their centres as mentioned in Section 8. In contrast to the Singapore Early Childhood Development Centres Act 2017 and the Education and Care Services National Law Act 2010 of Australia, the terms and conditions mentioned in Section 8 of CCCA 1984 may need further improvement. For Singapore and Australia, they address more fundamental matters that need to be fulfilled by the applicant in applying for a license or certificate of service approval. Australia for instance, under Section 47 of ECSNLA 2010 where in determining the application, the regulatory authority must have regard to the National Quality Framework. The provision states that, *'subject to subsection (3), in determining an application under section 43, the Regulatory Authority must have regard to (a) the National Quality Framework'*. This is important as the framework steers the purposes and aims of child care which the applicant should be aware of and focus on.

Besides that, amongst the conditions, which can be seen in both Singapore and Australia, that should be taken into consideration when considering whether to grant

the licence is whether the applicant has any history of being rejected or refused in previous applications or even a revoked licence as can be seen in Section 47 (2) (b) of Australia's ECSNLA 2010 which states that, *'In addition, the Regulatory Authority may have regard to either of the following—(b) the applicant's history of compliance with this Law or this Law as applying in any participating jurisdiction, including in relation to any other education and care service it operates'*, and in Section 8 (3) (e) of Singapore's Early Childhood Development Centres Act 2017 (ECDCA 2017) which states that:

'In deciding whether a licence should be granted or renewed, the Chief Licensing Officer must have regard to, and give such weight as the Chief Licensing Officer considers appropriate to, all of the following matters: (e) whether the applicant has previously — (i) been refused the grant or renewal of a licence under this Act or the repealed Act; (ii) had any licence revoked or shortened under this Act or the repealed Act; (iii) been the subject of any other regulatory sanction under this Act; (iv) been refused registration of a school under the Education Act; or (v) had any registration of a school cancelled under the Education Act;'

In other words, the regulatory authority must scrutinise whether the applicant has any history of non-compliance with the Act.

As far as laws and regulations of child care in Malaysia are concerned, for an operator who often is the applicant in registering the child care centres, amongst his duty is to employ those who have no history of immoral acts or criminal records as stated in Regulation 9 (1) (c) of CCCR 2012: *'An operator shall have the following duties:(c) to employ or appoint a manager, a supervisor, a child care provider or registered child care provider, and an employee who has no criminal records relating to moral turpitude, sexual wrongdoing or abuse of a child at a child care centre'*.

However, there is no stipulated provision that he himself has to be free from those requirements. The conditions that are mentioned under Section 8 of CCCA 1984

merely state that the applicant must be fit and proper. Section 8 of CCCA 1984 mentions that *'The Director General may register any child care centre subject to the following - (b) ensuring that the applicant or any other person he employs at the child care centre is a fit and proper person, whether by reason of age or otherwise, to operate, take part in the management of or be employed at the child care centre'*.

While it is clear in the regulations that the registration of the child care provider may be refused if he is found to have been convicted of moral turpitude, sexual wrongdoings, or child abuse cases as can be seen in Regulation 16 (4) (b) of CCCR 2012, nevertheless it is not mentioned that the applicant or operator too must be free of these convictions as practised by Singapore or Australia. Regulation 16 (4) (b) of CCCR 2012 makes it clear that the registration of the child care provider may be refused by stating that *'The Director General may refuse to register a person as a registered child care provider if the Director General is satisfied that – (b) the person has been convicted of an offence relating to moral turpitude, sexual wrongdoing or abuse of a child'*.

This Regulation only touches on child care provider but not the applicant or operator of the child care centre. Malaysian regulations therefore only focuses on the conditions stipulated for the child care provider, leaving the operator or the applicant free from any stipulated conditions regarding history of immoral or criminal acts.

However, it is mentioned in Section 12 of CCCA 1984 that the registration of a child care centre may be cancelled when there is contravention with any provisions in the Act, or when the person registered is found to be convicted of offence under this Act or any offence of moral turpitude. Section 12 of CCCA 1984 mentions that *'The Director General may cancel the registration made under section 7— (a) wherever*

there has been any contravention of or non-compliance with any conditions imposed in respect of any registration made under this Act’.

Nevertheless, the cancellation may only be enforced after the registration has been approved and there is the risk that the centre has been opened and has accepted children for a certain period of time. As such the Malaysia legislation is reactive rather than preventive. The background check of the operator should be done in the first place before the registration is granted not after it has been granted.

According to the recent amendment made in the Child Act 2010 in 2016, a database on “Register of Children” has been established. Therefore, institutions dealing with children may request for a screening process when appointing employees in their places. Also, up until 2017 there has been a list of about 102 abusers name who have been convicted for offences against children (Arukesamy, 2017).

However, according to the Minister of MWFCDC only three child care centres have used the record in screening the status of their employees (BERNAMA, 2017c). Therefore, awareness and attention on this matter need to be improved. Apart from disseminating information on this matter, it would be a positive effort for Malaysia to strengthen the requirement for background checking at the time the application of licensing is made, involving not just child care providers and employees but also the operator himself. Besides that, continuous screening should be done periodically in ensuring that the staffs are free from any convictions or offences at the time of employment.

The other CCCA 1984 condition is silent but it can be found in both Singapore and in Australia, it is with regard to financial capacity of the applicant as can be seen in Section 47 (2)(a) of Australia ECSNLA 2010 which mentions that *‘In addition, the*

Regulatory Authority may have regard to either of the following—(a) whether the applicant is capable of operating the education and care service having regard to its financial capacity and management capability and any other matter the Regulatory Authority considers relevant’. This matter can also be seen in the Singapore legislation as stated in Section 8 (3) (g) of Singapore’s ECDCA 2017: ‘In deciding whether a licence should be granted or renewed, the Chief Licensing Officer must have regard to, and give such weight as the Chief Licensing Officer considers appropriate to, all of the following matters:(g) whether the applicant has, or is likely to have, the financial capacity to operate and maintain an early childhood development centre’.

Singapore furthermore makes a requirement for the applicant to establish that the operator has the capability to deliver the services based on the prescribed curriculum as stated in Section 8 (3) (j) *‘whether the applicant has the capacity to deliver early childhood development services according to such requirements relating to the types and content of the curriculum or programme for early childhood development centres as may be prescribed’.* Singapore also lists down in the requirement that there must not be any matters that go against the public interest as mentioned under Section 8 (3) (k) *‘whether there is any other relevant matter that makes it contrary to the public interest to grant or renew the licence’.*

Requirements set by Singapore and Australia particularly on the conditions of the applicant and child care providers may be a guide for Malaysia in strengthening its laws and regulations in ensuring that child care services are delivered only by qualified child care operators and child care providers.

Apart from requirements for qualified child care operators and providers, effective legal requirements should include regulatory standards that have significant impacts on the quality of the process and the children's development. This then is the process in paving the efforts towards a quality child care settings. Therefore, in materialising the efforts towards quality child care, effective legal requirements need to be identified. These features should not just produce an impact on quality but also to encourage compliance for the operators and child care providers to increase adherence in fulfilling the legal requirements stipulated by the laws and regulations. Thus, the features must be the first important requirements that provide significant impacts for the children. The features must also be significant so as to balance the price that need to be paid in terms of the increasing cost for implementing the features. This is to ensure that the legal requirements will not be barriers for legal compliance. Besides that, most of the features are more effective when combined with other important legal requirements as the effect is not optimised with only a single legal requirement. Thus, what are the worthy structural features that are amenable as legal requirements in child care laws and regulations, as the legal requirements of the legislative framework of child care?

In identifying the structural features that predict the positive impacts for children's development as well as protection of the children, research that has been done on factors predicting quality child care are examined. The opinions of experts from the research studies that have been done on the structural features that are important and have an impact on the children and child care settings are further discussed to extract the list of features that need to be focused and strengthened by Malaysian laws and regulations on child care centres in Malaysia. This thesis proposes six main features to be inserted and strengthened in the legislative framework of child

care laws and regulations; they are selected due to its impact and significance in ensuring better protection and better development of children.

The findings from the NICHD Early Child Care Research Network illustrate that the structural quality which may become the legal requirements may cause significant impact on process quality aspects which ultimately provide good quality child care (Broekhuizen, 2015).

For instance, when a child care centre has low adult to child ratio, children will enjoy the activities more as the child care providers will have ample time to spend with them by offering more interesting and stimulating activities rather than spending time managing the classrooms (Vandell & Wolfe, 2000). Another example can be seen when the child care providers are well equipped with trainings, they are more responsive and are able to conduct higher quality activities with the children. The safety of the children will be more safeguarded when a high quality environment is prepared in the child care centre. Thus, better health and safety practices may be the controlling factor in curbing infections, injuries and other health issues (Vandell & Wolfe, 2000). In other words, the small number of children to be catered to by a child care provider, small group size, and well educated child care providers may encourage better learning atmospheres for the children (Phillipsen et al., 1997). Nonetheless, the associations of structural qualities and process qualities are not conclusive (Sílvia Barros et al., 2016; Slot et al., 2015). This means that there are mixed findings. There are studies which show significant relationship, but there are studies that have resulted otherwise or showed no relations at all.

Therefore, from the research that has been conducted internationally and the report on the enforcement made by SWD on the cases that have been dealt with, there

are six features of legal requirements or regulatory standards that need to be given attention to improve the laws and regulations on child care centres in Malaysia. The legal requirements are the adult to child ratio, group size and child care providers' education and trainings which are known as the iron triangle. The other features are the health and safety requirements, physical environments requirements and educational programme requirements.

From the research on legal requirements which are vital to be regulated in ensuring quality child care, most of the studies will involve the 'iron triangle' features which are adult to child ratio (Sílvia Barros et al., 2016; Bowne et al., 2017; Fiene, 2002; Melhuish et al., 2015; Munton et al., 2002; National Association for Regulatory Administration, National Center on Child Care Quality Improvement, & A Service of the Office of Child Care, 2017; OECD, 2012a; Perlman et al., 2017; Phillipsen et al., 1997; Slot et al., 2015; United Kingdom Department of Education, 2013; Ying Hu, Chi Kuan Mak, Neitzel, Li, & Fan, 2016), group size (Sílvia Barros et al., 2016; Bowne et al., 2017; Fiene, 2002; Melhuish et al., 2015; Munton et al., 2002; National Association for Regulatory Administration et al., 2017; OECD, 2012b; Phillipsen et al., 1997; Slot et al., 2015; Vandell & Wolfe, 2000), and education and training of staff (Sílvia Barros et al., 2016; Bowne et al., 2017; Burchinal, 2017; Economist Intelligence Unit & Lien Foundation, 2012; Fiene, 2002; Melhuish et al., 2015; Munton et al., 2002; National Association for Regulatory Administration et al., 2017; OECD, 2012b; United Kingdom Department for Education, 2017; United Kingdom Department of Education, 2013; Vandell & Wolfe, 2000).

Other legal requirements which are commonly found in studies involving structural qualities of child care which are amenable to be translated into legal

requirements are features with regard to physical environment and health and safety (Fiene, 2002; Melhuish et al., 2015; National Association for Regulatory Administration et al., 2017; OECD, 2012b; Rhee & Duksung, 2007; United Kingdom Department for Education, 2017; United Kingdom Department of Education, 2013; Vandell & Wolfe, 2000). More recent studies would suggest for the legal requirements to include educational programme as a legal requirement (Bowne et al., 2017; Burchinal, 2017; Economist Intelligence Unit & Lien Foundation, 2012; Melhuish et al., 2015; OECD, 2012b; Rhee & Duksung, 2007; Slot et al., 2015; United Kingdom Department for Education, 2017; United Kingdom Department of Education, 2013). The detailed discussions on these six legal requirements or regulatory standards are discussed further in Chapter Four and Five, to illustrate the importance of these legal requirements and the significance of these requirements as to their impacts on the quality of child care centres. There are other requirements or structural features which are chosen as factors that impact the quality- such as program duration (OECD, 2012b), parental engagement (Economist Intelligence Unit & Lien Foundation, 2012; National Association for Regulatory Administration, National Center on Child Care Quality Improvement, & A Service of the Office of Child Care, 2017), and transportation (National Association for Regulatory Administration et al., 2017) but these features are not widely discussed and agreed by scholars to be the features or legal requirements of quality child care.

3.5 Robust Enforcement: Mobilising the Functions of the Licensing Agency

The third essential element contributing to robust laws and regulations of child care is robust enforcement. This involves effective functions of the licensing agency.

The licensing agency must be adequately funded and supported by legislatures (NAEYC, 1993). Additionally, staffing is also important as adequate staffing will allow for good monitoring schedules with a reasonably distributed workload among the staff. Besides having adequate staff numbers, it is also important that they be equipped with proper knowledge and training on theory and practice. Finally, the management and leadership in the licensing agency should be effective.

The comprehensiveness of laws and regulations is ineffective when these laws cannot be well implemented or well enforced by the qualified authorities or licensing agency. Enforcement is a crucial part in ensuring that the standards underlined in the laws and regulations are adhered to, to attain good quality child care services. Enforcement should not just be confined to the use of force, compelling, or using powers and authorities; it should include facilitation and positive enforcement by providing guidance through preventive and corrective strategies through supervision, monitoring, technical advice and assistance, incentivising and corrective actions (National Center on Child Care Quality Improvement, 2014).

It appears that this positive strategy is the first layer or shield in preventing more serious conditions of non-compliance of laws and regulations. It is a way to solve problems before the situation worsens to a point where negative strategies in terms of sanctions might need to be implemented. Therefore, in enforcing good quality laws and regulations in producing good quality child care, the strategies must include encouraging, upgrading and safeguarding methods in achieving compliance with the laws and regulations. The authorities and agencies concerned, therefore, should educate and elaborate on the importance of regulatory standards and the reasons for choosing these standards. Therefore, there is a need for proper scheduling

to enable frequent monitoring, so as to identify areas which the operators and child care providers find difficulties in complying with (Koch Consulting, 2005). Frequent monitoring can help in identifying problems where possible positive solutions can be suggested, as opposed to just punishing the non-compliant actions without any corrective systems in place. This would ultimately be better and more beneficial for the operators and child care providers.

Enforcement can be categorized into three types, which are monitoring, technical assistance and sanctions (Koch Consulting, 2005). Monitoring and technical assistance can be considered as positive strategies while sanctions are considered as a negative strategy in ensuring compliance of laws and regulations by child care operators and child care providers. Monitoring is usually conducted in the form of visits, examining whether the operators are in compliance with the requirements, specially the legal requirements. If areas are found where the operators are struggling to comply with the requirements, then technical assistance should be offered in facilitating the providers and operators to fulfil these requirements, which eventually will benefit the children.

It has come to light that the problem lies in the frequency of visits. This in turn relates to enforcement support issues such as the number and availability of skilled staff. There is likelihood of more non-compliance when the visits are not done frequently, which may be harmful for the children in the long run (Lapp Payne, 2011).

As far as the situation in Malaysia is concerned, operators of child care centres which have registered their centres with SWD, have acknowledged that they have had inspections and visits. However the frequency of the visits is still low (UNITAR International University, 2017). Therefore, Malaysia needs to strengthen the

enforcement forces in terms of having more skilful resources and inspectors. This staffs needs to be well trained and educated on how to primarily encourage compliance through technical assistance and education. They must also be equipped with the knowledge to use the power of authorities judiciously through wisdom, in implementing sanctions such as compounds, temporary closures, sealing the premises and prosecutions. The aim of this enforcement strategy is to deter non adherence to laws and regulations. Therefore, the authorities should use their wisdom in taking action judiciously and should not be reluctant to implement negative strategies such as temporary closures, fines, de-registration or even bringing the operators for legal action in the court, when the necessity arises. This must be done in principle to protect the children from harm and negligent care (Koch Consulting, 2005).

3.5.1 Enforcement: Positive and Negative Strategies?

There are still room for improvements for the enforcement efforts in the Malaysian childcare sector. It can be seen that, from the statistic that has been reported by SWD from January 2016 until December 2016 on actions taken against child care centres for violating any laws or regulations in every states in Malaysia, the number of cases that has been dealt can be improved to ensure that a more robust enforcement is implemented (Social Welfare Department, 2016). For a period of one year, at 22 cases SWD of Negeri Sembilan marks the highest actions that have been taken. However, the rest of the states still need to improve their enforcement forces since the average cases dealt with is approximately 11 to 12 cases. Pahang, Johor and Kedah have merely reported below five cases with the lowest being Kedah with just one reported case while Pahang has only four cases, and Johor with only three actions being taken against child care centres. However, there are efforts done by SWD especially in

enforcing Section 6 (1) of CCCA 1984. It can be seen that most of the actions that have been taken in every states have involved this Section. This Section governs the issue of unregistered child care centre which states:

'No person shall operate or take part in the management of a child care centre which is not registered under the provisions of this Act.(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both and in the case of a second or subsequent offence, to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both'.

Looking at the punishment imposed, the maximum fine that can be inflicted is RM 10,000 or two years of imprisonment or both. From the data prepared by SWD in 2016, the highest conviction made against two child care centres in Kuala Lumpur was RM 6,000. It appears that other states may take the example from the Kuala Lumpur SWD enforcement forces especially in bringing more cases for prosecution in deterring more unregistered child care centres from being set up in the future. From the eleven cases that have been dealt with in Kuala Lumpur, five cases involved prosecuting the illegal child care centres in court.

Other than initiating action under Section 31 (1) (a) of CA 2001, other ground of action should also be highlighted to be available to the victims. It can be argued that children placed in child care centres should be guaranteed the right to have a safe learning environment. There is duty of care in common law for a teacher to anticipate the potential risk of injury. In the case of *Government of Malaysia v Jumat [1977] 2 MLJ 103*, the courts discussed on the critical issue on the degree of supervision that the educator should foresee (Hee, n.d.) .

Besides that, one of the grounds possible to be invoked by the victim is negligence. Under this ground, there is a need to prove that there is a duty of care owed by the child care providers upon the children. In 2006, the death of Brandon Teh shocked the country, and the parents took legal action by making criminal negligence as the grounds for action (The Star, 2006). The child care centre in question was an unregistered child care centre. On another note, the parents may be counter claimed for contributory negligence on the part of the parents when they choose to send their children to illegal child care centres, thus, jeopardizing their children's safety.

Another ground that may be forwarded by the plaintiff is educational malpractice (Aquila, 1991). This ground mainly caters cases involving the failure of the educators to facilitate the learning process. However, this cause of action is still debatable and not yet generally accepted as the case on malpractice in the medical field. Basically, educational malpractice can be based on constitutional ground, contract law and negligence.

Moreover, this effort in inflicting punishment however should be balanced with 'positive strategies' i.e. through advocacy and technical supports given to child care centres to assist in registration. This Chapter will explain further on 'positive strategies' of enforcement that are to be implemented by Malaysian child care centres enforcement forces by providing more technical advices and frequent visits.

From the data taken from SWD in 2016 on actions taken against child care centres, it may not reflect that most of the child care centres in the majority of the states in Malaysia comply with all the laws and regulations. It appears that there is a lack of enforcement forces on the part of the authority as there is only on average eleven to twelve cases for each state within the period of one year. Therefore, it is

proposed that for more 'positive strategies' to be implemented in providing more monitoring and assistances to the operators. Inspections should be conducted in a structured way by having organised schedules. Through inspections, any non-compliance of the laws and regulations may be detected. It is suggested by NARA that the statute of child care should set a minimum number of inspections that should be conducted at least not less than twice a year (National Association for Regulatory Administration et al., 2017). One or more inspection is suggested to be unannounced inspection. The regulatory authority should also be prepared to conduct re-inspections, visits to convey technical assistance, and investigations upon receiving any complaints in addition to the compulsory inspections.

Furthermore, when there is a lack of enforcement forces, the problem may be due to a few possibilities such as lack of skilful resources such as knowledge and well-trained enforcement officers. In Australia for instance, pre-service education and training are provided for the inspectors and officers of enforcement (OECD, 2016). Professional developmental learning and development are provided at state and also at national level.

In a report to SWD, UNITAR has made a suggestion for the child care sector to have a specific agency catering only to child care matters (UNITAR International University, 2017). A specific agency to uniform the curriculum for early childhood and care in child care centres, staff's trainings, management of the registration and supporting services and subsidies of all types of child care centres.

This kind of practice can be seen in Australia. The Australian Children's Education and Care Quality Authority (ACECQA) is set up to compliment the government in enforcing the National Quality Framework which consists of National

Quality Standards and National Legislative Framework. It is an independent national authority to manage matters regarding child care or the early childhood department (OECD, 2016). The same goes to Singapore where they also initiate to set up a specific agency named as The Early Childhood Development Agency (ECDA) which manage regulatory and developmental matters regarding the early childhood sector in Singapore from child care centres to kindergartens (ECDA, 2017). The agency which was officially launched on 1st April 2013 is given autonomy to manage the early childhood sector although it is under the auspice of the Ministry of Education and Ministry of Social and Family Development.

Referring to the compliance and enforcement framework set up by Australia, there are a few lessons that Malaysia can learn. Besides the need to have adequate manpower, the staffs need to be equipped with the proper grasp of knowledge on laws and regulations regarding child care centres. They should know the gist of the laws and the proper way on how to implement and enforce the laws and regulations. Enforcing the laws does not only mean inflicting sanctions such as temporary closure of the premise or seal of the premise or even prosecuting the offenders, but it also means monitoring and offering technical assistances.

The first layer of enforcement should be done by having frequent visits to inspect existing problems that hinder the child care centres from following the laws and regulations. Technical assistance should be offered for the child care centres on how to solve the problems that they are facing in fulfilling the requirements as required by the laws and regulations. The written directions for instance which may be

issued under Section 15⁶ of CCCA 1984, should come together with technical assistance in correcting the faults of the child care operators or providers.

Besides that, the agency should always initiate efforts to encourage and promote adherence by providing certain incentives, for instance to reassure that the laws and regulations are not to burden them but are there to assist them in providing quality services for the children. Nevertheless, this does not mean that the authority should be reluctant to take action when all the monitoring and technical assistance have been implemented. The authority should implement sanction judiciously when necessary. The initiatives made by the authority should be strong but at the same time not too rigid so as to encourage more compliance and adherence to the laws and regulations. The aim of the laws and regulations in protecting the children as well as providing quality education for good developmental growth should always be the priority.

3.6 Concluding Remarks

The purpose of enacting CCCA needs to be reviewed. The purpose of the laws needs to be expanded not just to manage the issue of registration and management, but to underpin the purpose on the need to put the welfare of the children as a priority. The purpose of the laws should cover the protection of the children as well as to deliver quality care and education for the children.

⁶ Section 15 of CCCA 1984 stated that *'The Director General may, in respect of any registered child care centre, give such directions in writing as he thinks necessary to ensure that— (a) the centre is operated and managed satisfactorily;(b) the welfare of the children attending the centre is promoted in a proper manner; (c) adequate apparatus and equipment necessary as safeguards against fire are provided therein; and (d) the provisions of this Act are complied with.'*

From the evaluation that has been made on the law regarding registration or licensing of child care centres in Malaysia, one of the important parts is on how to determine whether the operator is eligible to register his centre. This is the issue of qualification of the operator or the applicant. Overall, Malaysia did provide a specific section on terms and conditions. Nevertheless, the terms are more towards listing the quality features that should be fulfilled and can just be evaluated diligently when the centre has already started its operation. For instance, the first term with regard to the limit of the number of children, the applicant may just fill in the allowed number of children in the form. Accordingly, what is the proof or how to ensure that he will adhere to the requirement when registration has been approved later on? This should be the aspect that should be monitored under the enforcement and monitoring system. Another example is the requirement for the centre to operate continuously for four hours. The operator may claim this on the application but the problem remains because it is difficult to ensure adherence of the terms by the operator.

From examination made to the provision in Singapore and Australia in granting the approval for registration or licence, the weight is given more towards the ability, capacity and proprieties of the applicant. The condition for the applicant to bring evidence that he is free from any history of non-compliance, any convictions or charges or fees is essential to ensure that children are placed in safe hands and with trustworthy people. The financial capacity and management capability also play a role in determining whether that the operator has the capability to run the centres successfully. Therefore, these requirements are important to be inserted in the Malaysian laws and regulations as this is the first stage to filter and vet child care providers as to whether they are qualified to take care of children. In addition to this requirements are other effective legal requirements that need to be improved in the

Malaysian child care settings. This involved vital structural quality features which are amenable to be translated into laws and regulations. These features include adult to child ratio, group size, education and training of staff, physical environment, health and safety and educational programme.

Moreover, there is also a need to strengthen enforcement. There is a need to improve on the part of positive and negative enforcement. Negative enforcement can be in terms of sanctioning the offenders through issuing fines or compounds or even prosecution. These restrictive sanctions are to be implemented when there is immediate risk of danger towards the children and there are repeated non-adherences which may threaten the safety of the children (National Center on Child Care Quality Improvement, 2014). However, what is more important is the positive enforcement through technical assistances and consultations. This approach should be strengthened by equipping the officers with the necessary skills and knowledge especially on the gist of the laws and regulations. This is vital as more consultations would encourage more child care operators to register their centres and comply with the requirements.

As such, the first of three essential elements pertains to the basic introduction of the statute in terms of purpose and objectives of the statute, definitions and exemptions of the statute which should be reviewed to set a good foundation for child care laws and regulations in Malaysia. The second element concerns legal requirements for child care providers and child care operators, which are requirements that need to be given great attention. The third is the legal requirements on the structural quality features which need to be examined further to identify the structural features that provide high impact towards children's development and protection. These legal requirements need further scrutiny and are dealt further in Chapter Four

and Five. Furthermore, another essential element which needs to be improved in creating a better legislative framework is the element of enforcement. A robust enforcement needs to be instilled especially on the part of positive strategies. Positive strategies of enforcement include the consultation, technical assistances providing guidance to the operators in assisting for legal compliance. Thus, these three elements which constitute clearer statute, effective legal requirements and robust enforcement need to be improved in creating a better legislative framework.

A further discussion on legal requirements elements is examined in the next chapters. The practices implemented by other jurisdiction should be a guide for Malaysia. For instance, the legislation of Singapore should be exemplified by Malaysia since it is claimed that child care centres in Singapore practice high legislative adherence based on the low number of negligence cases reported (Erlan Joni E.K., Salleh S., Ahmad Mustafa M.S., Abdullah A., Mahat I.R., 2016). From 2011 to 2012 only seven cases have been reported, significantly there is no increase in the trend.

Malaysia should also be reminded that in reviewing and improving the laws and regulations, the guiding principle is that the efforts should remove the lowest standards by increasing the bar of standards and to choose language which is more precise in describing quality. Furthermore, the laws and regulations in child care should not just focus on providing custody but also should encourage developmental enhancement (Gallagher, Rooney, & Campbell, 1999).