

Ms [REDACTED]  
Person with Management or Control  
Community Services of Gungahlin Inc  
RE: Nicholls Early Childhood Centre

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*), together with receiving and investigating complaints arising under the *Law*.
2. As you are aware, the Authority has recently investigated matters relating to Nicholls Early Childhood Centre SE-00009819 (the Service) operated by Community Services of Gungahlin Inc PR-00005825 (the Provider), which engage suspected offences being contravened.
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 October 2022, 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 offence under the *Law*.
5. The Notice outlined the grounds for issue, relevant evidence supporting the suspected contravention of the *Law*, and potential compliance actions being considered if the allegation was substantiated. Refer copy of Notice (minus attachments due to size, noting they can be produced on request) at Attachment A.
6. The Notice advised that evidence obtained during the investigation supported the allegation of an offence under the *Law* as follows:

It was alleged that, between March and July 2022, the Provider failed to ensure that every reasonable precaution was taken to protect children attending the Service from harm and any form of hazard likely to cause injury, in that, support strategies were inadequately implemented, as required by the Service's Behaviour Support Policy, to guide the behaviour of [REDACTED] (2:7), in contravention of s167(1) of the *Law*.

7. On 9 November 2022, the Provider and Nominated Supervisor submitted a joint response with identified attachments. A copy of the Response (minus attachments due to size, noting they can be produced on request) is provided at Attachment B.
8. On 14 November 2022, the Provider acknowledged that the response from the Nominated Supervisor to their Show Cause Notice, was also the response for the Provider's Show cause Notice. Refer to Attachment C.
9. The eight-page response included the following attachments:
  - a) Enrolment form;
  - b) Initial complaint by [REDACTED];
  - c) Permission to contact [REDACTED];
  - d) Philosophy;
  - e) Behaviour Support Policy;
  - f) April critical reflection;
  - g) May critical reflection;
  - h) June critical reflection;
  - i) May Silver Wattle curriculum;
  - j) June Silver Wattle curriculum;
  - k) July Silver Wattle curriculum;
  - l) ECA Code of Ethics;
  - m) Code of Ethics Policy;
  - n) Code of Conduct.
10. Information received during the show cause process indicated that Ms [REDACTED] ceased in her role as nominated supervisor of the Service at the end of July 2021. This was not notified to the Authority as required under section 173(2)(b) of the *Law*. Such notification was required to be made in writing within seven days, as prescribed by Regulation 174(2)(b).

#### **Legislation Relevant to the Allegation**

11. Provisions of the *Law* relevant to the investigation include the following:

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

The approved provider, and the 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.

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

#### **Obligations upon Regulatory Authority, Providers and Services**

12. 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*".

13. 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.*
14. 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.*
15. 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*.
16. 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.
17. 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**

18. The Authority has considered all evidence gathered via the investigation process, inclusive of the response to the Notice, and is satisfied that the following allegation is substantiated on the balance of probabilities:

Between March and July 2022, the Provider failed to ensure that every reasonable precaution was taken to protect children attending the Service from harm and any form of hazard likely to cause injury, in that support strategies as required by the Service’s Behaviour Support Policy, were inadequately implemented to guide the behaviour of ██████████ (██████) (2:7), in contravention of s167(1) of the *Law*.

19. Within the joint Response, the Provider refuted the allegation, submitting the following points:

- a) The complainant ██████████ was not interviewed by the Authority to “gather a broader perspective of the situation and of the collaborative strategies used to protect children at the service” prior to issuing a show cause notice. The notification from the Provider to the Authority on 15 July 2022 advised of ██████████ complaint of injuries to his child/ren caused by ██████████ and that the safety and wellbeing of his child/ren was being compromised by the lack of action regarding ██████████ behaviour.

The Authority considers that Mr ██████████ evidence is not of probative value regarding the investigation and relevant offence elements. He was not a witness with direct knowledge of any support strategies being implemented in the education and care of ██████████ and his evidence is relevant only to injuries sustained by his own children. The involvement of ██████████

in such incidents is adequately evidenced in documentation submitted by the Provider, such as incident reports.

The Authority notes Mr [REDACTED] advice in his email of 8 November 2022 that his complaint regarded a situation caused by another child injuring his children, rather than the care of his children. The Provider and Nominated Supervisor are responsible for putting support strategies in place for any child experiencing additional challenges with emotional regulation, and that was the subject of the investigation.

- b) The Provider maintains that support strategies were adequately implemented within the framework of the Service's Behaviour Support Policy. It is stated that [REDACTED] behaviours were recorded, consultation with Ms [REDACTED] took place, and a Behavioural Management Plan (dated 11 May 2022) was implemented until [REDACTED] was suspended from the Service in mid-July 2022 due to increase in behavioural incidents.

The Authority notes that suspending or pausing a child's enrolment in a Service is an option to protect children from harm and hazard. Until behavioural support strategies and plans can be agreed and implemented following consultation with families, suspension is one strategy used to mitigate risk of harm to children from behaviours of a peer.

Whilst it is noted that incidents and educator responses were recorded, the evidence does not support that Ms [REDACTED] was consulted or that any reasonable level of exchange of information took place.

There is insufficient evidence that Ms [REDACTED] was adequately advised of every incident involving her daughter's behaviour between March and July 2022. It is not disputed by the Provider that Ms [REDACTED] only became aware of the Behaviour Management Plan on the 18 July 2022, during a meeting with Service's management. Corroborated evidence confirms that Ms [REDACTED] was not involved in the formulation of the Behaviour Management Plan in May 2022, contrary to the Behaviour Support Policy.

- c) A table was furnished within the Response outlining the actions taken by educators in compliance with the Behaviour Support Policy Statement inclusive of any Evidence of Compliance.

It appears that the Provider contends that educators were, and are, mainly responsible for the implementation of the Behaviour Support Policy, with Service management becoming actively involved in July 2022, when incidents escalated. Educator responses to incidents largely consisted of removal and discussion of behaviour and alternatives, whilst [REDACTED] was dysregulated. There was no evidence of proactive support strategies or understanding of developing emotional regulation in early childhood. The Behaviour Management Plan contained information and evidence supports that it was not effective or useful.

- d) Educators and management staff at the Service acted in compliance with the Support Policy, Philosophy and United Nations rights of the Child and Code of Conduct and ECA Code of Ethics.

While the Authority acknowledges the rights of a child, it is also the right of a child to be educated and cared for safely without exposure to known risks. The behaviours of [REDACTED] were well known and documented by the Service, and she was mentioned in the April,

May, and June critical reflections with regards to biting (April) and working with her to manage her emotions and use her voice (May and June).

20. A Provider's obligation under section 167 of the *Law* is positively and strongly framed– the provider must ensure that every reasonable precaution is taken to protect children being educated and cared for by the Service from harm and from any hazard likely to cause injury. Whilst it is acknowledged that appropriate policy and procedure were in place for the Service and, eventually, a Behaviour Management Plan created for [REDACTED] from an extensive recorded history of behavioural issues, evidence does not support that the Provider ensured adequate compliance with the Behavioural Support Policy and Procedures and that the strategies being implemented were appropriate for a 2.5 year-old.
21. Reasonable precautions would have included:
  - a) Discussion of [REDACTED] behaviour with Ms [REDACTED] in a more extensive manner than short exchanges at drop-off or collection times with other parents and children present;
  - b) Engagement with Ms [REDACTED] to formulate a behaviour management plan at an earlier stage;
  - c) Ensuring support strategies used were appropriate for a 2.5 year old;
  - d) Ensuring educators were supported to implement proactive strategies to guide [REDACTED] behaviour, as well as appropriate responsive strategies.
22. The Authority reiterates the Provider's responsibility under section 167(1) of the *Law*. Children continued to be injured as a result of the behaviours of a [REDACTED]. The Authority has determined that, if the Behavioural Support Policy had been adequately followed and adequate support measures implemented in collaboration with [REDACTED] family, injuries and incidents could have been prevented.
23. In this instance, the Authority has determined that an offence under section 167(1) of the *Law* is substantiated.
24. Considering the evidence obtained, including material submitted by the Provider, and the level of seriousness of the contravention, I have decided that issuing a Compliance Notice is appropriate and in the best interests of children. In making this decision, I have also taken into consideration the Service's previous compliance history.
25. 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.
26. The Compliance Notice is provided as Attachment D to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
27. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment D.**

### Review Rights

28. 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).
29. 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

30. 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>.
31. 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>
32. Should you have any questions about this Decision or Compliance Notice please contact Assistant Director Janine Fairburn via email at [janine.fairburn@act.gov.au](mailto:janine.fairburn@act.gov.au).

Yours Sincerely,



Jo Williams  
Director Children's Education and Care Assurance  
Education and Care Regulation and Support  
ACT Education Directorate

**30 January 2023**