

[REDACTED]
Nominated Supervisor
St John the Apostle OSHClub

Email: [REDACTED]

Dear [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 (CECA). 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 multiple suspected offences at St John the Apostle OSHClub SE-40008497 (the Service) operated by OSHCLUB PTY LTD - PR-40004402 (the Provider).
3. 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.
4. Authorised Officers have obtained evidence from other sources and the Authority has determined that the Provider has a case to answer regarding suspected offences. However, the Authority's investigation is not complete until the Provider has had an opportunity to respond to the allegations and evidence obtained by the Authority.
5. This is the reason for sending this Show Cause Notice (Notice) to you. Detailed instructions of how to respond appear at the end of this Notice.
6. If substantiated, the allegations may constitute offences under sections 165, 167, and 166 of the *Law*. If, after considering all available evidence, the Authority finds any offences are substantiated on the balance of probabilities (or any combination of them) it will need to consider whether compliance action is required.
7. Where offences under the *Law* are substantiated, the Authority considers many factors when determining appropriate 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.

Facts

3. On 28 February 2023, the Authority received a notification (NOT-40828809) from the Provider relating to a parent complaint that a child, [REDACTED] (6 old) was exposed to inappropriate contact from peer. Refer Attachment A.
4. On 15 March 2023, the Authority received a complaint from the parent regarding the notification and other matters relating to the education and care of [REDACTED].
5. Due to the risk of harms and hazards likely to cause injury if children are humiliated, belittled, and inadequately supervised, the Authority determined to investigate suspected offences under section 165, 166 and 167 of the *Law*.
6. Information received during the investigation provided reasonable grounds to suspect further additional offences under section 165, 167 and 166 the *Law*.

First set of grounds – Inappropriate Discipline

Allegation One

7. It is alleged that on 5 or 6 December 2022, the nominated supervisor failed to ensure that no child is subjected to inappropriate interactions amounting to discipline that is unreasonable under the circumstances, in that the nominated supervisor [REDACTED], belittled and humiliated a child, believed to be, [REDACTED], regarding a bathroom incident, contravening s166(2) of the *Law*, raising a further contravention of s167(2) of the *Law*.

Allegation Two

8. It is alleged that during 2022 and 2023, the nominated supervisor subjected children being educated and cared for by the service to inappropriate interactions amounting to discipline that was unreasonable in the circumstances, in that children, believed to be [REDACTED] [REDACTED], on occasion were instructed to sit and remain on a red mat located behind a work desk, and remain there until behaviourally compliant, contravening section 166(2) of the *Law*, raising a further contravention of s167(2) of the *Law*.

Legislation relevant to Allegation One and Two

Section 166(2) - 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

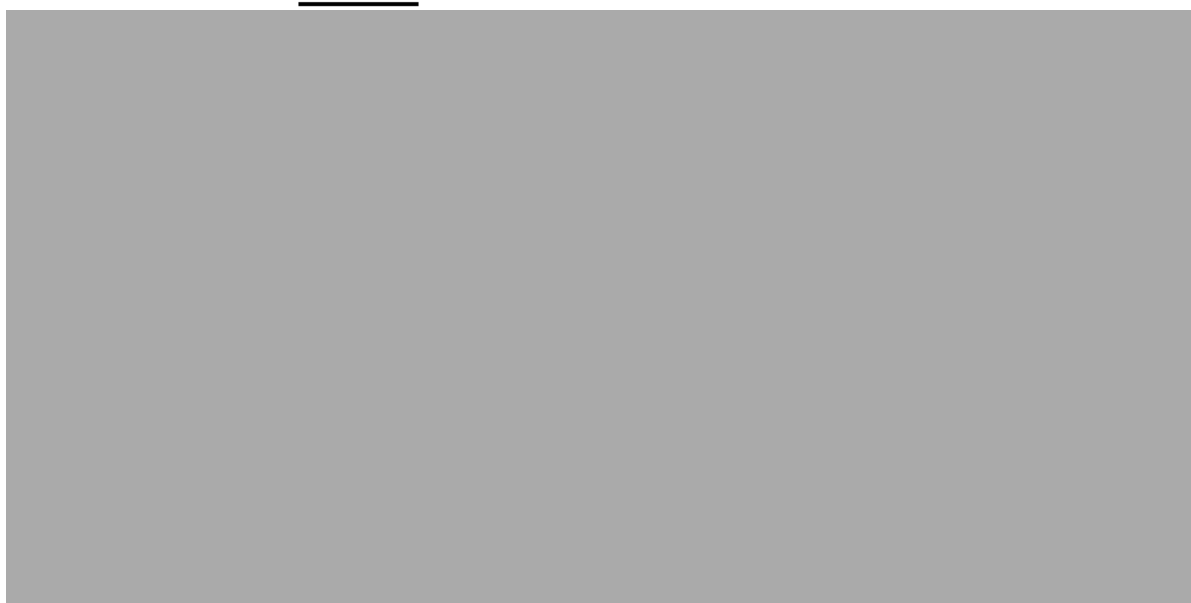
Penalty: \$10 000, in the case of an individual

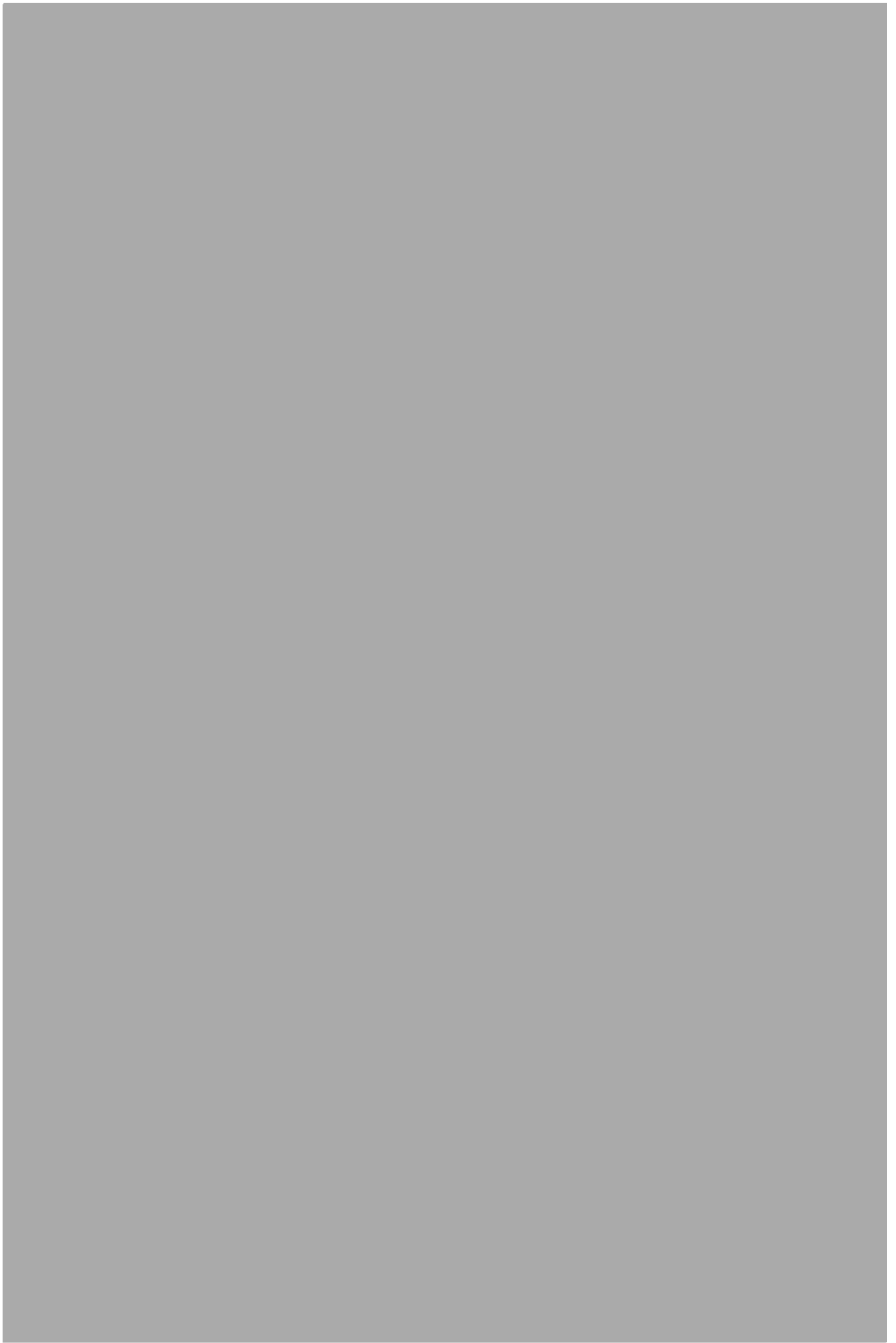
Section 167(2) of the *Law* - Offence relating to protection of children from harm and hazards
The Nominated Supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

Penalty: \$10 000, in the case of an individual

Evidence Relevant to Allegation One

9. Provider Notification (NOT-40828809) dated 28 February 2023, advises of a parent complaint relating to an incident occurring on 5 or 6 December 2022 where two children were playing in the bathroom as witnessed by an educator. Refer to Attachment A.
10. On 12 April 2023, the Provider furnished documents pursuant to a notice issued under section 215 on 22 March 2023, which included the following:
 - a. Working Directly with Children records (WDWC).
 - b. Child Attendance records
 - c. Incident reports
 - d. Service risk management plan.
 - e. Policy and procedures.Refer Attachment B for records relevant to the allegation.
11. During the investigation, the Authority obtained witness statements, relevant extracts from which appear below, with personal information redacted where appropriate. Due to the specific circumstances surrounding the alleged offences, witnesses are identifiable from the content of their evidence.
12. Please note that educator witness statements were obtained utilising powers under section 215 of the *Law*, imposing an obligation to attend before the Authority and provide relevant evidence under questioning by an Authorised Officer. It is an offence to fail to comply.
13. Relevant extracts from Witness A's statement include:









Evidence relevant to Allegation Two

15. On 9 June 2023, the Provider furnished documents pursuant to a supplementary 215 Notice issued 1 June 2023 which included the following relevant records:

- (a) Child support plans.
- (b) Incident reports.
- (c) Policy and procedure.

Refer relevant records at Attachment C.

16. On 13 June 2023, a compliance audit was completed at the Service by the Authority, during which a photo was taken of the administration area. The photo depicts a table chair upon a red mat. Refer to Attachment D.

17. Relevant extract from statement of Witness B include:





[REDACTED]

19. Relevant excerpts from statement of Witness D include:

[REDACTED]

- 
20. Behavioural support plans, also known to the Service as 'Child health and Well Being Plans', furnished by the Provider pursuant to 215 Notice, do not identify the use of the red mat as a behaviour guidance strategy. Refer support plans at Attachment C.

21. Provider Positive Behaviour Support and Guidance policy include the following extract:

'Behaviour guidance strategies will always respect the child's self-esteem and rights, whilst also being appropriate to the individual's developmental stage. All Educators, Staff, volunteers or students will apply appropriate behaviour support and guidance techniques which will be consistent with the organisation Philosophy and Values.'

'Where necessary, children may be asked to spend time reflecting on their behaviour. This reflection will remain positive and developmentally appropriate for the age of the child.'

Refer to policies located in Attachment C.

Contraventions Support Allegations

22. Evidence gathered appears to support contraventions of section 166(2) of the *Law*, which raises a contravention of s167(2) of the *Law*.

Second set of grounds – Supervision

Allegation Three

23. It is alleged that during 2022 you, as the Nominated Supervisor at the Service, failed to ensure that all children being educated and cared for by the service were adequately supervised, in that a child, believed to be , left the Service unsupervised, contravening s165(2) of the *Law*, and raising a further contravention of section 167(2) of said *Law*.

24. The following provisions of the *Law* are relevant to Allegation Three:

Section 165(2) of the Law - Offence to inadequately supervise children

The Nominated Supervisor 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(2) of the Law - Offence relating to protection of children from harm and hazards
The 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, in the case of an individual
\$50 000, in any other case.

Evidence relevant to Allegation Three

25. Authority records indicate that on 16 March 2022, Notification (NOT-40669917) submitted by the Provider relating to a written complaint regarding the education and care of [REDACTED] [REDACTED] the Notification was accompanied by the following documents:

- a) Notification 40669971.
- b) [REDACTED] - Complaint
- c) Response to allegations 17 3 2022

Refer relevant records at Attachment E

26. The complaint from [REDACTED] on 16 March 2023 includes the following paragraph relating to [REDACTED] absconding from the Service:

[REDACTED] this term has gotten out of the OSHC playground space and was collecting sticks outside the secured fence when he was brought back in and was in time out for doing so. I wasn't notified by OSHC my son was outside of this area unsupervised nor have I been notified of the Incident being notified to ACECQA being the You must notify the regulatory authority within 24 hours of becoming aware of a serious incident (Section 174(2)(a) and Regulation 176(2)(a) being he was locked out of a service.'

27. On 17 March 2023, the following response was allegedly compiled on behalf of the Program Coordinator, [REDACTED] with the following excerpt:

[REDACTED] Response 17/3/2022.

[REDACTED] noted that not once has an educator left the service to retrieve a child outside of the school grounds, she was not aware of the child being outside of the fence line or any incident of a child being beyond the boundaries. There is only one entrance and exit in the fence and that is situated at the main entrance and is padlocked high up.

[REDACTED] can recall an incident 3 to 4 weeks ago that involved the child and others playing with sticks and reaching through the fence panels to collect, but at no point did the child or any children go beyond the boundaries or are even able to fit through the fence line. (please see picture attached of the fence) Area was supervised at the time of the children collecting sticks. All children involved in the collection of sticks were spoke too as a group regarding the use, collection and playing with sticks appropriately as to not injure others as the group of children were using the sticks collected inappropriately.

Child in question communicated this incident to parent but this was not ever brought to the coordinator's attention. Through discussions with Coordinator and their sound knowledge of our policies and procedures we are comfortable that if an incident had occurred the coordinator would have followed policy and procedures and reported any incidents.

28. Authority records identify you as the Nominated Supervisor from 20 September 2022 to current. Refer to Attachment F.

29. Relevant extracts from Witness A's statement include:



Contraventions Support Allegations

33. Evidence gathered appears to support contraventions of section 165(2) of the *Law*, raising a contravention of 167(2) of the *Law*.

Fitness and Propriety as Nominated Supervisor

8. 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.

9. 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.
10. At minimum, fitness and propriety includes honesty, knowledge and ability.
11. Nominated supervisors have extensive responsibilities under the *Law*, relating to the broad areas of supervision, staffing, protection of children from harm and hazards, and educational programs, with specific obligations contained in both the *Law* and the *Regulations*.
12. 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). The nominated supervisor must also possess the ability to manage educators and any other staff, service premises, relationships with families and respond to children with medical and/or behavioural needs.
13. During the investigation, there is evidence regarding your response interactions with children displaying behavioural challenges.
14. This evidence raises a concern about your ability to manage and supervise an education and care service.
15. 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

16. 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.
17. 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.
18. Relevant legislation for enforceable undertakings and partial prohibition appears below.
19. An enforceable undertaking may include requirements such as undergoing additional training, having a mentor, advising the Authority of any proposed change in employment.
20. 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

21. 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.

22. At Attachment G 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 brian.cropper@act.gov.au or by post to:

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

Caution

23. 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*.
24. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
25. 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.
26. 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>.
27. 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>
28. Should you have any questions about this Show Cause Notice please contact Senior Investigator Brian Cropper on email brian.cropper@act.gov.au.

Yours sincerely



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

30 August 2023