

Mr [REDACTED]
Person with Management or Control
Young Men's Christian Association of Canberra Inc
RE: YMCA North Ainslie School Age Care

Email: [REDACTED]
[REDACTED]

Dear Mr [REDACTED]

Decision to Issue Compliance Notice

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently investigated suspected offences relating to the cessation and commencement of nominated supervisors at YMCA North Ainslie School Age Care SE-00009723 (the Service) operated by Young Men's Christian Association of Canberra Inc PR-00005888 (the Provider).
2. I am satisfied that the Provider did not comply with the provisions of the *Education and Care Services National Law (ACT)* (the Law) and the *Education and Care Services National Regulations* (the Regulations).
3. Web addresses for the Law and the Regulations are provided for your convenience at the end of this notice.

Facts

4. On 12 October 2020, the Provider made the following notifications to the Authority through the NQAITS system:
 - a. NOT-40478323 - notification of cessation of [REDACTED] as Nominated Supervisor, within a finish date of 30 September 2020; and
 - b. NOT-40478303 – notification of commencement of [REDACTED] as nominated supervisor, ostensibly from 1 October 2020, and ostensibly signed by [REDACTED] on 1 October 2020.
5. Authorised Officers had, on 7 October 2020, taken a witness statement under section 215 of the Law, which included evidence that was inconsistent with the above notifications. In addition, the notification of cessation was made 12 days after actual cessation.
6. The Authority conducted a formal investigation, during which evidence was gathered which supported the following allegations:

a. Allegation One

It was alleged that, on 12 October 2020, by submitting NOT--40478303 and accompanying NS01, the Provider, through its authorised representative ██████████, provided to the Authority information or documents that were known to be false or misleading in a material particular, namely the commencement date of ██████████ as Nominated Supervisor, which is an offence under section 295 of the *Law*;

b. Allegation Two

It was alleged that, between 1 October 2020 and 11 October 2020 (inclusive) the Provider operated the Service without any nominated supervisor, which is an offence under section 161 of the *Law*.

c. Allegation Three

It was alleged that the Provider failed to notify the Regulatory Authority of the cessation of ██████████ as Nominated Supervisor, in contravention of section 173(2)(b), which requires notification in writing within the time prescribed by Regulation 174(2)(b), being seven days of the event (or the approved provider becoming aware of the event), being 7 October 2020.

d. Allegation Four

It was alleged that, by reason of the matters in Allegations One, Two and Three, the Provider has operated in breach of its Provider Approval.

7. On 14 December 2020, a Show Cause Notice (SCN) was issued to the Provider. Refer Attachment A.
8. There were three grounds for issuing the SCN, being:
 - a. knowing provision of false or misleading information to the Authority;
 - b. operating a Service without a nominated supervisor (including failure to notify cessation); and
 - c. failing to comply with conditions on Provider Approval.
9. The SCN outlined the evidence obtained during the investigation and attached copies of relevant documentation, including notification documents and a witness statement obtained pursuant to powers in section 215 of the *Law*. The SCN advised that the Authority was considering compliance action based on evidence that there had been contraventions of the *Law* identified during the Authority's investigation.
10. On 16 December 2020, an initial response was received by email from the Provider. The Authority replied by email recommending that the response be revisited, and evidence supplied. Refer Attachment B.

11. On 22 December 2020, attachments were forwarded, which had been omitted from the initial response (together, the Response). Refer Attachment C for the Response.

Law and Regulations

Legislative Provisions relevant to Allegation One

Section 5 – Definitions

Nominated supervisor, in relation to an education and care service, means an individual who –

- (a) is nominated by the approved provider of the service under Part 3 to be a nominated supervisor of that service; and
- (b) unless the individual is the approved provider, has provided written consent to that nomination.

Person in day-to-day charge, in relation to an education and care service, means a person who is placed in day-to-day charge of the service in accordance with the national regulations.

Section 295 of the Law – False or misleading information or documents

- (1) A person must not give the Regulatory Authority or an authorised officer under this Law any information or document that the person knows is false or misleading in a material particular.

Penalty: \$6000, in the case of an individual.

\$30 000, in any other case.

- (2) Subsection (1) does not apply in respect of the giving of a document, if the person when giving the document—
 - (a) informs the Regulatory Authority or authorised officer, to the best of the person's ability, how it is false or misleading; and
 - (b) gives the correct information to the Regulatory Authority or authorised officer if the person has, or can reasonably obtain, the correct information.

Regulation 117A – Placing a person in day-to-day charge

For the purpose of the definition of a ***person in day-to-day charge*** in section 5 of the *Law*, a person is in day-to-day charge of an education and care service if –

- (a) the person is placed in day-to-day charge by the approved provider or a nominated supervisor of the education and care service; and
- (b) the person consents to the placement in writing.

Legislative Provisions Relevant to Allegation Two

Section 5 – Definition Nominated Supervisor – see above

Section 161 of the Law - Offence to operate education and care service without nominated supervisor

The approved provider of an education and care service must not operate the service unless there is at least one nominated supervisor for that service.

Penalty: \$5000, in the case of an individual.
\$25 000, in any other case.

Legislative Provisions Relevant to Allegation Three

Section 173(2)(b) of the Law – Offence to fail to notify certain circumstances to Regulatory Authority

- (2) An approved provider must notify the Regulatory Authority of the following in relation to an approved education and care service operated by the approved provider –
 - (b) if a nominated supervisor of an approved education and care service –
 - (i) ceases to be employed or engaged by the service; or
 - (ii) is removed from the role of nominated supervisor; or
 - (iii) withdraws consent to the nomination.
- (5) A notice under subsection (2) must be provided within the relevant prescribed time to the Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 174(2)(b) – Time to notify certain circumstances to Regulatory Authority

- (2) For the purposes of section 173(5) of the Law, a notice must be provided –
 - (b) In any other case, within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant event.

Legislative Provisions Relevant to Allegation Four

Section 19 of the Law – Conditions on Provider Approval

- (1) A provider approval may be granted subject to any conditions that are prescribed in the national regulations or that are determined by the Regulatory Authority.
- (2) Without limiting subsection (1), a provider approval is subject to the condition that the approved provider must comply with this Law.
- (3) A condition of a provider approval applies to the provider as the operator of any education and care service or associated children's service, unless the condition expressly provides otherwise.
- (4) An approved provider must comply with the conditions of the provider approval.

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

Consideration of Provider's Response to the SCN

Allegation One – Knowing Provision of False or Misleading Information or Documents - Substantiated

12. In relation to Allegation One, the SCN referred to evidence consisting of a notification (NOT-40478303) submitted to the ACECQA Portal on 12 October 2020, an original Form NS01 regarding the commencement of ██████████ as Nominated Supervisor of the Service, with corrective tape on it (Form NS01), and a compulsory witness statement of ██████████ with numerous attachments, including employment contracts. Those documents indicated that ██████████ did not consent to or commence a role as Nominated Supervisor on 1 October 2020, contrary to the notification submitted by the Provider on 12 October 2020.
13. In response to Allegation One, the Provider submitted that the incorrect date on the Form NS01 was not intended to mislead but “provide assurance that the service had a person in charge during that period”. In the transcript of interview with ██████████, she stated that she thought she was doing it correctly by backdating to show there was someone “covering”.
14. A nominated supervisor role is different from a “person in day-to-day charge”, not least because a nominated supervisor is subject to onerous legal responsibilities and liabilities, such as ensuring adequate staffing and supervision. A nominated supervisor may be subject to financial penalty. A person is not a nominated supervisor of a service until they have consented in writing, as is clear from the definition in section 5 of the *Law*, as appears above.
15. A person in day-to-day charge does not have personal liability under the *Law* but must still consent to the role in writing. It is not clear when ██████████ first consented to be a person in day-to-day charge but, assuming she had consented in writing before 1 October 2020, that does not translate to also being a nominated supervisor without express consent in writing.
16. A “responsible person” may be any of the approved provider (or a person with management or control if applicable), a nominated supervisor, or a person in day-to-day charge (see section 162 of the *Law*). The requirement is for a person in one of those three roles to be present at the service at all times the service is in operation. It seems that there may be some confusion about the role of a person in day-to-day charge as, on the new working directly with children forms, a nominated supervisor would be selecting both columns, as they would also be a responsible person.
17. The interview with ██████████ also indicates lack of understanding of different roles and being unaware that a nominated supervisor must have consented in writing to take on the role.
18. I am satisfied that ██████████ did not consent in writing to be a nominated supervisor until 12 October 2020. Until she had so consented, she was not a nominated supervisor of the Service, by definition.
19. Although there may have been no ill intent, the Notification and Form NS01 were submitted to the Authority, knowing the date of commencement and date of signing were incorrect. In other words, it was known that the document was false or misleading.

20. For the above reasons, I am satisfied that the Provider contravened section 295 of the *Law* on 12 October 2020 by submitting the Notification and Form NS01.

Allegation Two – Operation of Service without a Nominated Supervisor - Substantiated

21. In relation to Allegation Two, the SCN referred to evidence consisting of sign-in, sign-out records, and the evidence relied upon regarding Allegation One.
22. In response to Allegation Two, the Provider stated that, whilst an employee deemed in charge was onsite, the “administrative requirements” were not completed to reflect the appointment.
23. As mentioned above, the roles of person in day-to-day charge and nominated supervisor are distinct. Whilst ██████████ may have been a person in day-to-day charge (although it is unclear when she consented to that role in writing), she was not a nominated supervisor until she signed consent to take on that role. Rather than “administrative requirements”, it is consent to take on legal liability for obligations under the *Law*. ██████████ gave evidence under notice on 7 October 2020 that she was unsure whether she was going to be nominated supervisor.
24. I am satisfied that, between 1 October 2020 and 9 October 2020 (10 and 11 October being a weekend), the Provider contravened section 161 of the *Law* by operating the Service without any nominated supervisor.

Allegation Three – Failure to Notify Cessation of Nominated Supervisor

25. In relation to Allegation Three, the SCN referred to the notifications in Attachment A as evidence that ██████████ ceased her role as nominated supervisor on 30 September 2020, which was not notified to the Authority until 12 October 2020.
26. The Provider has admitted in its Response that the cessation was not notified to the Authority within the required time frame.
27. I am satisfied that the Provider contravened section 173(2)(b) of the *Law*, by failing to notify the Authority of ██████████ cessation on or before 7 October 2020.

Allegation Four – Failing to Comply with Conditions on Provider Approval

28. In relation to Allegation Four, the SCN referred to the matters and evidence relied upon in Allegations One, Two and Three to support a failure to comply with the statutory condition in section 19(2) of the *Law*, that the provider must comply with the *Law*.
29. The Provider has admitted a failure in compliance with the conditions of the provider approval.
30. I am satisfied that the Provider contravened section 19(4) of the *Law* by reason of substantiated Allegations One, Two and Three.

Obligations Upon Regulatory Authority

31. The foundation for the Authority’s obligations is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles. Relevant to this decision is the objective at section 3(2)(a), namely:

“to ensure the safety, health and wellbeing of children attending education and care services”.

32. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
- (c) *to monitor and enforce compliance with this law;*
 - (d) *to receive and investigate complaints arising under this law.*
33. The *Law* works to protect a particularly vulnerable group in our society – children – when they are in the care of people other than their parents or guardians. The *Law* authorises providers and services to participate in a regulated environment and requires those participants to comply with the *Law*.
34. A key objective of the *Law* is to protect children in the context of education and care services. The Authority looks to exercise its powers to emphasise and require best practice, as the *Law* requires, which is also inherently in the best interests of children.
35. The *Law* is predominantly a protective law and the exercise of disciplinary powers in this type of regulatory context is recognised by Courts as not being punitive: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177.

Decision

36. Considering the evidence obtained in the investigation, the Response (including actions taken by the Provider), and the objectives and guiding principles of the *Law*, I have determined that issuing a compliance notice would be appropriate and in the best interests of children.
37. It is noted that what took place was due to ignorance rather than dishonesty, but it is essential that the Authority is able to rely upon information submitted by approved providers as being correct. It is also essential that those in management positions within providers possess a thorough understanding of the *Law* and *Regulations*, including the provisions surrounding nominated supervisors and persons in day-to-day charge.
38. The Authority is empowered to issue a compliance notice under section 177 of the *Law*

177 – Compliance notices

- (1) This section applies if the Regulatory Authority is satisfied that an education and care service is not complying with any provision of this Law.
 - (2) The Regulatory Authority may give the approved provider a notice (a **compliance notice**) requiring the approved provider to take the steps specified in the notice to comply with that provision.
 - (3) An approved provider must comply with a compliance notice under subsection (2) within the period (being not less than 14 days) specified in the notice.
Penalty: \$6 000, in the case of an individual
\$30 000, in any other case.
39. The compliance notice is Attachment C to this Decision letter. You are required to take the steps directed in the Notice to comply with the relevant provisions.
40. You must provide evidence of the steps required by the time indicated within the Notice at Attachment C.

41. Please direct the Provider's response to compliance notice via email to Senior Investigator Tanya Masterman at tanya.masterman@act.gov.au or by post to:

Tanya Masterman
Senior Investigator
Children's Education and Care Assurance
GPO Box 158, CANBERRA ACT 2601

Right of Review

42. A decision to issue a compliance notice is a **reviewable decision** as defined in Section 190 of the *Law*. Under section 191 of the *Law*, you may apply for an internal review of the decision. Any application must be lodged within 14 days after you are notified of the decision (or, if not notified, within 14 days after becoming aware of the decision).
43. An application for review may be made by completing the form AR01 Application for Internal Review of Reviewable Decision which can be obtained from the ACECQA website.
44. Please direct the Provider's written submission via email to Senior Investigator Tanya Masterman at tanya.masterman@act.gov.au or by post to:

Tanya Masterman
Senior Investigator
Children's Education and Care Assurance
GPO Box 158, CANBERRA ACT 2601

Legislation

45. The *Education and Care Services National Law Act (ACT)* (the *Law*) applies to the Provider and to any service it operates.
46. The *Law* is applied in the ACT by the *Education and Care Services National Law (ACT) Act 2011* <http://www.legislation.act.gov.au/a/2011-42/default.asp>.
47. The *Law* and *Regulations* can be viewed at: http://www.acecqa.gov.au/national-law_and
<http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
48. Should you have any questions about this Show Cause Notice please contact Tanya Masterman by telephone on (02) 6205 2012 or email to tanya.masterman@act.gov.au.

Yours sincerely,



Clare Brookes
Senior Director
Early Childhood Policy and Regulation
ACT Education Directorate
3 February 2021