



Ms [REDACTED]
RE: ACT Family Day Care Service

Email: [REDACTED]

Dear Ms [REDACTED]

DECISION TO ISSUE PROHIBITION NOTICE – FAMILY DAYCARE EDUCATOR ONLY

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance (CECA), under the *Education and Care Services National Law Act (ACT)* (the Law). The Authority is responsible for regulation of education and care services in the ACT.
2. I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to work as an educator in a Family Day Care service.
3. The Authority has investigated allegations which engages suspected offences at ACT Family Day Care Service – SE-00014180 (the Service) operated by [REDACTED] – PR-00008098 (the Provider).
4. Web addresses to the *Education and Care Services National Law Act (ACT)* (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. On 14 June 2024, the Authority received a complaint alleging that a child, known to be [REDACTED] [REDACTED], on 12 June 2024 left the service unsupervised and walked home unattended [REDACTED] at the time was being educated and cared for by you at ACT Family Day Care Services. Refer Attachment A.
6. Due to the risk of harms and hazards likely to cause injury if children are inadequately supervised while being educated and cared for, the Authority determined to investigate the matter.
7. At the time that the incident occurred with [REDACTED] being educated and cared for, you were the sole Family Day Care Educator at the Service.
8. On 30 July 2024, the Authority issued you with a Show Cause Notice (the Notice). The Notice included evidence being relied on by the Authority for decision making and advice as to proposed compliance actions being considered if the allegation, and engaged offence under



the *Law*, were substantiated. Refer Attachment B for a copy of the Notice (minus attachments):

9. The allegation put to you in the Notice was as follows:

Allegation

It is alleged that there is a risk to the safety, health and wellbeing of children being educated and cared for by you, Ms [REDACTED] an educator at a family day care service arising out of an incident on 12 June 2024 whereby a child, believed to be [REDACTED] 3 years and 3 months old, left your care at [REDACTED], unnoticed and unsupervised in which he then walked approximately 100m alone, to his home.

10. On 03 September 2024 the Authority received your Response to the Notice. In the Response you stated that you had nothing to respond to. Refer Attachment C.

Law

11. The evidence obtained during the Authority's enquiries into the matter, and as provided to you via the Notice, engages the following sections of the *Law*:

Section 178 of the Law – Notice to suspend education and care by a family day care educator

- (1) This section applies if the Regulatory Authority is satisfied that because of the conduct of, or the inadequacy of the service provided by, a family day care educator engaged by or registered with a family day care service –
 - a) The approved provider or a nominated supervisor of an approved family day care service is not complying with any provision of this *Law*; or
 - b) There is a risk to the safety, health or wellbeing of children being educated and cared for by the family day care educator.
- (2) The Regulatory Authority may give the approved provider, the nominated supervisor (if applicable) and the educator a notice (***show cause notice***) stating –
 - a) That the Regulatory Authority intends to give the approved provider a notice directing the provider to suspend the provision of education and care by the educator; and
 - b) The reasons for the proposed directions; and
 - c) That the approved provider, nominated supervisor or educator, (as the case requires) may, within 14 days after the show cause notice is given, make submissions to the Regulatory Authority in respect of the proposed direction.
- (3) The show cause notice must be served by delivering it personally to the family day care educator.
- (4) The Regulatory Authority –



- a) Must consider any submissions from the approved provider, the nominated supervisor and the family day care educator received within the time frame allowed by subsection (2)(c); and
 - b) May consider any other submission and any matters the Regulatory Authority Considers relevant; and
 - c) May –
 - i) Give the approved provider a notice directing the provider to suspend the provision of education and care of children by the family day care educator; or
 - ii) Decide not to give that direction.
- (5) The Regulatory Authority must give the family day care educator a notice of the decision under subsection (4).
- (6) If the Regulatory Authority decides not to give the direction to suspend, the Regulatory Authority must give the approved provider notice of the decision.
- (7) A person must comply with a direction under subsection (4).
Penalty: \$6800, in the case of an individual.
\$34 400, in any other case.

Section 182 of the Law – Grounds for issuing prohibition notice

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
 - (a) To remain on the education the education and care service premises; or
 - (b) To provide education and care to children.

- (2) For the purpose of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following-
 - (a) An approved provider;
 - (b) A nominated supervisor;
 - (c) An educator;
 - (d) A family day care educator;
 - (e) An employee;
 - (f) A contractor;
 - (g) a volunteer;
 - (h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service -

or in any other capacity

- (3) The Regulatory Authority may give a prohibition notice to a person to—

- (a) prohibit the person from being nominated as a nominated supervisor if the Regulatory Authority considers the person is not a fit and proper person to be nominated as a nominated supervisor of a service; or
- (b) impose one or more conditions on the nomination of the person as a nominated supervisor that the Regulatory Authority considers appropriate, if the Regulatory Authority considers the person is a fit and proper person to be nominated as a nominated supervisor of a service subject to those conditions.

Section 183 of the Law – Show cause notice to be given before prohibition notice

- (1) Before giving a person a prohibition notice, the Regulatory Authority must give the person a notice (a *show cause notice*) –
 - (a) stating that the Regulatory Authority proposes to give the person a prohibition notice; and
 - (b) stating the reasons for the proposed prohibition; and
 - (c) inviting the person to make a written submission to the Regulatory Authority, within a stated time of at least 14 days, about the proposed prohibition.
- (2) Subsection (1) does not apply if the Regulatory Authority is satisfied it is necessary, in the interests of the safety, health or wellbeing of a child or children, to immediately issue a prohibition notice to the person.

Fitness and Propriety as a Family Day Care Educator

- 11. *Regulation* 143A provides some guidance on minimum requirements for a family day care educator, being that they must:
 - a. Have regard to the matters set out in subregulation (2); and
 - b. Have adequate knowledge and understanding of the provision of education and care to children.
- 12. The concept of fitness and propriety is not fixed. It is dependent on context and requirements of the particular position and may change over time to meet social and political expectations. At minimum, fitness and propriety includes honesty, knowledge, and ability.
- 13. During the investigation, there is evidence identifying that you failed to that children being cared for and educated by the service were adequately supervised due to your actions as a Family Day Care Educator. This resulted in a child leaving your service unsupervised and unattended and walking home.
- 14. This evidence substantiates, on the balance of probabilities that your actions were not fit or proper in regard to supervision requirements as a Family Day Care Educator.



Obligations upon Regulatory Authority

12. The starting point for the Authority is the *Law*. 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; ...'
13. The relevant guiding principle at sections 3(3)(a) namely:
 - a.) that the rights and best interests of the child is paramount;
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 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*.
16. 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.
17. The *Law* is predominantly a protective law and the exercise of powers in this type of regulatory context is recognised by Courts as not being punitive. In the case of *New South Wales Bar Association v Evatt* [1968] HCA 20 the High Court set out in clear terms that action to enforce professional standards is protective.

Reasons

18. Having considered all available evidence and the likelihood of risk to children, the Authority is satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to provide education and care to children in the capacity of a Family Day Care Educator.
19. The Authority is satisfied that your actions as a Family Day Care Educator on 12 June 2024 resulted in a child, being educated and cared for by the Service, leaving the Service unsupervised and unattended and walking home, resulting in a risk to the health and safety of that child.



20. It is reasonable to expect that children at a Family Day Care Service are adequately supervised. A child leaving the Service unsupervised and unattended without the educator being aware is a risk to the health and safety of the child due to inadequate supervision.
21. 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, as an Educator, you chose and consented to participating in the education and care of children and have a responsibility to comply with the standard of care under the Law.
22. I am satisfied that on the balance of probabilities, there is reasonable, reliable, and credible evidence to substantiate the allegation, which further supports my determination that there may be an unacceptable risk of harm to a child or children if you are allowed to be a Family Day Care Educator in the provision of education and care in a Family Day Care setting.
23. Considering the evidence and information available, and the objectives and guiding principles of the *Law*, the Authority has decided to issue you a Prohibition Notice, pursuant to sections 182 and 183(3) of the *Law*, to come into effect on the date of this Decision.
24. This notice prohibits you from working as an educator in a Family Day Care service. Please refer a copy of the Prohibition Notice at Attachment D.
25. The Authority may consider a cancellation of the Prohibition Notice in the future based on an application that provides information as set out in Section 186 of the *Law* and *Regulation* 189.
26. Section 186 of the *Law* permits a person for whom the prohibition notice is in force to apply to the Regulatory Authority to cancel the notice.

Section 186 of the Law - Cancellation of prohibition notice

- (1) If the Regulatory Authority is satisfied there is not a sufficient reason for a prohibition notice to remain in force for a person, the regulatory Authority must cancel the prohibition notice and give the person notice of the cancellation.
- (2) A person may for whom a prohibition notice is in force may apply to the Regulatory Authority to cancel the notice.
- (3) The applicant must-
 - (a) be in writing; and
 - (b) include the prescribed information; and
 - (c) be signed by the person.
- (4) The person may state in the application anything the person considers relevant to the Regulatory Authority's decision about whether there would be an unacceptable risk of harm to children if the person were-
 - (a) To remain at the education and care service premises; or
 - (b) To provide education and care to the children.



- (5) The application may include a statement setting out any changes in the person's circumstances since the prohibition notice was given or since any previous application under this section that would warrant the cancellation of the notice.

Regulation 189 Application to cancel prohibition notice

For the purpose of section 186(3) (b) of the *Law*, the following information is prescribed-

- (a) the applicant's name;
- (b) contact details for the applicant, including an address for service of the decision;
- (c) a statement setting out the grounds for the application to cancel the prohibition notice.

Note- Section 186(4) and (5) of the *Law* set out additional statements that may be included in the application

Review rights

- 27. In accordance with section 192 of the *Law* a decision to give prohibition notice is a reviewable decision for external review. A person who is the subject of a reviewable decision for an external review may apply to the relevant tribunal or court for a review of the decision. For the ACT this is the ACT Civil and Administrative Tribunal. Such application must be made within 30 days after the day on which you receive the prohibition notice.
- 28. The *Law* applies to you when working in any capacity within the children's education and care sector. 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>
- 29. The *Law* and *Regulations* may be viewed at: <http://www.acecqa.gov.au/national-law>, and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
- 30. Should you have any questions about this Prohibition Notice please contact Authorised Officer, Declan Barbagallo via email at declan.barbagallo@act.gov.au.

Yours Sincerely



Jo Williams
Director – Regulatory Operations
Education and Care Regulation and Support

22 October 2024