

2 September 2022

**BY EMAIL & BY HAND**

The Honourable Dominic Perrottet  
Premier of New South Wales  
52 Martin Place Sydney NSW 2000

Dear Premier Perrottet

**Early Childhood “strike” 7 September 2022 – independent inquiry needed into sector**

My letter to you on 11 February 2022 detailed how the maladministration of NSW’s Early Childhood laws by Minister Sarah Mitchell and her department was exhausting and demoralising our sector to crisis levels.

Since then, the situation has only worsened: a shortage of qualified staff sees our sector at breaking point. One union is calling for a national “strike” on Early Childhood Educators’ Day (7 September) “to address the crisis”: <https://unitedworkers.org.au/media-release/union-members-vote-to-shut-down-early-learning/>.

It is sad that Early Childhood Educators’ Day – meant to be a day to thank and celebrate our wonderful professionals – should turn into a day of protest. But my family will be supporting any staff member who wishes to attend the planned rally (set to start after 3pm). The reasons why a business would support their staff attending such a strike will become self-evident on reading this letter and its enclosure: in my 39 years of practising law, I have not dealt with a more arrogant and obstinate bureaucracy than NSW Education. Its lack of respect for all stakeholders, its preoccupation with ideology and process (instead of substance) and its rejection of your Government’s Better Regulation Principles is inexcusable. As is its contempt for the rule of law.

**Your recent refreshing statements to the press**

Since becoming Premier, you have spoken publicly of the need for NSW’s education system to return to basics, to get rid of the absurd “woke” elements that have infiltrated our system and to lift the administrative burden that is killing the spirit of our teachers. It is about time a politician of consequence had the courage to publicly state these self-evident truths. Former Premier Berejiklian repeatedly expressed similar sentiments to me in private meetings. But she was unable to fix the problem, constantly seeking input from Minister Mitchell.

You will achieve nothing Mr Premier if you – in formulating a solution to the current crisis – rely on information from Minister Mitchell or her department. They are part of the problem, not the solution.

**NSW Education demeans & exhausts our professionals with process-driven nonsense**

Some 30-40% of staff time is now spent on process driven tasks (red tape) imposed on our sector by NSW Education. Parents generally have no idea how NSW Education is driving up the cost of childcare and distracting our staff from their core responsibility (caring for and educating the children).

Here are some examples of the reasons why centres/staff have been marked down by NSW Education:

- in a group exercise involving ten children, a Berry staff member was told it was not sufficient she prepared only one file note of the experience. She needed ten: one recording what each child “got” out of the exercise.
- failing to meet unmeasurable concepts like “a child’s agency [is allowed to] influence events and their world” and “Educators [being] deliberate, purposeful, and thoughtful in their decisions and actions”. It is unconscionable to “rate” any professional on such impossibly vague, unprovable notions.
- failing to disclose in Berry’s paper sign-in register (viewable to all families) children’s surnames: this would have violated Privacy law and also disclosed the name of at least one journalist under Police protection.
- failing to display photos and full names of Berry’s lead staff at entrances (viewable even to strangers) in breach of Privacy laws. Some NSW Education officers conducting “spot-audits” sign in as “Officer No. #”.
- failing to involve children in “Aboriginal Reconciliation Action Plans”. Berry celebrates the indigenous every day in various ways. But we will never burden children with the adult concept of a required “reconciliation”.
- failing to involve children in ◊ preparing Quality Improvement Plans/Self-Assessments ◊ assessing/ planning their own learning/development ◊ assessing the effectiveness of emergency drills.
- failing to involve children in meal preparation. This “requirement” is illegal in NSW. It would also constitute criminal negligence if it caused a serious enough incident of food poisoning or anaphylaxis shock.

Similar tales of woe (called “Assessment & Rating Doozies”) were published by Australian Childcare Alliance NSW until NSW Education forced it to stop because their officers were being overly stressed by the exposé.

### **Contempt for the rule of law displayed by Minister Mitchell and NSW Education**

By law, NSW Education may only “assess and rate” centres against the National Quality Framework (NQF) set out in Schedule 1 to the Childcare Regulations. The vagueness of the NQF precludes any objective “assessment and rating”. As it turns out, we recently discovered (from a whistle-blower) that NSW Education is now assessing and rating centres not just against the NQF but also against a “Guidebook” produced by – and subject to change at the whim of – some bureaucrats. After challenging Minister Mitchell and NSW Education on this plainly unlawful conduct, I received a reply that simply asserted the power exists (even though the Guidebook itself correctly states that its contents are not part of the law).

This sort of arrogance (and alarming defiance of the rule of law) lies at the heart of the current crisis.

### **Minister Mitchell/NSW Education act as if their own graduates are incompetent**

There are countless other instances of NSW Education imposing similarly absurd requirements on our sector as those listed above. Viewed in isolation, each one is trivial. But viewed as a whole, they show a Minister and a bureaucracy preoccupied with process (and control) instead of substance. And they reveal a Minister and department shamefully micromanaging our professional educators as if they (those educators) were incompetent. Given the Minister and her department are responsible for producing competent graduates from our tertiary education system, how can they then be trusted to properly manage our education sector?

### **In truth there is no crisis in quality of our professionals**

In truth of course, our sector is not comprised of an army of incompetents (and Minister Mitchell and her department know it). As in any profession, there are some who are not up to standard. But the vast majority are women and men who display an unwavering commitment to children and to their profession. I have spent countless hours with these professionals discussing their administrative burdens. I have watched them: • interact with/guide the children in reading, maths, science experiments, musical instruments, dancing, hopping, throwing balls, climbing ropes and obstacles, teaching chess • deal with tantrums • change nappies, prepare & serve food (knowing which children have allergies) • clean up food and vomit, wash clothes • with clockwork precision, put children to sleep at different times/wake each one as per parent instructions • with clockwork precision, take temperatures and administer medicines • communicate daily with parents and help create a support network.

And against the impossible noise, they somehow keep their composure: dealing with each child as if they were the only child in the world. What they do is extraordinary. Formerly a partner of one of Australia’s largest law firms, I know all about exhausting hours: I can assure you nothing rates with the exhaustion these educators experience.

These early learning professionals (and their management) should be celebrated and thanked; not gaslighted. And certainly not gaslighted by the very Minister and department who have functional responsibility to educate and support them and to supervise their continuing education (under NSW Education Standards Authority (NESA)).

### **My request of you: honour these professionals & reward them with an independent inquiry**

Mr Premier, whatever may be the outcome of next week’s planned strike, I urge you to:

1. publicly acknowledge the extraordinary efforts of our early learning professionals and their employers, who together have miraculously kept this vital sector of the economy operating since February 2020 (despite the refusal of Minister Mitchell and her department to relax any of their oppressive rules);
2. exempt all early learning professionals from all fees payable for a course required for NESA accreditation; and
3. commission and announce an independent “root & branch” inquiry – not involving Minister Mitchell or NSW Education – into the changes needed to make NSW’s Early Childhood laws:
  - comply in all respects with your Government’s Better Regulation Principles
  - relieve the administrative burden on our professionals so they may teach and care for children free from excessive red tape and free from the pressures of an impossibly subjective “assessment and rating” regime.

### **Why exclude Minister Mitchell and NSW Education from the root & branch inquiry?**

Good governance demands that those who contributed to – or failed to exercise their functional responsibility to fix – a problem, should never be involved in any review of their own failure. If it is not self-evident from the above points, please refer to my letter of 11 February and the enclosed addendum as to why Minister Mitchell and her department cannot possibly be involved in the inquiry requested above.

Yours sincerely



JBOwens, Director & Legal Representative  
Enc: Addendum

**NSW's Irrational & Counterproductive Childcare Laws  
Devised & administered by NSW Education**

**Introduction**

1. Fundamental principles of good governance demand those who contributed to – or failed to exercise their functional responsibility to fix – a problem, should never be involved in any review of their own failure.
2. Set out below are some of the facts showing how NSW Education & Minister for Education & Early Learning (Sarah Mitchell) have brought about the crisis that now grips the NSW Early Childhood sector.
3. The crisis comprises alarming levels of exhaustion, demoralisation & burnout amongst staff, management & small business owners alike; the most costly childcare fees in Australia & an insoluble shortage of qualified staff.
4. In late January 2020, I pleaded with then Premier Gladys Berejiklian to tell Minister Mitchell and her department to focus on the dangers of a worrying new virus from China instead of bombarding us with compliance material.
5. Since 2020, we (like all centres) have been entirely preoccupied with finding staff, staying open and keeping the children, staff and families safe. And yet throughout this pandemic – as we struggle every day to stay open – we have continued to receive a bombardment of emails from NSW Education on general compliance issues.
6. NSW Education continues its unannounced spot-audits, even as no centre has spare staff to meet with the officers. It continues its discredited/oppressive Assessment & Ratings regime (awarding higher ratings to mega-centres in high-rise buildings than it awards to family-run cottages in gardens and with far superior teacher/child ratios).
7. Only recently has Minister Mitchell and NSW Education again refused our repeated requests that they allow a centre – unable to find relief staff to meet the current tough NSW ratios – to stay open if they can meet the old staffing ratios (that operated safely for decades). Centres have been told they must close until they can find the staff. We need to reflect on the absurdity of this: families and children are to be denied any care and education whatsoever because of NSW Education's obsession with ratios that do not even apply in the other States and which do not even apply (in the case of teacher ratios) to the mega-centres inside NSW.
8. For years, Minister Mitchell & her department have ignored the repeated pleas from me and others that they address the issues crippling our sector. And their refusal to relax any of their oppressive rules during the pandemic shows them to be detached from reality. They also fail to realise they have a responsibility to provide a viable sector not just to educate/care for children but also to allow NSW parents to go to work each day.

**Some history**

9. Small family-run businesses provide circa 60% of childcare/early learning in NSW. This dominance is a direct result of the policy adopted years ago by Labor luminary Peter Walsh that the Commonwealth should restrict itself to providing fee relief whilst leaving the costly task of building to the private sector. He expressed this preference to a friend of mine after thinking his government had just been price-gouged on the cost of building a new centre.
10. In contrast to Mr Walsh's thinking, many of the current & past controlling minds of NSW Education (& its predecessor in childcare administration Department of Community Services ("DOCS")) are/were known to be implacably opposed to an ongoing private childcare sector in NSW. It is most unfortunate these controlling minds do not share the same powers of rational thinking as were always displayed by Mr Walsh.
11. This would explain why NSW Education & Minister Mitchell have repeatedly ignored the sector's calls for sensible reform. Countless rational and compelling submissions have been made by representatives of the private sector.
12. The current childcare laws were enacted pursuant to a 2009 COAG Agreement. The Agreement required NSW Education/ interstate counterparts to come up with a consistent national law to assure "Quality" and reduce the regulatory burden on childcare centres. Instead, they gave us 1500 pages of laws/guidelines.
13. There is no consistent "National" law. NSW Education refused to accept the "Quality" rules of the other States. It imposed its own rules on elements like teacher/child ratios. These elements are major drivers of costs.
14. There is no evidence NSW Education's insistence on its own tougher rules has produced better outcomes when compared to the outcomes in the other States. In fact, NSW Education accepts that interstate childcare centres (operating on less demanding rules) are achieving the same or higher quality ratings as are achieved in NSW.
15. NSW Education's intransigence condemns NSW families to the most expensive childcare fees in Australia.

**Minister Mitchell & NSW Education pander to the NSW corporate mega-centres**

16. After insisting on such stricter rules for NSW, NSW Education then exempted NSW big businesses from the teacher/child ratio rule. Mega-centres for well over 100 children are now common: they are required to employ no

more than the four teachers a smaller centre caring for 80 children must employ. So, NSW Education insists that an 80-place centre operate on a teacher ratio of 4:80 (1:20) but then allows a 160, 240 or 320 place mega-centre to operate on a teacher ratio of 4:160 (1:40), 4:240 (1:60) or 4:320 (1:80).

17. NSW Education, after saying teacher numbers are the main driver of quality then has the audacity to award those mega-centres “Quality” ratings equal to/exceeding those achieved by the small centres with far superior teacher ratios. NSW Education also provides leniency to mega-centres on the “Quality” indicators “natural environment”, “outdoor space”, “ventilation and natural light”, especially for high-rise mega-centres.
18. My friends in the Liberal Party tell me even though these big corporates are private, NSW Education would much prefer the administrative ease of regulating a smaller concentrated market than countless small family-run centres. This rang true when years ago the then CEO of NSW Early Childhood, in a public meeting, rejected my “baseless assertion” that families generally prefer the services of small family-run centres to the impersonal mega-centres.

### **Imposing a level of micromanagement that would be rejected by every other profession**

19. NSW Education imposes a level of micromanagement on childcare professionals that would be rejected by every other profession in Australia. It is illogical for NSW Education to demand childcare centres employ university qualified teachers and then micromanage them as if they were unqualified. A fortiori where NSW Education is itself responsible for the quality of the teaching courses and ongoing accreditation.

### **Common-sense rules rejected by NSW Education**

20. NSW Education rejected the sensible notion adopted in other States that teachers need only attend for core teaching hours. In NSW, teachers must attend “at all times”, even when children are sleeping/eating.
21. Queensland has a common-sense provision that has been rejected in NSW: the staffing/child ratios will not be breached if a staff member takes a “rest pause” or is away for a “short absence”.

### **Coolangatta - Tweed Heads: two centres - opposite sides of road - same facts different outcomes**

22. To better appreciate the absurd & illegitimate nature of the current National Ratings & Assessment regime, consider the position applying to two centres on difference sides of the one street in Coolangatta/Tweed Heads.
23. Assume they are run in an identical fashion, including with staff and teacher numbers and core teaching hours as per the rules that apply in Queensland, not NSW. Assume the total staffing pool is shared between the two centres to ensure perfect consistency in the operations of both centres.
24. The Coolangatta centre achieves an “Exceeding” rating under Queensland’s “National” Law. But the Tweed Heads centre **must** be given a rating under the NSW Law of “Significant Improvement Required” or “Working Toward” because the Tweed Heads centre has failed to comply with the higher staff ratio and teacher number obligations. Indeed, the Tweed Heads centre – identical to its twin across the road – is at risk of prosecution.

### **What some parents think**

25. Some parents were good enough to attend one of my meetings with former Premier Berejiklian. On being told how staff are spending 30-40% of their time on NSW Education’s red-tape, they told Gladys:

*We pay our fees so staff can look after our children, not fill in forms or inputting data into a computer.*

26. Another parent told Gladys:

*This is absurd. We send our kids to childcare to let us go to work knowing they are SECURE, LOVED & STIMULATED. Childcare is not rocket science.*

### **Community centres’ staff share the pain but are too scared to speak out**

27. At a “Roadshow” conducted by NSW Education at Hornsby RSL on 18 September 2018, I challenged (from the floor) the NSW Education Executives on why they insist on such a demoralising, counterproductive regime.
28. I told those Executives that in my decades of experience as a lawyer running major banking compliance litigation back in the 1990s, I had never seen such an oppressive regime imposed on a profession. I told the “Roadshow” that no other profession would tolerate the level of micromanagement imposed on the early childhood profession.
29. The audience responded with heartening applause. An Executive responded that NSW Education would consider my points. Those same Executives were clueless when I alerted them to the various differences that exist in the supposed “National” law from jurisdiction to jurisdiction. Nor were they able to respond in a coherent way when I challenged them on the current discrimination within NSW in favour of the mega-centres on teacher numbers.
30. At the morning tea and lunch breaks, many attendees thanked me for my comments and confirmed their demoralisation from the oppressive level of “micromanagement.” All but one who approached me were from the community sector. Some told me they dared not speak out because their funding comes from the Government.

JBOwens