

Ms [REDACTED]
Nominated Supervisor
ACT Education Directorate
RE: Palmerston District Primary School – Preschool Unit

Email: [REDACTED]

Dear Ms [REDACTED]

Show Cause Notice – Proposed Compliance Action

1. Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children’s Education and Care Assurance, recently investigated complaints alleging that the *Education and Care Services National Law (ACT) (the Law)* was contravened at Palmerston District Primary School – Preschool Unit SE-00011217 (the Service), operated by ACT Education Directorate PR-00006465 (the Provider).
2. 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.
3. This show cause notice offers you the opportunity to respond to the allegations prior to any determination being made. If any or all of the allegations are substantiated, I will be considering compliance action based on suspected contraventions of the *Law* and the *Regulations* regarding failure to take reasonable precautions to protect children from harm and from hazards likely to cause injury, and failure to notify prescribed circumstances to the Authority.
4. As a delegate of the Authority, I would be considering compliance action under Part 7 of the *Law*, further details of which appear below.

Grounds for issuing Show Cause for Compliance Action

5. The Authority’s records indicate that you commenced in your role as Nominated Supervisor of the Service on 29 April 2019 and have continued in that role to date.
6. On 15 February 2021, the Authority was notified by phone of a complaint regarding conduct of an educator towards children. On 17 February 2021, the Provider formally notified the Authority via the NQAITS Portal of the complaint that an educator at the Service had interacted inappropriately with multiple children on 8, 9 and 10 February 2021 (NOT-40511420). Refer [Attachment A](#) for a copy of the notification and follow-up documents and emails with the Authority.
7. Due to the risk of harm to children caused by inappropriate interactions, the Authority conducted an investigation.

8. The Authority is considering compliance action based on evidence gathered which indicates that there have been contraventions of the *Law* and *Regulations*. Specifically, the evidence obtained during the investigation suggests two separate allegations of failing to take reasonable precautions to protect children from harm and from hazards likely to cause injury.

Allegation One

9. It is alleged that, between 8 and 10 February 2021 (inclusive), you in your role as Nominated Supervisor, failed to take reasonable precautions to protect children being educated and cared for by the Service from harm or hazard likely to cause injury by failing to ensure that interactions between educator [REDACTED] and multiple children met the requirements of Regulation 155, in contravention of section 167(2) of the *Law*.

Legislative Provisions Relevant to Allegation One

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 cared for by the service from harm and from any hazard likely to cause injury.

Regulation 155 – Interactions with children

An approved provider must take reasonable steps to ensure that the education and care service provides education and care to children in a way that –

- (a) encourages the children to express themselves and their opinions; and
- (b) allows the children to undertake experiences that develop self-reliance and self-esteem; and
- (c) maintains at all times the dignity and rights of each child; and
- (d) gives each child positive guidance and encouragement toward acceptable behaviour; and
- (e) has regard to the family and cultural values, age, and physical and intellectual development and abilities of each child being educated and cared for by the service.

Evidence Relevant to Allegation One

10. On 23 February 2021, a notice, allowable under section 215 of the *Law*, was issued to the Provider requiring production of documents by 2 March 2021.
11. A partial response was received on 10 March 2021, which was followed up by the Authority. The Provider then obtained the required prescribed documents and produced them on 12 March 2021.
12. Documents gathered included:
- a) child attendance records and working directly with children records;

- b) staff records;
 - c) relevant policies and procedures including “Palmerston District Primary School Preschool Unit Interactions with Children Guidelines”, reflecting the requirements of Regulation 155 (refer Attachment B).
13. An induction record was requested for [REDACTED] and a list of internal training courses was provided. Refer Attachment C for 2021 staff record and list of internal training courses.
 13. During the investigation the Authority obtained statements from numerous witnesses including [REDACTED], the [REDACTED] who lodged the complaint with yourself.
 14. The Authority advises that all witness evidence in the investigation was 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.
 15. Please refer to Attachment D for a copy of [REDACTED]’s statement, redacted where appropriate to remove irrelevant or personal information.
 16. Relevant statement extracts from other witnesses are included below, with irrelevant or personal information redacted.
 17. Relevant extracts from Witness A are:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

█ [REDACTED]

█ [REDACTED]

18. Relevant extracts from Witness B are:

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

19. Relevant extracts from Witness C are:

a. [REDACTED]

b.

[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

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[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

■

[Redacted text block]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

22. The allegations in [REDACTED]'s statement were assessed with regards to compliance with Regulation 155. Refer Attachment E for analysis table.
23. The Authority considers that ongoing or multiple instances of interactions failing to meet the requirements of Regulation 155 may constitute an offence under section 167, which is both a provider and nominated supervisor offence under the *Law*.
24. Staff records produced by the Provider support that [REDACTED] has been employed at the Service since 29 November 2017, indicating that the matters alleged may be consistent with embedded accepted practice at the Service.

Contravention Supported by Allegation One

25. Evidence gathered relevant to Allegation One includes witness statements and documentation provided under 215 Notice.
26. Evidence gathered relevant to Allegation One appears to support the following contravention of the *Law* by you as Nominated Supervisor:
 - a. That, between 8 and 10 February 2021 (inclusive), you in your role as Nominated Supervisor failed to take reasonable precautions to protect children being educated and cared for by the Service from harm or hazard likely to cause injury by failing to ensure that interactions between educator [REDACTED] and multiple children met the requirements of Regulation 155, in contravention of section 167(2) of the *Law*.

Allegation Two

27. It is alleged that between 1 February 2021 and 1 April 2021 (inclusive), you as Nominated Supervisor failed to take reasonable precautions to protect children from harm and hazards in that insufficient strategies were implemented in relation to support of [REDACTED] (enrolled in Class PSP), resulting in multiple circumstances posing a risk to the health, safety and wellbeing of children, particularly [REDACTED] enrolled in Class PSP), in contravention of section 167(2) of the *National Law*.

Legislative Provisions Relevant to Allegation Two

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 cared for by the service from harm and from any hazard likely to cause injury.

Evidence Relevant to Allegation Two

14. Due to information received during the course of the investigation which indicated further suspected offences, on 28 May 2021 a supplementary notice, allowable under section 215 of the *Law* (Supplementary 215 Notice), was issued to the Provider requiring production of documents by 11 June 2021. Documents were produced to the Authority on 4 June 2021.
15. The documents requested included specific documentation regarding [REDACTED]. The documents included:
 - a) a behaviour log recording brief descriptions of incidents (Refer Attachment F);
 - b) three incident reports regarding an illness and two minor accidental injuries to [REDACTED]
[REDACTED]
 - c) one SAS report regarding an incident of 31 March 2021 in which a toy was thrown at a staff member;

d) An ILP and Positive Behaviour Support plan which appeared to be finalised on 1 April 2021 (Attachment G);

16. On 15 June 2021, clarification was requested regarding the response to the Supplementary 215 Notice, which was received on 16 June 2021. That email clarified that no reports existed for the incidents outlined in the behaviour log. Refer Attachment H.

28. Relevant statement extracts from witnesses are included below, with irrelevant or personal information redacted where appropriate.

29. Relevant extracts from Witness A are:

■ [REDACTED]

30. Relevant extracts from Witness B are:

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

31. Relevant extracts from Witness C are:

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Contravention Supported by Allegation Two

- 33. Evidence gathered relevant to Allegation Two includes witness statements and documentation provided under 215 Notice and Supplementary 215 Notice.
- 34. Evidence gathered relevant to Allegation Two appears to support the following contravention of the *Law* by you as Nominated Supervisor:
 - a. That between 1 February 2021 and 1 April 2021 (inclusive), you in your role as Nominated Supervisor failed to take reasonable precautions to protect children from harm and hazards in that insufficient strategies were implemented in relation to the support of [REDACTED] (enrolled in Class PSP), resulting in multiple circumstances posing a risk to the health, safety and wellbeing of children, particularly [REDACTED] (enrolled in Class PSP), in contravention of section 167(1) of the *National Law*.

Fitness and Propriety as Nominated Supervisor

- 35. Nominated supervisors have extensive obligations under the *National Law*, relating to the broad areas of supervision, staffing, protection from harm and hazards, and educational programs. Specific obligations are contained in both the *National Law* (for example, section 167(2)) and within the *Regulations*. Accordingly, to be a fit and proper person to be appointed as nominated

supervisor, the person must have deep knowledge and understanding of the NQF, together with management capability.

36. 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.
37. The concept was described in *Australian Broadcasting Tribunal v Bond*¹ as follows:

The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from context, from the activities in which the person is or will be engaged and the ends to be served by those activities.
38. At minimum, fitness and propriety includes honesty, knowledge and ability.²
39. Accordingly, to be a fit and proper person to be appointed as nominated supervisor, the person must 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.
40. Under Regulation 117C, the minimum requirements for a nominated supervisor include:
 - a. having adequate knowledge and understanding of the provision of education and care to children; and
 - b. have the ability to effectively supervise and manage an education and care service.
41. During the course of the investigation, evidence gathered included witness statements regarding interactions between [REDACTED] [REDACTED] and children which did not appear to meet the requirements of Regulation 155. Witness statements and documents obtained indicated concerning circumstances posing a risk to the health, safety and wellbeing of children, particularly with respect to [REDACTED] [REDACTED]. Evidence indicated that you may have been unaware of what was taking place and no support plans or any other additional risk minimisation strategies were implemented or considered until the end of term one.
42. This evidence raises questions of fitness and propriety to undertake the role of nominated supervisor. As a delegate of the Authority, I am considering compliance action under Part 7 of the *Law*, including prohibition from being a nominated supervisor or an enforceable undertaking.
43. 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.

¹ (1990) 170 CLR 321 per Toohey and Gaudron JJ.

² *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156 per Dixon CJ, McTiernan and Webb JJ.

Proposed Compliance Action

44. The Authority is proposing compliance action under Part 7 of the *Law*, should the Authority find that the Allegation is substantiated on the balance of probabilities. Potential compliance actions include:
- a. Prohibition from acting in a role as Nominated Supervisor;
 - b. Enforceable undertaking under section 179A of the *Law*;
 - c. Non-statutory action (caution).

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

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

Regulation 117C – Minimum requirements for a nominated supervisor

For the purposes of section 161A of the *Law*, the prescribed minimum requirements for nomination of a person as a nominated supervisor of an education and care service are that the person must –

- (a) have attained the age of 18 years; and
- (b) have adequate knowledge and understanding of the provision of education and care to children; and
- (c) have the ability to effectively supervise and manage an education and care service.

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.

Right of response

45. You have a right to respond to the allegations set out in this notice. You may, within 14 days of receiving this letter, make a written submission for the Authority's consideration in deciding if a compliance action should be taken. Should you require additional time within which to respond, a formal application for extension should be directed to the contact officer.
29. At Attachment I 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 at tanya.masterman@act.gov.au or by post to Children's Education and Care Assurance, Attention Tanya Masterman, GPO Box 158, Canberra ACT 2601.

Caution

30. I am informing you that statements and excerpts of witness accounts taken for the Authority's investigation are included in the interests of procedural fairness. The statements taken during the investigation and the excerpts provided for your consideration in the show cause process are **protected disclosures** under section 296 of the *Law*.
31. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against them in reprisal.
32. 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.
33. The *Law* applies to you as a nominated supervisor and any service you are employed 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>.

34. 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>
35. Should you have any questions about this Show Cause Notice please contact Tanya Masterman on email tanya.masterman@act.gov.au

Yours Sincerely



Clare Brookes
Senior Director
Children's Education and Care Assurance
Education and Care Regulation and Support
ACT Education Directorate

11 August 2021