



Ms [REDACTED]
Person with Management or Control
Baringa Childcare Centre Incorporated
RE: Baringa Early Learning 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 (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 Baringa Early Learning Centre SE-00009748 (the Service) operated by Baringa Childcare Centre Incorporated PR-00005806 (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 22 August 2023, the Authority received a notification of incident (NOT-40893560) from the Provider, advising of an allegation that an educator ([REDACTED]) had smacked a child ([REDACTED]) on 15 August 2023.
5. Due to the risk of harms and hazards likely to cause injury if children are inappropriately disciplined, the Authority determined to investigate the matter, which engaged suspected offences under sections 166, 167 and 174 of the *Law*.
6. On 1 November 2023, 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 at Attachment A.
8. The Notice set out the following allegations to the Provider for response:

Allegation One

It is alleged that on 15 August 2023, the Provider failed to ensure that no child being educated and cared for by the Service was subjected to corporal punishment, in that a child, believed to be, [REDACTED] (4:8), was smacked three times on the bottom by an educator, in contravention of section 166(1) of the *Law* and engaging a further contravention of 167(1) of said *Law*.

Allegation Two

It is alleged that by 17 August 2023, the Provider failed to notify the Regulatory Authority of a complaint alleging that the *Law* had been contravened, in that, a child, believed to be [REDACTED] [REDACTED] was alleged to have smacked at the Service, contravening 174(2)(b)(ii) of the *Law*.

9. On 30 November 2023, the Provider submitted a response by email to the Notice within timeframe (Response), extended by agreement. Refer to Response at Attachment B.

Law

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

Section 166(1) of the Law - Offence to use inappropriate discipline

The Approved Provider of an education and care service must ensure that no child being educated and cared for by a service is subjected to-

- (a) Any form of corporal punishment ; or
- (b) Any discipline that is unreasonable under the circumstances.

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.

Section 174(2)(b) of the Law – Fail to notify certain information to Regulatory Authority

The Approved Provider of an education and care service must notify the Regulatory Authority of the following information in relation to an 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;

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

Section 174(4) of the Law – Fail to notify certain information to Regulatory Authority

A notice under subsection (2) must be in writing and be provided within the relevant prescribed time to –

- a) The Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 176(2)(b) – Time to notify certain information to regulatory Authority

For the purposes of section 174(4) of the Law, a notice must be provided-

- (b) In case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

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 Provider's response to the Notice, and is satisfied on the balance of probabilities, all allegations are proven, therefore substantiating contraventions of sections 166(1), 167(1) and 174(2) of the *Law*.
18. This finding is further supported by evidence of [REDACTED] disclosure of being smacked, which is independently corroborated by the witness.
19. Within the Response, it is noted that the Provider commits to best practice in the best interest of children, particularly in ensuring the safety, wellbeing, and support of children in the Service.
20. The Provider refutes the allegations on the following basis:
 - (a) Witness statements were taken weeks after the incident;

- (b) Nominated Supervisor not formally interviewed by Authority;
 - (c) Executive Officer has not been formally interviewed by Authority;
 - (d) Educator (accused) not formally interviewed by Authority;
 - (e) No reference to executive officer's file note regarding enquiries;
 - (f) No reference to (accused) educator's file note;
 - (g) Educator (accused) explained she patted the child and denied offence;
 - (h) There does not appear reasonable evidence of intention to inflict corporal punishment;
 - (i) There is no evidence of a complaint alleging the Law contravened.
21. Regarding point (a), the Authority notes the Provider does not reference the corroborating contemporaneous email file notes made by witnesses within a day of the incident that formed the basis of their later statements, taken under compulsory notice. These file notes and statements are evidence of a direct witness to ██████ being smacked by '█████' and the immediate independent disclosure, and complaint, from ██████ to a further educator witness, of being smacked, inclusive of the reason for being smacked. This type of disclosure is a common evidentiary exception to the hearsay rule.
22. Regarding points (b) to (d), where the Authority determines there is sufficient evidence to support allegation/s of contraventions of the *Law or Regulations*, (in other words, sufficient evidence for a case to answer) the accused entity or individual is afforded procedural fairness by way of a Show Cause Notice. Any response to the Notice forms part of the investigation and is considered by the Authority in determining whether offences are substantiated and, if so, any compliance action required.
23. Regarding points (e) to (g), the file note of the Executive Officer (EO) lacked probative value regarding the veracity of the allegations. There is no indication of how allegations were put to the educator to illicit her responses.
24. Regarding point (h), the 'discipline' is any strategy employed by an educator with the intention of changing a child's behaviour. Discipline that is inappropriate within the meaning of section 166 of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child. Examples include smacking, yelling, physically dragging a child, unreasonable restraint of a child, using threatening or humiliating language, isolating, or shaming children.
25. Although there is no evidence of the severity of the smacking, it is clear from ██████ disclosure to the witness educator, away from the scene of the incident, that he was upset because of being smacked by '█████'.
26. There is no further information or evidence furnished by the Provider in the Response that negates evidence by the two main educator witnesses, one a direct witness to the incident and one to ██████ disclosure. The Authority has determined that:
- (a) Smacking a child is identified both as corporal punishment and unreasonable under the circumstances;
 - (b) The discipline had an effect on the child, ██████
 - (c) Child disclosure to educator witness is a complaint regarding an alleged contravention of the *Law*;
 - (d) Enquiries by the Nominated Supervisor and Provider with witnesses identify a reportable conduct allegation;
 - (e) There is no supporting information regarding refresher training conducted in June 2023.
27. The Authority is satisfied that, on 15 August 2023, the Provider failed to ensure that no child was subjected to inappropriate discipline, and to ensure that 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, resulting in [REDACTED] being smacked by an educator.

28. In addition, the Authority is satisfied that the complaint made by [REDACTED] was notifiable to the Authority within 24 hours of the Provider becoming aware of the allegation.
29. Furthermore, the complaint meets the definition of **reportable allegation** under section 17EAB (1) and **reportable conduct** under 17E(1)(iv) of the *Ombudsman Act 1989*. The Authority notes the Provider has determined that the complaint was not a reportable allegation, and a report has not been made. It is not clear how this assessment was reasonably arrived at, considering the direct evidence of both incident and [REDACTED] disclosure.
30. The Authority recommends engaging in further training to ensure understanding of the scope of the reportable conduct scheme by the Provider, Nominated Supervisor, and service leaders.
31. A Provider's obligation under section 166 of the *Law* is positively and strongly framed– the provider must ensure that all children being educated and cared for by the Service are not subjected to inappropriate discipline amounting to corporal punishment, or unreasonable in the circumstances.
32. Ensuring that no child is subjected to corporal punishment, or discipline unreasonable in the circumstances, is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury.
33. 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*.
34. Considering the information submitted by the Provider, the level of seriousness of the contravention, 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.
35. 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.

36. The Compliance Notice is provided at 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

37. 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).
38. 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

39. The *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>.
40. 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>
41. 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.

Yours Sincerely,



Nicole Withers
Assistant Director (Acting)
Children's Education and Care Assurance
Education and Care Regulation and Support

2 February 2024