



Mr [REDACTED]
Nominated Supervisor
Harrison OSHClub

Email: [REDACTED]

Dear Mr [REDACTED]

Show Cause Notice – Potential Compliance Action

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. As you are aware, the Authority is the regulator of education and care services in the ACT and has the responsibility of monitoring and enforcing compliance with the *Education and Care Services National Law* (the *Law*). One of the Authority's roles is to investigate suspected offences under the *Law*.
2. Authorised Officers are currently investigating an allegation that an educator, known to be [REDACTED] inappropriately disciplined a child being educated and cared for on 28 June 2022 by holding a child's wrists tightly down on a table, restricting the child's movement at Harrison OSHClub SE-40013142 (the Service) operated by OSHCLUB PTY LTD PR-40004402 (the Provider).
3. Authorised Officers are also currently investigating allegations that educators are not being inducted by the Service and failed to take reasonable steps to protect children from harms and hazards likely to cause injury or illness.
4. The Authority's records indicate that you were the nominated supervisor at the relevant time, having commenced in that role on 22 May 2018 and left on 10 October 2022.
5. Web addresses to the *Law* and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this notice.
6. Authorised Officers have now finished obtaining evidence from other sources (unless further lines of enquiry emerge) and the Authority has determined that there is a case to answer for you, as the Nominated Supervisor, regarding suspected offences. However, the Authority's investigation is not complete until the Provider has had an opportunity to respond to the allegation/s and evidence obtained by the Authority. This is the reason for sending this Show Cause Notice (Notice) to you.
7. Detailed instructions of how to respond appear at the end of this Notice.
8. If substantiated, the allegation may constitute an offence under sections 166 and 167 of the *Law*. If, after considering all available evidence, the Authority finds any offences are substantiated, it will need to consider whether compliance action is required.

9. The Authority considers many factors when determining appropriate compliance action, the focus being on ensuring future compliance and improved outcomes for children, rather than punishment. Further details regarding potential compliance actions appear at the end of this Notice.

Background

10. On 30 June 2022, the Authority received a notification from the Provider alleging that on 28 June 2022 an educator, known to be [REDACTED], held a child's wrists tightly down on a table, restricting the child's movement. Refer Attachment A for documentation relevant to the notification.
11. On 1 July 2022, the Authority received additional information from the Provider, including a notification of stand down issued to [REDACTED] dated 1 July 2022. Refer Attachment B.
12. On 13 July 2022, the Authority received three emails containing the Providers internal investigation. Refer Attachment C.
13. Due to the risk to children if inappropriately disciplined, the Authority determined to investigate the allegation.

Allegation One and Two – Section 166 and 167 of the Law

14. It is alleged that, on 28 June 2022, you, as the Nominated Supervisor, failed to ensure that no child being educated and cared for by the service is subjected to any discipline that was unreasonable in the circumstances in that a child, known as [REDACTED], was disciplined by way of holding of a wrist down on a table by Ms [REDACTED] in contravention of section 166(2) of the Law.
15. It is alleged that, by failing to ensure that no child being educated and cared for by the service is subjected to any discipline that was unreasonable in the circumstances on 28 June 2022, you, as the Nominated Supervisor, has failed to take reasonable steps to protect children from harms and hazards likely to cause injury or illness, in contravention of s167(2) of the Law.
16. It is alleged that, by failing to ensure that educators were properly inducted at the Service, you, as the Nominated Supervisor, has failed to take reasonable steps to protect children from harms and hazards likely to cause injury or illness, in contravention of s167(2) of the Law.

Legislation Relevant to Allegations

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

Section 166(2) of the Law - Offence to use inappropriate discipline

A nominated supervisor of an education and care service must ensure that no child being educated and cared for by the service is subjected to—

- (a) any form of corporal punishment; or
- (b) any discipline that is unreasonable in the circumstances.

Penalty: \$10 000

Section 167(2) of the Law - Offence relating to protection of children from harm and hazards

A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

Penalty: \$10 000

Evidence Relevant to Allegations

18. Records from the National Quality Authority ITS database indicate that you were the nominated supervisor at the time, having commenced in that role on 22 May 2018. Refer Attachment D.
19. As part of the investigation, the Authority obtained documents from the Provider, exercising powers under section 215 of the *Law*.
20. Records produced by the Provider supported the following:
 - a) The Service was operating on 28 June 2022;
 - b) [REDACTED] was an educator at the Service and working directly with children on 28 June 2022;
 - c) [REDACTED] was enrolled at the Service and signed into the Service on 28 June 2022;
 - d) Staff induction for multiple educators but not all.

Refer evidence at Attachment E.

21. As part of the investigation, the Authority obtained statements from witnesses, relevant excerpts from which are included below. Please note that all witness statements were obtained exercising powers under section 215 of the *Law*. To clarify, all witnesses were compelled by notice to attend before Authorised Officers and provide evidence. Failure to comply is an offence under the *Law*, as is obstructing or hindering the Authority's investigation.
22. Relevant extracts from Witness A's statement are:

- a. [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

23. Relevant extracts from Witness B's statement are:

a. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24. Relevant extracts from Witness C's statement are:

a. *On commencement of employment at the Service I did not receive an induction. I was*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Contraventions Supported by Allegations

25. Evidence gathered appears to support contraventions of section 166(2) and 167(2) of the *Law*.

Fitness and Propriety as Nominated Supervisor

26. Regulation 117C provides some guidance on minimum requirements for a nominated supervisor, being that they must:

- a. be over 18 years of age;
- b. have adequate knowledge and understanding of the provision of education and care to children; and

- c. have the ability to effectively supervise and manage an education and care service.
27. The concept of fitness and propriety is not fixed. It is dependent on context and requirements of the particular position and may change over time to meet social and political expectations.
 28. At minimum, fitness and propriety includes honesty, knowledge and ability.
 29. Nominated supervisors have extensive responsibilities under the *Law*, relating to the broad areas of supervision, staffing, protection from harm and hazards, and educational programs. Specific obligations are contained in both the *Law* and the *Regulations*. Accordingly, to be a fit and proper person to be appointed as nominated supervisor, the person must be honest, have a deep knowledge and understanding of the National Quality Framework (including compliance responsibilities), and also possess the ability to manage educators and any other staff, service premises and relationships with families.
 30. During the course of the investigation, evidence gathered included documentation indicating that you as nominated supervisor, did not ensure that no child being educated or cared for by the service was subjected to any discipline that was unreasonable in the circumstance.
 31. This evidence raises a concern about your ability to manage and supervise an education and care service.
 32. The purpose of this Show Cause Notice is to provide you with an opportunity to respond to the evidence outlined above, and to specifically address the point of your fitness and propriety to be a nominated supervisor.

Potential Compliance Action

33. The Authority reiterates that no decision has been made at this time – this letter is a step in the investigation process. However, procedural fairness requires that the Authority take this opportunity to advise you of potential compliance actions, if any offences are substantiated and/or the Authority finds that you do not meet the fitness and propriety requirements to be a nominated supervisor. Potential compliance actions are under Part 7 of the *Law*, and include:
 - a. Non-statutory action such as a formal caution letter;
 - b. Enforceable undertaking under section 179A of the *Law*; or
 - c. Prohibition from acting in a role as Nominated Supervisor.
34. Relevant legislation for enforceable undertakings and partial prohibition appears below. An enforceable undertaking may include requirements such as undergoing additional training, having a mentor, advising the Authority of any proposed change in employment. A partial prohibition only applies to the role of nominated supervisor and not to the education and care sector as a whole. It may prevent you from being in a role as nominated supervisor if the Authority finds that you are not fit and proper, or it may place conditions on you being in such a role if you are fit and proper but do not possess all the required skills and knowledge. It is not always permanent, and the partial prohibition must be cancelled by the Authority if it is satisfied that there is not a sufficient reason for the it to remain in force.

Section 179A - Enforceable undertakings

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

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

- (3) The Regulatory Authority may give a prohibition notice to a person to –
 - (a) Prohibit the person from being a nominated supervisor if the Regulatory Authority considers the person is not a fit and proper person to be nominated as a nominated supervisor of a service; or
 - (b) Impose one or more conditions on the nomination of the person as a nominated supervisor that the Regulatory Authority considers appropriate, if the Regulatory Authority considers the person is a fit and proper person to be nominated as a nominated supervisor of a service subject to those conditions.

Right of response

35. As mentioned previously, this letter is your opportunity to respond to the allegations and evidence set out in this Notice, in addition to the question of fitness and propriety. You may, within 14 days of receiving this Notice, make a written submission for the Authority's

consideration in deciding if any offences are substantiated and, if so, whether any compliance action should be taken.

36. At Attachment F to this Notice is a '4 Step Guide to Responding to a Show Cause Notice' to assist in the development of your submission. Please direct your written submission via email to Vittorio.Colosimo@act.gov.au or by post to

Children's Education and Care Assurance
Attention Vittorio Colosimo
GPO Box 158, Canberra ACT 2601.

Caution

37. I am informing you that the excerpts of statements of witness taken for the purpose of the Authority's investigation are included in the interests of procedural fairness. The statements taken during the investigation are protected disclosures under section 296 of the *Law*.
38. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
39. Please also be aware that it is an offence under section 295 of the *Law* to provide the Authority with false or misleading information or documents.
40. The *Law* applies to you as a nominated supervisor and to any service you are engaged at. The *Law* is applied in the ACT by the *Education and Care Services National Law (ACT) Act 2011* <http://www.legislation.act.gov.au/a/2011-42/default.asp>.
41. The *Law* and *Regulations* can be viewed at: <http://www.acecqa.gov.au/national-law>, and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
42. Should you have any questions about this Show Cause Notice please contact Senior Investigator Vittorio Colosimo on email Vittorio.Colosimo@act.gov.au.

Yours sincerely



Jo Williams
Director
Education and Care Regulation and Support
ACT Education Directorate

21 April 2023