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Royal Commission into Institutional Responses to Child Sexual Abuse
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Issues paper 9: Addressing the risk of child sexual abuse in primary and secondary schools

Dear Commissioners,

Thank you for the opportunity to provide a submission in response to Issues Paper 9 about addressing the risk of child sexual abuse in primary and secondary schools.

As the Commission is aware, the NSW Ombudsman is responsible for overseeing the handling of allegations of reportable conduct that are made against employees[1] of more than 7,000 agencies – including government (public), Catholic systemic and registered independent schools. We are also required to keep under scrutiny the systems that agencies have in place for preventing and handling reportable conduct.

Additionally, the NSW Ombudsman is responsible for monitoring and inquiring into the delivery of community services under the *Community Services (Complaints, Reviews and Monitoring) Act 1993.* Our submission draws on our experience in exercising both of these functions.

Rather than focus on addressing each of the questions in the Issues Paper, we have focused our submission on responding to those issues where we have particular insights or expertise in the context of overseeing the NSW reportable conduct scheme.

Our submission includes:

1. An outline of our employment-related child protection jurisdiction and its evolution over the 16 years of the scheme's operation in NSW. To further assist the Commission, a copy of Part 1 of our statement of information to the Commission in February 2015 in relation to Knox Grammar School, which contains detailed information about our current operational practices is also included at Annexure 1.

[1] In this context, an 'employee' is defined broadly as including: any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

2. Analysis of key data in relation to reportable conduct in the schools sector, with a particular focus on sexual offences/misconduct.

3. Information about our engagement with the government, Catholic systemic and independent schools sectors.

4. Discussion of a number of key systemic issues in the context of the schools sector and the child protection system more broadly.

In addition to the case studies which we refer to throughout the submission, we have also attached a confidential document which contains a number of additional case studies illustrating our work with the schools sector and the NSW Police Force in relation to oversighting criminal allegations of reportable conduct. **While de-identified, the case studies contain highly sensitive information and include matters that are still before the Courts. The case studies contained in Annexure 2 are provided to the Commission on a confidential basis and we request that they not be tabled publicly.**

We also draw the Commission's attention to our previous public submissions which address a number of relevant areas of consideration for this Issues Paper, such as the need for national consistency in relation to pre-employment screening and information sharing processes.

I trust that our submission is of assistance to the Royal Commission. If you require further information, please do not hesitate to contact Ms Julianna Demetrius, Assistant Ombudsman (Strategic Projects) on 9286 0920.

Yours sincerely

Professor John McMillan
Acting Ombudsman

Steve Kinmond
Deputy Ombudsman
Community and Disability Services Commissioner

Submission on Issues Paper 9: Addressing the risk of child sexual abuse in primary and secondary schools

1. Background

1.1 The Ombudsman's Part 3A reportable conduct scheme

The NSW Ombudsman's employment-related child protection jurisdiction commenced in May 1999, when a system was established for the Ombudsman to oversee the handling of allegations of a child protection nature against employees of government and certain non-government agencies.[2]

Our jurisdiction involves overseeing the handling of child abuse and neglect allegations that are made against employees[3] of more than 7,000 government and non-government agencies.[4] The scheme was – and remains – a unique and unprecedented jurisdiction, not least because of the oversight it brings to both government and non-government organisations in their handling of child protection concerns and the conduct of their employees (including volunteers).

Part 3A of the *Ombudsman Act 1974* requires and enables the Ombudsman to:

- **Receive and assess notifications** concerning reportable allegations or convictions against an employee
- **Scrutinise agency systems** for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct and convictions
- **Monitor and oversight** agency investigations of reportable conduct
- **Respond to complaints** about inappropriate handling of any reportable allegation or conviction against employees
- **Conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable notification or conviction
- **Conduct systems reviews and education and training** activities to improve the understanding of, and responses to, reportable allegations, and
- **Report on trends** and issues in connection with reportable conduct matters.

All public authorities are subject to the requirements of Part 3A if the reportable conduct arises in the course of a person's employment. Some public authorities are 'designated agencies' and also need to notify reportable allegations if they arise from conduct that takes place outside of employment.[5] Some non-government agencies are also subject to Part 3A requirements and must notify reportable allegations that arise both within and outside of employment.[6] It is worth noting that historical

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[2] The scheme was established following recommendations arising from the Wood Royal Commission into the NSW Police Service.

[3] In this context, an 'employee' is defined broadly as including: any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

[4] In August 2013 the NSW Solicitor-General clarified the reach of our jurisdiction, advising us that '[O]n its face the notion of "substitute residential care" in the care of children would appear to extend to any arrangement where an organisation has the care and control of children of a kind that would otherwise be provided by parents and caregivers, were a child in his or her place of residence." This advice has greatly increased the number of agencies and individuals deemed to fall within our employment-related child protection jurisdiction. We are currently working with organisations in the recreational camping and youth sectors, together with religious and other volunteer organisations, which run camps falling within the scope of this advice.

[5] Under s25A of the *Ombudsman Act 1974*, designated government agency means any of the following:

(a) the Department of Education and Training (including a government school) or the Department of Health,

(a1) a Division of the Government Service (or a part of a Division of the Government Service) prescribed by the regulations for the purposes of this definition,

(b) a local health district within the meaning of the *Health Services Act 1997*,

(c) any other public authority prescribed by the regulations for the purposes of this definition.

[6] Designated non-government agency means any of the following:

(a) a non-government school within the meaning of the *Education Act 1990*,

allegations of child abuse only fall within our employment-related child protection jurisdiction if the involved individual is an "employee" of a relevant agency at the time when the allegation becomes known by the head of agency.

What is notifiable to the Ombudsman?

When an allegation of 'reportable conduct' is made against an employee of relevant government and non-government agencies – including non-government schools, approved children's services and agencies providing substitute residential care – the head of agency is required to notify the Ombudsman of any reportable allegations or convictions involving their employees as soon as practicable and, the 'notification' must be made in any event, within 30 days of the head of agency becoming aware of the allegation or conviction.

Section 25C requires the head of agency to 'make arrangements within the agency to require employees of the agency to notify the head of agency of any such reportable allegation or conviction of which they become aware'. We encourage agencies to notify us at the earliest possible opportunity, whether by way of formal notification or initially through telephone contact, so that we can play an early role in guiding agencies through their initial response.

Section 25A of the Ombudsman Act defines 'reportable allegation' as an allegation of reportable conduct against a person or an allegation of misconduct that *may involve* reportable conduct. The same section defines 'reportable conduct' as:

(a) Any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or
(b) Any assault, ill-treatment or neglect of a child, or
(c) Any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

The section also specifies that reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
(b) the use of force that, in all circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25C of the Act.

2. Evolution of our oversight and current operational challenges

In February 2015, we provided a statement of information to the Royal Commission in relation to its public hearing into allegations of child sexual abuse at Knox Grammar School. Part 1 of that statement (Annexure 1) provided a comprehensive overview of our employment-related child protection jurisdiction, including our current operational practices. In particular, the statement described our proactive work with key agencies, including the NSW Police Force and Family and Community Services (FACS), when criminal allegations and serious child protection risks are a feature of the reportable conduct matters we oversight.

(b) a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (not being a department referred to in paragraph (a) of the definition of ***designated government agency*** in this subsection),
(b1) an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*,
(c) an agency providing substitute residential care for children,
(d) any other body prescribed by the regulations for the purposes of this definition.

We do not propose to duplicate here the information contained in our February statement. However, for the purpose of the discussion which follows, it is important to once again emphasise the significant refinement to our operational practices that has occurred over the past six years.

Many of the changes to our practice were largely brought about by the introduction of Chapter 16A of the *Children and Young Person's (Care and Protection) Act 1998* – which has facilitated the exchange of information between agencies and closer collaboration between employers and police when there are possible criminal allegations. These changes have also occurred at a time where the WWCC scheme was being overhauled and our office was given a new function which enables us to make Notifications of Concern to the Children's Guardian. These Notifications are made if we form the view, as a result of concerns arising from the receipt of information by our office in the course of exercising our functions, that '*on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children*'[7] (see Annexure 1 for further details about this function).

Our oversight of the reportable conduct scheme now has a much greater focus on intervening in serious, high-risk matters and working in partnership with agencies to achieve better child protection and criminal outcomes.

When we first receive an allegation about a person who works with children, we spend time and resources on gathering and analysing relevant risk-related information. Our staff have direct access to key databases held by the NSWPF and FACS, as well as access to the NSW Carers Register – held by the Office of the Children's Guardian (OCG). Currently, no other agency in NSW has the same breadth of access to external databases – together with our own information holdings. This gives us a unique 'bird's eye' view of information relevant to assessing risks in the critical early stages of a case.

Once we have reviewed relevant information sources, if we need to do so we will release information to other agencies with responsibilities for children or encourage agencies to exchange information with each other – using relevant provisions in the Children and Young People (Care and Protection) Act.

In a significant number of cases, we refer detailed briefings to the NSWPF. These referrals generally result in the commencement or enhancement of police investigations and/or criminal charges. In other cases, we make own motion inquiries in response to notifications from employers. We do this when we become aware of risks to children that may not be addressed through the reportable conduct investigation alone.

Annexure 2 to this submission provides a number of examples of the significant outcomes – including charges and convictions in a number of cases involving schools – which have resulted from this collaborative work.

In the early years of the scheme's operation, we were managing a high volume[8] of notifications (almost double the number we handle today) from a relatively inexperienced and diverse range of agencies that needed significant guidance and support. This meant we had to scrutinise a much greater proportion of less serious matters than is our current practice. As a result, during these early years, our ability to strategically target our resources and undertake significant proactive work very was limited.

Over time, agencies have improved their systems and their general investigative competence. These improvements have enabled us to exempt certain matters from having to be notified to our office under class or kind determinations[9], resulting in efficiency gains for both our office and the agencies within our jurisdiction. We now hold over 20 such determinations; 15 of which are with the schools sector.

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[7] *Child Protection (Working with Children) Act 2013*, Schedule 1, Clause 2A. It is also important to note that this clause is not limited to matters arising from the exercise of our functions under Part 3A; if sufficient concerns arise from information which we have received from exercising *any* of our wide-ranging functions, we can refer the matter to the Children's Guardian.

[8] In 2002-03, we received 2,473 notifications compared with 1,306 notifications for 2014-15.

[9] Pursuant to s25A(c) of the Ombudsman Act.

The reduction in the number of notifications received by our office over time can be attributed to these 'class or kind' determinations. (We discuss the nature of the agreements we have with the various school sectors in section 4).

In large part due to the effect of our class or kind determinations, matters involving serious criminal allegations now make up a significant proportion of our work; for example, we currently have around 129 open matters concerning individuals who have been charged with criminal offences relating to children. In addition, we have a further 238 open notifications that either are, or have been, the subject of a police investigation but where charges were not, or have not yet, been laid.[10]

Since the new WWCC commenced in June 2013, we have made 436 releases of information to the OCG under Chapter 16A and 40 Notifications of Concern. As well, we have responded to 184 requests for information by the OCG under section 31 of the *Child Protection (Working with Children) Act 2012*; and made 74 Chapter 16A requests for information to the OCG.

The most significant challenge we currently face in relation to our oversight of the reportable conduct scheme is the need to maintain – within existing resources – a high level of scrutiny over the handling of the most high-risk allegations of reportable conduct. This work must occur against the background of a recent expansion to our reportable conduct jurisdiction.

In February 2014, the NSW Solicitor-General provided legal advice which clarified the reach of our jurisdiction in the context of the provision of substitute residential care – the number of agencies now falling within our jurisdiction has expanded considerably. Therefore, an immediate priority for our office is working with organisations in the recreational camping and youth sectors, together with religious and other volunteer organisations, which fall within the scope of this advice, to make them aware of their Part 3A obligations.

As well, a program of transitioning the provision of out-of-home care (OOHC) to non-government agencies is well underway in NSW. The need to build and support the capacity of the NGO OOHC sector to effectively respond to reportable conduct, together with the higher degree of risk inherently posed to children and young people living in OOHC placements, led to a deliberate decision on our part to focus a significant component of our practice development on the OOHC sector – starting with the Aboriginal OOHC sector – which is rapidly expanding.

In light of competing demands on our limited resources, we will be working closely with the schools sector, peak bodies and the Board of Studies Teaching and Educational Standards (BOSTES) to examine ways to enhance promotion of the Part 3A scheme among schools who have notified our office of reportable conduct allegations either rarely or not at all; or where other risks have been identified with individual schools. We discuss notification rates across the schools sector in section 3.

In addition to delivering our comprehensive training program, we are currently planning a large-scale conference for 26 February next year to promote best practice in preventing and responding to reportable conduct. The conference will bring together stakeholders from the education; early childhood, out-of-home care; religious, sporting and recreational sectors, and will examine progress made since the reportable conduct scheme was established 16 years ago. The work of the Royal Commission has repeatedly highlighted the risk to children when reportable allegations are not handled effectively and agencies fail to have good systems in place for preventing and responding to abuse. It is therefore timely for us to join with our stakeholders in taking stock and identifying future directions.

3. What the data tells us

In NSW the schools sector is made up of:

[10] Current as at 15 September 2015.

- Government (public) schools administered by the Department of Education.
- Catholic systemic schools administered directly by the Catholic Education Offices within each of the 11 Catholic Dioceses.
- Independent schools registered with the Board of Studies, Teaching and Education Standards (BOSTES), including but not limited to schools affiliated with various religions and educational philosophies.

The total number of staff working in NSW schools is 110,636, including 70,257 (64%) in the government sector and 40,379 (36%) in the non-government sector. Teachers make up the majority (83,259) of in-school staff, with 53,904 (65%) teachers working in the government sector and 29,355 (35%) in the non-government sector.[11]

Table 1: Comparison of notifications received from schools sector with <u>all</u> Part 3A notifications received between 1 July 2010 and 30 June 2015

Financial Year	Total Notifications	Total from Schools Sector			Notifications from school's sector as a % of all notifications
		Gov	Non-gov	Total	
2010 - 2011	815	318	105	423	52%
2011 - 2012	1163	340	117	457	39%
2012 - 2013	995	310	112	422	42%
2013 - 2014	1190	326	162	488	41%
2014 - 2015	1306	226	186	412	32%
Total	5469	1520	682	2202	N/A

Table 1 shows that the schools sector has been the source of between 32 – 52% of reportable allegations notified each year over the last five years. The overall number of notifications has remained relatively stable over the past five years; however, the proportion of total notifications has fluctuated by virtue of increases in the notifications received from other industry groups (for example, the out-of-home care sector).

In recent years, there have also been fluctuations in relation to the number of notifications from the Department of Education – for example, there was a decrease of around 30% in 2014/15 from the previous year. The explanation for this drop in reporting is that it is due, in part, to the new guidelines issued by our office in 2013 which narrowed our definition of ill treatment and neglect.[12]

[11] ABS 4221.0 Schools, Australia 2014, Table 51a (http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4221.02014?OpenDocument)

[12] NSW Ombudsman, *Defining Reportable Conduct* practice update, released in 2013. We note that although there was a drop in reporting of sexual misconduct allegations during the period, there was an increase of reporting in sexual offences.

Table 2: Schools sexual misconduct and sexual offence notifications received between 1 July 2010 and 30 June 2015

Sector	Total Notifications	Total Schools in NSW	Total schools that notified	% of Total Schools that notified	Total Sexual Misconduct/ Offence notifications
Government	1520	2211	779	35%	779
Catholic Systemic	292	545	156	29%	182
Independents	390	580	197	34%	191
Total Non-Government	682	1125	353	31%	373
Total	2202	3336	1132	34%	1152

Due to the class or kind determinations that apply to the majority of schools, the nature of the notifications we receive relating to school employees tend to fall within the category of 'serious reportable conduct', and are comprised of a high rate of sexual / misconduct / offence allegations.

Of all sexual misconduct /offence allegations received in the past five years, 61% were notified by schools.

Table 3: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – SUSTAINED FINDINGS as a percentage of total notifications

	Government		Catholic Systemic		Independents		Total Non-gov		Total – all schools	
Sustained findings	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual
	75	28%	17	26.5%	20	28.5%	37	27.5%	112	28%

Of the sexual misconduct/ offence notifications from schools finalised in the last two years, each sector sustained approximately 28% – compared to an overall sustained rate for sexual misconduct / offence notifications of 24% across all sectors during the same period. The overall sustained rate (for all allegation types) in the schools sector is 20% and 22.5% across all industry groups.

Table 4: Schools sexual misconduct and sexual offence open notifications – CRIMINAL CHARGES

	Open matters – all charges		Open matters – charges - sexual		Open matters – charges – sexual – all schools		Open matters – charges – sexual – Gov		Open matters – charges – sexual - Catholic Systemic		Open matters – charges – sexual - Independents		Open matters – charges – sexual – Total Non-gov	
Criminal charges	No.	% of open matters	No.	% of all charges	No.	% open sexual charges	No.	% of all schools sexual charges	No.	% of all schools sexual charges	No.	% of all schools sexual charges	No.	% of all schools sexual charges
	133	10%	106	80%	64	60%	37	58%	16	25%	11	17%	27	42%

As previously noted, the impact of the broad class or kind determinations across the schools sector is, in effect, a concentration of education-related notifications at the 'pointy end'. Table 4 shows the high proportion of open matters involving school employees that are the subject of related criminal charges.

The schools sector is responsible for 55.5% of all current matters involving related criminal charges and 60.4% of current matters involving related criminal charges of a sexual nature – despite this sector currently accounting for 39.5% of all current open notifications.

By comparison, the OOHC sector is responsible for 27% of all current matters involving related criminal charges and 21% of current matters involving related criminal charges of a sexual nature – despite this sector currently accounting for 44.6% of all current open notifications.

The remainder of the sector is responsible for 17.5% of all current matters involving related criminal charges and 18.9% of current matters involving related criminal charges of a sexual nature – the remainder of the sector currently accounts for 15.9% of all current open notifications.

Table 5: Schools sexual misconduct and sexual offence notifications closed between 1 July 2013 – 30 June 2015 – ALLEGED VICTIM'S AGE GROUP (WHERE KNOWN)

	Government		Catholic Systemic		Independents		Total Non-gov		Total – all schools	
	No.	% of total	No.	% of total	No.	% of total	No.	% of total	No.	% for all sectors
< 6 years	14	6.5%	5	10%	4	7%	9	8%	23	7%
7 - 9 years	12	5.5%	5	10%	9	15%	14	13%	26	8%
10 - 12 years	38	17%	11	21.5%	11	18.5%	22	20%	60	18%
13 - 15 years	75	33.5%	17	33%	21	35.5%	38	34.5%	113	34%
16 - 17 years	85	37.5%	13	25.5%	14	24%	27	24.5%	112	33%
Total	225	100%	51	100%	59	100%	110	100%	**334**	100%

The vast majority of the sexual misconduct/ offence allegations against school employees finalised in the last two years involved secondary school employees, with 67% of alleged victims predominantly falling within the 13–15 and 16–17 year age brackets.

Table 6: Schools sexual misconduct and sexual offence notifications closed between 1 July 2013 – 30 June 2015 – LENGTH OF TIME BETWEEN ALLEGED ABUSE AND DISCLOSURE/REPORT

	Government		Catholic Systemic		Independents		Total Non-gov		Total – all schools	
	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual	No.	Total % of sexual
Less than 1 year	238	88%	42	66%	52	74%	94	70%	332	82%
1 - 5 years	12	4%	7	11%	7	10%	14	10%	26	6%

6 – 10 years	6	2%	1	1%	1	1.5%	2	2%	8	2%
11 – 15 years	0	0%	3	5%	0	0%	3	2%	3	1%
16 – 20 years	7	3%	0	0%	1	1.5%	1	1%	8	2%
> 21 years	8	3%	11	17%	9	13%	20	15%	28	7%
Total historic	33	12%	22	34%	18	26%	40	30%	73	18%
Total	271	100%	64	100%	70	100%	134	100%	405	100%

Table 6 shows that overall, 18% of the notifications related to historical conduct (defined as having occurred or commenced more than 12 months prior to the disclosure). Of the historical notifications closed in the period, the largest proportion (38%) related to alleged conduct which occurred over 21 years ago; followed by alleged conduct occurring within the previous 1-5 years (36%).

Table 7: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM'S GENDER (where known – total 370)

	Government		**Catholic Systemic**		**Independents**		**Total Non-gov**		**Total – all schools**	
	No.	**Total % of sexual**	**No.**	**Total % of sexual**	**No.**	**Total % of sexual**	**No.**	**Total % of sexual**	**No.**	**Total % of sexual**
Male	80	31.5%	25	44%	36	59%	61	52%	141	38%
Female	172	68.5%	32	56%	25	41%	57	48%	229	62%
Total	252	100%	57	100%	61	100%	118	100%	370	100%

Of the matters closed in the last two years, just over 60% of the alleged victims were female.

Table 8: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM'S GENDER AGAISNT WHEN REPORTED

	Male alleged victim		**Female alleged victim**	
	No.	**% of total male**	**No.**	**% total female**
Less than 1 year	107	76%	196	85.2%
1 - 5 years	10	7%	14	6%
6 – 10 years	0	0%	8	3.5%
11 – 15 years	1	0.5%	1	0.5%
16 – 20 years	1	0.5%	6	2.6%
> 21 years	22	16%	5	2.2%
Total historic	34	24%	34	14.8%
Total	141	100%	230	100%

The notifications involving alleged male victims were more often historical than those involving female victims. Almost a quarter of allegations relating to male victims involved alleged conduct that occurred more than 12 months prior to the disclosure/report, compared with 15% of those involving female alleged victims.

Significantly, 16% of the matters involving alleged male victims related to conduct that was alleged to have occurred more than 21 years prior to the disclosure/report (compared with 2% for females).

Table 9: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM'S GENDER AGAINST AGE (where known - 333)

Age	Male alleged victim						Female alleged victim						
	No.	% of total for age	Employee gender				No.	% of total for age	+/– male	Employee gender			
			Male		Female					Male		Female	
< 6 years	10	42%	8	80%	2	20%	14	58%	+16%	12	86%	2	14%
7 - 9 years	9	36%	9	100%	0	0%	16	64%	+28%	14	88%	2	12%
10 - 12 years	24	41%	21	88%	3	12%	35	59%	+18%	30	86%	5	14%
13 - 15 years	43	38%	30	79%	13	21%	70	62%	+24%	65	93%	5	7%
16 - 18 years	38	34%	14	37%	24	63%	74	66%	+32%	64	86%	10	14%
Total of 333 (age & gender known)	124	N/A	82	66%	42	34%	209	N/A	+25.5%	185	89%	24	11%
Total of 370 (gender only)	141	N/A	96	68%	45	32%	230	N/A	+24%	203	88%	26	12%

The biggest disparity in the gender of alleged victims was within the 16-17 year age bracket.
In matters involving alleged male victims, the subject employee was male in 68% of cases; and female in 32% of matters.

In matters involving alleged female victims, the subject employee was male in 88% of cases and female in 12% of matters.

Table 10: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – SUBJECT EMPLOYEE'S GENDER

Employee Gender	Government		Catholic Systemic		Independents		Total Non-Gov		Total	
	No.	% of total gov sexual	Raw	% of total Catholic sexual	Raw	% of total Indpdt sexual	Raw	% of total nongov sexual	Raw	% of total schools sexual
Male	220	81%	53	83%	59	84%	112	84%	332	82%
Female	51	19%	11	17%	11	16%	22	16%	73	18%
Total	271	100%	64	100%	70	100%	134	100%	405	100%

In the sexual misconduct /offence notifications from schools that were finalised in the last two years, 82% involved male employees and 18% female employees.

Table 11: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – SUBJECT EMPLOYEE'S JOB TITLE – where known (total 394)

Employee Title	Government		Catholic Systemic		Independents		Total Non-Gov		Total	
	Raw	% of total gov sexual	Raw	% of total Catholic sexual	Raw	% of total Indpdt sexual	Raw	% of total nongov sexual	Raw	% of total schools sexual
Teacher	187	70%	35	56%	47	71%	82	65%	269	68%
Teacher aide	19	7%	3	5%	2	3.1%	5	4%	24	6%
Other employee	17	6.5%	2	3%	2	3.1%	4	3%	21	5.5%
Clergy and/or Religious	0	00%	12	19.5%	6	9.1%	18	14%	19	5%
Executive (Principal, Deputy)	10	4%	6	10%	1	1.5%	7	5%	17	4.5%
Support staff	12	4.5%	0	0%	2	3.1%	2	1%	14	3.5%
Transport driver	14	5%	0	0%	0	0%	0	0%	14	3.5%
Other school professional	4	1.5%	3	5%	6	9.1%	9	7%	13	3%
Volunteer	4	1.5%	1	1.5%	0	0%	1	1%	4	1%
Total	267	100%	62	100%	66	100%	128	100%	394	100%

The vast majority of employees who were the subject of sexual misconduct /offence allegations closed between 1 July 2013 and 30 June 2015 were employed in teaching roles.

The proportion of matters involving teachers in the government sector was 70% and in the independent sector, 71%. In contrast, the proportion of matters involving teachers in the Catholic sector was much lower at 56%.

Notifications relating to clergy and/or religious were the second biggest category (19.5%) in the Catholic sector. Sexual misconduct /offence notifications finalised against clergy and/or religious in the schools sector in the last two years largely related to historical conduct, with 63% relating to conduct that allegedly occurred more than 21 years prior to the disclosure/report.

4. How we work with stakeholders in the schools sector

In addition to working closely with individual schools as part of oversighting reportable conduct matters, at a strategic level we also engage with the schools sector in a variety of ways. We liaise closely with key bodies such as the Department of Education's Employment Performance and Conduct Directorate (EPAC), the Association of Independent Schools (AIS) and other bodies in the independent sector, including the Christian Schools Association and Christian Education National, and the Catholic Schools/Education Offices (CSOs/CEOs) within the network of Dioceses across NSW.

The sheer size of the schools sector means that we substantially rely on these bodies to act as a conduit for conveying important information to their members; providing the assistance and support their

members require to meet their Part 3A obligations; and driving practice improvements across their membership base.

Our engagement with the schools sector has also helped us in identifying a range of practice issues in relation to the reportable conduct scheme and the child protection system more broadly.

For example, several years ago we identified the need to ensure that the reportable conduct scheme gave complainants/victims (and, where relevant, responsible adults) appropriate advice about the progress and outcomes of reportable conduct investigations.

In 2013, we convened a roundtable with representatives from the Department of Education, Catholic education authorities, the AIS, CEN and CSA to examine:

- the practical challenges involved in balancing the rights of individuals the subject of allegations, alleged victims, witnesses and other children; while ensuring that disciplinary or criminal processes are not compromised, and
- opportunities to overcome aspects of privacy legislation that restrict the ability of agencies to keep alleged victims and their parents/carers apprised of the progress and outcome of investigations, including actions taken by the employing agency to manage risks.

As a result of this work, the Child Protection Legislation Amendment Bill 2015 is currently before Parliament. Among other things, it includes proposed amendments to the Ombudsman Act to permit information about investigations into reportable allegations to be provided to the involved child who is the alleged victim, and to certain other persons who are concerned with the welfare of the child. In particular, the proposed amendments permit our office, or the head of designated government or non-government agencies, to disclose information to the alleged victim, parent or authorised carer in relation to:

- information about the progress of the investigation,
- the findings of the investigation, and
- any action taken in response to those findings.

The passage of this legislation will assist us work together with other key stakeholders in seeking to identify best practice in relation to when, how and what information should be shared with victims (and relevant others).

We discuss a range of other systems issues that we have identified through our oversight in section 5.

- ***Class or kind determinations***

Within the schools sector, the Ombudsman now has class or kind determinations[13] with the Department of Education; the AIS, CSA and CEN (and participating member schools of these organisations respectively); and the CEO/CSO in each of the 11 Catholic Dioceses. These determinations are issued in recognition of our satisfaction with the general competency of the relevant body in relation to appropriately responding to the exempted conduct.

It is important to note that class or kind determinations do not exempt agencies from investigating and taking appropriate action in response to allegations of exempted conduct, or from keeping adequate records of such allegations. Sexual offences and sexual misconduct allegations must be notified to our office and are not included in any of our class or kind determinations.

[13] Section 25A(c) of the Act enables the Ombudsman to exempt conduct of a class or kind from being reportable conduct.

Reviewing agency systems

Reviewing an agency's systems is one way for the Ombudsman to assess whether an agency is meeting their Part 3A reporting obligations in accordance with class or kind determinations. Under section 25B of the Ombudsman Act we are required to keep under scrutiny the systems agencies have in place for preventing reportable conduct, as well as the systems for handling and responding to reportable allegations.

Our reviews of agency practice could be prompted by a decision to assess compliance with a class or kind determination; concerns about a particular agency's handling of matters; the vulnerability of particular groups of children and young people; as well as other relevant triggers. Since the reportable conduct scheme commenced we have conducted 184 targeted agency reviews. Of these, almost 60% (108) have involved the schools sector. We also routinely identify and address practice and systems issues as part of our response to individual notifications. This is an effective way of considering whether policies and procedures actually translate into practice.

Our ability to undertake reviews of agency systems is dependent on other competing demands on our resources, such as our office taking an increasingly active role in our oversight of serious reportable conduct matters. Over the last six years we have scaled back our compliance review activities in relation to the school sector in order to allow us to focus our resources towards providing more intensive support in relation to serious individual cases. In part, this shift in focus has been enabled by the maturing of practice by the schools sector in their handling of reportable conduct matters.

- ***Training and education activities***

We also deliver a comprehensive employment-related child protection training program which is targeted at agencies that fall within the jurisdiction of the reportable conduct scheme. We currently offer two workshops: *Responding to child protection allegations against employees* and *Handling Serious reportable allegations against employees*, peak bodies also regularly deliver training on handling reportable conduct allegations.

As noted at the outset of this submission, we are currently preparing for our reportable conduct conference in February 2016. We have started to consult a range of stakeholders from the schools sector about delivering sessions on how they have sought to improve practice across their membership/sector and priority areas for future reform.

4.1 Key stakeholders

Department of Education (government schools)

As previously noted, the Department of Education has consistently been responsible for the largest number of notifications from within the schools sector.

We first entered into a class or kind determination with the Department of Education in 2001 allowing it to notify certain reportable allegations to us by way of a monthly schedule – providing that there were no prior allegations against the employee and no harm to the child. We reviewed the determination the following year and in 2003, extended it to exempt from notification certain first time allegations of physical assault and neglect. It was further extended in 2005 and again in 2010. As noted earlier, our determination with the Department excludes certain allegations of neglect and ill-treatment from notification, as well as certain types of physical assault.

EPAC has been responsive to suggestions and recommendations we have made in relation to addressing practice issues identified through our oversight of the reportable conduct scheme. For example, in 2006 we raised concerns with the Department of Education about the quality and timeliness of its investigations. In response, the Department developed additional resources for

principals and reviewed its categories of findings. Following this, we noted a marked improvement in its handling of matters. Since then, the handling of reportable conduct matters by EPAC has become increasingly more sophisticated.

We established a standing liaison meeting with EPAC when the unit was first established. Regular meetings are used to discuss issues relating to individual cases as well as broader systemic issues. For example, our liaison has recently led to new arrangements being agreed between EPAC and the NSWPF in relation to accessing interview records to inform reportable conduct investigations; and prompting improvements to the recurrent child protection training provided to the Department's casual teaching workforce.

The Department's decision to centralise its handling of reportable conduct allegations under EPAC has been instrumental in achieving better quality and consistency of responses to reportable conduct across the public schools sector. The expertise and economies of scale obtained through utilising a single investigative entity in this very complex area of child protection practice cannot be over-stated. Overall, our observation is that the Department of Education conducts its investigations to a high standard, and generally takes a cooperative and constructive approach to meeting its reportable conduct obligations and working with our office to address broader child protection systems issues.

4.2 Catholic systemic schools

Catholic systemic schools account for the second largest number of primary and high school enrolments in NSW. There are over 580 Catholic schools in NSW[14] and the vast majority of these are systemic. Catholic systemic schools are administered directly by the Catholic Education/Schools Office (CEO/CSO) within each Diocese.

While the structure of the Catholic Church presents some unique challenges – which we discuss later in this section – our ongoing liaison with the Church's network of Dioceses has been essential to driving practice improvements.

When the reportable conduct scheme began, the Bishops of the 11 Dioceses (and the leaders of Catholic religious institutes) delegated their 'head of agency' function to the Catholic Commission for Employment Relations (CCER). This arrangement was maintained until 2005, when the head of agency function was devolved, for most reportable conduct matters, to Bishops and leaders of each religious institute (or their delegates). Therefore, for the past decade most of our work with the Catholic schools sector has been with the CEOs/CSOs within the Dioceses.

Since June 2005 we have had identical class or kind determinations with the CEO/CSO of each Diocese.

The current class or kind determinations with individual Dioceses exempt CEOs/CSOs from notifying:

> *An allegation of a physical assault, or a threat of a physical assault, unless it is alleged that:*
> *a) There was contact with any body part of area of a child that was clearly hostile and forceful, or reckless, and which had the potential to, or resulted in significant harm or injury to the child; or*
> *b) A child believed that the threat would result in significant harm or injury with them.*[15]

We hold quarterly liaison meetings with the child protection and professional standards officers who handle reportable conduct matters within each Diocese. The meetings have proven to be a very

[14] Figure cited by Catholic Education Commission NSW www.cecnsw.catholic.edu.au. Accessed 6 September 2015.
[15] The determination imposes certain requirements on the type of information that is to be provided to the Ombudsman if allegations of non-exempted conduct of physical assault are notified. It sets out the actions required by the agency in relation to exempted conduct, including provision to the Ombudsman of six monthly reports on the number and category breakdown of allegations exempted from notification.

productive way of engaging the Catholic systemic schools sector by providing a forum to regularly discuss discrete and systemic issues that arise in dealing with reportable allegations; as well as identifying and responding to broader child protection issues.

In addition to our quarterly meetings, we also hold ad-hoc meetings with various representatives from the Catholic systemic schools sector to provide assistance and guidance about the direction of individual reportable conduct investigations. Uptake of our employment-related child protection training by the Catholic systemic schools sector has been strong.

During the past decade, the Catholic Dioceses have developed robust systems for handling reportable conduct. Given that in the mid-2000's we identified significant inadequacies in the CCER's child protection systems, we supported the Church's decision in 2005 to devolve responsibility for the 'head of agency' function to Bishops and heads of religious institutes. Since then, our ability to engage more directly with each of the Dioceses has resulted in significant practice improvements across the sector.

In addition to the effective relationship that the Dioceses maintain with us through our liaison arrangements, a strength of the sector – and one that is shared by the government school sector and increasingly, the independent schools sector – is that Catholic systemic schools have dedicated staff within each Dioceses who are responsible for dealing with reportable conduct allegations.

However, the unique structure, governance and diversity of the Catholic Church undeniably continues to present particular challenges. While the Church has developed structural arrangements designed to improve the quality and consistency of management decisions in connection with reportable conduct matters – and we continue to support the devolution of responsibility for these matters to the Bishops and heads of religious institutes – we also believe there would be merit in the Church considering additional measures which could be put in place to achieve greater consistency and quality in relation to the decision making of Bishops (and other leaders of religious institutes) in relation to serious reportable conduct matters.

In particular, we believe there is a need for the Church to adopt a system that encourages stronger peer review and where necessary, obtaining independent expert assistance. In this regard, we note that this need is particularly apparent in relation to the Church balancing its pastoral care for priests with managing risks to children. In the past, we have observed a reluctance on the part of the Church to take prompt and decisive risk management action in relation to certain clergy who – by virtue of their status as priests; regardless of whether they continue to work directly with children – constitute a risk to children, young people, vulnerable adults and the reputation of the Church. In some of these cases, the decision by Church leaders not to remove the individual from their role as a priest appears to be at odds with their community obligations. In other cases, the more significant issue is the failure by the Church to adopt sophisticated risk management strategies.

- ***Our Part 3A jurisdiction in relation to clergy/religious***

The priest/Church relationship is different from the typical employee/employer relationship that we oversight. Currently, the circumstances in which clergy and religious are subject to the reportable allegations scheme are limited. Allegations against members of the clergy fall within our jurisdiction only if the person is either an employee of a relevant agency (such as a school), or is 'engaged ' (by the agency) to provide services to children at the time that the allegation arises.

In a number of matters we have handled, questions have arisen as to the scope of our jurisdiction. In many of these matters, whether we had jurisdiction has been dependent on whether a priest has been deemed to be engaged in 'child-related employment' at a Diocesan school at the time of the allegation. In several such cases, it has become apparent that the Church has been dealing with concerns relating to a priest for some time (years, in some cases) prior to notifying our office.

4.3 Independent schools

Our relationship with the AIS, and in more recent times, Christian Education National (CEN) and the Christian Schools Association (CSA), has been critical to our ability to effectively oversight and strengthen the handling of reportable conduct across the independent schools sector. Together, these three bodies represent and support more than 400 independent schools across NSW.

Independent schools are registered non-government schools which include, but are not limited to, schools affiliated with a variety of religions and educational philosophies. According to the Association of Independent Schools (AIS), in 2014 there were 465 registered independent schools in NSW, including 49 independent (congregational) Catholic schools operated by the Religious Institutes of brothers, nuns and priests (or by their agents).[16]

In 2014, the NSW independent schools sector enrolled more than 186,000 students in primary and secondary schools, representing 16.1% of all students in NSW. Independent schools account for almost 10% of all primary school enrolments in NSW and more than 19% of all secondary school enrolments. At the senior secondary level (Years 11 and 12), independent schools account for more than 20% of enrolments. Independent school numbers have increased significantly in NSW over the last 30 years, with the number of students enrolled in independent schools increasing by an average of nearly 4% per year.[17]

Much of our work with the independent schools sector is carried out through our liaison with the AIS, which represents more than 380 member schools enrolling more than 158,000 students.[18] Over a number of years, the AIS has made significant investments to raise practice standards among its membership. For instance, it sought to accredit child protection investigators over a decade ago and has a dedicated Workplace Management unit which provides a range of child protection advice, response management, policy and procedures audits, investigative, and risk management services to members.[19] In more recent years, we have also worked with Christian Education National (CEN) which CEN represents 16 schools in NSW and the ACT[20]and Christian Schools Australia (CSA) which has 47 member schools in NSW.[21] Some members of CSA and CEN are also affiliated with the AIS.

We first entered into a class or kind determination with the AIS and participating member schools in 2004. This took place after we had worked closely with the AIS to develop a training package for the accreditation of certain independent school employees as designated child protection investigators, as well as two key documents, namely the AIS' *Child Protection Policy Framework* and *Code of Conduct for the Care and Protection of Children*. Under the determination, only independent schools with AIS accredited investigators can be exempted from notifying certain matters to our office. In 2010, we worked with the AIS around further strengthening its processes for supporting, training and accrediting member schools. We subsequently expanded the class or kind determination with the AIS and participating member schools in 2012.

The current determination with the AIS exempts notification to us of:

> *First time reports of hitting a child; or inappropriate but minor and transitory restraint of a child; or an incident of inappropriate pushing and pulling a child, provided that*

[16] These schools undertake their own administration, with some support from their local Diocesan CEO/CSO.
[17] Figures cited by Association of Independent Schools. www.aisnsw.edu.au/About/Pages/Statistics.aspx. Accessed 2 September 2015.
[18] Information sourced from www.aisnsw.edu.au/About/Pages/default.aspx. Accessed 2 September 2015.
[19] The unit also provides work health and safety audits and inspections.
[20] Information sourced from www.cen.edu.au/index.php/2014-02-08-10-08-22/new-south-wales-and-act. Accessed 6 September 2015.
[21] Information sourced from www.csa.edu.au/schools-locator/search/?command=getresults&SearchLocation=nsw. Accessed 6 September 2015.

a) *the conduct does not involve the use of physical force being applied to any part of the head or neck, or to any other part of the body likely to cause more than short term (or transitory) harm.*

In relation to conduct of the class or kind exempted by the determination, heads of agency must abide by certain conditions, including notifying the AIS of the allegation; engaging an AIS accredited investigator; and seeking the support and advice of the AIS at key milestones during the investigation. The determination also requires the AIS to maintain a database of completed class or kind investigation notifications in relation to allegations of reportable conduct.

We entered into class or kind determinations with the CSA and the CEN and their participating members in 2011. CSA had previously approached us in 2007 about issuing a class or kind determination to its member schools; however, we declined to do so primarily because the rate of reportable conduct notifications from CSA's member schools was very low; and, in this context, we could not be confident about their capacity to meet the required standard of legislative compliance and investigation. Our decision to enter into the determinations with CSA and CEN in 2011 was contingent on both bodies submitting detailed proposals for the establishment of comprehensive systems for the provision of child protection advice, training and support to their members.

The current determinations with CSA and CEN exempt notification to the Ombudsman of the same conduct exempted by our determination with the AIS, but have some additional caveats, including a requirement for schools to outsource to accredited investigators all investigations of allegations of serious reportable conduct, or matters where the investigation would involve a conflict of interest.[22] In addition, for all matters involving clear allegations of criminal conduct, and for other complex matters, the determinations require schools to carefully consider whether they have the competency to properly investigate the allegations (if not, the investigation should be outsourced).[23]

As discussed above, in the early years of the reportable conduct scheme's operation we provided considerable advice and assistance to the AIS in relation to establishing adequate systems and resources to support its members. In consultation with the AIS, we also undertook a series of compliance reviews of independent schools. Over the last decade, we have also increasingly worked with CSA and CEN, particularly during the process of negotiating the class or kind determination entered into with both organisations in 2011, but also through the provision of training and presentations about responding to reportable conduct allegations.

In 2011, we began working in partnership with the AIS, CSA and CEN to promote a more consistent approach to child protection across the diverse independent schools sector, and to identify new ways to support their member schools fulfilling their child protection responsibilities. As part of this work, in 2013 we commenced a review of certain aspects of the independent school sector's systems for preventing and responding to child abuse allegations, focusing on compliance with our class or kind determinations. The focus of our review was AIS member schools that had utilised the determination after its reissue in March 2012.

Following discussions with the AIS, we ascertained those eligible member schools that had exempted reportable conduct matters over the period of our review. We surveyed each of these schools to assess their level of understanding about complaint handling and the reportable conduct scheme and we also reviewed each of their investigations. We attended a number of the schools in our review sample – across a range of geographic locations and school size – and met with principals and other staff to

[22] Serious reportable conduct includes alleged child-related sex offences by employees; alleged physical assaults by employees against a child or a young person that involve a) serious injuries to the head and/or body of children including burns; fractures; lacerations; internal injuries or significant bruising b) the violent shaking of a young child; matters where there is evidence of inappropriate or improper conduct of a kind that gives rise to a suspicion, on reasonable grounds, that the involved employee may have committed, or may commit, a sexual offence against a child or young person.

[23] The determination also imposes a range of requirements on CEN, particularly in relation to providing adequate support to member schools and monitoring their use of the determination.

provide feedback on their investigations and child protection policies and procedures. We also provided feedback to the AIS about what we found.

- ***Schools with low numbers of notifications or no history of notifications***

An area of potential risk in the independent schools sector concerns the practices of independent schools not affiliated with the AIS, CEN or CSA, and/or schools which are under-represented or entirely absent in the notifications data. The risk is particularly amplified for newer and/or small schools given that, in general, they are less likely to have experience in handling reportable conduct matters.

When non-affiliated schools do make a notification, we invest considerable resources in closely working with them in relation to handling the allegation as case study A (Annexure 2) shows. The benefits of schools being supported through the AIS during the investigative process are well illustrated by case study B (Annexure 2).

In 2012, we delivered a number of training sessions to inspectors employed by BOSTES to inform its responsibility for monitoring the compliance of non-government (independent) schools with the registration and accreditation requirements of the *Education Act 1990*. Registration is a non-government school's licence to operate under the Act. As part of the training, we emphasised to inspectors that when auditing independent schools' compliance with the Act, they should seek to examine whether schools are meeting their reportable conduct and mandatory reporting obligations.

More recently, prompted by case study A, we have been exploring with BOSTES how our agencies can work more closely to share information about schools where the systems for responding to child protection issues are inadequate. Examining how our office can work more closely with the AIS to engage with independent schools under-represented in the notifications data will also be a priority for our upcoming liaison meeting. In this regard, we recently decided that there would be benefit in bringing the AIS and the Catholic systemic schools sector together in a quarterly forum to discuss specific challenges its members share.

As we noted at the outset of the submission, our capacity to do as much as we would like to in this area is constrained by the sheer number of agencies that come under our jurisdiction and the need to direct a significant component of our limited resources towards scrutinising serious reportable conduct matters and concentrating on other high-risk and newly emerging sectors.

5. Observations on key systemic issues

In our previous submissions and statements of information to the Commission, we have shared a number of observations drawn from our 16 years of oversighting the reportable conduct scheme in NSW, as well as monitoring and reviewing the delivery of community services. As we noted earlier, we have emphasised the need for national consistency in key areas of child protection, such as employment-screening and information exchange, and the benefits of implementing consistent reportable conduct schemes in each state and territory.

In the context of the Commission's current focus on addressing the risk of child sexual abuse in primary and high schools, this section highlights the current strengths and weaknesses in relation to the exchange of child protection information in NSW and across borders given the mobility of the teaching profession; and discusses other systemic issues that have been identified through our oversight of reportable allegations from the schools sector, including:

- identifying and responding to sexual misconduct and conduct which crosses professional boundaries,
- addressing risks relating to casual teachers, and
- managing risks presented by individuals engaged by schools to provide non-teaching services.

5.1 Barriers to sharing information

We note that Issues Paper 9 contains a number of questions (topic F) about information sharing in the context of promoting child protection in the school setting.

The Ombudsman's office has been at the forefront of advocating for reforms to the area of information exchange for a number of years. In our 2008 submission to the Special Commission of Inquiry into Child Protection Services in NSW, we outlined problems associated with the privacy laws that inhibit the effective exchange of information between agencies about child protection matters. We proposed a specific legislative solution that would enable the ready flow of information between agencies to promote the "safety, welfare and wellbeing of children and young people". Justice Wood supported our proposal and in his final report, recommended the introduction of new information sharing provisions.

- ***The introduction of Chapter 16A***

In October 2009, Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* came into effect. Chapter 16A allows NSW government and certain non-government agencies (prescribed bodies) to share information that promotes the safety, welfare and wellbeing of a child or young person, and specifically overrides any other legislation (including privacy legislation) that conflicts with this objective. A prescribed body is any organisation specified in section 248(6) of the Act as follows:

> (a) the NSW Police Force, a Division of the Government Service or a public authority, or
> (b) a government school or a registered non-government school within the meaning of the *Education Act 1990*, or
> (c) a TAFE establishment within the meaning of the *Technical and Further Education Commission Act 1990*, or
> (d) a public health organisation within the meaning of the *Health Services Act 1997*, or
> (e) a private health facility within the meaning of the P*rivate Health Facilities Act 2007*, or
> (f) any other body or class of bodies (including an unincorporated body or bodies) prescribed by the regulations for the purposes of this section.[24]

The key principles underpinning Chapter 16A are:

1. agencies that have responsibilities relating to the safety, welfare or well-being of children or young people should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
2. those agencies should work collaboratively in a way that respects each other's functions and expertise,
3. each such agency should be able to communicate with each other so as to facilitate the provision of services to children and young persons and their families,
4. because the safety, welfare and well-being of children and young persons are paramount:
    1. the need to provide services relating to the care and protection of children and young persons, and
    2. the needs and interests of children and young persons, and of their families, in receiving those services,

take precedence over the protection of confidentiality or of an individual's privacy.

The introduction of Chapter 16A has significantly expanded the scope for relevant agencies to exchange information with each other in a broad range of child protection contexts. The case studies in

[24] Clause 7 of the *Children and Young Persons (Care and Protection) Regulation 2000* prescribes the relevant bodies regarded "as a prescribed body" for the purpose of section 248(6)(f) of the Act.

Appendix 2 clearly illustrate the impact and significance of the provision. The ability of government and non-government agencies to directly request relevant information from each other (and be proactive about providing it) has meant that information from a variety of sources can be easily gathered to better inform assessments of children who may be at risk, and better tailor appropriate responses. As we noted in our 2013 submission about WWCCs and subsequent submissions to the Commission, we believe that other jurisdictions would similarly benefit from a Chapter 16A type provision.

In highlighting the value of Chapter 16A, it is also important to acknowledge some of the challenges which still exist in relation to information exchange.

- ***Alerting prospective employers to possible child protection risks***

In our submission to the Commission about WWCCs we outlined the significant strengths of the new WWCC scheme in NSW (introduced in June 2013), which has resulted in a more robust screening process for people who work with children.

Despite this, we have concerns that an employer still cannot be confident that a person who has been cleared to work with children does not have any past known conduct issues which indicate they 'may pose a risk to the safety of children'. This is because the WWCC scheme is based on issuing either a blanket 'bar' or 'clearance' to work with children. The legal threshold for issuing a bar means that a person who has had, for example, a finding of sexual misconduct made against them in the past will not necessarily be barred from child-related work.

We have therefore argued that the Children's Guardian should develop a system for using the information exchange provisions in Chapter 16A to ensure that, in administering the WWCC, they provide the most comprehensive possible responses to employment screening. Case study C in Appendix 2 illustrates the value of risk-related information being provided to prospective employers.

As a result of this and other cases, we recommended that the Children's Guardian use Chapter 16A to share potentially significant risk-related information with prospective employers, particularly at the point in time when prospective employers are verifying with the Children's Guardian that a person is cleared to work with children. The Children's Guardian sought legal advice from the Crown Solicitor in 2014 about whether this was possible. The Crown Solicitor advised that there were no legal impediments to the Children's Guardian exchanging information in this way.

As a result, in February 2015, the Children's Guardian facilitated a working group with representatives from five government agencies – Education, FACS, Police, Health and Justice – and the Information and Privacy Commission, to consider the potential operational and resourcing implications. However, we were advised by the Children's Guardian in August 2015 that the overall view of the attendees was a "reluctance to receive 'below the bar' information". However, we note that this position is at odds with the information made available under the Carers' Register. We intend to continue exploring this issue with stakeholders.

Finally, we wish to stress that our advocacy on this issue does not mean we believe addressing it will, in and of itself, provide all the necessary safeguards. It is critical that the mechanism we have proposed is complemented by a much more sophisticated understanding across the child-related employment sector in relation to pre-employment screening processes and child safe practices more generally.

- ***Interstate exchange of information***

Given the ease with which persons who pose a risk to children can travel across jurisdictions, any weakness in the regime for exchanging information between states and territories can pose significant risks to children. We have previously flagged this issue, and the need for a nationally consistent

approach to information sharing provisions, in a number of our submissions to the Commission.[25] It is essential that relevant bodies within each state and territory have the power to exchange information, relating to the safety, welfare and wellbeing of children, with like bodies in other Australian jurisdictions.

While there are provisions that apply consistently across the nation in relation to the exchange of criminal information between jurisdictions, these provisions do not encompass other relevant information that can be vital to identifying risks to children, including relevant misconduct findings and child protection notifications.

In NSW, allegations of reportable conduct in relation to current employees of 'designated' agencies must be notified to the Ombudsman and investigated by the agency whether they occurred in the recent or distant past; whether they concern conduct at work or outside work; and whether the alleged conduct occurred within NSW or outside. However, where the alleged conduct has occurred outside NSW, many human service agencies have typically been unable to exchange relevant information for various reasons, including where the agency does not have the consent of the involved individual. This has led to inaccurate risk assessments and investigations being concluded on the basis of incomplete information and, as a result, children have been exposed to unacceptable risks – see case studies 1 and 2 below.

Community Services (as the statutory child protection authority) relies upon the *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance* (the Protocol) as its vehicle for obtaining information from other states. Among its purposes, the Protocol is intended to 'provide for cooperation between jurisdictions to facilitate the care and protection of children and young people'. To this end, the Protocol provides for (among other things), 'information sharing' between state child protection authorities. However, the provisions in the Protocol specifically related to 'information sharing', only refer to relevant child protection agencies providing to their interstate counterparts information that they 'hold' (clause 25).

In our December 2012 report to Parliament about responding to child sexual assault in Aboriginal communities, we highlighted that there are a number of problems with the current arrangements. First, consistent with the Protocol, Community Services has taken the view that it should not make a request to its counterpart in another state unless it is acting pursuant to its own legislative responsibilities (this requires it to first form an opinion that the relevant issue has already met, or may meet, the risk of significant harm threshold). Second, facilitating cross-border exchange of information via statutory child protection authorities may not be effective in cases where the critical information being sought is not actually 'held' by the statutory child protection authority in the state where the information is located.

Furthermore, we are aware that particular interstate child protection authorities believe that they do not have the legal authority to even request critical information from a third party agency within their jurisdiction, in circumstances where they themselves do not hold the information being sought and the seeking of such information would not be for the purpose of protecting a child from within their own state. These issues are well illustrated by the following case involving historical allegations of sexual misconduct/offences against a teacher.

> **Case study 1**
> In 2012, Community Services requested that one of its interstate counterparts obtain critical information from a school within the counterpart's jurisdiction about unconfirmed allegations that a teacher had engaged in a sexual relationship with a student when they had taught at that school. (Under the Ombudsman Act, the teacher's current employer – a NSW school – was under a legal obligation to investigate these historical allegations.) In response to Community Services' request, its interstate child protection counterpart advised that it did not 'hold' any information about the teacher within its own records. Community Services then requested that its counterpart seek relevant information from the

[25] See our submissions on Working with Children Checks; the schedule of systemic issues we provided to the Commission in 2013; and our response to the February 2015 hearing into Knox Grammar School.

relevant school within that state. In response, Community Services' counterpart advised that it did not have the authority to request the critical information from the school because it did not have the power to seek information in circumstances where it was not acting pursuant to performing its child protection responsibilities in connection with a child from within its own state.

In correspondence between Community Services and its interstate counterpart, the latter noted: 'A more national approach in this area of information sharing would be useful and valuable but unfortunately we do not have it at present.'

During the course of our audit of Aboriginal child sexual abuse, the NSW Department of Premier and Cabinet advised us that as part of the work plan to implement the *National Framework for Protecting Australia's Children*, the Commonwealth, in partnership with the States, was investigating the need for changes to legislation, most likely Commonwealth legislation, to extend the national protocol for sharing information on children at risk'. Our report recommended that DPC highlight the issues raised above as part of progressing legislative reform (and related policy and practice initiatives) to strengthen the existing interstate information exchange regime. We also recommended that the NSW Government actively pursue with the Federal Government and its state and territory counter-parts, the need for legislative and related policy change that address the current weaknesses in the regime for cross-border exchange of child protection-related information.

The case study below illustrates what can be achieved when quality information is exchanged across borders.

Case study 2
Consistent with our employment-related child protection role, an agency in NSW notified us of allegations of sexual misconduct by an employee in 2005 and 2009. The 2009 allegations resulted in a sustained finding of sexual misconduct and the employee was notified to the CCYP. In addition, the NSW Police Force and Community Services had also conducted related inquiries into the employee's conduct that confirmed he posed a potential risk to children.

In 2011, the former NSW employer received an information request from an interstate employer that was currently employing the person in child-related work and had become aware that there had been serious allegations made in NSW. The NSW employer was unclear as to whether it could legally provide the information requested. Following this case being brought to our office's attention, we coordinated a review of all relevant holdings in the possession of our office, Community Services and Police, relating to the person and requested Community Services provide a summary of these holdings to its interstate child protection counterpart.

The provision of this information prompted a police investigation. This then led to police promptly laying a number of charges against him in relation to the sexual abuse of children from within that state. He subsequently pleaded guilty.

In June this year, we were advised that the NSW Government:

> "*is working to improve and enable the sharing of information between governments and non-government agencies across the various jurisdictions for the safety, welfare and wellbeing of children [and that] this has required consideration of state and territories child protection and other legislation…and is currently considering further options to progress this work, including pursuing opportunities arising from the development of the Third Action Plan (2015-2018) under the National Framework for Protecting Australia's Children (2009-2020)".*[26]

Since then, we have received further advice from FACS about a NSW-led research project to identify options for improving inter-jurisdictional information sharing about foster carers. While focusing on one aspect of facilitating better outcomes for children in out-of-home care (OOHC), the project is

[26] NSW Government, *Progress Report: Responding to Child Sexual Assault in Aboriginal Communities*, June 2015, p12.

relevant to the need for national information sharing reform in relation to child protection more broadly.

5.2 Sexual misconduct and crossing professional boundaries

Allegations of sexual misconduct – especially those involving the crossing of professional boundaries – are among the most complex reportable conduct allegations to identify and respond to. Understanding and responding appropriately to early indicators that an employee may be crossing professional boundaries with children is critical to reducing the incidence of the sexual abuse of children in the workplace. Over the 16 years of our employment-related child protection jurisdiction, we have worked to improve agencies' understanding of the types of sexual misconduct that can precipitate child sexual offences.

- ***Defining sexual misconduct***

We have learnt that the guidelines issued to agencies in relation to what might constitute sexual misconduct – or even an indication of a possible sexual offence – is critical to assisting agencies in identifying conduct of concern, investigating such conduct and, where necessary, making adverse findings.

In this regard, we note that our statement of information to the Commission in February 2015 in relation to Knox Grammar School, discussed sexual misconduct in detail, noting the revised guidelines we issued in 2010 to provide greater clarity for employers in relation to the definition of 'sexual misconduct'.

From our analysis of cases over the years, we know that a high proportion of sexual offences that occur in employment contexts such as schools are preceded by the employee engaging in conduct with, or towards, a child that is in breach of professional standards. As the conduct does not always involve behaviour of an overtly sexual nature, it is crucial that employers are able to identify early signs of inappropriate conduct of this nature and take adequate action to address it. The revised definition contained in our 2010 guideline makes it clear that 'crossing of professional boundaries' with children, particularly if the employee knows or ought to know that their behaviour is unacceptable, can constitute sexual misconduct (regardless of whether or not the conduct involved a manifestly sexual element.

As we advised the Commission in our statement of information in relation to Knox Grammar School earlier this year, the primary weakness of the previous guidelines relating to sexual misconduct concerned the reliance on finding grooming in the context of behaviour by employees towards children which, while not explicitly sexual in nature, crossed professional boundaries. Given that the grooming of children constitutes an offence, and that it involves reaching a conclusion that the employee's behaviour is a precursor to a sexual relationship with a child, employing bodies were understandably reluctant to reach this conclusion. The difficulty in establishing the elements of 'grooming', and the gravity of such a finding, also impacted on the investigative process; for example, investigators would often not rigorously pursue lines of inquiry relating to behaviour which crossed professional boundaries because they had made an assessment that it was unlikely that more rigorous inquiries were ultimately going to support a 'grooming' finding.

In turn, this also led to inappropriate behaviour by employees towards children not being fed into the WWCC process because while the behaviour was clearly unacceptable, the evidence was not capable of supporting a conclusion that there was any intention to engage in a sexual relationship with a child. Therefore, against this background, when the current Deputy Ombudsman and Community and Disability Services Commissioner assumed responsibility for our employment-related child protection jurisdiction in 2010, he decided to include a focus on behaviour around the crossing of professional boundaries in relation to:

> *....behaviour that can reasonably be construed as involving an inappropriate and overly personal or intimate: relationship with; conduct towards; or focus on; a child or young person, or a group of children or young persons.*

The revised definition has allowed employers to pursue broader lines of inquiry and examine the nature of inappropriate relationships without the need to establish 'grooming'. Case study D in Appendix 2 illustrates this.

Notwithstanding the impact of our revised definition of sexual misconduct, it would be misleading to suggest that all agencies, including those within the schools sector, have sophisticated practices in responding to this issue. However, we are confident that many sectors have shown improvements in practice in this area over time.

We also appreciate the hesitance of some agencies in relation to naming conduct which is not overtly sexual as 'sexual misconduct'. It is important to note that given the significance of labelling behaviour as 'sexual misconduct', our guidelines for employers contain a number of caveats which caution employers against being too hasty to label crossing of professional boundaries behaviour as 'sexual misconduct'.

If there is any flaw in our approach to sexual misconduct, it is a semantic one – the legacy of a scheme established around terminology which, 16 years later, might not precisely describe the types of conduct that the scheme is intended to address.

5.3 Managing risks relating to casual teachers and individuals engaged by schools to provide non-teaching services

In our 2013 submission to the Commission about WWCCs, we outlined the strengths of the new scheme, including the continuous monitoring of any serious relevant offences or disciplinary records against an employee once they are granted a clearance.

A staggered, five-year schedule governs when existing employees in paid, volunteer or self-employed child related work are required to apply for a new WWCC under the enhanced scheme. According to Schedule 1 of the *Child Protection (Working with Children) Regulation 2013*, the WWCC compliance periods for the Education sector are as follows:

1 April 2016 – 31 March 2017:

- Education - Secondary schools
- Education - Vocational
- Education - Private tuition and coaching

1 April 2017 – 31 March 2018:

- Early education and child care
- Education and care service – approved provider, manager or certified supervisor
- Education – all remaining services

As the Commission has recognised in its recently released report about WWCCs, in the absence of broader child-safe strategies, a robust WWCC scheme will not in and of itself make organisations safe for children. In this regard, we note that even once the new WWCC in NSW is fully phased in, there are a number of systemic risks relating to the screening of people who are engaged by schools which warrant particular consideration.

- ***Casual teachers***

In recent months, we have had discussions with various representatives from the education sector and the Children's Guardian about the engagement of casual teachers.

In circumstances where a reportable allegation is made against a permanent teacher, the employer has the capacity to implement a range of risk management actions while an investigation is being undertaken; for example, a teacher may be placed on alternate duties, or other arrangements may be put in place to ensure that a teacher does not have unsupervised contact with children.

For casual teachers, the fact that a teacher may be working in a large number of different schools for very short periods of time means that risk management options are more limited. For this reason, the Department of Education will often choose to temporarily revoke a teacher's casual approval while an investigation is being undertaken, and list them on the Department's centralised 'not to be employed' (NTBE) list until such time as the investigation is finalised.

While this approach should ensure that a casual teacher who is the subject of an allegation will not be able to work in any government schools during the investigation period, it is permissible for teachers to be approved as a casual in more than one school sector simultaneously. As a result, there is a risk that an individual who has been simultaneously working as a casual teacher with the Department of Education as well as a Catholic and/or independent school, could continue to work in schools outside of the government sector while an investigation is underway, despite being placed on the government schools NTBE list.

In addition, we note that the other school sectors do not have a centralised list equivalent of the NTBE list. Therefore, by way of example, it is possible for a Catholic school in a particular Diocese to cancel a casual teacher's casual approval due to an allegation of misconduct, and for other Catholic schools to continue to engage the individual as a casual teacher.

- ***Persons engaged by schools to provide non-teaching services***

In a similar vein, a number of matters have also come to our attention that illustrate the challenges associated with managing risks presented by individuals who are engaged to provide various non-teaching services to the school community. Engagement of this type is generally arranged directly by the school – or groups associated with the school, such as Parents & Citizens (P&C) – such that their engagement is not known to any centralised authority.

For example, we were notified by one school of serious allegations against a person who the school had engaged to provide extra-curricular services to children. The allegations were reported to the Department of Education, which reported the matter to Police and placed the person on its NTBE list. However, the Department was unaware that he was also engaged by at least three schools. In each case, he was engaged directly by the school (or P&C). He was able to continue working in the schools for more than a year until he was arrested by police for child sexual abuse offences, after another school reported further allegations to Police. This scenario is analogous to the circumstances outlined above regarding casual teachers.

The potential risks associated with persons engaged to provide services within schools that are not services to children can be even more difficult to manage.

By way of illustration, we were contacted by a school authority after it discovered that a particular individual was being engaged by a number of its schools, and schools in other sectors, to provide services to teaching staff. Prior to the commencement of the Reportable Conduct and WWCC schemes, the school authority had deemed that this man was unsuitable to ever work with children within its schools. As he was providing services to teaching staff rather than directly to students, he was not required to hold a WWCC. There were allegations however that the man was leveraging off his access to the school community to engage with students one-on-one during class break times.

We made a Notification of Concern[27] to the Children's Guardian about this individual, and he was subsequently barred from working with children in NSW. Despite this, the bar does not prevent the man from being engaged in schools to provide services to adults because a WWCC bar does not preclude a person from attending school premises for purposes that do not involve child-related work (See case study E in Annexure 2).

While we emphasise with schools that they should have stringent systems in place to ensure that individuals who attend the school for non-child-related work purposes are not permitted to engage with students, it is important for schools to also take sufficient steps to ensure that these workers do not gain inappropriate access to children. In this matter, we were informed that the school had sound systems in place to ensure visitors were not permitted unsupervised contact with children, but that the school's executive had been persuaded by the man's self-proclaimed expertise and reputation, and by the fact that he had been highly recommended by other school executives.

For this reason, school executives should be provided with information on a regular and ongoing basis about the need for vigilance in relation to visitors to school premises and strict observance of systems and procedures designed to keep children safe.

- ***The engagement of private tutors***

It is important to note that a range of educational institutions are excluded from the reportable conduct scheme because they do not constitute 'non-government schools' as defined by the Education Act 1990.[28] As a result, there is a significant difference in the safeguards for children whilst at school, compared to child safety during their before or after-school or weekend tuition at one of the state's many, tutoring organisations. What is more, the lack of scrutiny applied to tutoring organisations impacts on the overall knowledge base about certain teachers who may pose a risk to students, such that schools may engage a teacher who was the subject of concerns within the tutoring sector, without being privy to the potential risks.

A matter came to our attention last year that illustrates our concerns in this area – see case study F (Annexure 2).

6. Concluding remarks

The introduction of the reportable conduct and WWCC schemes in NSW – along with a range of other related initiatives – has improved the safeguards for children in the schools environment. This impact is evidenced by a number of indicators, including more rigorous probity-checking; better awareness of child protection issues; improved systems for preventing and responding to child abuse in schools; and independent scrutiny of these systems. The complementary nature of the schemes, has also significantly curtailed the ability of persons who pose a risk to children to move around the system undetected.

In making these observations, we believe that it is important to acknowledge that the gains we have made in NSW have been achieved through strong leadership and support from across the government and non-government school sectors for the two schemes and as a result of related initiatives. In addition, oversight agencies and the schools sector alike recognise the need to commit to ongoing practice refinement.

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[27] Under Schedule 1, Clause 2A of the *Child Protection (Working with Children) Act 2012*, the Ombudsman can make a Notification of Concern to the Children's Guardian if, as a result of information received in the course of exercising the Ombudsman's functions, there are concerns that, on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to children. A Notification of Concern is an assessment requirement trigger under the Act.

[28] Pursuant to section 3 of the Act a non-government school means a registered non-government school registered under Part 7 of the Act.

In this regard, it is important that our office continues to refine its own intelligence capacity, particularly as it relates to identifying areas of the sector which need strengthening. An effective intelligence strategy in both the schools and other key sectors must also include obtaining and responding to critical information gleaned from key industry experts. In relation to the schools sector in particular, our office needs to further strengthen our strategic engagement with peak bodies across the sector to jointly determine priority areas that need we need to target.

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