



Mr [REDACTED]

Email: [REDACTED]

Dear Mr [REDACTED]

### DECISION TO ISSUE PROHIBITION NOTICE

1. As a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to be involved in the provision of education and care to children.
2. The Authority has conducted enquiries in response to allegations of inappropriate conduct by yourself in the presence of children, whilst you were employed as an educator at Snow Gum Early Childhood Learning Centre SE-00009835 (the Service), operated by [REDACTED] Consulting Pty Ltd PR-00005825 (the Provider).
3. Web addresses to the *Education and Care Services National Law Act (ACT) (the Law)* and the *Education and Care Services National Regulations (the Regulations)* are provided for your convenience at the end of this Decision.

#### Facts

4. On 13 November 2020, the Authority received a notification from the Provider regarding inappropriate conduct by yourself in the presence of children, including yelling, slamming doors, and throwing objects in anger.
5. The information gathered suggested conduct that, although inappropriate, was not disciplinary in nature and the Authority determined to make inquiries and seek evidence from witnesses on a voluntary basis.
6. During the course of obtaining voluntary statements, information was disclosed to the Authority that formed reasonable grounds for suspicion of an offence of inappropriate discipline under section 166(3) of the *Law*.
7. Due to the risk of harm to children when subjected to inappropriate discipline, the Authority determined to conduct a formal investigation.

8. On 4 February 2021, the Authority issued you with a Show Cause Notice (the Notice), including attachments, and advised that the Authority was considering whether you should be prohibited from:
  - i. Providing education and care to children for an education and care service;
  - ii. Being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service; and/or
  - iii. Carrying out any other activity relating to an education and care service.
9. Refer Attachment A for a copy of the Notice.
10. On 4 February 2021, you responded, via email, to the Notice. Refer Attachment B.
11. On 5 February 2021, the Authority wrote to you, via email, advising that in the absence of any further submission from you within the time specified in the Notice, the Authority may proceed to take compliance action. Refer Attachment C.
12. As of the date of this Decision, the Authority has no record of any further submission from you in relation to the Notice.

#### Allegations

13. It is alleged that, between 11:00 and 11:30am on Thursday 5 November 2020, whilst educating and caring for children at the Service, you restrained [REDACTED] a child being educated and cared for by the Service, by sitting on the floor with [REDACTED] back to your chest and both of your arms wrapped around his chest, whilst [REDACTED] was distressed and struggling to free himself, being discipline that was unreasonable in the circumstances and in contravention of section 166(3) of the Law.
14. I am satisfied that on the balance of probabilities, there is reasonable, reliable, and credible evidence to substantiate this allegation.
15. During initial inquiries made on a voluntary basis, the Authority obtained numerous statements which indicated inappropriate conduct by yourself in the presence of children, involving displays of uncontrolled anger, including yelling and physical aggression towards inanimate objects.
16. I am satisfied that on the balance of probabilities, there is reasonable, reliable, and credible evidence to substantiate this allegation, which further supports my determination that there may be an unacceptable risk of harm to a child or children if you are allowed to be involved in the provision of education and care.

## Law

17. The evidence obtained during the Authority's enquiries into the matter, and as provided to you via the Notice, engages the following sections of the Law:

### Section 166 of the Law – Offence to Use Inappropriate Discipline

- (3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to-
- (a) any form of corporal punishment; or
  - (b) any discipline that is unreasonable in the circumstances.

### Section 182 of the Law – Grounds for issuing prohibition notice

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
- (a) To remain on the education the education and care service premises; or
  - (b) To provide education and care to children.
- (2) For the purpose of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following-
- (a) An approved provider;
  - (b) A nominated supervisor;
  - (c) An educator;
  - (d) A family day care educator;
  - (e) An employee;
  - (f) A contractor;
  - (g) a volunteer;
  - (h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service -
- or in any other capacity

### Section 183 of the Law – Show cause notice to be given before prohibition notice

- (1) Before giving a person a prohibition notice, the Regulatory Authority must give the person a notice (a *show cause notice*) –
- (a) stating that the Regulatory Authority proposes to give the person a prohibition notice; and
  - (b) stating the reasons for the proposed prohibition; and
  - (c) inviting the person to make a written submission to the Regulatory Authority, within a stated time of at least 14 days, about the proposed prohibition.

- (2) Subsection (1) does not apply if the Regulatory Authority is satisfied it is necessary, in the interests of the safety, health or wellbeing of a child or children, to immediately issue a prohibition notice to the person.

#### Reasons

18. Having considered the information received and further evidence gathered during subsequent enquiries, I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to provide education and care to children.
19. In deciding if an action should be taken, I have considered all available evidence, your response to the Notice, your regulatory history and, the likelihood of risk to children.

#### Obligations upon Regulatory Authority

20. The starting point for the Authority is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles of the *Law*. Relevant to this decision is the objective at section 3(2)(a), namely:
- ‘To ensure the safety, health and wellbeing of children attending education and care services; ...’
21. The relevant guiding principle at sections 3(3)(a) namely:
- a.) that the rights and best interests of the child is paramount; ...
22. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
- c.) to monitor and enforce compliance with this law;
- d.) to receive and investigate complaints arising under this law.
23. The *Law* works to protect a particularly vulnerable part of our society — children — when they are in the care of people other than their parents or guardians. The *Law* authorises providers and services to participate in a regulated environment and requires those participants to comply with the *Law*.
24. A key object of the *Law* is to protect children in the context of education and care services. The Authority looks to exercise its powers to emphasise and require best practice, as the *Law* requires, which is also inherently in the best interests of children.
25. The *Law* is predominantly a protective law and the exercise of powers in this type of regulatory context is recognised by Courts as not being punitive. In the case of *New South Wales Bar Association v Evatt* [1968] HCA 20 the High Court set out in clear terms that action to enforce professional standards is protective.

## **Regulatory History**

26. In coming to a Decision, the Authority has considered your regulatory history within the ACT. Attached to the Notice was a copy of the Enforceable Undertaking entered into on 25 June 2020, arising from a conviction in the District Court of New South Wales for a charge of common assault against a ten-year-old child. The Authority notes that the Enforceable Undertaking required supervision and prevented you working as a Family Day Care Educator.

## **Decision**

27. Considering the evidence and information available, and the objectives and guiding principles of the *Law*, the Authority has decided to issue you a Prohibition Notice, pursuant to sections 182 and 183(2) of the *Law*, to come into effect on the date of this Decision.
28. This notice prohibits you from providing education and care to children for an education and care service; being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service; or carrying out any activity relating to an education and care service. A copy of the Prohibition Notice is at Attachment D.
29. The Authority may consider a cancellation of the Prohibition Notice in the future based on an application that provides information as set out in Section 186 of the *Law* and *Regulation* 189.
30. Section 186 of the *Law* permits a person for whom the prohibition notice is in force to apply to the Regulatory Authority to cancel the notice.

## **Section 186 of the Law - Cancellation of prohibition notice**

- (1) If the Regulatory Authority is satisfied there is not a sufficient reason for a prohibition notice to remain in force for a person, the regulatory Authority must cancel the prohibition notice and give the person notice of the cancellation.
- (2) A person may for whom a prohibition notice is in force may apply to the Regulatory Authority to cancel the notice.
- (3) The applicant must-
  - (a) be in writing; and
  - (b) include the prescribed information; and
  - (c) be signed by the person.
- (4) The person may state in the application anything the person considers relevant to the Regulatory Authority's decision about whether there would be an unacceptable risk of harm to children if the person were-
  - (a) To remain at the education and care service premises; or
  - (b) To provide education and care to the children.

- (5) The application may include a statement setting out any changes in the person's circumstances since the prohibition notice was given or since any previous application under this section that would warrant the cancellation of the notice.

Regulation 189 Application to cancel prohibition notice

For the purpose of section 186(3) (b) of the *Law*, the following information is prescribed-

- (a) the applicant's name;
- (b) contact details for the applicant, including an address for service of the decision;
- (c) a statement setting out the grounds for the application to cancel the prohibition notice.

Review rights

- 31. In accordance with section 192 of the *Law* a decision to give prohibition notice is a reviewable decision for external review. A person who is the subject of a reviewable decision for an external review may apply to the relevant tribunal or court for a review of the decision. For the ACT this is the ACT Civil and Administrative Tribunal. Such application must be made within 30 days after the day on which you receive the prohibition notice.
- 32. The *Law* applies to you as a former educator. 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>
- 33. The *Law* and *Regulations* may be viewed at: <http://www.acecqa.gov.au/national-law>, and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
- 34. Should you have any questions about this Prohibition Notice please contact Tanya Masterman via email at [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au).

Yours Sincerely



Clare Brookes  
Senior Director  
Children's Education and Care Assurance  
Early Childhood Policy and Regulation  
ACT Education Directorate

10 March 2021



**ACT**  
Government  
Education

Attach A

Mr [REDACTED]

Email: [REDACTED]

Dear Mr [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 (CECA), have recently been notified of an allegation of inappropriate conduct by yourself in the presence of children, whilst you were employed as an educator at Snow Gum Early Childhood Learning Centre SE-00009835 (the Service), operated by [REDACTED] Consulting Pty Ltd PR-00005825 (the Provider).
2. Web addresses for the *Education and Care Services National Law (ACT) (the Law)* and the *Education and Care Services National Regulations (the Regulations)* are provided for your convenience at the end of this notice.
3. I am considering compliance action based on a suspected contravention of the *Law* indicated by evidence gathered during a formal investigation and on additional inappropriate conduct indicated by voluntary statements. The compliance action I am considering is a prohibition notice under Part 7, Division 3 of the *Law*, on the grounds of an unacceptable risk of harm.
4. It is noted that you are currently subject to an Enforceable Undertaking which was agreed to on 25 June 2020. Refer Attachment A for a copy of the Enforceable Undertaking.

**Facts**

5. On 13 November 2020, the Authority received a notification from the Provider regarding inappropriate conduct by yourself in the presence of children, including yelling, slamming doors, and throwing objects in anger.
6. The information gathered suggested conduct that, although inappropriate, was not disciplinary in nature and the Authority determined to make inquiries and seek evidence from witnesses on a voluntary basis.
7. During the course of obtaining voluntary statements, information was disclosed to the Authority that formed reasonable grounds for suspicion of an offence of inappropriate discipline under section 166 of the *Law*.

8. "Discipline" is any strategy employed by an educator with the intention of changing a child's behaviour. Discipline that is inappropriate within the meaning of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child. Examples include yelling, physically dragging a child, unreasonable restraint of a child, using threatening or humiliating language, isolating, or shaming children.
9. Due to the risk of harm to children when subjected to inappropriate discipline, the Authority determined to conduct a formal investigation.

*Allegation of Inappropriate Discipline*

10. It is alleged that, between 11:00 and 11:30am on Thursday 5 November 2020, whilst educating and caring for children at the Service, you restrained [REDACTED] a child being educated and cared for by the Service, by sitting on the floor with [REDACTED] back to your chest and both of your arms wrapped around his chest, whilst [REDACTED] was distressed and struggling to free himself, being discipline that was unreasonable in the circumstances and in contravention of section 166(3) of the *Law*.

*Evidence Relevant to Allegation*

11. During the course of the investigation, the Authority exercised powers under section 215 of the *Law* to obtain documents from the Provider, including working directly with children records and child attendance records.
12. Those records indicate that both you and [REDACTED] were present at the Service at the relevant time. Refer Attachment B for a copy of the records, redacted to remove personal information.
13. The Authority also exercised powers under section 215 of the *Law* to obtain statements from witnesses, relevant excerpts of which are inserted below.
14. Relevant excerpts from Witness A's compulsory statement are:





Refer Attachment C for a copy of the map referred to.

15. Relevant excerpts from Witness B's compulsory statement are:



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Contravention Supported by Allegation

16. The evidence obtained by the Authority supports a contravention of the following section of the Law:

**Section 166(3) – Offence to Use Inappropriate Discipline**

- (3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to-
- (a) any form of corporal punishment; or
  - (b) any discipline that is unreasonable in the circumstances.

**Allegation of Inappropriate Interactions**

17. During initial inquiries made on a voluntary basis, the Authority obtained numerous statements which indicated inappropriate conduct by yourself in the presence of children, involving displays of uncontrolled anger, including yelling and physical aggression towards inanimate objects. Relevant excerpts from voluntary statements are included below.
18. Relevant excerpts from Witness C's voluntary statement are:






19. Relevant excerpts from Witness B's voluntary statement are:





20. Relevant excerpts from Witness D's voluntary statement are:



21. Although the evidence in paragraphs 17-19 above may not support an offence of inappropriate discipline, it indicates a concerning lack of emotional regulation in the presence of children. The behaviour alleged took place in the presence of children, causing them distress and posing a risk of harm to their safety, health and wellbeing. All interactions with children must meet the requirements of Regulation 155, which states:

**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.

**Potential Compliance Action**

22. The compliance action the Authority is considering is:

**Section 182 of the Law – Grounds for issuing prohibition notice**

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
  - a) To remain on the education the education and care service premises; or
  - b) To provide education and care to children.
- (2) For the purposes of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following –
  - a) An approved provider;
  - b) A nominated supervisor;
  - c) **An educator;**
  - d) A family day care educator;
  - e) An employee;
  - f) A contractor;
  - g) A volunteer;
  - h) **A person who was formerly a person referred to in paragraph (a) to (g) in relation to the approved education and care service or in any other capacity.**

**Section 185 of the Law – Content of Prohibition notice**

- (1) A prohibition notice given to a person under section 182(1) must state that the person is prohibited from doing one or more of the following –
  - (a) Providing education and care to children for an education and care service;
  - (b) Being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service;
  - (c) Carrying out any other activity relating to an education and care service.

**Effect of a Prohibition Notice**

23. Should a decision be made to issue a Prohibition Notice pursuant to section 182 of the Law, you would be immediately prohibited from doing one or more of the activities specified in section 185(1) of the Law, which appear above.

**Right of response**

24. You have the right to respond to the information and the proposed action of prohibition on you 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.
25. At **Attachment D** 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 Tanya Masterman at [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au) or by post to:

Tanya Masterman  
Senior Investigator  
Children's Education and Care Assurance  
GPO Box 158  
CANBERRA ACT 2601

**Caution**

26. Please be aware that if you are providing any information to the Authority, it is an offence under section 295 the Law to provide the Authority with false or misleading information or documents.

**Legislation**

27. The Law applies to you as a person engaged or formerly engaged within the early education and care sector.
28. 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>.
29. 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>
30. Should you have any questions about this Show Cause Notice please contact Tanya Masterman by telephone on (02) 6205 2012 or email to [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au).

Yours sincerely,



Clare Brookes  
Senior Director  
Early Childhood Policy and Regulation  
ACT Education Directorate

4 February 2021

**Enforceable Undertaking by the Person –** [REDACTED]

I, [REDACTED], give the following undertaking to the ACT Regulatory Authority, without admission and as an alternative to prohibition under section 184 of the *Education and Care Services National Law 2010*<sup>1</sup> (*National Law*):

1. Within 24 hours of being advised of acceptance of this Enforceable Undertaking by the Regulatory Authority, I will advise the Regulatory Authority of my place of work.
2. I will give the Regulatory Authority seven (7) days' notice of any change in my place of work. This requirement will be reviewed by the Regulatory Authority upon the expiration of twelve (12) months from the date of acceptance of this Enforceable Undertaking.
3. Whilst working in the early education and care sector I consent to the Regulatory Authority disclosing to my employer (and future employers as applicable) a copy of this Enforceable Undertaking and the document at Attachment A which includes details of my conviction.
4. This requirement will be reviewed by the Regulatory Authority upon the expiration of twelve (12) months from the date of acceptance of this Enforceable Undertaking.
5. Until this Enforceable Undertaking is withdrawn by the Regulatory Authority, I will not accept employment or engagement as a Family Day Care Educator.
6. Until this Enforceable Undertaking is withdrawn by the Regulatory Authority, I will not work directly with children in a centre-based service unsupervised.

I am aware of the consequences of failing to comply with this enforceable undertaking, namely:

- *If the Regulatory Authority considers that I have failed to comply with this undertaking it may apply to the Magistrates Court to enforce the undertaking.*
- *If the Court is satisfied that I have failed to comply with a term of this undertaking the Court may make any of the following orders:*
  - *An order directing me to comply with that term of the undertaking;*
  - *An order that I take any specified action for the purpose of complying with the undertaking;*
  - *Any other order that the Court considers appropriate in the circumstances.*
- *If the Court determines that I have failed to comply with a term of the undertaking, proceedings may be brought for any offence constituted by the contravention or alleged contravention in respect of which the undertaking was given.*

<sup>1</sup> Adopted in the ACT by the *Education and Care Services National Law (ACT) Act 2011*.

In accordance with Section 179A and 184(3) of the *National Law*, [REDACTED] gives the written undertaking to take the actions listed to comply with the *National Law*.

Name: [REDACTED]

Position: Educator

Date: 23/06/20

Signed: [REDACTED]

Acceptance of Undertaking by the Regulatory Authority

In accordance with Sections 179A and 184(3) of the *National Law*, the Regulatory Authority accepts the written undertaking that [REDACTED] will take and refrain from actions listed in this undertaking as an alternative to prohibition:

Name: CLARE BROOKES

Position: SENIOR DIRECTOR, FECA

Date: 25/06/20

Signed: [REDACTED]

Important information:  
Effect of this undertaking

- While this undertaking is in force, proceedings may not be brought for any offence constituted by the contravention or alleged contravention in respect of which the undertaking was given.
- If you comply with the requirements of this undertaking, no further proceedings may be brought for any offence constituted by the contravention or alleged contravention in respect of which the undertaking was given.
- You may with the written consent of the Regulatory Authority withdraw or amend this undertaking.
- The Regulatory Authority may withdraw its acceptance of this undertaking at any time and the undertaking ceases to be in force on that withdrawal.
- The Regulatory Authority may publish on its website an undertaking accepted under this section.