

Ms [REDACTED]
Person with Management or Control
Guardian Community Early Learning Centres Pty Ltd
RE: Guardian Childcare & Education Wanniasa

Email: [REDACTED]

Dear Ms [REDACTED],

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. 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 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

- 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 the Provider advising that the Authority had determined there was sufficient evidence to support a case to answer for the Provider 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 to the Provider for response:

Allegation One – Section 169 of the Law

It is alleged, on multiple occasions during January 2023 and February 2023, the Provider did not have the required number of educators educating and caring for the children as prescribed for this purpose in contravention of s169(1) of the *Law*.

It is alleged, during January 2023 and February 2023, the Provider did not have a waiver in place for a second Early Childhood Teacher (ECT) resulting in the Service not meeting the qualification requirements relevant to the educator's role as prescribed by the Regulations in contravention of s169(2) of the *Law*.

Allegation Two – Section 167 of the Law

It is alleged, on 28 February 2023, the Provider did not 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 as per the evacuation plan in contravention of s167(1) of the *Law*.

Allegation Three – Section 165 and 167 of the Law

It is alleged, on multiple occasions during January 2023 and February 2023, the Provider 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 in contravention of s165(1) of the *Law*, engaging s167(1) of the *Law*.

Allegation Four – Section 175 of the Law

It is alleged that Provider did not keep prescribed records, in particular working directly with children (WDWC) records for the Preschool room for dates 16, 23, 24, 25, 30, and 31 January 2023 in contravention of s175 of the *Law*.

Allegation Five – Section 174 of the Law

It is alleged the Provider received a complaint on 17 February 2023 regarding a child receiving an unwitnessed injury resulting in a black eye, that was not reported to the Authority, in contravention of s174 of the *Law*.

- 10) On 28 August 2023, the Provider requested an extension for the Show Cause Notice which was granted for the Provider until 14 September 2023. 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 the Provider on request) is provided at [Attachment B](#).

Law

- 11) The following provisions of the *Law* are relevant to [Allegation One](#):

Section 169(1) of the *Law* - Offence relating to staffing arrangements

An approved provider 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.

Penalty: \$10 000, in the case of an individual

\$50 000, in any other case.

Section 169(2) of the Law - Offence relating to staffing arrangements

An approved provider 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.

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

12) The following provisions of the *Law* are relevant to Allegation Two:

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.

13) The following provisions of the *Law* are relevant to Allegation Three:

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.

14) The following provisions of the *Law* are relevant to Allegation Four:

Section 175 of the Law - Offence relating to requirement to keep enrolment and other documents

An approved provider of an education and care service must keep the prescribed documents available for inspection by an authorised officer in accordance with this section.

Penalty: \$4 000, in the case of an individual
\$20 000, in any other case.

15) The following provisions of the *Law* are relevant to Allegation Five:

Section 174(2) of the Law - Offence to fail to notify certain information to Regulatory Authority

An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider—

- (a) any serious incident at the approved education and care service;
- (b) any complaints alleging—
 - i. that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or
 - ii. that this Law has been contravened;

(c) information in respect of any other prescribed matters

Penalty: \$4 000, in the case of an individual

\$20 000, in any other case.

Obligations upon Regulatory Authority, Providers and Services

- 16) 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*".
- 17) 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.*
- 18) Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
- (c) *to monitor and enforce compliance with this law;*
- 19) 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*.
- 20) 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.
- 21) 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

- 22) The Authority has considered all information, inclusive of the Provider's response to the Notice, and is satisfied that there is sufficient evidence to substantiate offences under sections 165(1), 167(1), 169(1), 174(2), and 175(1) of the *Law*.
- 23) In relation to Allegation One, the Authority is satisfied, on the balance of probabilities that the Provider 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(1) of the *Law*.
- 24) 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.
- 25) 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.

- 26) 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(2) of the *Law* was not being complied with in this instance.
- 27) The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
- 28) 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(1) of the *Law*.
- 29) 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.
- 30) 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.
- 31) The Authority is satisfied, on consideration of the Provider's response and the facts supporting that the incident did occur as alleged, that the Provider 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.
- 32) 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 the Nominated Supervisor was queried about the key to the gate and responding that she didn't have time to get the keys cut, rather than evidence supporting advise that they had taken the incorrect route.
- 33) 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.
- 34) The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
- 35) In relation to Allegation Three, the Authority is satisfied, on the balance of probabilities, that on multiple occasions during January 2023 and February 2023, the Provider 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(1) and engaging 167(1) of the *Law*.

- 36) 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.
- 37) 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.
- 38) A Provider's obligations under sections 165(1) and 167(1) of the *Law* is positively and strongly framed – the Provider 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.
- 39) 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.
- 40) The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
- 41) In relation to Allegation Four, the Authority is satisfied, on the balance of probabilities that the Provider failed to keep prescribed documents available as the Provider was unable to provide working directly with children records for 16, 23, 24, 25, 30, and 31 January 2023 for the preschool room, substantiating an offence under section 175(1) of the *Law*.
- 42) The Authority acknowledges that the Provider has not refuted non-compliance with section 175(1) of the *Law*, stating that the Educator Logs for the relevant period were in place however it appears that the relevant Educator Logs were archived and mixed with other documents.
- 43) The Authority is satisfied that working directly with children records required under *Regulation* 151, and prescribed under *Regulation* 177(1), were not available to Authorised Officer's as required, therefore supporting the substantiation of the offence.
- 44) *Regulation* 177(1)(h) provides that for the purposes of section 175(1) of the *Law*, in the case of a centre-based service, a record of educators working directly with children as set out in regulation 151 are prescribed in relation to each education and care service operated by the approved provider.
- 45) Although the Provider attests that these records were kept, they were not available for inspection when requested, as required under section 175(1) of the *Law*. This is supported by

the fact that the Provider was unable to produce the preschool working directly with children records as required by the Notice issued under section 215 of the *Law* on 30 March 2023.

- 46) The Authority notes, within the Provider's response, advice of actions and strategies being undertaken to mitigate risk of future similar non-compliance.
- 47) In relation to Allegation Five, the Authority is satisfied, on the balance of probabilities, that the Provider failed to notify the Authority of a complaint alleging contravention of the *Law* that the Provider received on 17 February 2023 relating to a child receiving a black eye, unwitnessed by educators, substantiating an offence under section 174(2) of the *Law*.
- 48) The Authority acknowledges that the Provider has refuted non-compliance with section 174(2) of the *Law*, stating that the Service considers that it meets its reporting requirements in relation to s174, however, at the relevant time it was not assessed that this was a complaint met the threshold of a reportable complaint.
- 49) The email received by the Provider on 17 February 2023 from [REDACTED] raised concerns that [REDACTED] received a black eye, and that the type of incident resulting in a black eye could go unnoticed. Mr [REDACTED] also stated that while he understands accidents can happen, he expected the Service to have the right processes and controls in place to identify, resolve and provide care - [REDACTED] was still in pain upon pick up and he had to apply ice to his injury which had not been done at the Service.
- 50) The Authority is satisfied that Mr [REDACTED] was raising concerns relating to inadequate supervision and inadequate management of an injury. These allege engagement of sections 165 and 167 of the *Law*.
- 51) The Authority notes, within the Provider's response, advice that the Provider has reviewed and considered the definition and threshold of a reportable complaint and in future these matters will be reported.
- 52) Considering the information submitted by the Provider, and the level of seriousness of the contraventions, and the objectives and guiding principles of the *Law*, the Authority has decided that issuing a Compliance Notice is appropriate and in the best interests of children.
- 53) The Authority has also taken into consideration 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 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*.
- 54) 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.

55) 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 D.

Review Rights

56) A decision to issue a compliance notice and a decision to impose a condition on a service approval are **reviewable decisions** 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).

57) 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

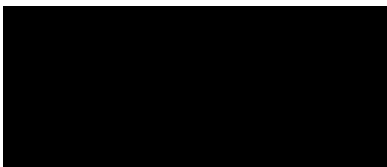
58) The Education and Care Services National *Law* applies to you as an approved provider and any service you operate. The National *Law* is applied in the ACT by the *Education and Care Services National Law (ACT) Act 2011* <http://www.legislation.act.gov.au/a/2011-42/default.asp>.

59) 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>

60) Should you have any questions about this Decision or Compliance Notice please contact me via email at janine.fairburn@act.gov.au.

Yours Sincerely,



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

30 November 2023