

Ms [REDACTED]
Person with Management or Control
Baringa Childcare Centre Incorporated
RE: Baringa Early Learning Centre

Email: [REDACTED]
[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 have recently assessed a notification, submitted by the Provider via NQA ITS, which give rise to suspected inadequate supervision at 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 13 September 2023, the Authority received a Notification of Complaint (NOT-40901931) engaging allegations that on 6 September 2023, a parent arrived at the Service to pick up their 1-year-old child, [REDACTED] and no educator could account for the child's whereabouts. The notified complaint advised that the child was subsequently located in a sleep room, standing in her cot screaming. Refer copy of NOT-40901931 at Attachment A.
5. The Provider submitted, with NOT-40901931, multiple documents including email trails, file notes and correspondence with families. Refer copy of additional documents at Attachment B.
6. Further additional information was submitted by the Provider between 26 September and 6 October. Additional information consisted of an incident and summary report, and educator attendance registers/logs. Refer copies of all correspondence and additional information at Attachment C.

Law

7. In relation to the non-compliance identified, the following provisions of the *Law* are engaged:

Section 165(1) of the *Law* - Offence to inadequately supervise children

The approved provider of an education and care service must ensure that 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.

Section 174 of the *Law* – Offence of failing to notify certain information to Authority

- (2) 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 complaint 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 to any other prescribed matters.

Penalty: \$4000, in the case of an individual.
\$20,000, in any other case

- (4) 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 – Time to notify certain information to Regulatory Authority

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

- a) In the case of a notice under section 174(2)(a) –
 - ii. In the case of a serious incident, within 24 hours of the incident or the time that the person becomes aware of the incident
- b) In the case of a notice under section 174(2)(b) or a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

Regulation 12 – Meaning of a serious incident

For the purposes of the definition of *serious incident* in section 5(1) of the Law, each of the following is prescribed as a serious incident –

- e) Any circumstance where a child being educated and cared for by an education and care service-
 - i. Appears to be missing or cannot be accounted for.

Obligations upon Regulatory Authority, Providers and Services

8. 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*".
9. 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.*
10. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
 - (c) *to monitor and enforce compliance with this law;*
11. 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*.
12. 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.
13. 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.

Decision

14. The Authority has considered all information supplied by the Provider via NOT-40901931 and all additional information submitted and is satisfied that there is sufficient evidence to substantiate an offence under section 165(1) of the *Law*, and further engaging 167(1) of the *Law*. Furthermore, the Authority is satisfied that the Provider did not notify the matter within the prescribed timeframe, contravening s174(4) of the *Law*.
15. The Authority is satisfied that, on 7 September 2023, the Provider received a complaint alleging that a serious incident had occurred at the Service. The serious incident being that a child, ██████ was missing and unaccounted for whilst being educated and cared for at the Service. The Provider notified the complaint to the Authority on 13 September 2023.
16. This complaint was not notified within 24 hours as prescribed by *Regulation* 176, therefore engaging a contravention of section 174(4) of the *Law*.

17. The Authority is satisfied that, on 6 September 2023, the Provider failed to ensure that that all children were adequately always supervised while in the care of the Service, in contravention of section 165(1) of the *Law*, and engaging section 167(1) of the *Law*.
18. The Authority is satisfied that evidence obtained via the notification and additional information submitted by the Provider supports, on balance of probabilities, the offences being substantiated.
19. The Authority is satisfied that [REDACTED] was not adequately supervised resulting in the following:
 - a) [REDACTED] had not appeared to be physically checked by an educator whilst in the sleep room between 1:45pm and 4:15pm;
 - b) No educator was able to correctly account for [REDACTED] whereabouts upon the parents arrival at the Service at 4pm.
 - c) [REDACTED] was eventually located at 4:15pm, visibly distressed in her cot in the sleep room.
20. 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. Adequate supervision is viewed as a reasonable precaution to be taken to protect children from harm and hazard likely to cause injury or illness.
21. 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.
22. 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*.
23. The Authority acknowledges that the Provider has advised in additional information submitted of multiple remediation steps being undertaken to mitigate the risk of further non-compliance relating to supervision of children.
24. Considering the information submitted by the Provider, the level of seriousness of the contravention, and the objectives and guiding principles of the *Law*, I have decided that issuing a Compliance Notice is appropriate and in the best interests of children.
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. You must produce evidence of the steps required by the times indicated for each step within the Notice at Attachment D.

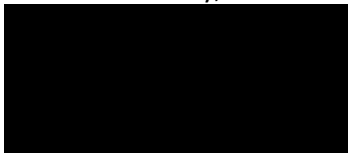
Review Rights

27. 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).
28. 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

29. 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>.
30. 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>
31. 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
27 October 2023