

- c) Failure to notify the Regulatory Authority of prescribed matters.

Background Facts

7. On 16 March 2022, the Authority received a notification of complaint relating to the operation of the Service. In particular, allegations of injuries to a child known to be [REDACTED] resulting from inadequate supervision and a failure to take all reasonable precautions to protect children from harms and hazards likely to cause injury. Refer Attachment A for documentation relevant to the notification.
8. On 17 March 2022, the Authority received a Direct Complaint relating to the operation of the Service. This complaint raised allegations that inadequate supervision and a failure to take all reasonable precautions to protect and care for children was causing injury to the complainant's child dating back to October 2021.
9. Due to the risk to children if inadequately supervised and exposed to harms and hazards, the Authority determined to investigate these matters.
10. On 4 April 2022, a notice allowable under section 215 of the *Law* (215 Notice) was sent to the Provider requiring information and documentation to be forwarded to the Authority.
11. On 19 April 2022, the Provider's initial response to the 215 Notice with submission of the following information and prescribed records was received via post:
 - a) Child attendance records and Working Directly with Children records for all children who attended the Service on 22 October 2021, 4 to 14 January 2022 inclusive, 21 January 2022, and 31 January 2022 to 4 February 2022 inclusive.
 - b) Records of responsible persons for 22 October 2021, 4 to 14 January 2022 inclusive, 21 January 2022, and 31 January 2022 to 4 February 2022 inclusive.
 - c) Staff records and contact details for educators working 22 October 2021, 4 to 14 January 2022 inclusive, 21 January 2022, and 31 January 2022 to 4 February 2022 inclusive.
 - d) Policies and procedures in effect from 22 October 2021 to 4 February 2022 in relation to:
 - (i) The administration of first aid as required by Regulation 168(2)(a)(iv);
 - (ii) Incident, injury, trauma and illness procedures as required by Regulation 168(2)(b);
 - (iii) Interactions with children as required by Regulation 168(2)(j);
 - (iv) Dealing with complaints as required by Regulation 168(2)(o); and
 - (v) Nappy change/toileting procedures
 - e) Nappy change records for 4 January 2022 to 14 January 2022 (inclusive)
 - f) Copy of all Incident/Illness/Trauma/Injury records completed by the Service for 22 October 2021, 4 to 14 January 2022 inclusive, 21 January 2022, and 31 January 2022 to 4 February 2022 inclusive.
 - g) Copy of all complaints received by the Service between 22 October 2021 to 4 February 2022.
12. Additional email correspondence was received from the Provider on 3 May 2022, 6 May 2022 and 2 June 2022 to clarify or provide records from the 215 Notice request.

13. The Authority is considering compliance action based on the evidence gathered, that indicate contraventions of the *Law*. Evidence obtained during the investigation gives grounds to support the following allegations:

Allegation One – Failure to adequately supervise children at all times

It is alleged that on, 22 October 2021, the Provider failed to adequately supervise children being educated and cared for by the Service resulting in harm, in that [REDACTED] received an injury to her face that was not witnessed, in contravention of section 165(1) of the *Law*, engaging a contravention of s167(1) of the *Law*.

Allegation Two - Failure to protect children by taking reasonable precautions

It is alleged that, between 4 January 2022 to 14 January 2022, the Provider failed to take reasonable steps to protect a child from harms and hazards, in that [REDACTED], was sent home in a soiled nappy one day and no underwear or nappy another day and pointing to her genital area saying 'ouch' after being advised by her parent of toilet training, resulting in a rash, in contravention of section 167(1) of the *Law*.

Allegation Three - Failure to notify the Regulatory Authority of prescribed matters

It is alleged that, on 4 February 2022 the Provider failed to notify the Authority of a serious incident, as defined by *Regulation 12*, in that [REDACTED] fell from a chair grazing her nose and upper lip which required urgent medical attention to be sought from a medical practitioner, contravening section 174(2) of the *Law*.

Allegation Four – Failure to notify the Regulatory Authority of prescribed matters

It is alleged that, on 4 February 2022, the Provider failed to notify the Authority of a received complaint alleging that the *Law* had been contravened and that a serious incident had occurred on 4 February 2022, contravening 174(2)(b) of the *Law*.

Legislation Relevant to Allegations

Section 165(1) of the *Law* - Offence to inadequately supervise children

The Approved Provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Section 167(1) of the *Law* - Offence relating to protection of children from harm and hazards

The Approved Provider 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, in the case of an individual
\$50 000, in any other case.

Section 174 of *Law* - Offence to fail to notify certain information to Regulatory Authority

(2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider—

(a) any serious incident at the approved education and care service;

- (b) any complaints alleging—
 - (i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or
 - (ii) that this Law has been contravened.

- (c) information in respect of any other prescribed matters.

Penalty: \$4 000, in the case of an individual
\$20 000, in any other case.

- (4) A notice under subsection (2) must be in writing and be provided within the relevant prescribed time to—

- (a) the Regulatory Authority that granted the service approval for the education and care service to which the notice relates

Regulation 176(2)(a)(ii) and (b) – Time to notify certain information to Regulatory Authority

- (2) For the purposes of section 174(4) of the Law, a notice must be provided—

- (a) in the case of a notice under section 174(2)(a)—

- (ii) in the case of any other serious incident, within 24 hours of the incident or the time that the person becomes aware of the incident.

- (b) in case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

Regulation 12(b) and (c) – Meaning of *serious incident*

For the purposes of the definition of *serious incident* in section 5(1) of the Law, each of the following is prescribed as a serious incident -

- (b) any incident involving serious injury or trauma to a child occurring while that child is being educated and cared for by an education and care service –
 - i. which a reasonable person would consider required urgent medical attention from a registered medical practitioner; or
 - ii. for which the child attended, or ought reasonably to have attended, a hospital;
- (c) any incident involving serious illness of a child occurring while that child is being educated and cared for by an education and care service for which the child attended, or ought reasonably to have attended, a hospital.

Evidence Relevant to Allegation One

14. Utilising prescribed records supplied by the Provider, a ratio analysis was conducted for the 22 October 2021. Refer to Attachment B.
15. The Authority noted an internal incident injury trauma and illness dated 22 October 2021 advising of ██████ sustaining an injury, whereby educators stated that they were unsure of what happened'. Refer Attachment C.
16. Through the course of its investigation, the Authority obtained evidence via witness statements with relevant extracts appearing below:
17. Relevant excerpts from Witness A's statement are as follows:

[REDACTED]

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

[REDACTED]

Contravention supported by Allegation One

21. Relevant evidence gathered via the Authority's investigation appear to support the following contraventions of the *Law*:

- a) That on the 22 October 2021, the Provider failed to adequately supervise children being educated and cared for by the Service resulting in harm, in that [REDACTED] received an injury to her face that was not witnessed, in contravention of section 165(1) of the *Law*.
- b) That on the 22 October 2021, the Provider failed to ensure every reasonable precaution was taken to protect children being educated and cared for by the Service from harm and hazard likely to cause injury or illness, in that a child, known as [REDACTED], was not sufficiently supervised and supported, resulting in her sustaining a facial injury unwitnessed by educators, in contravention of section 167(1) of the *Law*.

Evidence Relevant to Allegation Two

22. Utilising prescribed records supplied by the Provider, a ratio analysis was conducted for 4 January 2022. Refer to Attachment B.

23. Utilising prescribed records supplied by the Provider, a nappy change analysis was conducted for [REDACTED] between 5 January 2022 to 14 January 2022. Refer to Attachment E.

24. Through the course of its investigation, the Authority obtained evidence via witness statements with relevant extracts appearing below:

25. Relevant excerpts from Witness A's statement are as follows:

[REDACTED]

Refer relevant email correspondence submitted to the Authority from the complainant at Attachment F.

26. Relevant excerpts from Witness B's statement are as follows:

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

27. Relevant excerpts from Witness C's statement are as follows:

█ [REDACTED]

█ [REDACTED]

Contravention supported by Allegation Two

28. Relevant evidence gathered via the Authority's investigation appear to support the following contraventions of the *Law*:

- c) That, between 4 January 2022 to 14 January 2022, the Provider failed to take reasonable steps to protect a child from harms and hazards, in that [REDACTED], was sent home in a soiled nappy one day and no underwear or nappy another day, resulting in a rash, in contravention of section 167(1) of the *Law*

Evidence Relevant to Allegation Three and Four

29. Utilising prescribed records supplied by the Provider, a ratio analysis was conducted for the 4 February 2022. Refer to Attachment C.

30. The Authority noted an internal incident injury trauma and illness dated 4 February 2022 advising of [REDACTED] sustaining an injury to the face. Refer Attachment G.

31. Through the course of its investigation, the Authority obtained evidence via witness statements with relevant extracts appearing below:

32. Relevant excerpts from Witness A's statement are as follows:

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

- b) That on 4 February 2022, the Provider failed to notify the Authority of a complaint alleging that the *Law* had been contravened and that a serious incident had occurred on 4 February 2022, contravening 174(2)(b) of the *Law*.

Potential Compliance Action

36. 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. Potential compliance actions include:
- a. Non-statutory Administration Action (similar to a caution) with no further action;
 - b. Non-statutory Administrative Action with measures to be taken and evidence produced;
 - c. A Compliance Notice under section 177 of the *Law*, if the Authority is satisfied that the Service is not complying with the *Law*; or
 - d. Conditions on Service Approval under section 55 of the *Law*.
37. In arriving at a decision concerning compliance action the Authority considers many factors, such as severity of non-compliance and the compliance history of the Provider and Service.
38. A compliance notice requires specific steps to be undertaken by the Provider to demonstrate to the Authority how compliance with the *Law* and *Regulations* will be achieved and maintained. It is tailored in each circumstance to address the specific non-compliance identified as a result of the investigation.
39. In your response, you may wish to make suggestions as to how this can be demonstrated. The Authority is not bound by any suggestions but will consider them as part of the Authority's decision-making process. Alternatively (or additionally), the Authority may place a condition on the Service Approval to address the specific non-compliance identified as a result of the investigation.

Right of response

40. As mentioned previously, this letter is your opportunity to respond to the allegations and evidence set out in this Notice. 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.
41. 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 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

42. 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*.
43. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal. 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.
44. The *Law* applies to you as a provider and any service you operate. 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>.
45. 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>
46. Should you have any questions about this Show Cause Notice please contact Senior Investigator Vittorio Colosimo, on telephone (02) 6207 1739 or email
Vittorio.Colosimo@act.gov.au.

Yours sincerely



Janine Fairburn
Assistant Director
Children's Education and Care Assurance
Education and Care Regulation and Support
ACT Education Directorate

25 July 2022