

Ms [REDACTED]
Nominated Supervisor
Guardian Childcare & Education Wanniasa

Email: [REDACTED]@outlook.com

Dear Ms [REDACTED]

Decision to Issue Formal Caution

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. 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*).
2. As you are aware, the Authority has recently investigated several allegations, raised directly with the Authority, relating to Guardian Childcare & Education Wanniasa SE-40004191 (the Service) operated by Guardian Community Early Learning Centres Pty Ltd PR-00000823 (the Provider).
3. The allegations related to supervision, staffing arrangements, notification of incidents to the Authority and reasonable precautions not being taken to protect children between January and February 2023.
4. The Authority is satisfied that you, whilst in the capacity as the Nominated Supervisor of the Service, have contravened provisions of the *Law*. 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

5. In March 2023, the Authority received a direct complaint relating to the operation of the Service. Allegations included matters regarding:
 - a. inadequate staffing arrangements and inadequate supervision
 - b. a complaint received by the Service alleging unwitnessed injury to a child being educated and cared for at the Service that was not reported to the Authority
 - c. educators and children not being able to exit the Service following the evacuation pathway as they were locked in without a key to the gate
6. Due to the risk to children from the allegations, the Authority determined to investigate the complaint.

7. On 17 August 2023, the Authority issued a Show Cause Notice to you, as the Nominated Supervisor advising that the Authority had determined there was sufficient evidence to support a case to answer regarding suspected offences under the *Law*.
8. 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 C due to size, noting they can be produced again to the Provider on request) at Attachment A.
9. The Notice set out the following allegations relevant to you as Nominated Supervisor for response:

Allegation One – Section 169 of the Law

It is alleged on multiple occasions during January 2023 and February 2023 you, as Nominated Supervisor at the Service, did not ensure there were the required number of educators educating and caring for the children as prescribed for this purpose in contravention of s169(3) of the *Law*.

It is alleged during January 2023 and February 2023 you, as Nominated Supervisor at the Service, did not ensure that each educator educating and caring for children for the service met the qualification requirements relevant to the educators role as there was not a waiver in place for a second ECT resulting in the service not meeting the qualification requirements relevant to the educator's role as prescribed by the national regulations in contravention of s169(4) of the *Law*

Allegation Two – Section 167 of the Law

It is alleged on 28 February 2023 you, as Nominated Supervisor at the Service, did not ensure that every reasonable precaution was taken to protect children as a fire alarm went off at the Service and on evacuation of the Service children and educators did not have a key to open the gate and were unable to leave the courtyard as per the evacuation plan in contravention of s167(2) of the *Law*.

Allegation Three – Section 165 and 167 of the Law

It is alleged on multiple occasions during January 2023 and February 2023 that you, as Nominated Supervisor at the Service, did not ensure that all children being educated and cared for were adequately supervised at all times, in that a child received a black eye that the Service unwitnessed by educators and, that there were inadequate supports for additional needs children in contravention of s165(2) of the *Law*, engaging s167(2) of the *Law*.

10. On 14 September 2023, the Provider submitted a response, via an email, and 16 attachments of supportive evidence uploaded to NQA ITS portal. A copy of the Response (minus attachments due to size, noting they can be produced again to you on request) is provided at Attachment B.

11. You acknowledge via email on 15 September 2023, that the written response from the Provider is on your behalf as well and you have reviewed and acknowledged the content of the response. Refer copy of email at Attachment C.

Law

12. The following provisions of the *Law* are relevant to Allegation One:

Section 169(3) of the Law - Offence relating to staffing arrangements

A nominated supervisor of an education and care service must ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose.

Section 169(4) of the Law - Offence relating to staffing arrangements

A nominated supervisor of an education and care service must ensure that each educator educating and caring for children for the service meets the qualification requirements relevant to the educator's role as prescribed by the national regulations.

13. The following provisions of the *Law* are relevant to Allegation Two:

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.

14. The following provisions of the *Law* are relevant to Allegation Three:

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

15. Section 3 of the *Law* sets out objectives and guiding principles of the *Law*. 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; ...'

16. There are two relevant guiding principles at sections 3(3)(a) and (f), namely:
 - (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.
17. 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*.
18. The *Law* works to protect a particularly vulnerable part of 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*.
19. A key object 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.

Decision

20. The Authority has considered all information, inclusive of your adoption of the Provider's response to the Notice and is satisfied that there is sufficient evidence to substantiate offences under sections 165(2), 167(2), and 169(3) of the *Law*.
21. In relation to Allegation One, the Authority is satisfied, on the balance of probabilities that you, as Nominated Supervisor, failed to ensure the Service had the prescribed number of educators educating and caring for the children while in care of the Service at all times during January 2023 and February 2023, engaging an offence under section 169(3) of the *Law*.
22. The Authority acknowledges that the Provider has refuted non-compliance with section 169(1) of the *Law*, stating that the Service was using employment agencies during the period of allegation, and accessing ECT's from third parties.
23. However, the Authority is satisfied on balance of probabilities, based on ratio analysis undertaken and witness statements, that staffing arrangements were not always meeting minimum regulated ratio levels during the months of January and February 2023. The response to Notice did not include supportive evidence to mitigate evidence produced via the Notice supporting the non-compliance.
24. The Authority is not satisfied, on balance of probabilities, taking into consideration supportive evidence submitted identifying ECT's engaged during the months of January and February 2023, that section 169(4) was not being complied with in this instance.
25. The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.

26. In relation to Allegation Two, the Authority is satisfied, on the balance of probabilities, that the Provider failed to ensure every reasonable precaution was taken to protect children, as a fire alarm went off at the Service and, on evacuation of the Service, children and educators did not have a key to open the gate and were unable to leave the courtyard on 28 February 2023, engaging an offence under section 167(2) of the *Law*.
27. The Authority acknowledges that the Provider has refuted non-compliance with section 167(1) of the *Law*, stating that the Provider considers that children were not at risk of hazards and harm due to the keys not being available at the gate.
28. Furthermore, the Provider stated in the response to Notice that the gate was not part of the evacuation route at the relevant time, and the usage of the gate was only added to the evacuation diagrams after a review of the EMP in May 2023. At the time of the allegation, discussions were being held with fire engineers for this to be included as a main exit point and the EMP and evacuation diagrams were in the process of being updated.
29. The Authority is satisfied, on consideration of the Provider's response and the facts supporting that the incident did occur as alleged, that you as Nominated Supervisor, had not taken reasonable steps to ensure that staff were aware of, and understood, that the route they undertook for evacuation was not part of the evacuation route.
30. The Authority is satisfied that educators were of the view that this was an approved evacuation route, with witness evidence supporting that there was an emergency bag with a gate key attached for this very purpose. Furthermore, witness evidence supports that you were queried about the key to the gate and responding that you didn't have time to get the keys cut, rather than evidence supporting advice from you that that they had taken the incorrect route.
31. The Authority is satisfied, on balance of probabilities, that educators had not been clearly advised of the correct evacuation route, and the absence of keys for the gate placed children at significant risk should the alarm have been for a fire emergency rather than a drill.
32. The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
33. In relation to Allegation Three, the Authority is satisfied, on the balance of probabilities, that on multiple occasions during January 2023 and February 2023, you, as the Nominated Supervisor, did not ensure that all children being educated and cared for by the service were adequately supervised at all times, in that a child received a black eye at the Service unwitnessed by educators and, that there were inadequate supports for additional needs children, substantiating an offence under sections 165(2) and engaging 167(2) of the *Law*.

34. The Authority acknowledges that the Provider appears not to have admitted to or refuted non-compliance with sections 165(1) and 167(1) of the *Law* in this instance, rather the Provider's response to the allegation outlined that during the relevant period, the Service continued to undertake 15-minute checks so that headcounts were undertaken. This process ensures that team members regularly move through the playground and know the whereabouts of all children.
35. The Authority is satisfied, based on witness evidence, and evidence supporting a child sustained an unwitnessed black eye, that the Provider was not ensuring adequate supervision of all children, at all times, during January 2023 and February 2023.
36. A Nominated Supervisor's obligations under sections 165(2) and 167(2) of the *Law* is positively and strongly framed – a Nominated Supervisor must always ensure adequate supervision, and 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 or illness. Provision of adequate supervision is viewed as a reasonable precaution to be taken to protect children from harm and hazard likely to cause injury or illness.
37. Furthermore, it is considered a reasonable precaution to ensure that staffing and supervision levels always meet the emotional, developmental, and physiological needs of 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.
38. The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
39. Considering the evidence, the objectives and guiding principles of the *Law*, and the fact that you have no previous compliance history the Authority has decided to issue this Caution rather than statutory compliance action.
40. This Decision serves a reminder to you, as a Nominated Supervisor, that it is imperative that any person working in the early education and care sector, who accept the responsibilities of a nominated supervisor, are fully aware of their responsibilities and obligations, regardless of performing other roles, duties or when absent from the Service.
41. As a Nominated Supervisor, it is imperative that you ensure that all staff, at all times, are aware of and understand the policies, procedures and expectations of yourself and the Provider in relation to supervision of children, and in their roles of supporting, educating and caring for children.
42. Details of this decision will be recorded and may be considered should any further similar non-compliances be identified moving forward regarding your role as a Nominated Supervisor.

Legislation

43. 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>.
44. 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>
45. If you have any questions relating to this letter, please contact me by way of email at Janine.Fairburn@act.gov.au.

Yours sincerely



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

30 November 2023