



Ms [REDACTED]  
Former Nominated Supervisor  
Guardian Community Early Learning Centres Pty Ltd  
RE: Guardian Childcare & Education Gungahlin

Email: [REDACTED]

Dear Ms [REDACTED]

**Show Cause Notice – Proposed Compliance Action**

1. The ACT Regulatory Authority (the Authority), also known as Children’s Education and Care Assurance, recently investigated a complaint alleging that the *Education and Care Services National Law (ACT)* (the *Law*) was contravened at Guardian Childcare & Education Gungahlin SE-40005341 (the Service), operated by Guardian Community Early Learning Centres Pty Ltd PR-00000823 (the Provider).
2. 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 notice.
3. I am considering compliance action based on suspected contraventions of the *Law* and the *Regulations* arising from the investigation into a complaint regarding supervision and failure to take reasonable precautions to protect children from harm and from hazard.
4. During the investigation, the Authority received documentation which raised a suspected contravention regarding staffing levels. As a delegate of the Authority, I am considering compliance action under Part 7 of the *Law*, including prohibition from the role of nominated supervisor.

**Grounds for issuing Show Cause for Compliance Action**

5. The Authority is considering compliance action based on evidence that supports contraventions of the *Law* arising from the Authority’s investigation. Specifically, the evidence obtained during the investigation suggests two sets of grounds that support offences under the *Law*.
6. The first set of grounds relates to protecting a child from harm or hazards. The second set of grounds relates to staffing levels and supervision.

**Background**

7. On 9 November 2020, the Provider notified the Authority of a complaint that a serious injury had occurred. Further information was obtained from the Provider. Refer Attachment A for documentation relevant to the notification.

8. It was determined by the Authority that there was insufficient evidence to raise a reasonable suspicion of an offence, and an outcome letter was sent to the Provider on 8 February 2021. Refer Attachment B for a copy of that letter.
9. Further information was received by the Authority on 18 February 2021, and it was determined to investigate suspected offences of inadequate supervision and failure to take reasonable precautions to protect children from harm and from hazard likely to cause injury.

**First set of grounds –Supervision and Protection from Harm**

Allegation One

10. It is alleged that, on Friday 6 November 2020, you as Nominated Supervisor failed to ensure adequate supervision of all children being educated and cared for in that [REDACTED] sustained a significant facial injury which was not witnessed by educators, no first aid was administered, and parents were not promptly contacted, in contravention of section 167(2) of the *Law*.

Legislation Relevant to Allegation One

11. The following provisions of the *Law* and *Regulations* are relevant to Allegation One:

**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.

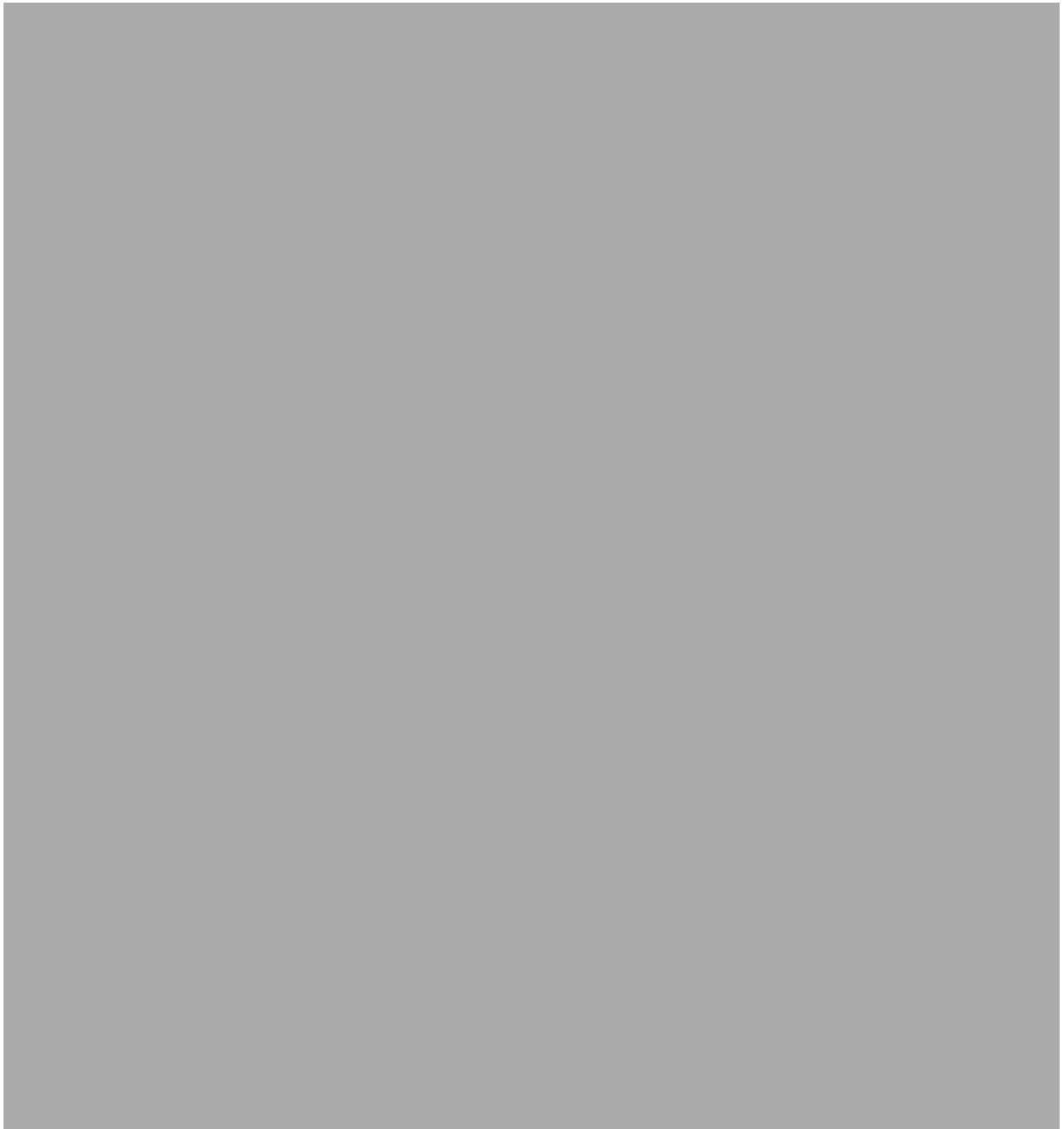
Penalty: \$10 000

Evidence Relevant to Allegation One

12. Records from the National Quality Authority ITS database indicate that you were the nominated supervisor at the time, having commenced in that role on 21 October 2019 and resigning on 26 April 2021. Refer Attachment C.
13. As part of the investigation, the Authority obtained documents from the Provider, exercising powers under section 215 of the *Law*.
14. Records produced by the Provider indicated that the Service was operating on 6 November 2020, [REDACTED] was in attendance and that Tiny Explorers and Nursery Rooms were merged. Refer Attachment D for working directly with children records and children's attendance records.
15. According to the records in Attachment D, you were working directly with children in combined Nursery and Tiny Explorer rooms between 7:30am and 12:30pm, which includes the time during which the injury was found by the Provider to have occurred.
16. Documents produced by the Provider included records of the Provider's investigation and resultant disciplinary action against two educators, including records of interview, indicating

the process was overseen by yourself in conjunction with the new nominated supervisor,  
██████████ Refer Attachment E.

17. As part of the investigation, the Authority obtained a statement from Ms ██████████. Refer Attachment F, for a copy of the statement, redacted where appropriate, including copies of photographs. It is not suggested by the Authority that ██████████ vomiting resulted from the injury. Rather, the final hospital discharge summary attributes it to a viral illness.
18. An additional photograph was forwarded to the Provider by Ms ██████████ under cover of email of 8 November 2020. Refer Attachment G. It is noted that the bruising is visible when ██████████ hair is not held back as it is in other photographs.
19. As part of the investigation, the Authority obtained statements from additional witnesses, relevant excerpts from which are included below.
20. Relevant extracts from Witness A's statement are:





**21. Relevant extracts from Witness B's statement are:**



Contraventions Supported by Allegation One

22. Evidence gathered appears to support a contravention of section 167(1) of the *Law*.

**Second Set of Grounds – Staffing**

Allegation Two

23. It is alleged that, on 6 November 2020, you as nominated supervisor failed to ensure adequate staffing at all times during which children were being educated and cared for by the Service, in contravention of section 169(3) of the *Law*, engaging further contraventions of s 165(2) and 167(2).

Legislation Relevant to Allegation Two

**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.

Penalty: \$10 000

**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.

Penalty: \$10 000

### **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 a 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

### **Regulation 123 (1) and (2) –Educator to child ratio-centre – based service**

(1) The minimum number of educators required to educate and care for children at a centre-based service is to be calculated in accordance with the following ratios –

- (a) for children from birth to 24 months of age— 1 educator to 4 children;
- (b) for children over 24 months and less than 36 months of age— 1 educator to 5 children;
- (c) for children aged 36 months of age or over (not including children over preschool age)— 1 educator to 11 children;
- (d) for children over preschool age, 1 educator to 15 children.

(2) If children being educated and cared for at a centre-based service are of mixed ages the minimum number of educators for the children must meet the requirements of subregulation (1) at all times.

### **Regulation 122 –Educators must be working directly with children to be included in ratios**

An educator cannot be included in calculating the educator to child ratio of a centre- based service unless the educator is working directly with children at the service.

### **Regulation 13 – Meaning of *working directly with children***

For the purpose of these Regulations a person is working directly with children at a given time if at that time the person –

- a) Is physically present with the children; and
- b) Is directly engaged in providing education and care to the children.

### **Evidence Relevant to Allegation Two**

- 24. Documentation obtained from the Provider in the course of the investigation included working directly with children records and children’s attendance records for 6 November 2020 (Refer Attachment D).
- 25. A CIT student on placement, [REDACTED], was signed in on working directly with children records in the combined Tiny Explorers/Nursery rooms but is not included in ratio.
- 26. Ratio analysis was carried out utilising working directly with children records and children’s attendance records. Refer Attachment H for a copy of ratio analysis, which indicated that the Service had between one and three educators fewer than the prescribed minimum for multiple extended periods during the day.

27. Additionally, witness evidence indicated that educators █████ and █████ were inside undertaking other tasks when signed in on working directly with children records, indicating that the Service is likely to have been further under ratio than indicated by the analysis in Attachment G.

28. Relevant extract from Witness A is:



29. Relevant extract from Witness B is:



Contravention supported by Allegation Two

30. Evidence gathered appears to support a contravention of section 169(3) of the *Law*, engaging further contraventions of sections 165(2) and 167(2) of the *Law*.

*Fitness and Propriety as Nominated Supervisor*

31. During the course of the investigation, evidence gathered included documentation indicating inadequate staffing of the Service on 6 November 2020, reflected in educators' accounts regarding the circumstances at the Service that day, which likely contributed to █████ injury being unwitnessed, lack of first aid and lack of parent contact, for the afternoon, despite the visibility of the injury.

32. This evidence raises questions of fitness and propriety to undertake the role of nominated supervisor. As a delegate of the Authority, I am considering compliance action under Part 7 of the *Law*, including an enforceable undertaking or prohibition from being a nominated supervisor or

33. 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.

34. The concept was described in *Australian Broadcasting Tribunal v Bond*<sup>1</sup> as follows:

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<sup>1</sup> (1990) 170 CLR 321 per Toohey and Gaudron JJ.

*The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from context, from the activities in which the person is or will be engaged and the ends to be served by those activities.*

35. At minimum, fitness and propriety includes honesty, knowledge and ability.<sup>2</sup>
36. Nominated supervisors have extensive responsibilities under the *Law*, relating to the broad areas of supervision, staffing, protection from harm and hazards, and educational programs. Specific obligations are contained in both the *Law* and the *Regulations*. Accordingly, to be a fit and proper person to be appointed as nominated supervisor, the person must be honest, have deep knowledge and understanding of the National Quality Framework (including compliance responsibilities), and also possess the ability to manage educators and any other staff, service premises and relationships with families.
37. Information gathered throughout the investigation raises a concern about your ability to manage and supervise an education and care service.
38. The purpose of this Show Cause Notice is to provide you with an opportunity to respond to the evidence outlined above, and to specifically address the point of your fitness and propriety to be a nominated supervisor.

#### **Proposed Compliance Action**

39. The Authority is proposing compliance action under Part 7 of the *Law*, should the Authority find that the Allegation is substantiated on the balance of probabilities. Potential compliance actions include:
  - a. Prohibition from acting in a role as Nominated Supervisor;
  - b. Enforceable undertaking under section 179A of the *Law*;
  - c. Non-statutory action.

#### **Regulation 117C – Minimum requirements for a nominated supervisor**

For the purposes of section 161A of the *Law*, the prescribed minimum requirements for nomination of a person as a nominated supervisor of an education and care service are that the person must –

- (a) have attained the age of 18 years; and
- (b) have adequate knowledge and understanding of the provision of education and care to children; and
- (c) have the ability to effectively supervise and manage an education and care service.

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<sup>2</sup> *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156 per Dixon CJ, McTiernan and Webb JJ.

### **Section 182(3) - Grounds for issuing a prohibition notice**

- (3) The Regulatory Authority may give a prohibition notice to a person to –
  - (a) Prohibit the person from being 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 179A - Enforceable undertakings**

- (1) This section applies –
  - (a) if a person has contravened, or if the Regulatory Authority alleges a person has contravened, a provision of this Law; or
  - (b) in the circumstances set out in section 27(a), 72(a) or 184(3).
- (2) If subsection (1)(a) applies, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions, to comply with this Law.
- (3) If subsection (1)(b) applies in relation to the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the approved provider, under which the approved provider undertakes to take certain actions, or refrain from taking certain actions in relation to the education and care service.
- (4) If subsection (1)(b) applies in relation to a person other than the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions in relation to an education and care service.
- (5) A person may, with the consent of the Regulatory Authority, withdraw or amend an undertaking.
- (6) The Regulatory Authority may withdraw its acceptance of the undertaking at any time and the undertaking ceases to be in force on that withdrawal.
- (7) The Regulatory Authority may publish on the Regulatory Authority's website an undertaking accepted under this section.

### **Right of response**

40. You have a right to respond to the allegations set out in this notice. You may, within 14 days of receiving this letter, make a written submission for the Authority's consideration in deciding if a compliance action should be taken.

41. At Attachment I to this Notice is a '4 Step Guide to Responding to a Show Cause Notice' to assist in the development of your submission. Please direct your written submission via email to [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au) or by post to

Children's Education and Care Assurance  
Attention Tanya Masterman  
GPO Box 158  
Canberra ACT 2601.

**Caution**

42. I am informing you that the excerpts of statements of witness taken for the purpose of the Authority's investigation are included in the interests of procedural fairness. The statements taken during the investigation are protected disclosures under section 296 of the *Law*.
43. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
44. Please also be aware that it is an offence under section 295 of the *Law* to provide the Authority with false or misleading information or documents.
45. The *Law* applies to you as a nominated supervisor and to any service you operate. 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>.
46. 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>
47. Should you have any questions about this Show Cause Notice please contact Senior Investigator Tanya Masterman, on telephone (02) 6205 2012 or email [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au)

Yours sincerely



Clare Brookes  
Senior Director,  
Education and Care Regulation and Support  
ACT Education Directorate

12 May 2021