



[REDACTED]  
Nominated Supervisor  
RE: Nicholls Early Childhood Service

Email: [REDACTED]

Dear [REDACTED]

**Decision to Assess Fitness and Propriety**

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children’s Education and Care Assurance, recently investigated a Notification and complaint alleging that every reasonable precaution was not taken to protect children from harm and hazard likely to cause injury at Nicholls Early Childhood Centre SE-00009819 (the Service) operated by Community Services of Gungahlin Inc PR-00005825 (the Provider).
2. Web addresses to the *Education and Care Services National Law (ACT)* (the *Law*) and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this notice.

**Facts**

3. On 28 October 2022, a show cause notice (Notice) was issued to you, advising that the Authority had determined that there was sufficient evidence to support a case to answer regarding a suspected offence under the *Law*.
4. 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.
5. 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, you as Nominated Supervisor 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] [REDACTED] (2:7), in contravention of s167(2) of the *Law*.

6. Raising the following allegation: concerns impacting your fitness and propriety to be a nominated supervisor at a Service:

- a. In March 2022, there was evidence of sufficient risk of harm to children in the Silver Wattle room as a result of a child's [REDACTED] behaviour. As such, educators commenced recording her incidents in the Behaviour Management Sheets;
- b. Incidents/Illness/Injury reports submitted by the Provider to the Authority indicate that 19 injuries occurred to children as a result of [REDACTED] behaviour between March 2022 and May 2022 and continuing subsequent to the creation of the Behaviour Management Plan (BMP) on 11 May 2022;
- c. Service records and witness evidence support that there was inadequate communication with the parent of [REDACTED]. This includes a failure to inform her of and involve her with the development and implementation of the BMP, contrary to the Behaviour Support Policy, within a reasonable time.

A copy of the Notice can be found at Attachment A (minus attachments due to size, noting they can be provided upon request).

7. On 9 November 2022, your response to the Notice ("Response") was received which included fourteen attachments. The Response was also relied upon by the Provider. A copy of the Response (minus attachments due to size, noting they can be provided on request) is provided at Attachment B.
8. The attachments included:
  - 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.

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

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

##### **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

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

10. 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”.
11. 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.*
12. 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.*
13. 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*.
14. 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.
15. 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**

16. 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, you as Nominated Supervisor 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 [REDACTED] (2:7), in contravention of s167(2) of the *Law*.

17. Within the joint Response, you as Nominated Supervisor refuted the allegation, submitting the following points:
  - a. The complainant [REDACTED] 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 [REDACTED] complaint of injuries to his child/ren caused by [REDACTED], and that the safety and wellbeing of his child/ren was being compromised by the lack of action regarding [REDACTED] behaviour.

The Authority considers that [REDACTED] 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 [REDACTED] and his evidence is relevant only to injuries sustained by his own children. The involvement of [REDACTED] in such incidents is adequately evidenced in documentation submitted by the Provider, such as incident reports.

The Authority notes [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. You as Nominated Supervisor maintain 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 [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 [REDACTED] was consulted or that any reasonable level of exchange of information took place.

There is insufficient evidence that [REDACTED] was adequately advised of every incident involving her daughter’s behaviour between March and July 2022. It is not disputed that [REDACTED] only became aware of the Behaviour Management Plan on 18 July 2022, during a meeting with Service’s management. Corroborated evidence confirms that [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 you as Nominated Supervisor contend 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).

18. A nominated supervisor's obligation under section 167 of the *Law* is positively and strongly framed– the nominated supervisor 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 you as Nominated Supervisor ensured adequate compliance with the Behavioural Support Policy and Procedures and that the strategies being implemented were appropriate for a 2.5 year-old.
19. Reasonable precautions would have included:
  - a. Discussion of [REDACTED] behaviour with [REDACTED] in a more extensive manner than short exchanges at drop-off or collection times with other parents and children present;
  - b. Engagement with [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]'s behaviour, as well as appropriate responsive strategies.
20. The Authority reiterates the Nominated Supervisor's responsibility under section 167(2) of the *Law*. Children continued to be injured as a result of the behaviours of [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.
21. In this instance, the Authority has determined that an offence under section 167(2) of the *Law* is substantiated.

### **Fitness and Propriety Assessment**

22. Having considered the evidence, including material provided in your Response, the Authority is not currently satisfied that you are fit and proper to be in the role of nominated supervisor. The Authority's concerns relate to:
- a. Supervisory and management capacity;
  - b. Knowledge and understanding of child development and emotional regulation sufficient to support educators to support children who require additional levels of support and guidance.
23. Accordingly, the Authority would like to offer you the opportunity to attend a fitness and propriety assessment at the Authority's premises at Stirling.
24. The assessment will be carried out by two representatives of the Authority, being Senior Regulatory Authority staff, and will consist of:
- a. A verbal interview to further assess your capacity to engage in a role as nominated supervisor;
  - b. A written assessment of your knowledge and understanding of the National Quality Framework, which consists of 20 multiple choice questions and one scenario which might occur in a service. This assessment will take approximately one hour, will be supervised by an Authorised Officer, and you will be provided with a copy of the *Law and Regulations* for reference during the assessment. Please note that the written assessment has an 80% pass mark.
25. The Authority has tentatively scheduled your assessment for March 2023 and will confirm prior to the scheduled appointment.
26. Appropriate hygiene precautions will be taken as advised by ACT Health, including ample social distancing and sanitising of all rooms, with hand sanitiser provided. We are unable to provide refreshments at this time, but please feel free to bring a water bottle. If you feel unwell on the day the assessment is scheduled, please advise so that the assessment may be postponed.
27. If you decline to take this opportunity to demonstrate your fitness and propriety to engage in a role as Nominated Supervisor or you do not pass the assessment, the Authority may consider prohibition from engaging in the role of nominated supervisor or other action to ensure that the health, safety and wellbeing of children is not compromised.
28. Please advise within three business days of receipt of this letter whether you wish to accept the Authority's offer of an assessment. Any queries should be directed to Authorised Officer Brian Cropper on [Brian-Cropper@act.gov.au](mailto:Brian-Cropper@act.gov.au).

### **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.

**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.

**Legislation**

- 29. The *Law* applies to you as an educator and nominated supervisor. 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>.
- 30. 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>

Yours Sincerely,



**Jo Williams**  
**Director, Education and Care Regulation and Support**  
**ACT Education Directorate**  
**30 January 2023**