

Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	[redacted]
Government Department	Department for Education and Child Development
Ombudsman reference	2017/10388
Date complaint received	13 October 2017
Issues	<ol style="list-style-type: none">1. Whether there was an unreasonable delay in concluding the department's investigation2. Whether the department failed to provide procedural fairness to the complainant3. Whether the department's decision to permanently remove the complainant from its Family Day Care register was unreasonable

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

To protect her identity, the name of the complainant has been omitted from this report.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a number of responses from the department
- considering the *Education and Care Services National Law 2010 (National Law)*, the *Education and Early Childhood Services (Registration and Standards) Act 2011 (the Education Act)* and the *Children's Protection Act 1993*
- considering the department's *Management of Complaints and Care Concerns Policy*, *Information for Applicants Brochure* and *Service Management in Family Day Care Standard (Service Management Standard)*
- considering the Family Day Care Code of Conduct
- considering the Family Day Care Confidentiality Fact Sheet
- providing the department and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw*, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved...²

Response to my provisional report

The complainant responded to my provisional report by way of letter dated 13 February 2018. The complainant reiterated some of the background information which I have considered, particularly wishing to strongly refute the allegation that she would speak detrimentally to children.

The department responded to my provisional report by way of letter dated 22 February 2018. The department provided further submissions in relation to a number of points. I have considered the department's submissions and addressed them later in this report where relevant.

The department has also clarified that its staff are not subject to the *Children's Protection Act* and that this was not the basis of the department's attempts to maintain confidentiality. The department also stated that:

DECD understands and accepts the point made in paragraphs 71 and 72 on page 13 [of my provisional report] about the need to provide sufficient information for a person to understand the allegations against them, and will adapt its processes in this regard, but must do so in a way that ensures the confidentiality of witnesses and complainants.

I have therefore not considered the *Children's Protection Act* in this report.

Background

1. The complainant works as a Family Day Care (FDC) educator. She has been in that role for 30 years and provides care from her residence.
2. FDC educators provide education and care for children under the age of 13. FDC is a service often utilised by parents whose children have challenging behaviours, special needs, or who need care available on a 24 hour basis.

Legislative framework

3. The National Law was passed in 2010 to provide a unified national framework for children's education and care. The National Law was adopted in South Australia in 2011, pursuant to section 10 of the Education Act.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pp361-362, per Dixon J.

4. Under the National Law, South Australia's regulatory authority is the Education and Early Childhood Services Registration and Standards Board (**Education Standards Board**).³
5. A body seeking to operate an education and care service must apply to the Education Standards Board for a provider approval⁴ and a service approval.⁵ The department has applied for and been granted a provider approval and a service approval. Therefore the department has approval to operate a FDC service.
6. As the provider of the FDC service, the department must comply with the National Law.⁶
7. Section 51(1) of the National Law stipulates that there are conditions on service approval, including a condition that the care service is operated in a way that ensures the safety, health and wellbeing of the children being cared for by the service, and that the care service is operated in a way that meets the educational and developmental needs of the children being cared for by the service.
8. Section 269 of the National Law requires the department, as an approved provider, to keep a register that contains prescribed details with respect to each FDC educator registered with the service.
9. On 14 May 2013 the complainant was added to the department's FDC register and signed the Educator Registration Conditions, which set out the responsibilities of the FDC educators.
10. The department's *Management of Complaints and Care Concerns Policy* describes the nature of 'complaints' and 'care concerns' in general terms:

Care concerns are usually expressed by parents in terms of questions about an aspect of the care their children are receiving...Care concerns do not pose a risk to children's safety...

It is most appropriate and recommended that parents address the issue directly with their educator. The Coordinator listens, affirms their concern and provide (sic) advice about approaching their educator...

Complaints often involve a possible risk to children's health and safety...

All complaints are to be taken seriously, are reported to the Scheme Manager and are risk assessed. An initial enquiry is conducted and a planned approach is used to resolve the issue.

Care Concerns/Complaints about the complainant

11. On 31 May 2016 a care concern was received by the department about the conduct of the complainant (**Care Concern 1**).
12. Care Concern 1 contained allegations that the complainant had:
 - said belittling things to children, particularly a child who has significant additional needs
 - upset children through comments made about them and to them
 - told a child he was 'stinking' and belittled him by referring to him wearing pull-ups

³ Education and Early Childhood Services (Registration and Standards) Act 2011 (SA) sections 13(9) and 21.

⁴ Education and Care Services National Law 2010 section 10.

⁵ Education and Care Services National Law 2010 section 43.

⁶ Education and Care Services National Law 2010 section 19(2).

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- told a child he should 'grow up' and 'grow some balls'
 - told a child she would call the police on him which frightened him.
13. On 8 June 2016 two department staff members visited the complainant at her home for an enquiry meeting. The complainant was verbally advised of the five allegations of Care Concern 1.
14. The department's record of the enquiry meeting contains the following information:
- the complainant said that the allegations were totally untrue and that she would never call a child 'stinky'
 - the complainant used an example of how she interacts with a child she cares for who wears pull-ups, in order to demonstrate that her language was appropriate. The complainant appeared to believe that Care Concern 1 had been made about her interactions with this particular child
 - the department staff members advised her that she may not have the right child in mind and that the complaint had come from a member of the community
 - the complainant then asked if it related to a child in her care, and the department staff members advised her that it was not the child she had in mind
 - the complainant stated that she was very upset about the allegations and that she thought that there was someone out to get her, as she always tries to do the right thing
 - the department staff members then advised the complainant that this was not the first complaint they had received about her regarding inappropriate interactions with both children and parents. The department staff members advised that they had reviewed her file going back to 2010 and discussed a number of examples.
 - one of the staff members put the following to the complainant:

I acknowledge that when staff have addressed concerns and complaints with you, you are generally open to discussion with them and have shown a willingness to address the issues. I'm also aware that you have attended training to increase your interpersonal skills. I acknowledge that some of the concerns and complaints have occurred because people have taken your generous nature for granted. However the fact that similar concerns keep on occurring demonstrates that you are unable to maintain appropriate practices.
 - the complainant responded that she acknowledged that some of those incidents had happened, but she had learnt from them and did not do those things anymore
 - the complainant agreed with the department staff members that sometimes she did not stop and think before speaking her mind
 - the complainant was advised that given the serious nature of the allegations and the pattern of behaviour, the information would be provided to the Director, Early Childhood Services for her consideration, that it was possible that the complainant would be suspended from the department's FDC register, and that if this happened there was a risk that she would be permanently removed from the department's FDC register.
15. On 12 December 2016 the department wrote to the complainant to formally advise her of the allegations in Care Concern 1. The letter also made reference to historical complaints about the complainant. The letter stated:
- I provide you with an opportunity to submit further information on the concerns outlined in this letter and reasons why you should not be permanently removed from the DECD FDC educator register.
16. The letter was emailed to the complainant on 15 December 2016. The complainant was given 14 days to respond.

17. On 19 December 2016 the complainant emailed the department. The email states:

I write in response to the email from [the Director, Early Childhood Services] on Thursday 15th December 2016. I have always treated children with dignity and respect and as the FDC Coordinator reports that I have in my possession and families' testaments indicate, children in my care have received my positive guidance and encouragement towards acceptable behavior. I deny the concern raised by a community member on 31st May 2016.

Further, I find the list of previous allegations alarming. I have not been made aware of a number of these, either in conversation or in writing. I find this disturbing as, in some instances, I have not had the chance to hear and explain, and what I have done so in conversation, there is no acknowledgement of my explanations.

Before I can respond I request more details. In particular I ask for the dates of the 'inappropriate interactions with children and also parents', details of and actions taken by DECD to notify me of these and of my response. Of the incidents I am aware of my own records indicate that the matters had been dealt with or were unsubstantiated.

I am on leave from Friday 23rd December until I return to work on Monday 9th January. Without the details I have requested I am unable to fully respond to your letter. I ask for a suitable period to address these, following the Christmas holiday break, my leave, and my receipt of the information I have requested, before any further action is taken.

18. On 21 December 2016 the department emailed the complainant, stating that her request would be considered and that a response would be provided during the week commencing 16 January 2017. The email confirmed that the complainant would then be given a further 14 day period in which to respond to the allegations.
19. On 16 January 2017 the department received another complaint from a member of the public. The complaint was in relation to an incident which had occurred in late November or early December 2016. The complaint alleged that, while in a shopping centre car park, the complainant was observed to scream 'come here' at the top of her voice, and to grab the left arm of a small boy in a rough way.
20. On 24 January 2017 two department staff members visited the complainant at her home for an enquiry meeting. The complainant was verbally advised of the content of the new complaint. In response to the allegation, the complainant stated that she may have done this, but it would have been to protect the child if he tried to run away.
21. The department staff members asked the complainant her reason for grabbing the child. The complainant indicated that without being given an exact date, she could not confirm which child was in care at the time and therefore would be unable to state with certainty her reason for grabbing the child. The complainant indicated that one particular child is most likely to run off, and that if she considered he was in danger she would probably act instinctively by yelling.
22. The department appears to have taken no further action in regard to this complaint. The departmental documents either refer to this complaint as 'unsubstantiated' or 'partially substantiated'. It appears that this complaint was not incorporated into the department's ongoing investigation into Care Concern 1.
23. On 21 March 2017 the department wrote to the complainant providing a document containing the details she had requested on 19 December 2016. The document was in the form of a table titled 'Summary of Documented Concerns'. The complainant was advised that she had 14 days to respond to the allegations in Care Concern 1.

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24. On 27 March 2017 another care concern was received by the department about the conduct of the complainant (**Care Concern 2**).
 25. Care Concern 2 contained allegations that the complainant had:
 - roughly handled children in her care and that this behaviour had occurred on a regular basis
 - spoke negatively in front of children, including telling a child/children in care that she hated him/them and did not want him/them in her care or to provide care anymore
 - repeatedly parked illegally when collecting children from a Primary School (**the Primary School**) and made children enter the car from the road side, potentially putting children at risk from oncoming traffic
 - had previously requested that children in her care leave their class early to assist the complainant with after school pick-ups
 - spoke to staff at the school in a rude and disrespectful manner, generating complaints from staff to the principal.
 26. The department determined that the complainant should be suspended from its FDC register while Care Concerns 1 and 2 were investigated. The department advised the families who used the complainant's care services that she had been suspended from providing care through the department's service. The department advised the families that they could continue to use the complainant's services privately, but that they would not be entitled to child care benefits and that the complainant would not be covered by insurance.
 27. The department verbally advised the complainant of Care Concern 2 and of her suspension on 29 March 2017 via telephone call.
 28. The department initially determined to suspend the complainant from 5pm on 29 March 2017. However, the guardian of one child asked for the child to be in care until 7pm as he had to stay late at work. The department therefore altered the suspension to take place from 7pm.
 29. The complainant was not advised of her suspension in writing during March 2017.⁷
 30. Out of the 15 families who were using the complainant's care as at the date of her suspension, 13 families chose to continue using her care privately.
 31. On 5 April 2017 the complainant provided submissions responding to Care Concern 1. In addition, the complainant provided supporting evidence, including the following:
 - her response to every allegation contained in the table 'Summary of Documented Concerns' regarding historical incidents
 - receipts from professional improvement courses that the complainant had completed
 - copies of home visit records conducted by her Coordinator
 - a personal reference from her Coordinator
 - personal references from seven parents who currently use the complainant's care
 - a learning journal of one child cared for by the complainant
 - evidence that the complainant had been nominated for 'Educator of the Year' in 2013, 2014 and 2015.

⁷ In its response to my provisional report, the department clarified that the complainant was advised of her suspension in writing as part of the letter dated 13 April 2017.

32. On 13 April 2017 the department wrote to the complainant to formally advise her of the allegations in Care Concern 2. The complainant was advised that she had 14 days to respond to the allegations.
33. On 26 April 2017 the complainant provided submissions responding to Care Concern 2.
34. On 29 May 2017 the department wrote to the complainant advising her that Care Concerns 1 and 2 would be considered together as part of the same investigation. The letter also advised the complainant:

The care concerns are complex and require careful consideration before any decision is made about your ongoing suitability to continue providing care in a [department FDC] service. The department is endeavouring to resolve this matter quickly however the process can take much longer in cases where there is a considerable amount of conflicting information.

35. On 29 June 2017 the department emailed the complainant advising her that all information required for its investigation had now been collected and the file would now be forwarded to the Executive Director, Early Years and Child Development (**the Executive Director**) for a decision regarding whether the complainant would be permanently removed from the department's FDC register.
36. On 12 July 2017 the Executive Director wrote to the complainant, advising that she had decided to permanently remove the complainant from the department's FDC register. The complainant was given 28 days to provide a response.
37. On 2 August 2017 the complainant wrote to the department with a response. However, the letter was mistakenly addressed to the Education Standards Board. The complainant's response was therefore not received by the department until 16 August 2017.
38. On 22 September 2017 the Executive Director wrote to the complainant advising that she had decided to uphold her decision to permanently remove the complainant from the department's FDC register.
39. On 28 September 2017 the department wrote to the parents whose children were still receiving care from the complainant, advising them that the complainant had been permanently removed from the department's FDC register. The letter stated:

Care cannot be provided by [the complainant] under the DECD FDC program and benefits (Child Care Benefit) will not be paid on your behalf. Private care provision may be in breach of the National Law and you should contact the Education Standards Board...for advice. [The complainant's] FDC insurance will not cover any child in care under a private arrangement.

41. The complainant has advised my Office that she has had her own public liability insurance since April 2017.

Relevant law/policies

42. The department's *Management of Complaints and Care Concerns Policy* relevantly provides:

Natural Justice

The principles of natural justice bind administrative bodies where a judgement is being made which may have an effect of interfering with a significant interest of the individual; eg their ability to earn money.

What is it?

Natural justice is a common law concept. It requires that decision makers give persons adversely affected by their decision a 'fair go' before making that decision.

The paramount rules of natural justice are:

- That the person affected must have a right to be heard before the decision is made
- That the decision maker must not be biased or appear to be biased.

Decision makers must ensure that the person is told what the relevant issues are and informed of the nature and content of material which is being considered against him/her.

...

The purpose behind natural justice is to ensure that decision-making is fair and reasonable, but it is important not to confuse those objectives with what is legally required. At the end of the day, whether a decision complies with natural justice depends not on whether the decision itself is fair and reasonable, but on whether a fair and proper procedure was followed in making the decision.

What does this mean for Family Day Care?

When a complaint is made against an educator or an issue is identified, the educator must have an opportunity to know what the complaint or issue is and to put his/her side of the story.

Staff must not appear to have made a decision about the issue or appear to 'take sides'.

Evidence to support a decision

A decision that will adversely affect a person should not be based merely on suspicion, gossip or rumour. There must be facts or information to support all adverse findings. The best way of testing the reliability or credibility of information is to disclose it to a person in advance of the decision, as required by the hearing rule.

Whether there was an unreasonable delay in concluding the department's investigation

43. The department commenced its investigation on or about 31 May 2016. The department concluded its investigation on 22 September 2017.
44. The complainant expressed dissatisfaction with the process of the department's investigation a number of times throughout the investigation process, particularly regarding the length of time the investigation was taking.
45. In her letter to the department dated 2 August 2017, the complainant included the following comments:

On each occasion, I have been given a strict timeframe to work to for [response] (within 14 days). If I [had] not adhered to this my suspension would be permanent. It states in the FDC Guide that matters would be handled promptly by Head Office, however in these instances this has certainly not been the case. These matters have been handled extremely sluggishly from FDC and in one of the most frustrating instances it was not dealt with for 6 months, hardly the prompt response outlined in the FDC guidelines.

I feel that this has only now been handled more promptly once I went to my local member of parliament on the 4th of May 2017...

46. It appears that the guide referred to by the complainant is a defunct document called 'Your Guide' which was previously provided to family day care educators. This

document has since been replaced by other policies of the department. I note that the current *Management of Complaints and Care Concerns Policy* does not stipulate timeframes for the department to adhere to during an investigation.

47. The department's Service Management Standard, dated March 2017, states that 'complaints will be considered in a confidential, timely and impartial manner and in accordance with due process and principles of natural justice'. I acknowledge that the Service Management Standard was not in place during 2016.
48. The department has provided the following information in relation to the length of its investigation:

DECD does not believe there were excessive delays in the completion of the investigation into the care concerns and complaints regarding [the complainant]...At all times, DECD endeavours to resolve matters quickly, however the process can take longer in cases where complaints are complex, there are multiple complaints or where there is a considerable amount of conflicting information...

The nature of [Care Concern 1], plus others that had been made earlier that year caused the DECD FDC staff to consider [the complainant's] position. Surveys were undertaken with a number of parents, and her file and recent assessments reviewed. This lead (sic) to consideration as to whether [the complainant] should remain on the DECD FDC register. A letter was sent on 12 December 2016 setting out the matters of concern to DECD FDC and inviting [the complainant] to respond...

DECD accepts that there was a period of some six months from the complaint in 2016 until its letter of 12 December 2016. During this time, the matter was under careful review. [The complainant] had not been removed from the register and therefore was able to continue her care as usual during this period...

The serious complaint received at the end of March 2017 [Care Concern 2] was of a nature that required [the complainant] to be removed from the register while it was investigated. This occurred while the previous matter was also under consideration. Both complaints were similar in nature to historical complaints regarding [the complainant's] interactions with children and adults. The complaints were complex and required careful consideration and further investigation before any decision could be made about [the complainant's] ongoing suitability to continue providing care in a DECD FDC service. This was undertaken over the next couple of months, resulting in the letter of 12 July 2017. As noted, however, DECD had been in contact with [the complainant] during this period. DECD made efforts to ensure that the matter was resolved as expeditiously as possible in circumstances where there were numerous complaints, some of which were serious.

49. A document provided by the department, titled 'Running Record of Care Concerns' has the following entry:

...It is to be noted that there were some changeover of staff both in the Family Day Care Scheme office and within the Early Childhood Policy and Programs unit between June 2016 and the end of 2016.

50. I accept that once the two Care Concerns were amalgamated, the investigation became more complex and the department needed to consider a large amount of material. However, it appears that most of the delays occurred in the early stages of the investigation, prior to Care Concern 2 being received.
51. The complainant was verbally notified of Care Concern 1 at an enquiry meeting on 8 June 2016. It is clear that the complainant was advised of the possibility of her being suspended and/or removed from the department's FDC register. The complainant was understandably anxious to be formally advised of Care Concern 1 so that she could put forth her response to the allegations in writing.

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52. The department has provided a timeline of events relevant to its investigation. I note that following the enquiry meeting on 8 June 2016, the department reviewed her file. The department also conducted parent surveys on 21 and 22 July 2016. However, on the available evidence, no further action was taken in relation to the investigation from 22 July 2016 until 15 December 2016 when the complainant was advised in writing of Care Concern 1. The department has not provided any satisfactory explanation for that delay.
53. The length of the delay at this stage of the investigation was, in my view, concerning. It deprived the complainant of her ability to give a formal contemporaneous response in writing. The complainant did not provide a formal response to the allegations in Care Concern 1 until 5 April 2017. The complainant was therefore relying on her memory of the events that occurred almost 12 months prior.
54. I consider that by failing to advise the complainant in writing of the allegations contained in Care Concern 1 for approximately seven months, the department acted in a manner that was unreasonable.
55. In her letter to the department dated 2 August 2017, the complainant included the following complaint:

Please note the first letter I received about allegations on the 31st of May 2016 was sent to me by email on 12th of December 2016 and was given only 14 days to answer. I replied by email on 19th of December 2016 and requested an extension of time to answer the allegations and to get a copy of the file for myself for the past 6 years that they had decided to go back over.

Permission was given on the 21st of December 2016 and I was told that my request would be responded to during the week commencing the 16th of January and I would then be given a further 14 days to respond.

After numerous phone calls to the DECD office and speaking to [Manager 1], [Manager 2] and [Manager 3], who were all Acting Managers of Child Care Policy and Programmes, I finally received information on the 23rd of March 2017 (a full two months after they said they would get back to me).

56. I understand that in January 2017 the department received another complaint about the complainant, which was handled separately. The department has provided the following information:

DECD received a further complaint about [the complainant] in mid-January 2017, relating to conduct alleged to have occurred in November or December 2016. DECD FDC raised these matters with [the complainant] on 24 January 2017.

DECD FDC compiled a comprehensive table that set out the entire complaints history, showing when these matters had been raised and [the complainant's] response to them, and this was sent to [the complainant] with a letter dated 21 March 2017. This table included the matter alleged to have occurred in November/December 2016 which was reported to DECD in January 2017.

57. I accept that the need to assess the new complaint is likely to have caused some delay in the provision of the historical information requested by the complainant. I note that the document 'Summary of Documented Concerns' encompasses events from 2010 to 2017 and totals 17 pages. It includes a description of allegations, the date the complainant was informed of the allegation, the action taken by the department, and the complainant's response to the allegations.

58. In the circumstances, I consider that the delay in providing the 'Summary of Documented Concerns' to the complainant was not an unreasonable delay. However, I note that as the complainant had been granted permission to wait until she received the information before providing her response to Care Concern 1, the delay in providing the 'Summary of Documented Concerns' had the effect of further delaying the complainant from providing a written response to the allegations in relation to Care Concern 1.
59. In light of the nature of the allegations, the amount of information considered by the department in its investigations and the complexity of the evidence, I consider that apart from the delays during 2016, the time taken in 2017 for the department to finalise its investigation was not unreasonable.

Opinion

In light of the above, I consider that by failing to advise the complainant in writing of the allegations contained in Care Concern 1 for approximately seven months, the department acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend that the department provide a written apology to the complainant for that delay.

Whether the department failed to provide procedural fairness to the complainant

60. The doctrine of procedural fairness was aptly summarised by Justice Mason in the High Court case *Kioa v West*.⁸

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

61. Justice Mason also stated:

...when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109.⁹

62. In my view, for procedural fairness to be accorded in the circumstances of this matter, the complainant was entitled to be advised of the allegations against her, in writing and with sufficient detail that she could meaningfully address the allegations. The complainant was also entitled to have an opportunity to respond to the allegations before any decision was made which affected her.
63. I comment that the department's *Management of Complaints and Care Concerns Policy* states that complainants should be given 28 days to respond in writing to allegations. I note that the complainant was given 14 days to respond to the Care Concerns.

Care Concern 1

64. The complainant was verbally advised of the allegations in Care Concern 1 on 8 June 2016. The complainant was formally advised of the allegations in writing on 15

⁸ (1985) 159 CLR 550, 584.

⁹ *Kioa v West* (1985) 159 CLR 550, 582.

December 2016. The complainant was provided with historical information on 23 March 2017.

65. The complainant responded to the department on 5 April 2017. The complainant provided a detailed response to the historical allegations. The complainant did not specifically address the allegations in Care Concern 1, except to state '...several of the allegations I completely refute happened'. The complainant's response does not specify which of the allegations in Care Concern 1 are refuted.
66. However, I note that at the enquiry meeting on 8 June 2016, the complainant stated that all of the allegations in Care Concern 1 were 'completely untrue'. I note that this enquiry meeting occurred just over a week after the department received Care Concern 1.
67. I note that the complainant's letter to the department dated 2 August 2017 provides a more detailed response to the allegations in Care Concern 1.
68. I have considered whether the complainant was advised of the allegations in Care Concern 1 in sufficient detail so that she could meaningfully respond.
69. In the department's letter dated 15 December 2016, the department advised the complainant:

On 31 May 2016, the Department for Education and Child Development (DECD) Family Day Care (FDC) received a care concern from a community member. The concern raised alleged that you have:

- said belittling things to children, particularly a child who has significant additional needs
- upset children through comments made about them and to them by you
- told a child he was 'stinking' and belittled him by referring to him wearing pull-ups
- told a child he should 'grow up' and 'grow some balls'
- told a child you would call the police on him which frightened him.

Education and Care Services National Regulation 155 requires - Interactions with children requires approved provider to ensure that:

The education and care service provides education and care to children in a way that:

- (c) maintains at all times the dignity and rights of each child
- (d) gives each child positive guidance and encouragement toward acceptable behaviour.

70. I note that the allegations in Care Concern 1 relate to two specific events. Both of the events allegedly occurred while the complainant was not caring for any children, and both related to children that were in the care of another educator, Ms A. The first event allegedly happened at Ms A's house. The second event allegedly happened at a Football Club.
71. It is evident from the complainant's response during the enquiry meeting on 8 June 2016 that she did not know which events the allegations related to. It appears she assumed that the allegations related to something that had happened while she had children in her care and thus guessed at which child the allegations may relate to. The two departmental employees who conducted the enquiry meeting do not appear to have given the complainant any more specific information to enable her to identify the events to which the allegations related. The two departmental employees advised the complainant that she 'did not have the right child in mind' and that the care concern had been submitted by a member of the community.

72. In my view, in both the enquiry meeting and the letter dated 15 December 2016, the complainant was not given enough information to enable her to meaningfully respond to the allegations. The allegation that the complainant said belittling things to children, particularly a child who has significant additional needs, is a generic allegation. It appears that the complainant cared for a number of children with significant additional needs. Similarly, the allegation that the complainant upset children through comments made about them and to them is a very broad allegation.
73. I am aware that the department generally attempts to maintain the confidentiality of the persons who give information to the department in the course of its investigation. The department has stated:
- In investigating matters, DECD family day care staff are very careful about maintaining the confidentiality of witness statements, complaints and parent surveys so that DECD can ensure that complainants, parents and witnesses can freely raise and share concerns about the health, safety and wellbeing of children in care, and concerns about those who provide care, without fear of retribution.
74. I also note that the department has submitted that it had particular reasons for ensuring that the identity of its reporters, complainants and witnesses were kept confidential in the context of this particular investigation. However, the department demonstrated that it was possible to share a greater amount of information with the complainant without breaching confidentiality, as was shown in the letter of 12 July 2017. Given that the information was able to be eventually disclosed to the complainant, it is my view that the information should have been disclosed to the complainant at an earlier time.
75. I appreciate that the department must have procedures in place which protect confidentiality and encourage persons with information to share that information with the department. However, I am mindful of the comments made by the High Court of Australia in *Veal v Minister for Immigration*.¹⁰ This case related to an unsolicited letter received by the Department for Immigration in relation to an application for a protection visa. The application was refused and the matter was subsequently taken to the Refugee Review Tribunal. The existence of the letter was not made known to the applicant by the Tribunal.
76. On appeal, the High Court stated:
- In appeal to this Court, the appellant and the Minister treated the determinative question as being whether procedural fairness required the Tribunal to inform the appellant of the existence of the letter, or its contents, before the Tribunal decided to affirm the refusal to grant the appellant a protection visa. That question...should be answered "yes". It was right for the Tribunal not to have provided a copy of the letter to the appellant and not to have disclosed to the appellant any information that may have revealed the identity of its author. Before reaching its decision, however, the Tribunal should have told the appellant the substance of the allegations made in the letter.¹¹
77. In all the circumstances, I consider that the department could have given more detailed information about the allegations to the complainant, without disclosing confidential information. The department did not advise the complainant where or when the alleged events were said to have occurred. The complainant was not provided with any details of the comments that were alleged to have been made by her that 'upset children' or were 'belittling'.

¹⁰ Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88.

¹¹ Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88, 92.

78. In the letter to the complainant dated 12 July 2017, advising her that she had been removed from the department's FDC register, the complainant was provided with more detailed allegations.
79. It is apparent that after receiving this detailed information, the complainant was able to correctly deduce which two events the allegations related to.
80. In her response to the department dated 2 August 2017, the complainant provided the following comments:

Background to the incident at the [Football] Club with [Ms A] on page 1

On 31st of May 2016, DECD FDC received a care concern from a community member.

In May 2016, on a Friday night, at the Football Club, [Ms A] had taken 3 siblings to dinner, which we would do on a regular basis.

I WAS NOT WORKING AT THE TIME OF THE ALLEGATION.

The incident about "grow some balls" and to "grow up" was a comment made by a member of the club to the child as he was playing unsupervised, and he came in crying to [Ms A] about what the man had said. **As stated previously I did not say these comments to the child.**

...I did not tell the child I would call the police on him.

The incident that occurred is as follows:

...It was not the first occasion that the child had refused to go home from the club after dinner. It was about 8.30pm. He decided to run off into a large reserve across the road from the club.

It was a large unlit area and it was dark, raining, windy and cold. He refused to get into [Ms A's] car. I stayed with [Ms A] as she had his brother and sister. The child had put himself in danger and I stayed to support [Ms A] in this distressing situation. After about 30-40 minutes [Ms A] rang the child's mother. Her response was that she wasn't coming to collect the child and told [Ms A] to ring the police and that they could bring him home. When [Ms A] told [the child] this he got into the car.

At no time did I tell the child I would call the police on him. It was relayed via [Ms A] at the direction of his mother...

New allegations on page two

Statements taken from the complainant and a witness provided specific details about four separate incidents in or around April 2016:

I WAS NOT WORKING WHEN THESE INCIDENTS WERE MEANT TO HAPPEN.

I was visiting a fellow educator's place, [Ms A], who was doing overnight care, and the children in care were her responsibility. She asked if I could smell anything and I said yes. She told the child it would be OK and she would spray Glen 20 on the couch where he just sat (please note: that this incident involves the same child as outlined in the above club incident).

I strongly refute that I made any of the other comments.

Additionally, the parent provided the following statements:

I did attend the school where the above child attended school (this is also the club incident child). I was collecting another child, who coincidentally was in the child's class. When I would collect my child I would ask him how his day was and he would tell me about the other child's behaviour. I would stay in the car and wait for the child that I was collecting to come to me and I would not talk to anyone else. I was just supporting and asking a child about his day.

I strongly refute talking to other adults and breaking confidentiality.¹²

81. I am concerned that the complainant was not advised of the details of the allegations until she was provided with the letter which advised her that she was being permanently removed from the department's FDC register.

82. I note that the letter dated 12 July 2017 also stated that:

I provide you with 28 days to submit any further relevant information regarding care concerns outlined in this letter and reasons why you should not be permanently removed from the DECD FDC educator register...If no response is received you will be removed from the register.

83. Given that the letter of 12 July 2017 did provide sufficient detail to allow the complainant to meaningfully understand, and respond to, the allegations against her and that she was given the opportunity to submit a further response, I consider that procedural fairness was ultimately accorded in relation to the substance of the allegations in Care Concern 1.

84. As stated above in this report, I consider that there was an unreasonable delay in the department advising the complainant in writing of the allegations of Care Concern 1. Further, the complainant was not actually advised of the specific details of the allegations until the letter of 12 July 2017.

85. I have considered whether the delay in the investigation operated in such a way as to deny the complainant procedural fairness. I note the complainant's comments regarding the effect of the delay:

...The last 13 months of waiting for letters to be sent regarding allegations dating back many years, particularly when I know the allegations to be not only false but personally offensive, has been extremely difficult. This whole process has caused me considerable emotional stress, it has been debilitating to my self-worth, it has caused me considerable loss of income and financial hardship and has had detrimental effects to my reputation and health. It has been soul destroying to me and my sons who have been here for me.¹³

86. It is clear that the delay caused significant pain and stress to the complainant, which would have been alleviated, at least to some extent, by the department completing its investigation sooner.

87. I consider that in this case, procedural fairness required the department to advise the complainant of the allegations and give her an opportunity to provide a formal, contemporaneous response while the events which are the basis of the allegations were fresh in the complainant's memory. I consider that the lengthy delay operated to deprive the complainant of her ability to provide a response while the events were fresh in her memory, creating a real risk that the complainant was prejudiced by having to rely on her memory of events from almost 12 months ago whilst she was providing a formal response to the allegations. It is my view that the consequence of the delay was that the requisite level of procedural fairness was not provided to the complainant in relation to Care Concern 1.

Care Concern 2

88. The complainant was advised in writing of the allegations in Care Concern 2 on 13 April 2017. The department advised the complainant:

¹² Emphasis in original.

¹³ Letter to the department dated 2 August 2017.

On 27 March 2017 [the] Department for Education and Child Development (DECD) Family Day Care (FDC) Coordinator...received a care concern regarding your interaction with children and lack of professional conduct. [The Coordinator] was informed that, whilst collecting children from [the] Primary School it has been observed that you:

- roughly handled children in your care and that this behaviour had occurred on a regular basis
- spoke negatively in front of children, including telling a child/children in care that you hated him/them and did not want him/them in your care or to provide care anymore
- repeatedly parked illegally when collecting children from the school and made children enter the car from the road side, potentially putting children at risk from oncoming traffic
- had previously requested children in your care leave their class early to assist you with after school pick-ups
- spoke to staff at the school in a rude and disrespectful manner, generating complaints from staff to the principal.

89. I consider that the department's letter contained sufficiently specific details to enable the complainant to meaningfully respond to the five allegations contained therein.

90. The complainant responded to the department on 26 April 2017. The complainant also provided a further response to Care Concern 2 in her letter to the department dated 2 August 2017. It appears that the requisite standard of procedural fairness was met regarding the five allegations of Care Concern 2.

Allegation: breach of confidentiality in the letter of 12 July 2017

91. In the letter to the complainant dated 13 April 2017 advising the complainant of the allegations in Care Concern 2, there is no mention of an allegation that the complainant breached the confidentiality of children and families in care. However, in the letter to the complainant dated 12 July 2017 advising the complainant that she had been removed from the department's FDC register, this allegation was disclosed and was found to be substantiated.

92. A number of enquiries were made with the department regarding whether the department considers that procedural fairness was afforded to the complainant, as it appeared that a new allegation was founded which had not been put to the complainant prior to the letter of 12 July 2017.

93. The department provided the following information in response:

The allegation of breaching confidentiality flows from the allegation that [the complainant] spoke negatively about children in front of them. The witness statement identified that these comments were made to another adult in front of the children.

On 13 April 2017, [the complainant] was provided with an opportunity to respond in writing to the following allegation:

Spoke negatively in front of children, including telling a child/children in care that you hated him/them and did not want him/them in your care [or] to provide care anymore.

[The complainant] addressed this in her response dated 26 April 2017. She denied the allegation.

...To have made such comments about children in their presence to [the staff member] amounted to a failure to respect the confidentiality of those children and of that family using that care service.

The DECD FDC Confidentiality fact sheet requires that children in care have their confidentiality respected in relation to discussions about their behaviour, medical

conditions and any additional needs. As these comments were made in front of another person and related to [the complainant's] perception of the children's behaviour and the amount of time they spent in care, DECD made a finding that [the complainant] had breached this requirement.

DECD accepts that the breach in confidentiality arising as a consequence of [the complainant] speaking negatively about children in their presence could have been made clearer. However, DECD FDC is of the view that this was clearly outlined in the letter of 12 July [2017] and [the complainant] was given an opportunity to respond in writing. If it was considered that DECD could not rely on this as a specific separate allegation, DECD is of the view that there is sufficient other substantiated conduct to justify its decision to permanently remove [the complainant] from the DECD FDC educator register.

94. I remain concerned that an allegation was held to be founded that had not been put to the complainant. The letter of 12 July 2017 itself does not put the allegation to the complainant. The letter begins by setting out the background, reiterating the five allegations of Care Concern 1, reiterating the five allegations of Care Concern 2, and then setting out the evidence received from witnesses. The letter then states under the heading 'Decision' that the first three allegations from Care Concern 2 had not been substantiated, but that:

Given the specificity of the allegations from two sources and the similarity of the alleged behaviours to a previously unsubstantiated care concern I believe on balance that the following allegations are founded and that you:

- have roughly handled children in your care
- have spoken negatively in front of children
- have not kept the confidentiality of children and families in care.

95. I am concerned that it was not made apparent to the complainant the context in which the allegation of breach of confidentiality arose, or the set of facts which were relied upon to form the basis of the allegation. The allegation that the complainant made comments about the children to a teacher at the Primary School was put to the complainant, but was not characterised as a breach of confidentiality.
96. I have previously stated in this report that although I do not consider the complainant was initially given sufficient detail to respond to some of the allegations, she was given sufficient detail within the letter of 12 July 2017 and was given an opportunity to respond. On that basis, I considered that sufficient procedural fairness was afforded.
97. While the complainant was given the opportunity to respond to the letter of 12 July 2017, I am unable to conclude that procedural fairness was afforded to her regarding the allegation of breach of confidentiality. The complainant was not advised that the breach of confidentiality was alleged to have occurred in relation to the facts which formed the basis of the allegation that she 'spoke negatively in front of children'. I do not consider that the facts were sufficiently clear that the complainant could have deduced the basis of the new allegation that she had not kept the confidentiality of children and families in care.
98. The fact that the department characterised the incident of 'speaking negatively in front of children' as 'breaching confidentiality' only became apparent through enquiries made in the course of my investigation. On the available evidence, this was never brought to the attention of the complainant and she was never given an opportunity to meaningfully respond.

99. Justice Gleeson stated in *Kioa v West* that:

...adverse information that is credible, relevant and significant to the decision to be made...creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.¹⁴

100. On the information before me, an allegation was found to be substantiated by the department which was never formally put to the complainant with sufficient explanation and context to enable her to meaningfully respond. I consider that the department therefore failed to afford procedural fairness to the complainant regarding the allegation that she breached confidentiality.

101. I comment that I also continue to have concerns about the general allegations, contained in the information that was before the department, that the complainant has breached confidentiality. The information before me contains numerous allegations of incidents in which the complainant may have breached confidentiality, which it appears may have been relevant considerations by the department in reaching its decision.

102. I refer to the letter of 12 July 2017 which states:

Additionally the parent provided the following statements:

- Child would often hear his name mentioned when he was walking past at school when you were talking with other adults, comments included you saying:
 - He was a feral
 - That he soiled himself
 - He was suspended from school and was bashing people.

103. This clearly raises a potential breach of confidentiality, relating to events other than the event in which the complainant allegedly spoke negatively in front of children. I query why, if this allegation did not form part of the department's consideration, it was included in the letter to the complainant advising her of the department's decision and reasons.

104. The events referred to in which a child would hear his name mentioned when he was walking past appear to relate to a different school than the Primary School. In the information before me, there is an allegation that a group of four people, one of whom was the complainant, would 'often sit in a circle and say derogatory things' about the child.

105. I am concerned that it does not appear that this allegation has ever been put to the complainant. However, I am willing to accept the department's submissions that it intended the breach of confidentiality allegation to relate only and specifically to the incident in which the complainant allegedly spoke negatively in front of children.

106. In her response to the department dated 2 August 2017, the complainant made the following comments in relation to confidentiality:

I strongly refute talking to other adults and breaking confidentiality...

Over the years I have been reporting the mother for Centrelink fraud. She has been claiming two pensions. She has been found guilty of fraud, and she knows it is me who reported her...

I believe this is her way of getting back at me by making up false allegations...

¹⁴ *Kioa v West* (1985) 159 CLR 550, 629.

I strongly refute ever being mean to the child. I had previously had a good and open relationship with the mother and would regularly discuss her child's behavioural issues with his younger brother...

Coordinator role

There has been a major breach of confidentiality. I believed that my coordinator was a sounding board for issues that I encountered within my service...I mistakenly believed that the role of the coordinator was to offer "*support and advice*" (as outlined in the NQS). I find now that these discussions have been used against me in reports, which I find to be both completely unprofessional and not in keeping with the guidelines of the DECD FDC Departments.

Entrapment

On some occasions two office staff...came to my home during office hours where I was working alone and spoke to me about the children and families in care. These conversations...have then been written up that "*I discussed children in front of other children*". As I am solely in charge of the children, what alternatives were there...were [the two staff members] and myself meant to leave the children unsupervised to discuss the matters that they had come to my home to discuss?

...

I believe that I have always had the health, safety and wellbeing of children and families at heart over my three decades as a FDC educator. I strongly believe that I have complied with the Education Registration Conditions.

107. In my provisional report, I commented that I was concerned that the department appeared to have sent employees to interview the complainant at her home while she was working, and then proceeded to record an allegation by those officers against the complainant that she discussed children in front of other children.
108. In its response to my provisional report, the department submitted that no record of the interview of 8 June 2016 in which the complainant has been accused of breaching confidentiality. The department stated:

The extract from [the complainant's] letter dated 2 August 2017...refers to visits from two staff "on some occasions". DECD family day care staff advise that at the time of the interview these two staff members conducted with [the complainant] on 8 June 2016, there was one child present in the home. These staff members were highly aware of the need to balance the needs to this child with the need to engage with [the complainant] in relation to the complaint raised against her.

DECD also notes that [the complainant] alleges that "the conversations...have been written up that "*I discussed children in care in front of other children*"...". In the course of the interview, which was about inappropriate interactions with children, the staff members noted that this was the latest in a number of allegations dating back years about inappropriate interactions with children and parents, and these allegations were outlined; they included that she had spoken about a child in front of that child and other children. There is no record of this interview that criticises [the complainant] for discussing children in front of other children in the course of the interview...

109. I have reviewed all of the information before me, including the department's investigation file and record of the interview of 8 June 2016. I agree that the department did not record any allegations that the complainant breached confidentiality during the course of the interview.
110. In my view, the department failed to afford procedural fairness to the complainant regarding the allegation that she breached confidentiality, in particular, by failing to

characterise the incident where the complainant allegedly spoke negatively to children as being a breach of confidentiality.

Allegation: breach of confidentiality in the letter of 22 September 2017

111. The letter to the complainant from the department dated 22 September 2017 containing the final decision of the department comments that the complainant's response 'demonstrates her preparedness to share highly confidential information about children and families.'
112. In my provisional report, I stated that the basis for this comment about sharing confidential information was unclear. The complainant's letter dated 2 August 2017 stated that she had discussed one child's behavioural issues with the child's brother. However from the context it did not appear to me that this was what the department's review panel was referring to.
113. I have examined the Panel Report. In relation to the complainant's response regarding the incident at the Football Club, contained in Care Concern 1, the Panel Report notes that the complainant 'provided highly confidential information about the family and the child that had no bearing on the allegations'.
114. In relation to Care Concern 1, the final recommendation of the Panel is recorded in the Panel Report in the following terms:

Decision

The positive parent references and observations about [the complainant's] practices should be acknowledged. However it is the panel's opinion that:

The content of the witness statements provide substance to:

- the similarity of the alleged behaviours, with those instances of unprofessional behaviour or inappropriate interactions with children and parents
- ([the complainant] has previously acknowledged that she has not managed her behaviour appropriately and while she has undertaken training to address this, it has not been effective)
- other reports from members of the community, parents and other professionals about her negative and abrupt manner towards children and adults

it was believed on balance that the allegations were founded.

[The complainant's] response demonstrated her preparedness to share highly confidential information about children and families, and her lack of insight seems to make her try to shift responsibility to FDC staff, educators and families in care.

115. It appears to me from the context of the panel's comments that the panel considers the complainant to have breached confidentiality by disclosing details about the child (such as the child's age and behavioural issues) to the department as part of her response to the investigation.
116. This raises concerns about the department's approach to the investigation process. The department conducted a confidential investigation. The precise details of the witnesses and reporters were not disclosed to the complainant. Similarly, it does not appear that the complainant's submissions were disclosed to anyone other than the department, during the course of the investigation.
117. It is my view that the complainant was entitled to refer to specific details and examples in her submissions to the department and in response to the department's investigation.

I do not consider that submissions for the purposes of a confidential investigation, to an agency which is also an approved provider of FDC, can be considered to be a breach of confidentiality.

118. In response to my provisional report, the department has provided further information about the reason the comments about confidentiality were included by the panel:

The report at paragraph 101 to 102 also refers to the panel's comments about the fact that it was concerned that [the complainant] was prepared to share highly confidential information about children and families in her response. DECD accepts the view that [the complainant] was entitled in her response to refer to specific details and examples. What gave the panel cause for concern, however, were [the complainant's] statements about "the club child" being "signed over by his parents..."[.] This information is not relevant to the question of whether the allegations about [the complainant's] behaviour towards this child that was reported to DECD family day care were true or not. The panel considered that this represented unnecessary denigration of the child, that it was sharing information that the panel did not need to know... In addition, the panel was concerned that [the complainant] would make assertions in her response about the mother of the child being guilty of Centrelink fraud...The panel considered that [the complainant] was trying to impugn the child's mother rather than address the allegations against her. The panel wishes to clarify that it was these specific matters, and only these matters, that were the basis of its statement that it was concerned about [the complainant] sharing highly confidential information about children and families in her response, and that their concerns were primarily due to the fact that this information was not only highly sensitive but was not relevant to the issues under consideration.

119. In light of this information, I accept that this was the reason those comments were included by the panel in its report and in its letter to the complainant dated 22 September 2017. However, I continue to have concerns about the reasoning of the panel and the department's approach to the investigation. Given my view that the complainant was entitled to include confidential information in her responses to the department, I consider that it was inappropriate for the department to draw any adverse inferences from the complainant's inclusion of 'sensitive confidential information' because the department considered the information to be irrelevant. A complainant who is under investigation and is putting forward a response to allegations is entitled to include any information which they wish the department to consider. The department may consider some of that information to be irrelevant. However, the inclusion of irrelevant information in a submission to the department is not a basis for a negative inference to be drawn.
120. Similarly, I do not consider it was appropriate for adverse inferences to be drawn about the complainant's inclusion, in her submissions, of information regarding alleged Centrelink fraud. The complainant was in a position of being uncertain of the person/s who had made complaints about her and/or had provided witness evidence to the department during its investigation. I understand the complainant included those submissions to support her statement that she refuted the allegations, and posited a motive for a possible reporter to have made untrue allegations. It was open to the department not to accept those assertions by the complainant. However, I do not consider it was appropriate to draw adverse inferences from the inclusion of that information in the complainant's submission.

The department's decision to remove the complainant from its FDC register

121. I note that the letter from the department dated 12 July 2017 is signed by the Executive Director. The letter states:

Dear [complainant]

Following the conclusion of the department's inquiry into care concerns received following your interactions with children and lack of professional conduct I confirm that I have decided to permanently remove you from the [department's] FDC educator register. In making my decision in respect to these care concerns, I considered all information presented to me which included statements from complainants, witness statements, your responses to the allegations, parent surveys and your educator history.

...

I would like to inform you that my decision to remove you from the DECD FDC register only prevents you from providing family day care services under the auspices of DECD.

122. Following receipt and consideration of the complainant's response dated 2 August 2017, the department wrote to the complainant again on 22 September 2017:

Thank you for your letter dated 2 August 2017 responding to correspondence notifying you of the outcome of the inquiry into care concerns raised in relation to your service and subsequent removal from the [department's] FDC educator register...

A panel, comprised of three staff from the Early Childhood Services directorate, have reviewed your file and the additional material you provided.

In summary the panel determined the following:

- whilst parent surveys undertaken by the department in 2016 and feedback from current families early in 2017 provided positive observations about your child care practices and were supported by references you provided, the panel had to balance this with:
 - the similarity of the alleged behaviours with previous concerns regarding instances of unprofessional behaviour or inappropriate interactions with children and parents
 - reports from members of the community, parents and other professionals that your manner toward children and community members was not in line with the educator registration conditions...
- your response:
 - demonstrated your preparedness to share highly confidential information about children and families
 - did not support a change to the decision to permanently remove you from the DECD FDC educator register.

Following review of information provided to me by the panel I have decided to uphold my decision to permanently remove you from the DECD FDC register.

123. This letter was also signed by the Executive Director.
124. I consider that the approach of the department created some confusion and an appearance that procedural fairness had not been afforded to the complainant, as it appeared that a decision had been made in advance while the department was still considering the matter. The Executive Director purported to make a decision on 12 July 2017. The decision was reviewed by an independent panel but the final decision of 22 September 2017 was also made by the Executive Director. As a matter of good administrative practice, I consider that a review of a decision should ordinarily be completed by a person who was not the original decision maker.
125. I comment that while the Executive Director purported to make a decision on 12 July 2017, the complainant was not actually removed from the register at that time and was given the opportunity to provide further reasons as to why she should not be removed from the register. The basis for the decision of 12 July 2017 was made sufficiently clear, with reasons given, which allowed the complainant to meaningfully respond. However, by purporting to have already made the decision, rather than a provisional decision, I consider that the Executive Director may have created a perception of prejudgement. I comment that the department may wish to consider altering the

wording of its letters to make it clear that the initial decision is a provisional decision in order to avoid a perception that procedural fairness is being denied.

126. As the complainant was given an opportunity to respond to the letter of 12 July 2017 and was not removed from the department's FDC register until after her final response was considered by an independent panel, I consider that the format of the 12 July 2017 letter did not constitute a failure to accord procedural fairness.
127. In all of the circumstances, I consider that the department failed to afford procedural fairness to the complainant by:
- failing to advise the complainant in writing of Care Concern 1 for approximately seven months
 - failing to advise the complainant of the allegation that she breached confidentiality.

Opinion

In light of the above, I consider that by failing to provide the complainant with procedural fairness, the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this, I recommend that the department amend its *Management of Complaints and Care Concerns Policy* to include:

- timeframes in which the steps of the investigation should be undertaken
- a requirement that complainants be informed of the nature of the allegations against them with as much detail as can be provided whilst not disclosing any confidential information.

Whether the department's decision to permanently remove the complainant from its Family Day Care register was unreasonable

128. I have considered whether, on the evidence available to it, it was reasonably open to the department to permanently remove the complainant from its FDC register.
129. The department concluded that the five allegations contained in Care Concern 1 were all substantiated.
130. The department concluded that three of the six allegations contained in Care Concern 2 were substantiated. I have discussed my concerns with the sixth allegation, relating to breach of confidentiality, earlier in this provisional report.
131. I have some concerns about the department's approach to another of the allegations in Care Concern 2. This is the allegation that the complainant roughly handled children. I note that none of the historical allegations relate to the complainant roughly handling children.
132. In her response to the department, the complainant stated the following:

Allegation on page four at the Shopping Centre

I would further like to add that it happened in the car park...the child in question had let go of the trolley he was holding onto and went to run in front of a car. I did a quick risk assessment and reacted in a way to stop him running in front of this car.

133. I have considered the process of investigation into the allegation that the complainant roughly handled children. It appears that the original care concern was submitted by a

member of staff at the Primary School. The relevant allegation was that the complainant 'roughly handled children in your care and that this behaviour had occurred on a regular basis'.

134. It appears that the department then contacted the Primary School seeking more information and had difficulty getting a response. The department has provided a record of a phone conversation with a staff member at the Primary School. This record contains the following relevant information:
- the staff member apologised for not providing the department with the information that the department was seeking. The staff member stated that the two other staff members who had witnessed the alleged behaviours were ill and were not presently at the school
 - the staff member stated that there was no documentation about the events allegedly witnessed by the two other staff members
 - the staff member stated that the two other staff members could not remember any specific dates, but that the events would have occurred from February until March
 - the staff member provided details about the alleged incident in which the complainant dragged around a small boy who smelled of faeces. It is evident that this event had not formed part of the original care concern submitted by staff members at the Primary School
 - in relation to this event, the staff member stated that she thought the little boy probably had gastro and she thought the way the complainant handled the situation was inappropriate and disrespectful to the child.
135. I comment that if this event did take place, this does not allege that the complainant roughly handled the child. The substance of the witness statement is that it was disrespectful to the child. The witness statement does not state that the child was mistreated or otherwise physically handled in a rough way.
136. The only instance of similar behaviour is the incident which occurred in a shopping centre car park in January 2017. I note that the allegation that the complainant roughly grabbed a child by the arm is unsubstantiated. However, even if this complaint had been substantiated, I am of the view that a single incident wherein a carer grabs a child by the arm to prevent the child from being hit by a car is not evidence of a pattern of behaviour of roughly handling children.
137. Nevertheless, I accept that the department has substantiated numerous allegations, both recently and historically, relating to the complainant's conduct.
138. The department has provided the following information regarding its decision to permanently remove the complainant from its FDC register:

The conditions on DECD's FDC service approval imposed by the *Education and Care Services National Law* include a condition requiring DECD to operate that service in a way that ensures the safety, health and wellbeing of the children being educated and cared for by the service, and in a way that meets the educational and developmental needs of the children being educated and cared for by the service...As an approved provider of FDC in South Australia, DECD is required to ensure, and committed to ensuring, that education and care within the DECD family day care service is provided in an environment that supports the safety and welfare of the children receiving care.

DECD FDC carefully vets all persons applying to join the DECD service to ensure that only persons that it considers fit and proper to provide education and care within the FDC context are accepted. Fitness and propriety extends beyond having a criminal history check; persons who provide care as part of the DECD FDC service must demonstrate integrity and high standards of respect for others at all times, as persons within the FDC community, such as parents, other educators and those in the wider community associate them with and consider them as representative of the DECD service...

The FDC model is one in which a sole educator is responsible for a small group of children, generally in the educator's own home. Many children in FDC are pre-verbal, or have special needs, and these children are therefore in a particular position of vulnerability. Given these factors, and the obligations on an approved provider of a FDC service to ensure the safety and wellbeing of children, that their needs are met and their dignity maintained at all times when they are in the service, DECD takes complaints very seriously...

The safety and wellbeing of children and young people is DECD's paramount obligation...

The role of a FDC educator is unique in that it requires an adult to work alone with children, for long periods of time, with minimal external supervision. The families using DECD FDC do so on the understanding that educators who are part of the DECD FDC scheme are fit and proper childcare professionals. In addition, educators who are part of the service are the public face of the service, and representative of the service. DECD FDC seeks to provide a service of the highest quality, and expects its educators to meet a high standard to ensure this, and to give persons using the service confidence in it.

The regulatory model for FDC, whereby approved providers have direct responsibility for and oversight of educators, places significant legal obligations on DECD as the approved provider for DECD FDC in the course of its management of the educators and its services...

The matters raised through care concerns/complaints, witness statements, educator history identifying similar instances of unprofessional behaviour or inappropriate interactions with children and parents (previously acknowledged by [the complainant]), as well as other reports from members of the community, parents and professionals about [the complainant's] negative and abrupt manner towards children and parents are relevant to determine [the complainant's] ongoing suitability as a DECD FDC educator and have been considered by DECD...

A panel was convened to comprehensively review the matter, and the matters considered most concerning by the panel were set out in the letter to [the complainant] on 22 September 2017...

A number of previous complaints had been made about [the complainant], and DECD FDC had worked with her in relation to a number of issues in order to improve her skills and performance. The similarity of a number of the most recent allegations...to previous complaints, however, showed a lack of sustained improvement.

Taking all this into account, DECD FDC was satisfied that, on balance, enough of the allegations that were considered most serious were substantiated. On that basis, DECD determined it was no longer confident in [the complainant's] ability to provide an education and care service for DECD FDC, and she should be removed from the register. That she had shown an inability to address behaviours leading to complaints despite assistance from DECD in the past established that it was appropriate that this removal be permanent.

139. I note that removal from the department's FDC register does not prevent the complainant from working as a family day care educator privately.
140. It appears from the evidence before me that the complainant is a dedicated and committed carer who provides, with few exceptions, high quality care to the children who are in her care. This is evidenced from the parent surveys, parent references, and also the Home Visit Records by the complainant's coordinators over the years.
141. However, in order to meet community expectations for a carer who belongs to the department's register of approved carers, I accept that there are very high standards expected of FDC educators which extend beyond their ability to provide care and include their interactions with parents and members of the community.

142. Enquiries have been made with the department regarding the extent to which the fit and proper person test extends to behaviours exhibited when an individual is not at work. The complainant has emphasised that the five allegations contained in Care Concern 1 all related to events which took place when the complainant was not working, but was accompanying [Ms A] while [Ms A] was caring for children.

143. The department has provided the following information:

In the assessment of a person's fitness and propriety generally, conduct that shows a propensity to behaviour of a certain type is relevant, whether that is committed within the work environment or not...

From the perspective of child safety, an individual's conduct outside the work place can be relevant in the assessment of a person's initial and ongoing suitability to be engaged with and/or participate in a DECD service providing education and care to children or young people...

Allegations relating to the manner in which a person has treated a child in care, even if that child is not within their own care, are relevant in determining whether that person is a fit and proper person to provide education and care in the family day care setting as part of the DECD FDC service.

DECD FDC expects all educators to adhere to high standards of personal behaviour...any tendency suggesting an unsuitability to work with children is relevant to a person's application.

That does not cease once a person is registered. If DECD FDC becomes aware of any information suggesting that a person is unsuitable to provide care for children on the basis that there are allegations suggesting that they have caused, or have a propensity to cause, physical or emotional harm to children, DECD must act on that information...

It was noted by the panel that the complaint made in May 2016 related to [the complainant's] belittling and making nasty comments to a child in the care of another person and involved a child with special needs. It is concerning that [the complainant] considers the fact that she was not working at the time of this behaviour to be a relevant consideration and highlights that she does not understand, share or demonstrate the values required of DECD FDC educators. Behaviour of this type, even outside the setting of her own education service, tends to suggest that [the complainant] is not suitable to continue providing care as part of the DECD FDC service.

144. I accept that educators who are on the department's FDC register must exhibit high personal standard of behaviour towards members of the community in general. I particularly note that educators must respect and maintain the dignity of all children who are in care, whether they are in the care of that educator or another educator.

145. In all of the circumstances, and based on all of the information before me, it is my view that it was reasonably open to the department to decide that the complainant should be removed from the department's FDC register.

Opinion

In light of the above, I consider that the department did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act by deciding to remove the complainant from its FDC register.

Summary of Opinions

My view is that:

- by failing to advise the complainant in writing of the allegations contained in Care Concern 1 for approximately seven months, the department acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act
- by failing to provide the complainant with procedural fairness, the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.
- in removing the complainant from its FDC register, the department did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

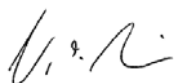
Summary of Recommendations

I recommend that the department:

- provide a written apology to the complainant for the delay of seven months
- amend its *Management of Complaints and Care Concerns Policy* to include
 - timeframes in which the steps of an investigation should be undertaken
 - a requirement that complainants be informed of the nature of the allegations against them with as much detail as can be provided whilst not disclosing any confidential information.

Final Comment

I have considered whether, given my view that the department failed to meet the requisite standard of procedural fairness, I should recommend that the department review its final decision to remove the complainant from its FDC register and give the complainant a further opportunity to be heard. My view is that even if the department did further consider submissions from the complainant on the matter of confidentiality and did accept the complainant's submissions and reach a decision that the allegation of breach of confidentiality was unsubstantiated, the department would likely still determine to remove the complainant from its FDC register based on the other allegations which it has substantiated. The department has made submissions to me to this effect.¹⁵ I have reached the view that the department was not unlawful, unreasonable or wrong in its final decision. Therefore it is my view that while there has been a failure to meet all the requisite elements that procedural fairness required in this case, I do not consider that any meaningful outcome could be achieved by having the department remake its decision.



Wayne Lines
SA OMBUDSMAN

5 March 2018

¹⁵ Letter from the department dated 15 December 2017.