

[REDACTED]  
Nominated Supervisor  
Young Mens Christian Association of Canberra Inc  
RE: YMCA Giralang After School Care

Email: [REDACTED]@live.com.au

Dear [REDACTED]

**Decision to Issue Formal Caution**

1. As you are aware, the ACT Regulatory Authority (the Authority) also known as Children's Education and Care Assurance (CECA), investigated suspected offences relating to two children leaving YMCA Giralang After School Care SE-00009716 (the Service), operated by Young Men's Christian Association of Canberra Inc PR-00005888 (the Provider), unnoticed on 27 June 2023.
2. The Authority is satisfied that you, whilst in the capacity as the Nominated Supervisor of the Service, have contravened provisions of the *Education and Care Services National Law (ACT)* (the Law).
3. Web addresses to the Law and the *Education and Care Services National Regulations (the Regulations)* are provided for your convenience at the end of this decision.

**Facts**

4. On 28 June 2023, the Authority received a notification (NOT-40872942) and incident report from the Provider advising that on 27 June 2023, two children, [REDACTED] [REDACTED] (5:2) and [REDACTED] [REDACTED] (4:10), had left the Service unnoticed, and were unaccounted for between 30 to 60 minutes. The notification advised that the children were subsequently located at home.
5. Due to the risk of harm and hazards to children, likely to cause injury resulting from inadequate supervision, the Authority determined to investigate.
6. On 13 September, the Authority sent you, as the Nominated Supervisor of the Service, a Show Cause Notice (the Notice), advising that the Authority had determined there was sufficient evidence to support a case to answer regarding a suspected offences under the Law.
7. The Notice outlined the grounds for issue, relevant evidence supporting the suspected contraventions of the Law, and potential compliance actions being considered if the

allegations were substantiated. Refer copy of Notice (minus attachments A through G due to size, noting they can be produced again to the Provider on request) at [Attachment A](#).

8. The Notice set out the following allegations for your response:

**Allegation One**

It is alleged, that on 27 June 2023, you, as the Nominated Supervisor, failed to ensure that all children being educated and cared for by the Service were adequately supervised, in that children [REDACTED] [REDACTED] (5:2) and [REDACTED] [REDACTED] (4:10), were able to leave the Service unnoticed, and were unaccounted for approximately 30-40 minutes, contravening section 165(2) of the *Law* and engaging a contravention of 167(2) of said *Law*.

**Allegation Two**

It is alleged that by 27 June 2023, you, as the Nominated Supervisor, failed to ensure that every reasonable precaution was taken to protect children from harm and hazard likely to cause injury, in that an adequate risk assessment was not conducted regarding junior children, both preschool and kindergarten, being combined with older children in the senior children's space, contravening section 167(2) of the *Law*.

**Allegation Three**

It is alleged that by 27 June 2023, you, as the Nominated Supervisor, failed to ensure that every reasonable precaution was taken to protect children from harm and hazard likely to cause injury, in that a person was not adequately authorised and informed of being in day-to-day charge of the Service, in compliance with *Regulation* 117A, in contravening section 167(2) of the *Law*.

9. On 11 October 2023, your response to the Notice was emailed to the Authority including six attachments. The attachments included copies of policies, an ACECQA CECA ECED folder checklist, an induction checklist and a letter titled [REDACTED] CECA letter. Refer copy of response (minus attachments due to size, noting they can be produced upon request) at [Attachment B](#).

**Law**

10. The following provisions of the Law were engaged by the investigation and Decision.

**Section 165(2) of the Law – Offence to inadequately supervise children:**

A nominated supervisor of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

**Section 167(2) of the Law - Offence relating to protection of children from harm and hazards:**

A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

### **Obligations upon Regulatory Authority**

11. 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*".
12. The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have specific application in this instance, being:
  - (a) *that the rights and best interests of the child are paramount; ...*
  - (f) *that best practice is expected in the provision of education and care services.*
13. 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.*
14. 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*.
15. 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.
16. 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.

### **Reasons and Decision**

17. The Authority has considered all evidence gathered via the investigation process, inclusive of the response to the Notice, and is satisfied on the balance of probabilities, allegations are proven, therefore substantiating contraventions of sections 165(2), 167(2) of the *Law*.
18. However, in considering the evidence, the objectives and guiding principles of the *Law*, the fact that you have no previous compliance history, and your response to the incident asserting that there were miscommunications and assumptions surrounding your responsibilities and obligations as a nominated supervisor on the day relating to the Service, the Authority has decided to issue this Caution Letter rather than statutory compliance action.

19. Your response did not expressly admit or deny the allegations, however, provided explanations and attachments that appear to refute the allegations as put forward in the Notice. You did not contest the occurrence of the incident as outlined in the notification, however, did indicate the responsibility of others due to you not being present at the Service on the day.
20. However, the Authority notes that you were the only Nominated Supervisor of the Service, a role that you consented to in writing, regardless of your physical attendance at the Service on the given day.
21. The Authority is satisfied that failings to ensure adequate supervision at all times, and to ensure all reasonable precautions were taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury, resulted in the two preschool aged children being able to leave the Service unnoticed and remaining unaccounted for 30-40 minutes on 27 June 2023.
22. The Authority is satisfied that risk assessments, and associated mitigation strategies, for inclusion of preschool children within the senior space being utilised on 27 June 2023 were not adequate to meet the needs of preschool children in attendance at the Service.
23. A Nominated Supervisor's obligation under section 165 and 167 of the *Law* is positively and strongly framed— a nominated supervisor must ensure that all children being educated and cared for by the Service are adequately supervised at all times and the nominated supervisor must ensure that every reasonable precaution to protect children from harm and any form of hazard likely to cause injury. These offences are of strict liability.
24. This Decision serves as a reminder to you that people and entities that choose to participate in regulated activities have a legal responsibility and an obligation to accept the consequences of that responsibility. In this case you chose and consented to participating in the education and care of children and have a responsibility to comply with the standard of care under the *Law*.
25. It is imperative that any person working in the early education and care sector, who accept the responsibilities of a Nominated Supervisor and consent in writing, are fully aware of their responsibilities and obligations. These responsibilities and obligations do not cease if a nominated supervisor is not in attendance on a particular day.
26. To support you in your role as a nominated supervisor, and understand better the expectations of the *Law*, please find attached relevant ACECQA resources at Attachment C.
27. Additional resources to assist you can be found at <https://www.acecqa.gov.au/resources> .

## **Legislation**

28. 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>.
29. 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>
30. If you have any questions relating to this letter, please contact Authorised Officer Brian Cropper by way of email at [brian.cropper@act.gov.au](mailto:brian.cropper@act.gov.au).

Yours sincerely



Janine Fairburn  
Assistant Director  
Children's Education and Care Assurance  
Education and Care Regulation and Support

1 November 2023