

██████████  
Person with Management or Control

Young Mens Christian Association of Canberra Inc

RE: YMCA Giralang After School Care

Email: ██████████

Dear ██████████,

### Decision to Issue Compliance Notice

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance (CECA). The Authority is the regulator of education and care services in the ACT and has the responsibility of monitoring and enforcing compliance with the *Education and Care Services National Law (ACT) (the Law)*, together with receiving and investigating complaints arising under the *Law*.
2. As you are aware, the Authority has recently investigated suspected offences relating to YMCA Giralang After School Care SE-00009716 (the Service) operated by Young Men's Christian Association of Canberra Inc PR-00005888 (the Provider).
3. The Regulatory Authority is satisfied that the Provider was not complying with the provisions of the *Law* in respect to this matter. Web addresses to the *Law* and associated *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, ██████████ (██████████ 5:2) and ██████████ (██████████ 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 harms and hazards likely to cause injury if children are inadequately supervised, the Authority determined to investigate suspected offences under section 165 and 167 of the *Law*. Information received during the investigation provided reasonable grounds to suspect further additional offences under section 167 the *Law* and *Regulation* 177.

6. On 13 September, the Authority sent the Provider a Show Cause Notice (the Notice), advising the Provider that the Authority had determined there was sufficient evidence to support a case to answer for the Provider regarding a suspected offences under the *Law*.
7. The Notice outlined the grounds for issue, relevant evidence supporting the suspected contravention of the *Law*, and potential compliance actions being considered if the allegations was 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 to the Provider for response:

#### Allegation One

It is alleged, that on 27 June 2023, the Provider, failed to ensure that all children being educated and cared for by the Service were adequately supervised, in that children ██████████ (5:2) and ██████████ ██████████ (4:10), were able to leave the Service unnoticed, and were unaccounted for approximately 30-40 minutes, contravening section 165(1) of the *Law* and engaging a contravention of 167(1) of said *Law*.

#### Allegation Two

It is alleged that by 27 June 2023, the Provider 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(1) of the *Law*.

#### Allegation Three

It is alleged that by 27 June 2023, the Provider, 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*, contravening section 167(1) of the *Law*.

#### Allegation Four

It is alleged on 27 June 2023, the Provider failed to take reasonable steps to ensure prescribed record were accurate, in that Child Attendance Records were not maintained in compliance with *Regulation 158*, breaching *Regulation 177(2)*.

9. On 25 September 2023, the Provider submitted a response, across three emails, with multiple attachments A through K. A copy of the Response (minus attachments due to size, noting they can be produced again to the Provider on request) is provided at [Attachment B](#).

### Law

10. Provisions of the *Law* relevant to the matters raised in the Notice include the following:

#### **Section 165(1) of the Law - Offence to inadequately supervise children**

The approved provider 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.

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

### **Section 167(1) of the Law - Offence relating to protection of children from harm and hazards**

The Approved Provider 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.

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

### **Regulation 117A - Placing a person in day-to-day charge**

For the purposes of the definition of a person in day-to-day charge in section 5(1) 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.

### **Regulation 158(1) – Children’s attendance record to kept by provider**

The approved provider of an education and care service must ensure that a record of attendance is kept for the service that-

- (a) Records the full name of each child attending the service; and
- (b) Records the date and time each child arrives and departs; and
- (c) Is signed by one of the following persons at the time that the child arrives and departs-
  - (i). The person who delivers the child to the education and care service premises or collects the child from the education and care service premises;
  - (ii). A nominated supervisor or an educator.

### **Regulation 177 – Prescribed enrolment and other documents to be kept by provider.**

- (1) For the purposes of section 175(1) of the Law, the following documents are prescribed in relation to each education and care service operated by the approved provider –
  - (k) A children’s attendance records as set out in regulation 158;
- (2) The approved provider of the education and care service must take all reasonable steps to ensure the documents referred to in sub regulation (1) are accurate.

Penalty: \$2000

### **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, all allegations are proven, therefore substantiating contraventions of sections 165(1), 167(1) of the *Law* and *Regulation 177(2)*.
18. Within the Notice response, it is noted that the Provider acknowledges the seriousness of the allegations and submits the following main points:
  - a) Processes to mitigate risk were in place but failed on this [incident] day. At induction staff are required to read and sign all policies and supervision plans.
  - b) Miscommunication resulted in documentation being signed.
  - c) Nominated Supervisor and Responsible Person failed to record absences and used absent Nominated Supervisors logon details.
19. The Provider's response did not explicitly admit or refute the allegations as set out in the Notice, but rather gave explanations for the incident and outlined rectification action undertaken in response to the incident.
20. The Authority is satisfied that failings by the Provider 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.
21. 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.

22. In addition, the Authority is satisfied that by not maintaining appropriate documentation for the appointment of Nominated Supervisors, the Provider has failed in ensuring that a responsible person, aware of their role, was engaged on the day of the incident.
23. A Provider's obligation under section 165 and 167 of the *Law* is positively and strongly framed– the provider must ensure that all children being educated and cared for by the Service are adequately supervised at all times and the Provider must ensure that every reasonable precaution to protect children from harm and any form of hazard likely to cause injury.
24. Furthermore, it is considered a reasonable precaution to ensure that staffing and supervision levels always meet the emotional, developmental, and physiological needs of all children and educators alike. These staffing and supervision levels may need to be adapted to be above minimum regulated ratio levels to protect children from harm and hazard likely to cause injury – both physically and psychologically.
25. 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 the Provider chose and consented to participating in the education and care of children and has a responsibility to comply with the standard of care under the *Law*.
26. The Authority acknowledges that the Provider has advised in their response to the Notice, and supported by attached evidence, of multiple remediation steps undertaken to mitigate the risk of further non-compliance relating to supervision of children.
27. Considering the information submitted by the Provider, the level of seriousness of the contravention, and the objectives and guiding principles of the *Law*, I have decided that issuing a Compliance Notice is appropriate and in the best interests of children.

28. The Authority is empowered to issue a compliance notice under section 177 of the *Law*:

**Section 177 of the *Law*– 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.

29. The Compliance Notice is provided as Attachment C to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment C**.


### **Review Rights**

30. 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 this 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).
31. 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.

### **Legislation**

32. The Education and Care Services National *Law* applies to you as an approved provider and any service you operate.  
The National *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>.
33. The *National Law* is made up of an Act and Regulations which can be viewed at:
- <http://www.acecqa.gov.au/national-law>, and
  - <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
34. Should you have any questions about this Decision or Compliance Notice please contact Authorised Officer Brian Cropper via 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