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# A study into the legislative – and related key policy and operational – frameworks for sharing information relating to child sexual abuse in institutional contexts

## Report for the Royal Commission into Institutional Responses to Child Sexual Abuse

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- Legislation accurate at 31 August 2015
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### **Project team**

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned and funded this research project. It was carried out by researchers Carolyn Adams and Krista Lee-Jones.

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### **Disclaimer**

The views and findings expressed in this report are those of the authors and do not necessarily reflect those of the Royal Commission.

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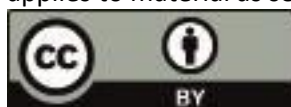
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# Preface

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On Friday, 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations. The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond where child sexual abuse has occurred?
5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within themes two, three and five.

The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program, please visit [www.childabuseroyalcommission.gov.au/research](http://www.childabuseroyalcommission.gov.au/research)

# Contents

Preface	iii
Executive summary	1
1. Introduction	4
1.1 Aim and research questions	6
1.2 Methods	6
1.3 Limits of this research	7
2. International legal framework	11
2.1 International Covenant on Civil and Political Rights: The right to privacy	12
2.2 Convention on the Rights of the Child: the best interests principle	13
3. International resources	16
3.1 Introduction	16
3.2 United Kingdom	16
3.3 United States	18
3.4 Canada	20
3.5 New Zealand	21
4. Confidentiality, secrecy and privacy	24
4.1 Duty of confidentiality at common law and in equity	24
4.2 Duty of confidentiality in legislation	25
4.3 Privacy legislation	27
4.4 Conclusion	36
5. Child protection and out-of-home care	38
5.1 Introduction	38
5.2 Notification	39
5.3 Referrals	42
5.4 Assessment and investigation	43
5.5. Out-of-home care	47
5.6 Information sharing with and between prescribed bodies	54
5.7 Children's commissioners and guardians	64
5.8 Cross-jurisdictional sharing	66
5.9 Confidentiality	68
5.10 Conclusion	72
6. Working with children legislation	74
6.1 Introduction	74
6.2 A national approach	74
6.3 Types of information used for assessment	75
6.4 Who is subject to a working with children check?	77
6.5 Information sharing for assessment	78
6.6 Confidentiality	78
6.7 Cross-jurisdictional sharing	79

6.8 Register	79
6.9 Conclusion	80
<b>7. Child sex offenders</b>	<b>81</b>
7.1 Introduction	81
7.2 National system	81
7.3 Sex Offenders Register	82
7.4 Disclosure of personal information	84
7.5 Monitoring registered offenders	88
7.6 Cross-jurisdictional sharing	89
7.7 Conclusion	90
<b>8. Early childhood services</b>	<b>91</b>
8.1 The Education and Care Services National Law	91
8.2 Other legislation specific to early childhood services	97
8.3 Conclusion	98
<b>9. Schools</b>	<b>99</b>
9.1 Introduction	99
9.2 Registration and sharing information about teachers	99
9.3 Sharing information about other school staff members	109
9.4 Sharing information about students within a jurisdiction	115
9.5 Sharing information about students across jurisdictions	124
<b>10. Juvenile detention</b>	<b>127</b>
10.1 Introduction	127
10.2 Relevant legislation	128
10.3 Conclusion	138
<b>11. Extracurricular activities</b>	<b>139</b>
11.1 Introduction	139
11.2 Reporting	139
11.3 Working with children checks	140
11.4 Child protection	141
11.5 Privacy	142
11.6 Conclusion	143
<b>Appendix A: Glossary</b>	<b>144</b>
<b>Appendix B: References</b>	<b>147</b>
<b>Appendix C: Methods</b>	<b>158</b>



# Executive summary

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This report considers the legislative – and related key policy and operational – frameworks for sharing information relating to child sexual abuse in institutional contexts between institutions and across jurisdictions in Australia. The research team was asked, in particular, to identify aspects of information sharing frameworks that:

- facilitate appropriate and timely information sharing between institutions and across jurisdictions to identify, prevent and respond to child sexual abuse in institutional contexts; or
- impede or limit such information sharing.

Appropriate and timely sharing of information between government agencies and non-government organisations, and across jurisdictions in Australia is essential to allow institutions to work together in an integrated way to identify, prevent and respond to institutional child sexual abuse. This report examines information sharing arrangements in a range of sectors of interest to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission): child protection, out-of-home care (OOHC), early childhood services, schools, juvenile justice and extracurricular activities. No single institution collects all the necessary information or has all the appropriate tools to adequately protect children in these sectors, and so the information collected **must** be shared to ensure an effective response.

However, information relating to child sexual abuse very often includes sensitive personal information about adults who may pose a risk to children, and children who may be at risk or pose a risk to other children. For this reason, the legislative and policy frameworks around sharing such information must attempt to resolve the tension between two sets of rights: the rights of children to physical and personal integrity and protection from all forms of violence, including sexual abuse; and the right to privacy for the children and adults. This tension can result in a complex legislative framework and confusion for those working within the framework.

However, this report highlights that it is possible to resolve this tension in particular legislative and policy contexts. It is possible to share information about child sexual abuse in institutional contexts in ways that are consistent with the right to privacy. The right to privacy is not absolute and should not prevent the sharing of information necessary to identify, prevent and respond to institutional child sexual abuse. Privacy regulation is not designed or intended to prevent the timely sharing of personal information where necessary and appropriate. Indeed, privacy regulation is intended to provide a framework within which information can flow because it is properly handled and adequately protected.

A 2015 report by the Social Policy Research Centre at the University of NSW (SPRC Report) found that ‘organisational factors are the most significant barriers (and enablers) of information sharing’ and while ‘legislation and policy can also create barriers to information sharing ... the research shows that the interpretation of these policies is more significant than policies themselves’.<sup>1</sup> While these insights are significant, and are being explored in other work for the Royal Commission, it is also important to ensure that the legislative and policy frameworks for sharing information about institutional child sexual abuse are not themselves unnecessarily impeding or limiting the flow of information – and that is the focus of this report.

The report identifies a number of elements in the legislative and policy framework that are likely to impede or limit the timely and appropriate sharing of information. One issue identified by the Wood Special Commission

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1 Matthew Keeley et al, ‘Opportunities for Information Sharing: Case Studies’ (Report, Social Policy Research Centre University of NSW, April 2015) 2.

of Inquiry in 2008 and again by the Australian Law Reform Commission (ALRC) in 2009 is the widespread use of confidentiality or secrecy offences in legislation.<sup>2</sup> Imposing criminal sanctions on those working in the child protection and welfare sectors for breach of secrecy or confidentiality provisions is likely to contribute to an organisational culture that is risk averse when it comes to sharing information. A disciplinary response or civil penalty may be a more appropriate option.

Complexity and fragmentation in the Australian federal information sharing landscape do give rise to confusion and are likely to affect the timely sharing of information, particularly across jurisdictions. Commonwealth, state and territory privacy laws are often cited as posing a challenge in this regard that might largely be addressed if jurisdictions adopted a consistent set of privacy principles, as suggested by the ALRC in 2008.<sup>3</sup> This challenge has been addressed in a different way in the early childhood services sector where a unique national regulatory scheme is in place that excludes the operation of state and territory privacy legislation in relation to the scheme, and amends and applies the *Privacy Act 1988* (Cth) as a law of each participating jurisdiction.

This challenge has not been met as successfully in relation to the Interstate Student Data Transfer Notes (ISDTNs) and Protocols, which provide for the sharing of information between schools when a student moves from one state or territory to another. Where a student is moving from a government school, the protocols require that the school must obtain consent from the student before transferring information to the new school. Where consent is not forthcoming, the principal is advised to 'contact the Privacy Officer in their state and territory education authority for advice about the transfer of information without parent/guardian or student consent'.<sup>4</sup> This approach demonstrates the uncertainty caused by the complex web of privacy regulation at the state and territory level and is likely to impede appropriate information sharing.

The non-government schools sector has a good privacy model, as outlined in its *Privacy Compliance Manual*.<sup>5</sup> In all jurisdictions, information collected for a particular purpose may be used and disclosed for that purpose. The manual makes clear, therefore, that schools should include express statements in Standard Collection Notices about what information is collected from students and staff, and how it will be used and disclosed, including to facilitate the transfer of students between schools and to discharge the school's duty of care to students and staff. This approach is consistent with privacy principles and provides a firm foundation for sharing personal information with other schools, including across jurisdictions.

The complexity and fragmentation associated with working with children checks is being addressed to some extent by the *Memorandum of Understanding for a National Exchange of Criminal History for People Working with Children* initiative. The Royal Commission has also prepared a report on working with children checks, which makes a number of recommendations to address these issues<sup>6</sup> but, given the timing of that report, the recommendations have not been considered in detail in this research report.

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- 2 New South Wales, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008); Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
  - 3 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).
  - 4 Education Council, *Interstate Student Data Transfer Note: Form 4 – Interstate Student Data Transfer Note Protocol for Use by Government Schools* (2006).
  - 5 Independent Schools Council of Australia and National Catholic Education Commission, *Privacy Compliance Manual* (2013).
  - 6 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015).



A multitude of provisions in child protection legislation across the jurisdictions provide for very specific information exchange between particular agencies and organisations. Bringing these provisions together, as has been done in Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), may help to bring clarity to, and increase confidence in, information sharing arrangements. This may also highlight agencies and organisations that lie outside the information sharing arrangements that should be included. Given the trend in contracting out, it is particularly important that appropriate non-government organisations are included in the arrangements.

The report also identifies a number of other elements that facilitate and support timely sharing of information. These include provisions that make clear that, in all actions concerning children, the best interests of the child must be a primary consideration – ‘the best interests of the child principle’. Provisions of this nature help to ensure that when a child’s right to safety comes into tension with the child’s right to privacy or another’s right to privacy, the safety of the child becomes the primary consideration.

Information may also be shared under an exception to the privacy principles for sharing ‘as required or authorised by law’, and much information is shared on this basis. Provisions that expressly provide for the sharing of information should also state that they are relying on this exemption in the privacy principles. This clarifies the relationship between privacy legislation and the information sharing provision, and underlines that the sharing is consistent with privacy legislation.<sup>7</sup>

Some evidence canvassed in this report shows that creating central ‘hubs’ of information that are controlled by a central agency is not the most effective mechanism for sharing information and can lead to delays and other problems. Regimes that allow front-line professionals in government agencies and non-government organisations to exercise their judgement and to share information laterally appear to be a more effective approach. As an example, this approach has been adopted for sharing information among ‘prescribed bodies’ in child protection legislation in NSW and the Northern Territory.<sup>8</sup> A ‘hub’ approach is still evident in some jurisdictions and in relation to sharing information across jurisdictions in the child protection and OOHC context.

Systems that establish multi-institutional teams can help to improve the information sharing network because of the importance of trust and understanding in supporting confident sharing of information. Cross-institutional training is important to ensure that individuals who work with other institutions understand the legal framework, policies and procedures in those other institutions. It is also important that the agencies and organisations have shared common objectives when sharing information. Upholding the best interests of the child principle should be one of these objectives.

It is possible to design legislative and policy frameworks that support appropriate and timely information sharing. They must be clear and they must be well understood. However, it is important to also consider the importance of the following issues highlighted in the SPRC Report: leadership and effective management; trust between organisations; guidance to clarify when and how to share information; and pro-active, rather than reactive, information sharing to ensure the timely and appropriate sharing of information.<sup>9</sup>

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7 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [16.93].

8 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 16A; *Care and Protection of Children Act* (NT) s 293C.

9 Matthew Keeley et al, ‘Opportunities for Information Sharing: Case Studies’ (Report, Social Policy Research Centre University of NSW, April 2015) 8–9.

# 1. Introduction

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This report considers the legislative – and related key policy and operational – frameworks for sharing information relating to child sexual abuse in institutional contexts between institutions and across jurisdictions in Australia. Appropriate and timely sharing of information between institutions is essential to identify, prevent and respond to child sexual abuse in institutions. Information sharing can help to identify harm; to identify and manage risk; and to facilitate appropriate and integrated responses to victims/survivors.

Information about or relating to child sexual abuse is very often sensitive personal information. For this reason, the legislative and policy frameworks around sharing such information must attempt to balance the need to share information in appropriate circumstances with the need to provide appropriate privacy protection for personal information. This tension can result in complexity in the legislative framework and confusion for those working within the framework. As the Australian Law Reform Commission (ALRC) has noted, however:

*Inconsistency and fragmentation in privacy laws should not prevent appropriate information sharing. Information sharing opportunities, which are in the public interest and recognise privacy as a right to be protected, should be encouraged. Rather than preventing appropriate information sharing, privacy laws and regulators should encourage agencies and organisations to design information sharing schemes that are compliant with privacy requirements or, where necessary, seek suitable exemptions or changes to legislation to facilitate information sharing projects.*<sup>10</sup>

The Report of the Special Commission of Inquiry into Child Protection Services in NSW (Wood Report) identified the lack of a clear and workable structure for sharing information between agencies in NSW as a major barrier to effective interagency work.<sup>11</sup> While relevant legislation in NSW and in other jurisdictions, including at the federal level, has been amended since that report was published, problems with the legislative structure remain. This is particularly evident where information needs to be shared across jurisdictions.

Appropriate and timely sharing of information between institutions and across jurisdictions in Australia is an essential component of allowing institutions to work together in an integrated way to identify, prevent and respond to child sexual abuse in institutional contexts. No single institution collects all the necessary information or has all the appropriate tools to adequately protect children and so the information collected **MUST** be shared to ensure an effective response. However, many and varied structural and organisational barriers impede such sharing. This report identifies a number of elements in the legislative and policy framework that create substantive barriers to sharing information. However, a range of barriers also arise because of other factors, including confusion caused by the complexity of the regulatory framework and the risk-averse behaviour of relevant staff, driven by lack of understanding of the legislative and policy requirements.

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10 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 510.

11 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3, [24.83].

The United Kingdom Government advises practitioners and senior managers working with children, parents and carers that:

*Fears about sharing information cannot be allowed to stand in the way of the need to safeguard and promote the welfare of children and young people at risk of abuse and neglect.*<sup>12</sup>

The report goes on to provide a useful ‘myth-busting guide’ that is also relevant in the Australian context. One of the myths is that privacy legislation prevents the sharing of personal information. The report notes that privacy legislation is intended to provide a framework for sharing personal information appropriately, not for preventing the flow of information. Another myth is that consent is always needed to share information. Consent is not always necessary, particularly where the health or safety of a child is at risk and any delays in dealing with a matter are not in the best interests of the child. These issues are discussed in detail in relation to relevant Australian legislation in the body of this report.

The ALRC has examined the benefits of appropriate and timely information sharing in the context of the Commission’s inquiry into family violence. These include allowing institutions with relevant responsibilities to work more effectively, and preventing victims/survivors from having to supply the same information on different occasions to different service providers. However, the ALRC also notes that increased sharing of information can result in a reluctance to report information due to concerns about how the information is likely to be used. The ALRC suggests that it is important to ensure that information is shared appropriately and stored securely.<sup>13</sup> A number of submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) also highlighted the importance of appropriate handling of sensitive personal information to ensure that individuals are confident to report or complain.<sup>14</sup>

A 2015 report prepared by the Social Policy Research Centre at the University of New South Wales (SPRC Report) also raises the point that:

*... none of the legislative or policy frameworks examined could be said to actively encourage a culture of proactive sharing of information prior to a request being made, whether that be to fulfil a duty of care owed to third parties or to fulfil more effectively the specific policy objectives of the information sharing framework or program.*<sup>15</sup>

This approach to sharing information is reflected in the permissive nature of many of the information sharing provisions examined in this report. Most provisions **allow** institutions to share information, rather than requiring them to do so. The SPRC Report also notes that research has shown that ‘laws, regulations and policies that mandate information sharing have been identified as efficient enablers of information’.<sup>16</sup> This is one area that would warrant further consideration. This report highlights a number of situations in which an institution could be required to share information but is not currently required to do so.

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12 United Kingdom Government, *Information Sharing: Advice for Practitioners Providing Safeguarding Services to Children, Young People, Parents and Carers* (2015).

13 Australian Law Reform Commission, *Family Violence – A National Legal Response* Report No 114 (2010) [30.7]–[30.8].

14 See, for example, Childwise, Submission No 14 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 3: Child Safe Organisations*, October 2013.

15 Matthew Keeley et al, ‘Opportunities for Information Sharing: Case Studies’ (Report, Social Policy Research Centre University of NSW, April 2015) 28.

16 Ibid.

## 1.1 Aim and research questions

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The aim of this project was to consider the legislative – and related key policy and operational – frameworks for sharing information relating to child sexual abuse in institutional contexts and to identify aspects of information sharing frameworks that appear to:

- facilitate appropriate and timely information sharing between institutions and across jurisdictions to identify, prevent and respond to child sexual abuse in institutional contexts; or
- impede or limit such information sharing.

The research team was asked to review a range of Commonwealth, state and territory legislation that specifically allows, requires or prohibits disclosure or sharing of information about child sexual abuse in institutional contexts, including privacy legislation. The team was also asked to review a limited range of key policies and operational mechanisms developed and implemented by government agencies and regulatory oversight bodies.

In analysing the legislative provisions, the research team was asked to consider the following questions:

1. The types of information that may/must/may not be shared
2. Who may/must/must not share information
3. With whom may/must information be shared
4. When may/must information be shared
5. Any other significant requirements/restrictions/circumstances relevant to the sharing of information (including any relating to how information may/must be shared).

The team was also asked to consider what aspects of information sharing frameworks in comparable overseas jurisdictions work to promote, facilitate or support appropriate and timely sharing of information.

## 1.2 Methods

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This report is a doctrinal and comparative analysis of the legislative – and related key policy and operational – frameworks in Australian states and territories for sharing information about child sexual abuse in institutional contexts between institutions and across Australian jurisdictions. The report includes a critical review of the extent to which these frameworks promote appropriate and timely information sharing to identify, prevent and respond to child sexual abuse in institutional contexts and has identified a range of provisions that may impede such sharing.

The research team initially relied on a comprehensive overview of relevant legislation provided by the Royal Commission to identify legislation for consideration in this report. The research team also interrogated the Australasian Legal Information Institute (AustLII) database, primarily by browsing and also using key word searches, to identify legislation relevant to the particular areas of focus in this report. This database was chosen because the information on the site is drawn from authoritative Commonwealth, state and territory government sites and the database has greater functionality than some of the federal, state and territory government databases.

The report examines legislation in the areas of child protection and out-of-home care (OOHC); child sex offenders, working with children check clearances, early childhood services, schools, juvenile justice, and privacy and health privacy legislation. The report examines those areas of government and non-government activity that have specific regulatory regimes, such as OOHC, early childhood services, schools and juvenile

justice. The report also examines the extent to which child protection, child sex offender, and working with children check clearance legislation regulates activities that do not fall under specific regulatory frameworks, such as extracurricular activities.

Due to time and resource constraints, the report does not consider in detail legislation of general application – such as that regulating the employment of public sector employees – which was included in the overview of legislation referred to above. Relevant provisions in such legislation might include, for example, the general duty of a public sector employee not to share information obtained in the course of his or her employment without appropriate authorisation, and general records management requirements. The report does consider privacy and health privacy legislation – despite that fact that such legislation is of general application – as this legislation was expressly identified as a potential issue in discussions with the Royal Commission.

To identify relevant policy and operational documents, the team interrogated the websites of relevant agencies in each state and territory – that is, agencies with responsibility for child protection, early childhood services, education and juvenile justice.

The team also conducted a limited literature review to identify academic and grey literature relevant to the legislative framework in the Australian states and territories, and in a number of comparative international jurisdictions: the United Kingdom, the United States, Canada and New Zealand. These jurisdictions were selected because they are all common law jurisdictions, with comparable legislative and policy frameworks in relation to child protection. The first three are also federal systems that, like Australia, are required to deal with issues of complexity and fragmentation in their regulatory frameworks. New Zealand was selected because it takes a similar approach to governance issues to Australia. It is also included in some of the information sharing arrangements discussed in this report, such as for cross-jurisdictional teacher registration recognition. This report is not a comprehensive literature review. However, where relevant literature was identified, references have been included to inform the doctrinal research. A more detailed description of the literature search methods is set out in Appendix C.

## 1.3 Limits of this research

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This report is a doctrinal and comparative analysis of the legislative and key policy and operational frameworks for sharing information between institutions and across jurisdictions in Australia relating to child sexual abuse in institutional contexts. The report does not consider in detail the points at which information about institutional child sexual abuse is initially collected – for example, through mandatory or non-mandatory reporting, complaints or investigations. It focuses on the sharing of that information between institutions after the information has been collected.

### Limits of the law: cultural and organisational issues

As a doctrinal and comparative analysis of the legal framework, this report does not consider in detail issues of organisational culture, which are in any event under consideration by the Royal Commission in another context. However, the following brief discussion underlines that the legal framework is only one element in a more complex information sharing context.

The SPRC Report found that ‘organisational factors are the most significant barriers (and enablers) of information sharing’ and while ‘legislation and policy can also create barriers to information sharing ... the

research shows that the interpretation of these policies is more significant than policies themselves'.<sup>17</sup> These themes were also explored in a 2015 workshop held by the Centre of Excellence for Information Sharing in the United Kingdom. The workshop outcomes highlighted that relationships and trust are essential in the context of information sharing and that there is a need to 'overcome the cultural barriers of using and sharing multi-agency information effectively to support families'.<sup>18</sup>

Organisational theory recognises that institutions have 'cultures' and that individuals are socialised into the organisational culture – the values and norms – of an institution, 'transforming an outsider into an insider'.<sup>19</sup> This involves encouraging organisational commitment, identification and loyalty. This can mean that:

*In making decisions their organizational loyalty leads them to evaluate alternative courses of action in terms of the consequences of their action for the group.*<sup>20</sup>

Herbert Simon notes that this sense of identification means that a decision-maker is likely to make decisions that accord with the values and objectives of the organisation and that this can give rise to problems.

*The principal undesirable effect of identification is that it prevents the institutionalized individual from making correct decisions in cases where the restricted area of values with which he [or she] identifies must be weighed against other values outside that area ... The organization members ... believe the bureau's welfare more important than the general welfare when the two conflict.*<sup>21</sup>

This particular issue was raised in a submission to the Royal Commission from Barnardos Australia, which noted that 'workers need to be clear that their organisation supports them valuing children rather than their staff group'.<sup>22</sup>

Organisational culture may also reflect differences between particular professions – for example, health professionals and social work professionals. Research suggests that health professionals, working within a medical model and focused on the individual patient, are more likely to prioritise protecting patient confidentiality and less likely to focus on the need to share information. Social work professionals, working within a model that is concerned with a wider group including families and the community, are more receptive to the need to share information.<sup>23</sup> Munro has specifically canvassed some of the communication issues in professional child protection networks and found that these include 'territorialism, status and power, competition for resources, differing priorities, differing value systems and disrespect for each other's expertise' as well as mistrust of other professionals' perspectives.<sup>24</sup>

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17 Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015) 2.

18 Huxton and Jovian Smalley, *Trust, Transparency and Transformation: Developing a Multi-Agency Information Sharing Culture When Working with Families*, Centre of Excellence for Information Sharing (19 June 2015) <<http://informationsharing.org.uk/trust-transparency-and-transformation-developing-a-multi-agency-information-sharing-culture-when-working-with-families/>>.

19 Ibid 221.

20 Herbert A Simon, 'Decision-Making and Administrative Organisation' in Robert K Merton et al (eds), *Reader in Bureaucracy* (The Free Press, 1952) 185, 190.

21 Ibid 191.

22 Barnardos Australia, Submission No 1 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 3: Child Safe Organisations*, 11 October 2013.

23 Sue Richardson and Sheena Asthana, 'Inter-agency Information Sharing in Health and Social Care Services: The Role of Professional Culture' (2006) 36 *British Journal of Social Work* 657, 662.

24 Eileen Munro, 'What Tools do we Need to Improve Identification of Child Abuse?' (2005) 14 *Child Abuse Review* 374, 383.

The ALRC and the NSW Law Reform Commission (NSWLRC) in their joint 2010 report, *Family Violence – a National Legal Response*<sup>25</sup>, and the Wood Report<sup>26</sup> also considered the cultural barriers to information sharing among public sector agencies and private sector organisations.

While these insights are significant, it is also important to ensure that the legislative and policy frameworks for sharing information about institutional child sexual abuse are not themselves barriers to information sharing – and that is the focus of this report. It is possible to design legislative frameworks that support appropriate and timely information sharing. They must be clear and they must be well understood. However, according to the SPRC Report, timely and appropriate information sharing is more likely with effective leadership and management; trust between organisations; guidance to clarify when and how to share information; effective procedures for seeking consent to share information; and pro-active, rather than reactive, information sharing.<sup>27</sup>

## Commonwealth legislation

This report does not consider Commonwealth legislation in detail, except for the *Privacy Act 1988* (Cth), which directly regulates the sharing of personal information by and with private sector organisations such as private schools and institutions providing OOHC. The report focuses on information collected – and therefore shared, or not shared – by those working with, and providing services to, children directly, which primarily occurs under legislative frameworks established at state and territory level. It also focuses on a number of key service sectors where child protection is relevant in a range of contexts, including OOHC, early childhood services, schools and juvenile justice.

It is possible that information about child sexual abuse may be collected in specific contexts at the federal level – for example, during proceedings in the Family Court or in discussions with Centrelink staff about child support or social security benefits. The issue of sharing information about children at risk in areas regulated by Commonwealth legislation was considered in detail by the ALRC and the NSWLRC in two reports dealing with family violence. The *Family Violence – A National Legal Response*<sup>28</sup> report includes a chapter on information sharing that notes the importance of an integrated response and deals in detail with the issues associated with information sharing between the federal Family Court and state and territory child protection agencies; between the Family Court and state and territory courts; and between public sector agencies at the Commonwealth, state and territory level and private sector organisations.<sup>29</sup>

In 2011, the ALRC published its report, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*<sup>30</sup>, which considered Commonwealth legislation in areas such as social security, income management, child support and family assistance, employment law, superannuation, migration and privacy, and touched on information sharing. Another report, *Information Sharing in Family Law and Child Protection*

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25 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – a National Response* Report No 114 (2010) [30.186]–[30.237].

26 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3 [24.108]–[24.113].

27 Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015) 8–9.

28 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010).

29 Ibid ch 30.

30 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011).



– *Enhancing Collaboration*, prepared by Professor Richard Chisholm AM for the Royal Commission, addresses the sharing of information with the Family Court in the child protection context.

Finally, the *Information Sharing Protocol Between the Commonwealth and Child Protection Agencies* aims to facilitate investigations and assessments of vulnerable and at-risk children in Australia to promote their care, safety, welfare, wellbeing and health. Three Commonwealth agencies – Centrelink, Medicare and the Child Support Agency – as well as all state and territory child protection agencies are currently parties to the protocol. A review of the protocol was undertaken in 2011.<sup>31</sup>

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31 Allen Consulting Group 2011, Report to the Department of Families, Housing, Community Services and Indigenous Affairs, *Operational Review of the Information Sharing Protocol between the Commonwealth and Child Protection Agencies*, August 2011.



## 2. International legal framework

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Australia is a party to a range of international legal instruments directly relevant to the subject of this report. These include the *International Covenant on Civil and Political Rights* (ICCPR)<sup>32</sup>, which protects the right to privacy, and the *United Nations Convention on the Rights of the Child* (CRC).<sup>33</sup> Australia is bound in international law to comply with the provisions of these international instruments and to implement them in Australian law and practice. Thus, they provide a framework for developing Australian law and policy. In general terms, international instruments do not become a part of Australian law until they are implemented through legislation.<sup>34</sup> Even before this, however, they may be used to help interpret domestic law, including developing common law.<sup>35</sup>

In the case of the right to privacy set out in the ICCPR, this has been partially incorporated into Australian law at Commonwealth, state and territory level through a range of legislation including privacy and health privacy legislation. Privacy legislation in Australia regulates the collection, use and disclosure of personal information and is, therefore, of direct relevance to the sharing of information about child sexual abuse. Privacy and health privacy legislation are discussed in detail in section 4.3.

In the case of the CRC, some rights set out in that instrument have also been directly incorporated into Australian law at Commonwealth, state and territory level through a range of legislation including provisions that expressly recognise the ‘best interests of the child’ principle set out in Article 3.<sup>36</sup> For example, the *Education and Care Services National Law* provides that one of the guiding principles of the national education and care services quality framework is that ‘the rights and best interests of the child are paramount’.<sup>37</sup>

The issue for those professionals who need to share information about institutional child sexual abuse is that frequently there is tension between the right to privacy and the rights of children, including the best interests of the child principle. The right to privacy is not absolute, however, and it is possible to resolve the tension in particular legislative and policy contexts. In relation to sharing information about child sexual abuse in institutional contexts, it is important to consider that all children have the human right to physical and personal

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32 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

33 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

34 *New South Wales v Commonwealth* (1975) 135 CLR 337; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Dietrich v The Queen* (1992) 177 (CLR) 292.

35 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

36 These include, for example, *Children and Young People Act 2008* (ACT) s 851, which provides that the Minister or director-general may give someone protected information about a child if it is in the best interests of the child; *Care and Protection of Children Act* (NT) s 10, which provides that when a decision involving a child is made, the best interests of the child are the paramount concern; *Child Protection Act 1999* (Qld) s 5A, which provides that the main principle for administering the Act is that the safety, wellbeing and best interests of a child are paramount; *Children, Young Persons and Their Families Act 1997* (Tas) s 8, which provides that in any exercise of powers under the Act in relation to a child, the best interests of the child must be the paramount consideration; *Commission for Children and Young People Act 2012* (Vic) s 8, which provides that the Commission must perform their functions for the purpose of promoting the best interests of the child; and the *Children and Community Services Act 2004* (WA) s 8, which sets out how to determine the best interests of the child for the purposes of the Act.

37 *Education and Care Services National Law Act 2010* (Vic), sch, s 3(3)(a).

integrity and protection from all forms of violence, including sexual abuse<sup>38</sup>, and that it is possible to share information about child sexual abuse in institutional contexts in ways that are consistent with the right to privacy.

## 2.1 International Covenant on Civil and Political Rights: The right to privacy

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The right to privacy is set out in Article 17 of the ICCPR, which provides as follows:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

The critical terms, for the purposes of this report, are ‘unlawful’ and ‘arbitrary’. The right to privacy is not absolute and a State may interfere with privacy – for example, by sharing personal information about a child victim or survivor of sexual abuse, or a potential perpetrator of child sexual abuse – where the interference is both lawful and not ‘arbitrary’. An interference will be lawful if the interference is based in the law – that is, if the sharing is authorised or required by law and specifies ‘in detail the precise circumstances in which such interference may be permitted’.<sup>39</sup>

An interference with privacy will not be ‘arbitrary’ if it is ‘reasonable in the particular circumstances’.<sup>40</sup> The United Nations Human Rights Committee, which administers the ICCPR, recognises that as ‘all persons live in society, the protection of privacy is necessarily relative’.<sup>41</sup> In order to be ‘reasonable’ a law that interferes with privacy must be ‘proportional to the end sought and be necessary in the circumstances of any given case’.<sup>42</sup>

The ALRC noted in its report, *For Your Information: Australian Privacy Law and Practice*, that:

*This clearly envisages a balancing of interests and, in particular, a balancing of public interests. The other human rights that must be balanced with the right to privacy ... are many and varied. It is not only the right to freedom of expression that must be considered but numerous other rights including the right to liberty and security of the person, and the right of every child ‘to such measures of protection as are required by his status as a minor, on the part of his family, society and the State’.*<sup>43</sup>

Australian privacy law and policy has also been developed within the framework provided by the Organisation for Economic Co-operation and Development (OECD) *Guidelines for the Protection of Privacy and Transborder*

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38 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.

39 United Nations Human Rights Committee, *General Comment No 16: Article 17: The Right to Respect of Privacy, Family, Home and Correspondence and Protection of Honour and Reputation*, 32nd sess, UN Doc CCPR/C/GC/16 (8 April 1988) [8].

40 Ibid [4].

41 Ibid [7].

42 United Human Rights Committee, *Views: Communication No 488/1992*, 55th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.3] (*Toonen v Australia*).

43 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [5.125]. Footnotes omitted. Quote is from art 9 of the ICCPR.

*Flows of Personal Data* (OECD Guidelines).<sup>44</sup> The OECD Guidelines were updated in 2013<sup>45</sup> but the revision left intact the eight core principles dealing with the handling of personal information that provided the basis for the various sets of privacy principles set out in Commonwealth, state and territory privacy legislation. For example, the OECD Guidelines provide that individuals should be made aware of the purposes for which their personal information is collected, and that the information should only be used or disclosed for those purposes except with the consent of the individual or as authorised by law.<sup>46</sup> The OECD Guidelines also require that personal information should be protected by reasonable security safeguards against loss or unauthorised access and that individuals should have the right to know that institutions hold personal information about them and the right to ensure that the information is complete and correct.<sup>47</sup>

As with Article 17 of the ICCPR, these principles provide a framework for the appropriate handling of information. They are not intended to prevent appropriate use and disclosure. Indeed, the OECD Guidelines were developed to promote ‘respect for privacy as a fundamental value and a condition for the free flow of personal data across borders’.<sup>48</sup>

This makes clear that, while effective measures must be taken to ensure that information is appropriately handled, this does not mean the information cannot be shared in appropriate circumstances. Those circumstances will include when the rights of children – including their right to be protected from child sexual abuse – require protection.

## 2.2 Convention on the Rights of the Child: the best interests principle

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Australia is also a party to the *United Nations Convention on the Rights of the Child* (CRC). A number of articles of the CRC are directly relevant to the sharing of information in relation to institutional child sexual abuse. Article 3 of the CRC provides as follows:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration** [emphasis added].*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

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44 Organisation for Economic Co-operation and Development, *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (23 September 1980).

45 Organisation for Economic Co-operation and Development, *Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (11 July 2013).

46 Ibid [9], [10].

47 Ibid [11], [13].

48 Organisation for Economic Co-operation and Development, *The OECD Privacy Framework* (2013), Forward, 3.

Article 19 of the CRC provides:

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, **including sexual abuse**, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child [emphasis added].*
2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of **prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment** described heretofore, and, as appropriate, for judicial involvement [emphasis added].*

Article 16 provides that:

1. *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.*
2. *The child has the right to the protection of the law against such interference or attacks.*

And finally, Article 34 provides as follows:

*States Parties undertake to protect the child from all forms of **sexual exploitation and sexual abuse**. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.*

It is clear from these provisions that States parties have an obligation to protect children from all forms of violence, including sexual abuse. States parties must also ensure that the best interests of children are a primary consideration in all actions concerning children, including decision-making by public and private social welfare institutions and in developing relevant legislation and policy. This is a firm basis on which to develop information sharing law and policy that prioritises the prevention, detection and response to child sexual abuse in institutions.

There is a need to ensure that these laws also provide appropriate protection for the right to privacy for both children and adults. Privacy law and policy consistent with Article 17 of the ICCPR and Article 16 of the CRC, will not prevent the sharing of information where it is 'reasonable in the circumstances'. The laws regulating such information sharing may be justified on the basis that they are necessary to achieve the legitimate goal set out in Article 34 of the CRC of preventing, detecting and responding to child sexual abuse. Such laws must also be proportional, so they should not go further than necessary to achieve the goal. However, it is evident that the ICCPR and the CRC provide a firm international legal foundation on which to build law and policy that ensures information relating to child sexual abuse in institutions is shared in a timely way with those who need to know.

The tension between the right to privacy and the rights of the child may arise in relation to children themselves. In a submission to the Royal Commission, the Queensland Commission for Children and Young People and Child Guardian noted that children, as well as adults, have a right to privacy. While suggesting that children should be consulted about the release of their personal information, where possible, the Commission

expressed the view that where there was a conflict between a child's right to privacy and their right to safety, the right to safety and wellbeing should be the paramount consideration.<sup>49</sup>

In developing legislation and policy that finds an appropriate balance between these various rights, governments and legislatures should ensure that, to the extent possible, their intentions are clear and transparent. This is particularly important in the area of balancing rights, which are, by their nature 'indeterminate, highly contextual and subject to reasonable disagreement'.<sup>50</sup> Clarity is crucial so that decision-makers, including courts, can interpret and apply legislation with confidence, in accordance with established principles of statutory interpretation. These include that 'where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations'<sup>51</sup> and that 'courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'.<sup>52</sup> The first principle means that, where legislation regulating the sharing of information is ambiguous, courts may consider to what extent the laws are necessary to achieve a legitimate goal and 'proportional' in accordance with the relevant articles of the ICCPR and the CRC. The second is the principle of legality, which encourages legislatures to direct their attention to the rights and freedoms in question and to make their intention clear.

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49 Queensland Commission for Children and Young People and Child Guardian, Submission No 17 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 3: Child Safe Organisations*, October 2013, 37.

50 Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413, 415.

51 See, for example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492.

52 *Ibid.* In addition, the High Court has made clear that the common law, for example the tort of negligence, cannot be used to 'subvert ... other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms' and that 'when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose on them conflicting claims or obligations.' [*Sullivan v Moody; Thompson v Connon* (2001) 207 CLR 562, 576, 582].

## 3. International resources

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### 3.1 Introduction

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Although this report is primarily focused on the legislative and key policy and operational frameworks for sharing information about institutional child sexual abuse in Australia, the research for the report was informed by a range of articles, reports and other resources relevant to the regulation of information sharing. Below is a brief discussion of some highly relevant and more recent reports and research in relation to comparable overseas jurisdictions that provide useful insights into information sharing regulatory frameworks. This section deals with four overseas jurisdictions: the United Kingdom, the United States, Canada and New Zealand. These jurisdictions were selected because they are all common law jurisdictions with comparable legislative and policy frameworks in relation to child protection, and because they are either federal systems or included in some of the discussion on information sharing arrangements in this report. For example, cross-jurisdictional teacher registration recognition arrangements, which include New Zealand are discussed.

### 3.2 United Kingdom

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*As there are a number of high-profile public inquiries into child death tragedies, ‘information sharing’ has now become a moral and political imperative across England and Wales for improving the welfare and protection of children.*<sup>53</sup>

In England and Wales, primary responsibility for safeguarding and promoting the welfare of children falls to local area authorities. The Children Act 2004 (UK) provides that there must be a Local Safeguarding Children Board (LSCB) for every local authority area and that each LSCB should include representatives from council, police, juvenile justice, health and education, as well as two lay members representing the community. LSCBs are responsible for developing local policy and procedures for safeguarding and promoting the welfare of children<sup>54</sup>, supporting information sharing among and between agencies and organisations, and addressing barriers to information sharing. They can also require a person to comply with a request for information.<sup>55</sup> In Scotland, there are Child Protection Committees, which play a similar role.<sup>56</sup>

A 2015 United Kingdom (UK) Government policy document *Information Sharing: Advice for Practitioners Providing Safeguarding Services to Children, Young People, Parents and Carers* (UK Information Sharing Advice) acknowledges that poor or non-existent information sharing repeatedly emerges as an issue in Serious Case Reviews carried out following the death of, or serious injury to, a child. The UK Information Sharing Advice sets out seven ‘golden rules’ for sharing information<sup>57</sup>: remembering that privacy legislation is not intended

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53 Kellie Thompson, ‘Multi-agency Information Practices in Children’s Services: the Metaphorical ‘Jigsaw’ and Professionals Quest for the Full Picture’ (2013) 18 *Child and Family Social Work* 189.

54 UK Government, *Working Together to Safeguard Children: A Guide to Inter-agency Working to Safeguard and Promote the Welfare of Children* (2015) 68.

55 Ibid 71.

56 Scottish Government, *Delivering Child Protection* (1 October 2013), <<http://www.gov.scot/Topics/People/Young-People/protecting/child-protection/delivery>>.

57 United Kingdom Government, *Information Sharing: Advice for Practitioners Providing Safeguarding Services to Children, Young People, Parents and Carers* (2015) 4.



to be a barrier to information sharing, but to provide a framework to ensure that information is shared appropriately; to be open with individuals about why information is collected and with whom it will be shared and, where possible, to seek their consent to do so; remembering that it is possible to share information without consent if there is good reason to do so, such as a risk to the safety of a child or young person; and ensuring that information sharing is necessary, proportionate, relevant, adequate, accurate, timely and secure.<sup>58</sup>

The approach adopted in the UK Information Sharing Advice was based in part on the 2011 *Munro Review of Child Protection Final Report* (Munro Review), which recommended a child-centred approach with less central prescription and more trust and reliance placed on front-line practitioners.<sup>59</sup> The UK Information Sharing Advice suggests that front-line practitioners are best placed to exercise their professional judgement about when to share information with colleagues and across agencies to keep children safe. It notes the importance of being able to share with other agencies and third-party service providers and that this requires a culture of appropriate information sharing, supported by multi-agency training.<sup>60</sup>

The Munro Review also canvassed evidence that multi-agency teams, which might be colocated, provided more efficient information sharing arrangements partly because they contribute to 'building relationships, trust and understanding between agencies in order to enhance confidence in information sharing'.<sup>61</sup>

A 2015 Centre of Excellence for Information Sharing report states that:

*Concerns about information sharing are often based on professional codes of ethics/confidentiality, ways of working ('cultural norms'), but can also arise from a lack of confidence in the systems and resources scaffolding, supporting or facilitating information sharing, such as legislation or information systems.*<sup>62</sup>

The report goes on to discuss the importance of agency culture to information sharing and notes that because culture and context are important factors, it is 'highly unlikely that a "one size fits all" or purely bureaucratic or procedural approach to information sharing is going to "solve the problem" on its own'.<sup>63</sup>

In a 2001 PhD thesis, *Interagency Coordination and Collaboration in the Management of Child Sexual Abuse in Australia and England*, Anne Margaret Lawrence noted that 'the exchange of information is generally regarded in the literature, as well as in practice, to be of paramount importance in the management of child sexual abuse'.<sup>64</sup> However, she also noted that 'organisations do not necessarily communicate effectively or efficiently merely by being mandated to do so'.<sup>65</sup> Her research underlined the need for clear policies about access to confidential information and the importance of trust and confidence between the professionals working in different agencies. Importantly, she also highlighted the need for each agency to have a clearly stated

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58 Ibid.

59 Eileen Munro, 'The Munro Review of Child Protection Final Report: A Child-Centred System' (Report for the Department of Education, 2011) 5.

60 United Kingdom Government, *Information Sharing: Advice for Practitioners Providing Safeguarding Services to Children, Young People, Parents and Carers* (2015) 7.

61 Eileen Munro, 'The Munro Review of Child Protection Final Report: A Child-Centred System' (Report for the Department of Education, 2011) 82.

62 Rob Wilson and Andrew Gray, *Information Sharing: Easy to Say, Harder to Do Well* (Centre for Excellence for Information Sharing, 2015) 7.

63 Ibid 8. This report includes an extensive bibliography of resources on information sharing.

64 Anne Margaret Lawrence, *Interagency Coordination and Collaboration in the Management of Child Sexual Abuse in Australia and England* (PhD Thesis, University of Plymouth, 2001) 234.

65 Anne Margaret Lawrence, *Interagency Coordination and Collaboration in the Management of Child Sexual Abuse in Australia and England* (PhD Thesis, University of Plymouth, 2001) 233.

objective regarding the purpose of the exchange of information and the importance of common shared objectives across agencies. If one agency's objective is the welfare of the child but another's the welfare of adults, it will be more difficult to come to an agreed policy basis for the exchange of information.<sup>66</sup>

Bellamy et al note that much available guidance on information sharing is 'couched in spuriously precise, legalistic terms', but that judgements about when to share information must be made on a case-by-case basis.<sup>67</sup> The authors analyse findings from a major study of information sharing and confidentiality practices in multi-agency arrangements in an attempt to identify factors that increase confidence and, as a result, the volume and consistency of information sharing. The article notes that strengthening formal regulatory regimes for information sharing and the protection of confidentiality has proved helpful, but that there are clear limits to the role of formal regulation in achieving the policy goal. The research concludes that it is also important to increase the level of social integration in the information sharing partnerships 'by investing in building good relationships among managers, by engaging in mentoring and training, and by working together on such products as information sharing protocols'.<sup>68</sup> However, the authors caution that 'these endeavours may be inhibited, to significant but varying degrees, by deep, and possibly unresolvable, differences in the aims and values of some agencies'.<sup>69</sup>

### 3.3 United States

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In the United States (US), primary responsibility for delivering services relating to the welfare of children rests with the states and each state has its own legal and administrative structures and programs that address the needs of children and their families. However, the federal government plays a role through funding programs and developing legislative initiatives, and states must comply with specific federal requirements and guidelines to be eligible for funding under certain programs.<sup>70</sup>

The primary responsibility for implementing federal child legislation and policy, such as the Child Abuse Prevention and Treatment Act (CAPTA)<sup>71</sup>, rests with the Children's Bureau within the Administration on Children, Youth and Families in the Department of Health and Human Services. The Children's Bureau works with state and local agencies to develop programs that focus on preventing child abuse and neglect. Where child sexual abuse occurs in an institutional context, law enforcement agencies have primary responsibility.<sup>72</sup>

The US Department of Health and Human Services, the Administration for Children and Families and the Children's Bureau maintain a *Child Welfare Information Gateway*, which includes a list of resources on information sharing among institutions that serve children, youth and families.<sup>73</sup> These resources address

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66 Ibid 235.

67 C Bellamy et al, 'Information Sharing and Confidentiality in Social Policy: Regulating Multi-Agency Working' (2008) 86(3) *Public Administration* 737, 738.

68 Ibid, 757.

69 Ibid.

70 Children's Bureau, Department of Health and Human Services (US), *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (2012) 1.

71 *Child Abuse Prevention and Treatment Act* 42 USC 5101.

72 Children's Bureau, Department of Health and Human Services (US), *How the Child Welfare System Works* (2013) 2.

73 Department of Health and Human Services (US), Administration for Children and Families and the Children's Bureau, *Child Welfare Information Gateway: Information Sharing*, <<https://www.childwelfare.gov/topics/management/info-systems/info-sharing/>>.



issues that are not considered in detail in this report, such as the technical challenges presented by sharing electronic data across agencies and across jurisdictions; establishing shared databases and systems; and linkage of such data. These resources may be of interest if further work on these issues is conducted.

One resource that is more directly on point – the US Department of Justice’s *Guidelines for Juvenile Information Sharing* – provides research-based standards and methods to achieve appropriate information sharing across institutions and jurisdictions at federal, state and local level. The Guidelines suggest that the first step to effective cross-institutional and cross-jurisdictional information sharing is to establish information sharing ‘collaboratives’ responsible for developing, implementing and maintaining information sharing arrangements.<sup>74</sup> Such collaboratives should include representatives from each relevant agency and organisation in each relevant jurisdiction who have authority to make decisions on behalf of their agency or organisation. The Guidelines recommend involving children, youth and their families in the collaborative as they will be able to provide input on navigating between systems and institutions, where information is falling into gaps and where information is flowing effectively.<sup>75</sup> The Guidelines also recommend that privacy impact assessments are undertaken to ensure that all privacy issues have been identified and addressed.<sup>76</sup>

The Guidelines suggest that cross-agency and cross-jurisdictional training is also important because although individuals may work closely with other agencies and organisations, they are unlikely to have a deep understanding of the other’s legal framework, policies, procedures and resources.<sup>77</sup> The Guidelines also suggest that agencies and organisations should appoint a ‘person of influence’ within the institution to champion information sharing<sup>78</sup>, and consider the importance of a shared vision, goals and objectives to underpin effective information sharing.<sup>79</sup>

In terms of the legal and policy framework, the Guidelines suggest that agreements or memoranda of understanding are put in place to ensure that information is only disclosed with consent or based on legal authority; that agencies and organisations should not, without good cause, refuse to disclose information; that agencies and organisations only access information as permitted by legal authority; that they agree to use information only where necessary to achieve the agreed purpose and to support defined activities; and that information should only be re-disclosed in the same circumstances.<sup>80</sup> One important suggestion is the use of a common consent form, for use when information is initially collected, to ensure that individuals are provided with all the information they need to understand why information is collected and how it will be used and disclosed, and that agencies and organisations are working from the same foundation and on the same assumptions.<sup>81</sup>

It is also possible in the United States to undertake an Information Sharing Certificate Program at Georgetown University’s McCourt School of Public Policy. The program is aimed at agencies and organisations serving children and youth known to multiple systems – for example, child protection, juvenile justice, education, and health – to assist them in dealing with information sharing challenges, while respecting laws and policies that

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74 Department of Justice (US), *Guidelines for Juvenile Information Sharing* (2006) 5.

75 Ibid.

76 Ibid 11.

77 Ibid 6.

78 Ibid 5.

79 Ibid 11.

80 Ibid 13.

81 Ibid 14.

protect privacy and other rights.<sup>82</sup> This is, perhaps, an indication of the level of complexity associated with these issues in a federal system.

A 2012 survey of legislation in all states and territories across the United States by the Children's Bureau, *Cross Reporting Among Responders to Child Abuse and Neglect*, noted that specific models of information sharing vary widely from state to state but that typically information is shared among social services agencies, law enforcement departments and prosecutors' offices.<sup>83</sup> In 26 states, cases involving sexual abuse **must** be cross-reported to law enforcement agencies. In 16 states, child protection and law enforcement agencies **must** share information in order to minimise the number of times individual children are interviewed. Seven states require information sharing among multidisciplinary teams that conduct assessments and provide services to families.<sup>84</sup> This survey indicates the level of fragmentation that may occur across a federal system.

## 3.4 Canada

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In Canada, child protection is primarily the responsibility of the provincial and territorial governments. Babington, in a 2009 report, noted that:

*There is no overarching Canadian national policy framework, nor is there national legislation relating to child protection. Traditionally, the Canadian Government has been reluctant to intervene with Provincial/Territorial Governments in the handling of child protection matters.*<sup>85</sup>

It was beyond the resources of this project to examine the information sharing arrangements in each Canadian province and territory, but it is interesting to note that each has its own legislative framework, institutional structures and policy and that they are more diverse than those in the Australian states and territories:

*In most provinces and territories, child protection is the responsibility of a government department with local offices that deal exclusively with child welfare matters. In Quebec, however, child protection services are provided through regionalized Youth Centres that also provide family counselling, services for families with custody disputes and services to young offenders. In Ontario, children's aid societies are regionally based non-profit organizations; they are subject to provincial regulation and funding, but have a significant degree of operating autonomy ... Relatively recently a number of Aboriginal communities across the country have established Aboriginal child protection agencies, a process known as devolution.*<sup>86</sup>

There have been calls for greater action at the national level in Canada on the basis that 'programs for children pertaining to sexual exploitation issues are inconsistently available across the country and often lack the means to coordinate efforts or exchange information and best practices'.<sup>87</sup> A report of the Canadian Parliamentary Standing Senate Committee on Human Rights noted that 'UNICEF's experience in different countries demonstrates that a coordinated and resourced national system is far more effective than purely

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82 Centre for Juvenile Justice Reform, Information Sharing Certificate Program, Georgetown University 2014, <<http://cjjr.georgetown.edu/events/information-sharing-certificate-program/>>.

83 Children's Bureau, Department of Health and Human Services (US), *Cross-Reporting Among Responders to Child Abuse and Neglect* (2013) 1.

84 Ibid 2.

85 Brian Babington, *An Examination of Multi-Jurisdictional Child Protection Systems in the UK, Ireland, Canada and the USA* (2009) 13.

86 Nicholas Bala and Kate Kehoe, Report for the Department of Justice (Ca), *Concurrent Legal Proceedings in Cases of Family Violence: the Child Protection Perspective*, 6.

87 Standing Senate Committee on Human Rights, Parliament of Canada, *The Sexual Exploitation of Children in Canada: The Need for National Action* (2011) 35.

vertical programs developed in isolation for specific problems’.<sup>88</sup> The report also highlights problems encountered by service providers where children move from one jurisdiction to another and, in particular, where Aboriginal children move on and off reserve. Importantly, the report noted that a national approach would assist to ensure that Canada was meeting its international obligations.<sup>89</sup>

However, there is a level of national coordination and information sharing in the law enforcement sector. The Canadian Police Centre for Missing and Exploited Children submitted that:

*A cornerstone of successful service delivery at the national centre is communication. Prior to the national strategy, much of the work of police was done in isolation. The majority of our investigations are multi-jurisdictional in nature. The offender and/or the victim may not even live in the same community, town or country.*<sup>90</sup>

In addition, the Royal Canadian Mounted Police National Child Exploitation Coordination Centre functions as the point of contact for investigations related to the exploitation of children on the internet in Canada.<sup>91</sup>

In 2013, the Canadian Government announced reforms to the National Sex Offender Registry in relation to sex offenders travelling overseas and the establishment of a national, publicly accessible database of high-risk child sex offenders who are already subject to public notification by the provinces and territories.<sup>92</sup> The High Risk Child Sex Offender Database Act was passed in June 2015 but, at the date of this report, is not yet in force.<sup>93</sup>

## 3.5 New Zealand

In New Zealand, the Child, Youth and Family agency has primary responsibility for both child protection and juvenile justice. The New Zealand Government *White Paper for Vulnerable Children* proposed a range of strategies to ensure that vital information does not ‘slip through our fingers’.<sup>94</sup>

The Children’s Action Plan was developed in response to the white paper and provides for the development of a new Vulnerable Kids Information System, which is an electronic system to record and manage concerns about vulnerable children. Practitioners from a range of government agencies and non-government organisations and service providers will have access to the system in which they will record their interactions with children and their families; share specific information about the child and their family; develop Child Action Plans for delivery of services; and report on results. The system was to be piloted in Hamilton from 1 September 2015 and then rolled out nationally.<sup>95</sup> This approach was adopted despite some evidence in the literature that centralised electronic collection of information may not improve practice and outcomes, and

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88 Ibid 36.

89 Ibid 38.

90 Ibid 38–39.

91 Royal Canadian Mounted Police, *National Child Exploitation Coordination Centre* (26 November 2013), <<http://www.rcmp-grc.gc.ca/ncecc-cncee/about-ausujet-eng.htm>>.

92 Canadian Government, *Strengthening Measures Against Child Exploitation* (16 September 2013), <<http://pm.gc.ca/eng/node/33953>>.

93 *High Risk Child Sex Offender Database Act*, SC 2015, c 23, s 29.

94 New Zealand Government, *White Paper for Vulnerable Children*, (2012) vol I, 9.

95 New Zealand Government, *Children’s Action Plan: The Vulnerable Kids Information System (ViKI) Factsheet* (2012).

that the problems lie elsewhere – for example, in collecting, understanding and effectively communicating relevant information.<sup>96</sup>

The Vulnerable Kids Information System will also enable the tracking of high-risk adults and offenders. This aspect of the System was developed in response to an inquiry into a convicted sex offender who was employed as a teacher in a New Zealand school.<sup>97</sup> The person was employed despite police vetting procedures and the fact that he was subject to an Extended Supervision Order following release from detention on the basis that he was assessed as presenting ongoing risks to children.<sup>98</sup> In addition, the New Zealand Government has committed to the introduction of Child Abuse Prevention Orders for people who are convicted of, or found on the balance of probabilities to have committed, a specified offence against children and are assessed as posing a risk to children.<sup>99</sup>

Under the Children's Action Plan, the New Zealand Government has established a Vulnerable Children's Hub, a new contact and triage point that gathers and uses information to match children's needs with appropriate services. The New Zealand Government recognises that the new arrangements will give rise to privacy issues. The Privacy Act 1993 (NZ) allows for the making of Approved Information Sharing Agreements (AISAs), and an AISA has been developed for the Vulnerable Children's Hub to provide both security and transparency around how information is collected, used and disclosed. It has been signed on behalf of the Ministries of social development, health, police, justice, education and the Children's Action Plan Directorate.<sup>100</sup>

The AISA provides that the safety, welfare and wellbeing of a vulnerable child and their family are paramount considerations when making decisions to share information with or about them; whenever practicable, the reasons why information should be shared needs to be communicated openly and honestly with vulnerable children and their family; and information sharing under the AISA must be relevant, necessary and proportionate to the circumstances and needs of vulnerable children and their family and shall be consistent with the purposes and scope of the AISA.<sup>101</sup> The information that may be shared under the AISA includes that regarding notifications that a child is at risk; a child's physical or mental health that may indicate that the child has been abused or neglected or is at risk; a child's current and previous wellbeing; psychological or emotional difficulties; issues of concern with respect to education; whether a child has a substance abuse problem or a history of violence; and information about a person who may pose a risk to a child and information about that risk.<sup>102</sup>

Parties to the AISA **may** share information with the Hub and the Hub **may** share information with a party for the purposes set out under the AISA.<sup>103</sup> Information **may** also be shared within parties to the AISA but there is

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96 Bob Hudson, 'Information Sharing and Children's Services Reform in England: Can Legislation Change Practice?' (2005) 19(6) *Journal of Interprofessional Care* 537; Eileen Munro, 'What Tools do we Need to Improve Identification of Child Abuse?' (2005) 14 *Child Abuse Review* 374, 375; Sue Penna, 'The Children Act 2004: Child Protection and Social Surveillance' (2005) 27(2) *Journal of Social Welfare and Family Law* 143.

97 Mel Smith and Judith Aitken, Report to Minister of Education (NZ), *Ministerial Inquiry Into the Employment of a Convicted Sex Offender in the Education Sector*, 15 June 2012.

98 New Zealand Government, *White Paper for Vulnerable Children* (2012) vol II, 133.

99 New Zealand Government, *Children's Action Plan: Identifying, Supporting and Protecting Vulnerable Children* (2012) 2.

100 New Zealand Government, *Information Sharing Agreement for Improving Public Services for Vulnerable Children Authorised by Part 9A of the Privacy Act 1993* (at 25 June 2015).

101 Ibid s 6.

102 New Zealand Government, *Information Sharing Agreement for Improving Public Services for Vulnerable Children Authorised by Part 9A of the Privacy Act 1993* (at 25 June 2015) s 7(1).

103 Ibid s 7(2).

no express provision for information to be shared between parties, although this may be authorised or required under other arrangements.<sup>104</sup> Therefore, it appears that the system established under the AISA will be centralised and based on the Hub, rather than allowing for lateral sharing of information.

The AISA also provides that sharing information under the AISA will not breach relevant privacy and health privacy principles; that information must be shared using secure information technology systems; and that staff are trained to ensure compliance with the terms and conditions of the AISA.<sup>105</sup>

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104 Ibid s 10.

105 Ibid ss 8, 9.

## 4. Confidentiality, secrecy and privacy

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The prevention and detection of, and response to, institutional child sexual abuse requires a multi-institutional and, in some circumstances, cross-jurisdictional response.<sup>106</sup> This means that personal information about victims/survivors and potential perpetrators must be shared between institutions in appropriate circumstances. However, there are also legal duties to protect personal information that create tension for decision makers who are called on to share information. A legal duty to protect certain personal information can arise in a number of ways under Australian law: under common law and in equity and under legislation. This section considers the laws that protect personal information, that is, laws relating to confidentiality, secrecy and privacy.

### 4.1 Duty of confidentiality at common law and in equity

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An equitable obligation of confidence arises where information is, by its nature, confidential; or information is communicated in circumstances importing an obligation of confidence. The obligation is not absolute, however, and disclosure may be authorised by, for example, the consent of the person providing the information, or may be warranted due to it being in the public interest or by law. The obligation of confidence may be imposed expressly or by implication and it is possible that the circumstances in which information is communicated themselves dictate that the information is confidential.<sup>107</sup>

Information may cease to be confidential if it is publicly available or widely known, but this may not relieve a person who has an obligation of confidence from the obligation not to reveal the information. Further, disclosure to a limited number of people may not render the information no longer confidential.

An obligation of confidence may also be imposed on a third party who comes into possession of confidential information with knowledge of the initial obligation. Increasingly, the courts recognise that a third person coming into possession of information that is obviously confidential will be bound by an obligation of confidence. It is important to note that Australian law only recognises a very limited defence of public interest for the disclosure of confidential information: generally the information must concern an ‘iniquity’ or crime before the disclosure can be defended as being in the public interest.

While Australian common law has not as yet recognised at appellate level a tort of invasion of privacy by disclosure of private information, as has occurred in NZ and the UK, the equitable action for breach of confidence effectively performs the role of protecting private information, subject to the constraints of that action. The current state of the law is discussed in the recent ALRC report, *Serious Invasions of Privacy in the Digital Era*.<sup>108</sup>

A duty to protect confidential information may also arise at common law where there is an express or implied contractual duty to protect the information.

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106 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3, ch 24.

107 See, for example, the judgment of Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria* (1987) 14 FCA 434.

108 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) ch 3.

Information that may be protected by an equitable duty of confidence or an express or implied contract includes commercial or technical information, government information or, most relevantly for this report, personal information. An obligation to protect information is likely to arise, for example, where a client communicates confidential information to a health service provider or a social worker.

The Wood Report noted that many workers involved in child protection ‘will be subject to ethical rules or conventions which are directed towards maintaining client confidentiality’.<sup>109</sup>

Professionals working in fields relevant to child protection are aware of their obligations of confidence and may feel conflicted about sharing information that has been provided in confidence. Legislation can modify an equitable or common law duty of confidentiality, or ethical rules or conventions, to authorise or require a person to share information in specific circumstances. However, it is important that where these legal obligations, rules and conventions are to be modified by legislation that the legislation is clear about the circumstances in which information can or must be shared.

In addition, some legislation that seeks to support information sharing also provides that where information is shared in good faith under the legislation, there will be no civil or criminal liability in relation to the sharing of the information. The sharing is also not to be regarded as a breach of any duty of confidentiality or secrecy imposed by law, or as a breach of professional ethics or standards or as unprofessional conduct.<sup>110</sup>

## 4.2 Duty of confidentiality in legislation

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Legislation may also impose duties of confidentiality on individuals dealing with personal information. These provisions may be referred to as confidentiality or secrecy provisions. The Wood Report noted that individuals within agencies and organisations with child protection responsibilities are very often subject to specific confidentiality or secrecy provisions, breach of which may constitute a criminal offence.<sup>111</sup> Section 254 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), for example, provides that a person who discloses any information obtained in connection with the administration or execution of the Act is guilty of an offence unless the disclosure is made in a specific range of circumstances including ‘in connection with the administration or execution of this Act or the regulations’ or ‘with other lawful excuse’.<sup>112</sup> Confidentiality or secrecy provisions relevant to sharing information about child sexual abuse may also be found in health legislation<sup>113</sup>; public service legislation<sup>114</sup>; the *Education and Care Services National Law*<sup>115</sup>; education legislation<sup>116</sup>; and juvenile justice legislation.<sup>117</sup>

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109 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3, [24.87].

110 See, for example, *Child Sex Offenders Registration Act 2006* (SA) s 66H.

111 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3, [24.87].

112 See also *Children and Young People Act 2008* (ACT) s 846; *Care and Protection of Children Act* (NT) s 308; *Child Protection Act 1999* (Qld) s 187; *Children’s Protection Act 1993* (SA) s 58; *Children, Young Persons and Their Families Act 1997* (Tas) s 103; *Children, Youth and Families Act 2005* (Vic) s 206; *Children and Community Services Act 2004* (WA) s 241.

113 See, for example, *Health Services Act 1988* (Vic) s 141.

114 See, for example, *Public Service Act 2008* (Qld) s 172.

115 See, for example, *Education and Care Services National Law Act 2010* (Vic) s 273.

116 See, for example, *School Education Act 1999* (WA) s 242.

117 See, for example, *Youth Justice Act* (NT) s 214.



These provisions are intended to ensure that information obtained in the course of employment and other activities regulated by the legislation is only used and disclosed in appropriate and lawful circumstances. Confidentiality or secrecy provisions can, however, have a chilling effect on the sharing of information. In its 2009 report, *Secrecy Laws and Open Government in Australia* (ALRC Secrecy Report), the ALRC recommended that all Commonwealth secrecy offences should be reviewed to determine whether criminal sanctions are warranted for the unauthorised disclosure of information.<sup>118</sup> The ALRC also recommended that secrecy provisions should generally include an exception for disclosures in the course of an officer's functions or duties.<sup>119</sup> The report noted that exceptions of this kind 'have been given a wide interpretation by the High Court, and encompass matters incidental to carrying out the functions and duties authorised by an officer's employment'.<sup>120</sup> In addition, at the Commonwealth level, the *Criminal Code Act 1995* provides a defence of 'lawful authority' so that 'a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law'.<sup>121</sup>

The ALRC Secrecy Report identified 506 secrecy provisions in 176 pieces of legislation, including 358 distinct criminal offences in Commonwealth legislation.<sup>122</sup> A similar complete survey of state and territory confidentiality and secrecy provisions relevant to sharing information about child sexual abuse was beyond the resources of the current project, although a number of specific examples are discussed in other sections of this report. However, the principles identified in the ALRC Secrecy Report are relevant at the state and territory level. It would be worth considering whether breach of state and territory confidentiality and secrecy provisions warrants the imposition of criminal sanctions. It is possible that a disciplinary response or civil penalty may be a more appropriate option. Imposing criminal sanctions on those working in the child protection and welfare sectors for breach of secrecy or confidentiality provisions is likely to encourage a risk-averse organisational culture when it comes to sharing information.

It is also important to ensure that state and territory secrecy provisions include exceptions for the sharing of information in the course of an officer's functions or duties, or where authorised or required by law.

In addition, as noted above, some state and territory legislation that provides for the sharing of information expressly states that where a person shares information in good faith and, for example, in response to a lawful request or as authorised or required by law, they will not be subject to civil or criminal liability.<sup>123</sup> Although not strictly necessary where appropriate exceptions are included in confidentiality and secrecy provisions, these 'limitation of liability' provisions seek to ensure that an individual sharing information will not be subject to liability under confidentiality or secrecy provisions and to provide those sharing information with confidence to do so.

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118 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Rec 11–1.

119 Ibid Rec 10–2.

120 Ibid [10.18].

121 *Criminal Code Act 1995* (Cth) sch, s 10.5.

122 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [1.20].

123 See, for example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245G; *Care and Protection of Children Act* (NT) s 39; *Children, Young Persons and Their Families Act 1997* (Tas) s 19(8).



## 4.3 Privacy legislation

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The collection, use and disclosure – and thus the sharing – of personal information by public sector agencies and private sector organisations in Australia is regulated by privacy legislation at the federal, state and territory level. In general terms, the *Privacy Act 1988* (Cth) regulates the handling of personal information by Australian Government agencies and by private sector organisations, with some exceptions.<sup>124</sup> There is also privacy legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria that, broadly speaking, regulates the handling of personal information by state and territory public sector agencies.<sup>125</sup> In South Australia the handling of personal information by public sector agencies is regulated by the *Information Privacy Principles Instruction 2013* (SA), which is a Cabinet Administrative Instruction issued by the Government of South Australia (SA Instructions) and the *Information Sharing Guidelines for Promoting Safety and Wellbeing* (ISG)<sup>126</sup>, also authorised by a Cabinet Direction. There is no privacy legislation or similar administrative instruction in Western Australia. Each of the Acts and the SA Instructions includes a set of privacy principles regulating the collection, use and disclosure of personal information.

There is separate health privacy legislation in the Australian Capital Territory, New South Wales and Victoria.<sup>127</sup> This legislation regulates the handling of health information – that is, personal information about the physical or mental health of an individual. This legislation applies to both public sector agencies and private sector organisations that either hold health records or provide health services.<sup>128</sup> Each of these Acts includes a set of health privacy principles regulating the collection, use and disclosure of health information. The *Information Privacy Act 2009* (Qld) includes a separate set of health privacy principles covering health information but these principles only apply to public sector health agencies. While the privacy principles set out in the various privacy and health privacy Acts are all based to some extent on the guidelines of the Organisation for Economic Co-operation and Development (OECD Guidelines) discussed above and are broadly similar, they are not the same.

### Inconsistency and fragmentation

The complexity of privacy regulation across Australia has been regularly identified as an impediment to appropriate and timely information sharing in a range of contexts.<sup>129</sup> The ALRC in its report, *For Your Information: Australian Privacy Law and Practice* (ALRC Privacy Report), raised the issue of inconsistency and

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124 *Privacy Act 1988* (Cth) ss 6, 6C. Small businesses with an annual turnover of \$3 million or less are not covered by the legislation unless they are a health service provider.

125 *Information Privacy Act 2014* (ACT); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Act* (NT); *Information Privacy Act 2009* (Qld); *Personal Information Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic).

126 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013).

127 *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic).

128 *Health Records (Privacy and Access) Act 1997* (ACT) Dictionary; *Health Records and Information Privacy Act 2002* (NSW) s 11; *Health Records Act 2001* (Vic) ss 10, 11.

129 See, for example, New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3, [24.89]; Australian Research Alliance for Children and Youth (ARACY), Report to the Minister for Families, Housing, Community Services and Indigenous Affairs, *Working Together to Prevent Child Abuse and Neglect – A Common Approach for Identifying and Responding Early to Indicators of Need*, June 2010, 33.

fragmentation in privacy regulation across Australia and how this 'can result in reluctance by organisations and agencies to share information.'<sup>130</sup> The report highlighted that:

*The complexity of privacy laws is a particular issue in the context of service provision to vulnerable people. The Community Services Ministers' Advisory Council (CSMAC) noted that the range of differing privacy regimes across Australia creates problems for information exchange between jurisdictions, including in the critical area of child protection, where state and territory specific legislation applies. Issues also arise in relation to information exchange within jurisdictions, where some non-government welfare organisations are subject to the Privacy Act, and state and territory agencies must comply with state and territory regimes. CSMAC noted that this inconsistency creates difficulties in relation to the development of memorandums of understanding and other protocols governing the exchange of information.*<sup>131</sup>

An added complication is that the state and territory privacy legislation is often expressed to apply to private sector organisations contracted to provide services to the state or territory.<sup>132</sup> This means that these organisations may be subject to two different privacy regimes, one federal and one state or territory, and may even be subject to three privacy regimes in those jurisdictions with separate health privacy legislation. Conversely, in some situations, different privacy regimes can apply to the representatives of public sector agencies and private sector organisations working side by side on the same case.<sup>133</sup>

The Wood Report considered that the privacy framework in NSW was an impediment to efficient cross-agency work, noting that the legislative framework for sharing information in NSW included the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act); the *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act); the *Privacy Code of Practice 2003* (General); the *Health Records and Information Privacy Code of Practice 2005*; and various privacy directions and guidelines issued by the Privacy Commissioner.<sup>134</sup> To address this issue, the report recommended that in NSW:

*The Children and Young Persons (Care and Protection) Act 1998 (NSW) should be amended to permit the exchange of information between human services and justice agencies, and between such agencies and the non-government sector, where that exchange is for the purpose of making a decision, assessment, plan or investigation relating to the safety, welfare and well-being of a child or young person in accordance with the principles set out in Chapter 24. The amendments should provide that, to the extent inconsistent, the provisions of the Privacy and Personal Information Protection Act 1998 and Health Records and Information Privacy Act 2002 should not apply. Where agencies have Codes of Practice in accordance with privacy legislation their terms should be consistent with this legislative provision and consistent with each other in relation to the discharge of the functions of those agencies in the area of child protection.*<sup>135</sup>

These proposals for reform were aimed at allowing those public sector agencies and private sector organisations who have responsibility for the safety and welfare of children to share information without needing to rely on the Department of Community Services (the government agency responsible for child protection) as an intermediary. The proposal was also framed to ensure that information was not used or

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130 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 499.

131 Ibid 510.

132 See, for example, *Information Privacy Act 2014* (ACT) s 9.

133 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, Report (2008) vol 3 [24.98].

134 Ibid [24.84].

135 Ibid Rec 24.6.

disclosed for other purposes and that information that was untested or unverified was not given further exposure than necessary for genuine child protection purposes.<sup>136</sup>

The NSW Government accepted this recommendation<sup>137</sup> and responded by amending the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to insert Chapter 16A Exchange of Information and Co-ordination of Services.<sup>138</sup> Chapter 16A is discussed in detail below, but in broad terms it allows ‘prescribed bodies’ that have responsibilities relating to the safety, welfare or wellbeing of children to share information to facilitate the provision of services to children and their families. In particular, Chapter 16A provides that because the safety, welfare and wellbeing of children is paramount, their needs, and the needs of their families, take precedence over the protection of confidentiality or of an individual’s privacy.<sup>139</sup> Section 245G protects anyone who shares information in good faith from liability for civil, criminal or professional sanctions. This will protect a person from liability for breach of a duty of confidence and from prosecution under relevant secrecy provisions, for example. Section 245H sets aside any other law that prohibits or restricts the disclosure of information. This includes the PIPP Act and the HRIP Act and any codes, directions or guidelines issued under those Acts.

The provisions of Chapter 16A also pay due regard to the protection of privacy and the appropriate handling of personal information. Section 245F, for example, requires that where information is shared under Chapter 16A, it must not be used or disclosed for a purpose that is not associated with the safety, welfare or wellbeing of the child or children to whom the information relates. Section 254 creates an offence for disclosing information obtained in connection with the administration of the Act unless the disclosure is made in appropriate circumstances – for example, in connection with the administration of the Act.

As noted above, South Australia does not have privacy legislation regulating the handling of personal information between government agencies. Instead, the handling of personal information by public sector agencies is regulated by the *SA Instructions* and the ISG.<sup>140</sup> The ISG supports information sharing between a wide range of government and non-government agencies and organisations. The ISG is intended to provide a consistent State-wide approach to information sharing where there are threats to the safety and wellbeing of children and others. Again, the safety and wellbeing of children is made the primary consideration when making information sharing decisions.<sup>141</sup>

The Parenting Research Centre Final Report into *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (*‘Implementation of Recommendations Report’*) found, however, that in some jurisdictions:

*State and Commonwealth privacy legislation was also **seen by respondents** to be a potential barrier to reform in this sector. Where joined-up responses are proposed that require information sharing between agencies, a common objection is that to do so breaches obligations under privacy law [emphasis added].*<sup>142</sup>

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136 Ibid [24.173].

137 NSW Government, *Keep Them Safe: A Shared Approach to Child Wellbeing* (2009) 94.

138 *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) sch 1.

139 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245A(2)(d).

140 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013).

141 Ibid 5.

142 Parenting Research Centre, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 97–98.

The *Implementation of Recommendations Report* also identified a number of issues raised by governments that affected implementation of recommendations including an issue raised by the Victorian Government concerning ‘laws that conflicted with the recommendation, such as privacy laws governing the sharing of information’.<sup>143</sup> It is important to understand, however, that where legislation makes clear provision for the sharing of information between agencies and organisations within a jurisdiction this is consistent with privacy legislation in every jurisdiction in Australia. Information can be shared where the sharing is required or authorised by law, although there is a level of inconsistency in how the relevant privacy provisions are framed.<sup>144</sup> This issue is discussed further below.

One of the issues here may be that state and territory legislation and executive government directions cannot set aside the provisions of the federal Privacy Act in their application to Commonwealth agencies and private sector organisations. Thus, despite efforts by state and territory governments to introduce consistent information handling practices for public sector agencies and private sector organisations working together in the area of child protection and welfare, private sector organisations are bound by, for example, the information sharing provisions in Chapter 16A of the Children and Young Persons (Care and Protection) Act, discussed above, **and** the federal Privacy Act. While this may be confusing for agencies and organisations, the issues can be resolved in many circumstances, for example, the federal Privacy Act provides that personal information, including sensitive personal information may collected, used and disclosed where required or authorised by or under an Australian law.<sup>145</sup> ‘Australian law’ is defined to include an Act or regulations of the Commonwealth or of a state or territory, as well as a rule of common law or equity.<sup>146</sup> Thus, under the federal legislation information may be shared as authorised by Chapter 16A of the Children and Young Persons (Care and Protection) Act.

Despite this, greater consistency in Australian privacy regulation would assist to ensure that agencies and organisations better understood their obligations in relation to handling information and might avoid the risk averse approach to sharing information based on the complexity and fragmentation of the regulatory regime. In its *Privacy Report*, the ALRC considered various mechanisms for achieving greater national consistency in the regulation of personal information across Australia, including the adoption of uniform privacy principles at Commonwealth, state and territory level.<sup>147</sup>

## A single set of privacy principles

The ALRC noted in its *Privacy Report*, that the privacy principles in the federal, state and territory privacy regimes are similar but not identical and recommended the development of a single set of uniform privacy principles (UPPs) to be applied across Australia. The Australian Government, acting on this recommendation, amended the federal Privacy Act in 2012 to bring together the previously separate sets of principles governing the public and private sectors into one set of Australian Privacy Principles (APPs).<sup>148</sup> These have not been

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143 Ibid 76.

144 *Privacy Act 1988* (Cth) APP6.2(b); *Information Privacy Act 2014* (ACT) TPP6.2(b); *Privacy and Personal Information Protection Act 1998*(NSW) s 25; *Information Act* (NT) IPP1(f); *Information Privacy Act 2009* (Qld) IPP11.1(d), HPP2.1(f); *Information Privacy Principles Instruction 2013* (SA) cl 4(10)(d); *Personal Information Protection Act 2004* (Tas) PPIP2.1(f); *Privacy and Data Protection Act 2014* (Vic) IPP2.1(f).

145 *Privacy Act 1998* (Cth) APP 3.4; APP 6.2.

146 *Privacy Act 1998* (Cth) s 6.

147 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, ch 3.

148 *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

adopted by the states and territories except in the Australian Capital Territory where the Territory Privacy Principles have been 'drafted to mirror and align with the Australian privacy principles in the Commonwealth APPs'.<sup>149</sup>

In addition, the ALRC Privacy Report did not support the use of separate health privacy principles and separate health privacy legislation, although the report acknowledges that the handling of health information 'does raise some unique issues and these require additional consideration in the development of privacy principles'.<sup>150</sup> Instead, the ALRC recommended that health information be treated as a sub-set of personal information and that any additional requirements be reflected in additions to the privacy principles.<sup>151</sup> This approach recognises that health information is merely a sub set of personal information that is handled in a range of contexts outside health services, such as insurance. The ALRC recommended that the federal Privacy Act should be amended to apply to private sector organisations to the exclusion of state and territory health privacy legislation.<sup>152</sup> This would simplify, to some extent, the laws regulating the handling of personal information, including personal health information, by private sector organisations in those jurisdictions with separate health privacy legislation.

Although the Australian Government accepted, in principle, that the state and territory health privacy legislation should not apply to private sector organisations, the Government did not implement the recommendation to apply the federal Privacy Act to the exclusion of such legislation. Instead, it undertook to work with the states and territories to progress the matter through further discussions in appropriate fora.<sup>153</sup> It is unclear whether these discussions have commenced or progressed.

## Collection, use and disclosure for particular purposes

All privacy legislation across Australia, and the *SA Instructions*, allows agencies and organisations to collect personal information that is necessary for, or directly related to, one of the agency or organisation's functions or activities.<sup>154</sup> These provisions are not, however, expressed in the same way across Australia. In particular, in relation to the collection of sensitive personal information the requirements in some jurisdictions are more stringent. The federal Privacy Act and the *Information Privacy Act 2014* (ACT), for example, provide that an agency or organisation may only collect sensitive personal information with the consent of the individual although there are a number of exceptions to this including where the collection is authorised or required by or under Australian law.<sup>155</sup> This more stringent approach was adopted in the Australian Privacy Principles on

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149 Explanatory Statement, Information Privacy Bill 2014, sch 1.

150 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [60.92].

151 Ibid [60.101].

152 Ibid Rec 3–1.

153 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108: For Your Information: Australian Privacy Law and Practice* (2009) 21.

154 *Privacy Act 1988* (Cth) APP3.1.

155 Ibid APP3.4. See also, *Information Privacy Act 2014* (ACT) TPP3.3; *Information Act* (NT) IPP10.1; *Personal Information Protection Act 2004* (Tas) PPIP10; *Privacy and Data Protection Act 2014* (Vic) IPP10.1; *Health Records Act 2001* (Vic) sch 1, cl 1.1(a), although note that an organisation may collect health information under cl 1.1(d) if the information is disclosed to the organisation for a purpose that is directly related to the primary purpose of collection and the individual would reasonably expect the organisation to use or disclose the information for that purpose.

the basis of a recommendation in the ALRC Privacy Report,<sup>156</sup> but does complicate the sharing of sensitive personal information between agencies and organisations as they may have to rely on implied consent to collect the information.

Once the information is collected by an agency or organisation all privacy legislation across Australia, and the *SA Instructions*, allow agencies and organisations to use or disclose that information, including sensitive personal information, without consent for the purpose it was collected, that is, for the ‘primary purpose of collection’.<sup>157</sup> Thus, it is important for agencies and organisations to be clear about the purposes for which they collect information and to inform individuals about those purposes wherever possible. For example, if sensitive personal information is collected by a department of education for a range of purposes that expressly include meeting a duty of care to students when facilitating the transfer of students between schools, the department may use and disclose the information without further consent for that purpose. This is of course premised on the basis that facilitating the transfer of students between schools is one of the functions or activities of the department of education.

## Serious and imminent threat

All privacy legislation across Australia, and the *SA Instructions*, allow agencies and organisations to use or disclose information without consent where it is necessary to lessen or prevent a serious threat to the life, health or safety of an individual. This exception may have application where personal information relates to a child at risk or a potential perpetrator of child sexual abuse.

The exception is not, however, expressed in the same way across Australia, for example, the federal Privacy Act provides that personal information may be used or disclosed where it is unreasonable or impracticable to obtain the individual’s consent and the institution reasonably believes it is necessary to lessen or prevent a serious threat to the life, health or safety of any individual.<sup>158</sup> The legislation in the Australian Capital Territory, Queensland and Tasmania and the language of the *SA Instructions* is in similar terms.<sup>159</sup> In the Northern Territory, where the threat is to life, health or safety generally it must be serious **and** imminent. The legislation also expressly deals with a threat of harm to, or exploitation of, a child and in these circumstances the threat need only be serious **or** imminent.<sup>160</sup> The legislation in NSW and Victoria, however, provides that the disclosure must be necessary to prevent or lessen a serious **and** imminent threat to the life or health of an individual.<sup>161</sup>

Both the Wood Report and the ALRC Family Violence Report identified that this exception, where it is limited to a ‘serious **and** imminent’ threat does not allow for circumstances in which there is progressive abuse and

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156 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [22.69].

157 *Privacy Act 1988* (Cth) APP6; *Information Privacy Act 2014* (ACT) TPP3; *Privacy and Personal Information Protection Act 1998* (NSW) ss 17, 18; *Health Records and Information Privacy Act 2002* (NSW) sch 1, cl 1; *Information Act* (NT) IPP1.1; *Information Privacy Act 2009* (Qld) IPP1, HPP1(1); *Information Privacy Principles Instruction 2013* (SA) cl 4(8) and (10); *Personal Information Protection Act 2004* (Tas) PPIP1; *Privacy and Data Protection Act 2014* (Vic) IPP1.1; *Health Records Act 2001* (Vic) sch 1, cl 1.1.

158 *Privacy Act 1988* (Cth) s 16A(1) and APP6.2(c).

159 *Information Privacy Act 2014* (ACT) s 19(1)(a) and TPP 6.2(c); *Information Privacy Act 2009* (Qld) IPP11.1(c) and HPP2.1 (d); *Personal Information Protection Act 2004* (Tas) PPIP2.1(d); *Information Privacy Principles Instructions 2013* (SA) cl 4(10)(c).

160 *Information Act* (NT) IPP2.1(d)(i) and (ii).

161 *Privacy and Personal Information Protection Act 1998* (NSW) s 18(1)(c); *Health Records and Information Privacy Act 2002* (NSW) HPP11.1(c); *Privacy and Data Protection Act 2014* (Vic) IPP2.1(d); *Health Records Act 2001* (Vic) HPP 2.1(h).



neglect of a child<sup>162</sup> or ‘where a child’s life, health or safety was at risk of harm in the medium to long term, not only where the threat of harm was imminent’.<sup>163</sup> The requirement that the threat be imminent may not cover, for example, the sharing of information about a potential perpetrator where the risk is not immediate.

In NSW, Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* has addressed the issue in relation to sharing of information within the jurisdiction by providing that privacy provisions are not to prevent the sharing of information between a wide range of ‘prescribed entities’. This is not the case, however, in Victoria where the mandated sharing of information under the *Children, Youth and Families Act 2005* (Vic) is more limited in scope. Outside the mandated sharing arrangements, individuals may feel constrained or confused by the requirement for imminence. It is also an example of a provision that is likely to make sharing information across jurisdictions more complex.

The ALRC Family Violence Report recommended, therefore, that privacy principles across Australia should be amended where necessary to remove the requirement for the threat to be imminent. This would permit the sharing of personal information where public sector agencies and private sector organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual’s life, health or safety.<sup>164</sup>

## Required or authorised by law

All privacy legislation across Australia, and the *SA Instructions*, allows agencies and organisations to use or disclose information where it is required or authorised by law, although there is a level of inconsistency in how the provisions are framed.<sup>165</sup> The ALRC Privacy Report recommended that the relevant Commonwealth provision should allow for the use or disclosure of personal information where required or authorised by or under a law and that ‘law’ be defined to include Commonwealth, state and territory Acts and delegated legislation; common law and equitable duties of confidentiality; an order of a court or tribunal; and other instruments given the force of law by an Act.<sup>166</sup> This approach could also be adopted at state and territory level.

The ALRC Privacy Report noted that, where legislation intends to rely on the ‘required or authorised by law’ exception it would be possible – and desirable for the purposes of clarity – for legislation to make express reference to the fact that the use or disclosure is relying on this exception in privacy legislation.<sup>167</sup> For example, s 42(1)(g) of the *Australian Passports Act 2005* (Cth) expressly provides that the Minister may direct a person to disclose certain information ‘for the purposes of: (a) paragraph 6.2(b) of Australian Privacy Principle 6; and (c) a provision of a State or Territory that provides that information that is personal may be disclosed if the disclosure is authorised by law’. This makes the relationship between privacy legislation and the provision

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162 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3 [24.98].

163 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [30.139].

164 *Ibid* Rec 30–9.

165 *Privacy Act 1988* (Cth) APP6.2(b); *Information Privacy Act 2014* (ACT) TPP6.2(b); *Privacy and Personal Information Protection Act 1998* (NSW) s 25; *Information Act* (NT) IPP1(f); *Information Privacy Act 2009* (Qld) IPP11.1(d), HPP2.1(f); *Information Privacy Principles Instruction 2013* (SA) cl 4(10)(d); *Personal Information Protection Act 2004* (Tas) PPIP2.1(f); *Privacy and Data Protection Act 2014* (Vic) IPP2.1(f).

166 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) UPP5.1(e), Rec 16–1.

167 *Ibid* [16.93].

requiring or authorising disclosure clear and underlines that the disclosure is consistent with privacy legislation. This approach could also be adopted at state and territory level.

## Public interest directions and privacy codes

There are a number of mechanisms available under privacy legislation to tailor privacy principles to particular contexts. The Wood Report noted agency concern, however, that the directions by the Privacy Commissioner in NSW were ‘of limited duration, require extension, are not easy to apply and are not a satisfactory alternative to legislation or to a Code of Practice.’<sup>168</sup> The Wood Report also noted that the Department of Community Services Code of Practice ran to 75 pages, without including appendices, and that it included links to other legislation and guidelines. The Report noted that the length and complexity of the Code made the task of handling information more, rather than less, difficult.<sup>169</sup>

There are still a number of privacy public interest directions and codes of practice in place in NSW. These directions and codes modify the application of privacy and health privacy legislation by agencies with responsibilities in relation to child welfare. The *Privacy Code of Practice (General) 2003* (NSW) deals with the collection, use and disclosure of personal information by a range of agencies including human services; correctional services; and ageing, disability and home care services. The *Health Records and Information Privacy Code of Practice 2005* (NSW) deals with the collection, use and disclosure of health information by human services agencies. The NSW Department of Education and Training has a separate *Privacy Code of Practice* in place.

In NSW, there are also a number of relevant public interest directions made by the Privacy Commissioner under s 41(1) of the PPIP Act. These include the *Direction on the Collection of Personal Information about Third Parties by NSW Public Sector (Human Services) Agencies from their Clients*; *Direction on Processing of Personal Information by Public Sector Agencies in relation to their Investigative Functions*; *Direction on Information Transfers Between Public Sector Agencies*; and the *Direction in Relation to Youth on Track*.

In NSW, Chapter 16A of the Children and Young Persons (Care and Protection) Act provides that provisions under any other Act or law that prohibit or restrict the disclosure of information do not operate to prevent the provision of information under Chapter 16A. Thus, where public interest directions and codes place a restriction on disclosure, that will be set aside in the context of information sharing under Chapter 16A. This does not, however, deal with the level of complexity posed by the directions and codes, which do not necessarily prohibit or restrict disclosure but provide detailed provisions about when and how information may or must be handled.

The situation is not as complex in other jurisdictions. There are no relevant public interest directions or codes of practice in operation at the Commonwealth level or in Victoria, for example.<sup>170</sup>

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168 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3 [24.98].

169 Ibid [24.102]–[24.106].

170 Although there are not yet any relevant public interest determinations, temporary public interest determinations or information usage arrangements in operation in Victoria, in introducing the Privacy and Data Protection Bill 2014 to the Victorian Parliament, the Attorney-General noted that ‘[t]he availability of these mechanisms is expected to significantly assist in the delivery of public services in the public interest, in particular in areas such as the implementation of child protection programs where multiple agencies hold information’: Victoria, *Parliamentary Debates*, Legislative Assembly, 12 June 2014, 2109 (Robert Clark, Attorney-General).



## Cross-jurisdictional sharing

All privacy legislation across Australia includes provisions dealing with the sharing of information outside the relevant jurisdiction. These provisions grew out of the OECD Guidelines, discussed above, which were developed to promote ‘respect for privacy as a fundamental value and a condition for the free flow of personal data across borders’.<sup>171</sup> Although the OECD Guidelines were developed to address international movement of personal information, the principles are also relevant to the movement of personal information across state and territory borders. The OECD Guidelines provide that in developing laws and policies to protect privacy, jurisdictions should not create unjustified obstacles to cross-border flows of personal information. They suggest that jurisdictions should allow personal information to flow across borders ‘where sufficient safeguards exist to ensure a continuing level of protection’, including effective enforcement mechanisms.<sup>172</sup>

The federal Privacy Act applies across Australia and allows the use and disclosure of information across Australia. Australian Privacy Principle (APP) 8 in the Act deals with the movement of personal information overseas and will not be considered here.<sup>173</sup> The relevant privacy principles in the Australian Capital Territory and Queensland legislation also address international movement of personal information and do not specifically address the movement of personal information across state and territory borders.<sup>174</sup>

New South Wales, the Northern Territory, Tasmania and Victoria, however, impose specific and, in some cases, quite complex requirements on agencies transferring information to an individual or organisation outside the state or territory.<sup>175</sup> Under the NSW legislation, information must not be disclosed to a Commonwealth agency or to a person or body outside NSW unless a relevant privacy law applies to that Commonwealth agency or is in force in that jurisdiction; or the disclosure is authorised by a privacy code of practice.

The provisions in the other jurisdictions include a wider range of grounds for transferring personal information outside the state or territory. A Tasmanian agency may disclose personal information about an individual to another person or other body who is outside Tasmania only if the agency reasonably believes that the recipient is subject to a law, binding scheme or contract that has principles for fair handling of the information that are substantially similar to the personal information protection principles in the Tasmanian Act; or the individual consents to the disclosure; or the disclosure is necessary for the performance of a contract or the conclusion or performance of a contract concluded in the interest of the individual between the personal information custodian and a third party; or the personal information custodian has taken reasonable steps to ensure that the information which it has disclosed is not to be held, used or disclosed by the recipient of the information inconsistently with the personal information protection principles; or the disclosure is authorised or required by any other law.

There are also provisions in the New South Wales and Victorian health privacy legislation dealing with transfer of health information outside those jurisdictions.<sup>176</sup>

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171 Organisation for Economic Co-operation and Development, *Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (11 July 2013) 3.

172 Ibid 30.

173 *Privacy Act 1988* (Cth) APP8.

174 *Information Privacy Act 2014* (ACT) TPP 8; *Information Privacy Act 2009* (Qld) s 23.

175 *Privacy and Personal Information Protection Act 1998* (NSW) s 19(2); *Information Act* (NT) IPP9; *Personal Information Protection Act 2004* (Tas) PIPP9; *Privacy and Data Protection Act 2004* (Vic) IPP9.1.

176 *Health Records and Information Privacy Act 2002* (NSW) HPP14; *Health Records Act 2001* (Vic) HPP9.

In relation to the transfer of information outside Australia, the ALRC Privacy Report recommended that an agency or organisation should remain accountable for personal information unless the agency or organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds privacy protections that are substantially similar to the uniform privacy principles developed in the context of that report; the individual consents to the transfer, after being expressly advised that the consequence of providing consent is that the agency or organisation will no longer be accountable for the individual's personal information once transferred; or the agency or organisation is required or authorised by or under law to transfer the personal information.<sup>177</sup>

At the moment, the transfer of personal information across state and territory borders is not specifically regulated by privacy law or principles in the Australian Capital Territory, Queensland, South Australia and Western Australia. Where it is regulated, not all states and territories include the three grounds suggested by the ALRC. For example, New South Wales and Victorian privacy legislation does not expressly provide for the sharing of information across borders where required or authorised by law. However, conversely, both the *Health Records and Information Privacy Act 2002* (NSW) and the *Health Records Act 2001* (Vic) do provide that information may be transferred outside the jurisdiction where the transfer is required or authorised by law.<sup>178</sup> While it is necessary to provide appropriate protection for personal information that is transferred across state and territory borders, the existing matrix of inconsistent provisions is a potential impediment to the sharing of information across jurisdictions.

## 4.4 Conclusion

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The ALRC concluded in its Privacy Report that:

*Inconsistency and fragmentation in privacy laws should not prevent appropriate information sharing. Information sharing opportunities, which are in the public interest and recognise privacy as a right to be protected, should be encouraged.*<sup>179</sup>

In practice, this is difficult to achieve if complexity and fragmentation in privacy regulation cause confusion, and make people reluctant to share information. The Wood Report noted that while many of the concerns raised with the privacy regime in NSW might be misplaced 'as a matter of minute legal analysis' the nature and volume of the concerns and the extent of misunderstanding meant that it was impracticable to leave the current regime intact.<sup>180</sup>

These issues have been addressed using a range of strategies in particular contexts that are discussed further below. For example, as noted above, Chapter 16A of the NSW Children and Young Persons (Care and Protection) Act provides that provisions under any other Act or law that prohibit or restrict the disclosure of information, which includes privacy legislation, do not operate to prevent the provision of information under Chapter 16A. The *Education and Care Services National Law* has taken a nationwide approach to ensure consistency in relation to information sharing and most jurisdictions have expressly set aside state and

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177 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [31.242].

178 *Health Records and Information Privacy Act 2002* (NSW) HPP14; *Health Records Act 2001* (Vic) HPP9.

179 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 510.

180 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008) vol 3 [24.99].

territory privacy legislation for the purposes of information sharing within that scheme.<sup>181</sup> This is discussed in detail in section 8.

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181 *Education and Care Services National Law Act 2010* (Vic) s 5(1)(ca). Note, however, that the *Education and Care Services National Law (ACT) Act 2011* (ACT) does not set aside the *Information Privacy Act 2014* (ACT).

## 5. Child protection and out-of-home care

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### 5.1 Introduction

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Each state and territory has different ways in which the abuse, or suspected abuse, of children and young people is reported, referrals are made, information is exchanged between agencies and organisations, investigations are conducted, and services are delivered. While some of these processes are legislatively based in child protection legislation, practical guidance is often provided through a variety of protocols, inter-agency guidelines and memoranda of understanding.<sup>182</sup>

The name of the relevant child protection legislation<sup>183</sup> and child protection agency<sup>184</sup>, and head of the child protection agency<sup>185</sup> differs across jurisdictions. For the sake of consistency and ease of comparison, the relevant agency is referred to as the ‘child protection agency’ throughout this report and the head of that agency is referred to as the ‘head of the child protection agency’.

The 2012–13 report on Child Protection in Australia by the Australian Institute of Health and Welfare (AIHW) reported that while ‘the processes used by each jurisdiction to protect children are broadly similar’, there are ‘important differences’ in how jurisdictions deal with and report child protection issues.<sup>186</sup> These differences are apparent in the information sharing arrangements across the different jurisdictions.

This review identified that information sharing provisions in the child protection sphere are inconsistent across jurisdictions. This was also identified in a number of submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). Submissions noted that inconsistencies and differences in information sharing processes may lead to gaps and irregularities that may, in turn, adversely impact on the safety and care of children and young people.<sup>187</sup> Research has also shown that when information has not been shared it has often resulted in the non-confirmation of abuse or neglect, thereby denying children and their families access to further services or protection from continued abuse.<sup>188</sup>

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182 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010) [13.105].

183 *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act* (NT); *Child Protection Act 1999* (Qld); *Children’s Protection Act 1993* (SA); *Children, Young Persons and their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

184 ACT: Office for Children, Youth and Family Support; NSW: Department of Families and Community Services; NT: Department of Children and Families; Qld: Department of Communities, Child Safety and Disability Services; SA: Department for Education and Child Development; Tas: Department of Health and Human Services; Vic: Department of Human Services; WA: Department for Child Protection and Family Support.

185 The relevant heads of department are as follows – ACT: Director-General of the Community Services Directorate; NSW: Secretary of the Department of Family and Community Services; NT: CEO of the Department of Children and Families; Qld: CEO of the Department of Communities, Child Safety and Disability Services; SA: Chief Executive of the Department for Education and Child Development; Tas: Secretary for the Department of Health and Human Services; Vic: Secretary of Department of Human Services; WA: CEO of the Department for Child Protection and Family Support.

186 Australian Institute for Health and Welfare, *Child Protection in Australia 2013–14*, 4.

187 See, for example, Salvation Army, Submission No 30 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

188 Government of South Australia, *Interagency Code of Practice: Investigation of Suspected Child Abuse or Neglect* (2013) 35.

In addition, various inquiries into child protection services have been conducted in recent years that, among other things, have highlighted inefficiencies in the sharing of information in the child protection sphere. These inquiries have led to legislative and policy change in some areas.

A consistent theme across all child protection legislation is that the welfare and best interests of the child are of paramount consideration.<sup>189</sup> As noted above, this is also a central theme to the *United Nations Convention on the Rights of the Child*.<sup>190</sup> This means that in considering whether to share information, a person or organisation should give paramount consideration to the best interests of the child and that, in some circumstances, this obligation will outweigh the public interest in the protection of confidentiality or privacy. This is also explicitly stated in information sharing policies. For example, the ACT Policy for Health Staff states that:

*In relation to vulnerable or at risk children and young people, the balance between protecting their privacy and sharing information in order to protect them can sometimes be tricky for staff. When in doubt, the best interest of the child should always be the overarching guiding principle and paramount consideration. Confidentiality and privacy are important but should never override the safety of the child or young person.*<sup>191</sup>

## 5.2 Notification

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As discussed at section 1.3 *Limits of this research*, this report is not intended to consider in detail the points where information about institutional child sexual abuse is initially collected – for example, through mandatory or non-mandatory reporting, complaints or investigations. It focuses on the sharing of that information between institutions after the information has been collected. However, because the initial report of alleged or suspected child abuse often triggers an information flow within the child protection system, it is considered briefly here.

‘Notifications’ consist of contacts made to an authorised department by persons or other bodies making allegations of child abuse or neglect, child maltreatment or harm to a child.<sup>192</sup> In most jurisdictions, certain persons are required to report their reasonable suspicions that a child has been abused or is in need of protection – known as mandatory reporting laws.<sup>193</sup> Several jurisdictions also provide for voluntary reporting.<sup>194</sup> Again, the provisions differ slightly between the jurisdictions.<sup>195</sup> There are also provisions that

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189 *Children and Young People Act 2008* (ACT) s 11(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(a); *Care and Protection of Children Act* (NT) s 10; *Child Protection Act 1999* (Qld) s 5(1); *Children’s Protection Act 1993* (SA) s 4(1)–3; *Children, Young Persons and their Families Act 1997* (Tas) ss 7, 8(2)(a); *Children, Youth and Families Act 2005* (Vic) s 10(1); *Children and Community Services Act 2004* (WA) s 7.

190 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

191 ACT Health, *Child Protection Practice Paper* (2013) 42.

192 Australian Institute for Health and Welfare, *Child Protection Australia 2012–13*, 17.

193 For further information, see Australian Institute of Family Studies, *Mandatory Reporting of Child Abuse and Neglect* (CFCA Resource Sheet, 2014), <<https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>>.

194 See, for example, *Children and Young People Act 2008* (ACT) s 354; *Child Protection Act 1999* (Qld) s 13A; *Children’s Protection Act 1993* (SA) s 56.

195 For instance, in New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24 provides that a person believing on reasonable grounds that a child is at risk of harm, may notify the head of the child protection department. Authorised carers have additional reporting provisions as ‘employees’ under the *Ombudsman Act 1974* (NSW) s 25C.

enable a person to make a voluntary prenatal report if they suspect or believe a child, once born, may be in need of care and protection.<sup>196</sup>

The types of professionals who are legally compelled to make a report differ across jurisdictions. For example, in Victoria, doctors, nurses, midwives, teachers and principals, and police are considered mandatory reporters.<sup>197</sup> Notably, out-of-home carers are not mandatory reporters in all jurisdictions – including Victoria and Western Australia. As an alternative, Victorian legislation, contains specific provisions that apply to the notification of allegations of sexual or physical abuse of a child placed in care by a foster carer, a registered out-of-home carer or a carer in a community service.<sup>198</sup> There are some limitations on these provisions. For example, in relation to a registered out-of-home carer, the abuse must have been alleged to have occurred in the course of the person’s employment or engagement by an out-of-home care service as an out-of-home carer.<sup>199</sup>

In comparison, in NSW, out-of-home care (OOHC) agencies are required to make a report wherever sexual abuse is alleged or suspected, not only in relation to foster carers and OOHC staff, but also others with whom the child has contact (for example, teachers, sports coaches and other family members).<sup>200</sup>

NSW is also the only state in Australia with independent monitoring of reports of sexual abuse. This occurs under the *Ombudsman Act 1974* (NSW) which requires both government and non-government OOHC agencies to report allegations of abuse in care, including sexual abuse, to the Ombudsman’s Office within 30 days of becoming aware of an allegation and to subsequently report on the investigation of that allegation, including advising on any action taken or proposed.<sup>201</sup>

A Bill before NSW Parliament at the time of writing this report aims to add another safeguard for strengthening the child protection framework for children in care. A proposed amendment to the Ombudsman Act aims to clarify the scope of the Ombudsman’s oversight role in relation to these investigations and extends it to include adults who live with authorised carers for three weeks or more. The Bill will allow agencies to provide information and advice to the child victims, parents or carers on the progress and outcome of these investigations. It will also be extended to alleged victims with disabilities and/or their relevant support persons. The proposed victims support amendments will override NSW and Commonwealth privacy issues so that persons providing advice are afforded civil protections for disclosure of information.<sup>202</sup>

## Protection for reporters

All people who make notifications of alleged or suspected child abuse in good faith (known as ‘notifiers’ or ‘reporters’) are protected against the possibility of civil or criminal liability or breach of professional

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196 See, for example, *Children and Young People Act 2008* (ACT) s 362.

197 *Children, Youth and Families Act 2005* (Vic) s 182.

198 Ibid ss 81, 82.

199 Ibid s 82(1)(b).

200 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27.

201 *Ombudsman Act 1974* (NSW) Pt 3A. Designated agencies include most government (Community Services, Ageing Disability and Home Care, Juvenile Justice, NSW Health, local government) and non-government agencies (including government and non-government schools, childcare centres, out-of-home care) in the child-related employment sphere.

202 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2015, 1394–98 (Brad Hazzard, Minister for Family and Community Services, Second Reading Speech, *Child Protection Legislation Amendment Bill 2015*). **Update:** The *Child Protection Legislation Amendment Act 2015* (NSW) was passed by the NSW Parliament and assented to on 28 September 2015.

standards.<sup>203</sup> Although there are no specific provisions in South Australia and Western Australia for voluntary reporting, both jurisdictions still provide protection for those who have acted in good faith when reporting maltreatment of a child to the relevant authority, who will generally be protected from civil or criminal liability. ‘Good faith’ is defined in various ways across the jurisdictions but, generally, to act in good faith means to act honestly and not unreasonably or for an irrelevant purpose. For example, in the Australian Capital Territory, the notification must be made honestly and without recklessness; in New South Wales and the Northern Territory it must be made ‘in good faith’; in Queensland, the person must be ‘acting honestly’ and in compliance with the relevant provisions of the legislation.<sup>204</sup>

There are also provisions designed to protect the identity of those who make such notifications by making it an offence to disclose their identity. The restriction on disclosure of the identity of notifiers is discussed below.

Considered together, these provisions support a level of confidence in the making of a report or notification. However, it is important that appropriate standards are in place for the storage, use and disclosure of such information.

## Database of notifications

While it is beyond the scope of this report to consider the legislative and policy framework around records management, child protection legislation in some jurisdictions identifies when a notification is to be recorded. Legislation in NSW provides that the head of the child protection agency must keep a record of any report, and any action taken as a direct consequence of the report that has a significant effect on the child involved.<sup>205</sup> Similarly, in the Northern Territory, the head of the child protection agency must record the receipt of a report or notification about a child.<sup>206</sup> In the Australian Capital Territory, all concerns reported to the child protection agency will be recorded, whether or not the child is assessed as being at risk of harm or not.<sup>207</sup>

In Victoria, legislation requires the head of the child protection agency and a community-based child and family service to make a written record of each report or referral received and each disclosure made under the legislation about the wellbeing of a child.<sup>208</sup> However, upon the receipt of an allegation of physical or sexual abuse by an out-of-home carer, the head of the child protection agency is only required to record the notification or allegation *if* he or she decides that the allegation warrants further investigation. This could potentially prevent the aggregate assessment of the risk of harm to a child or the behaviour of an individual. The importance of being able to track such trends of behaviour was raised by the NSW Government in its submission to the Royal Commission, which stated:

*... allegations that do not involve sexual abuse may indicate a risk of future abuse – for example, allegations involving grooming behaviour, exhibitionism or inappropriate touching. It is important that these allegations,*

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203 *Children and Young People Act 2008* (ACT) s 874; *Children’s Protection Act 1993* (SA) s 12; *Children, Young Persons and their Families Act 1997* (Tas) s 101A; *Children, Youth and Families Act 2005* (Vic) s 40.

204 *Children and Young Persons Act 2008* (ACT) s 874(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1); *Care and Protection of Children Act* (NT) s 27(1); *Child Protection Act 1999* (Qld) s 159Q(1).

205 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 28(1),(2).

206 *Care and Protection of Children Act* (NT) s 29(1).

207 ACT Government Department of Community Services, *Keeping Children and Young People Safe: A Shared Community Responsibility: A Guide to Reporting Child Abuse and Neglect in ACT* (2014).

208 *Children, Youth and Families Act 2005* (Vic) s 39.



as well as allegations of abuse, are able to be made confidentially and promptly investigated to reduce the risk of misconduct escalating to sexual abuse.<sup>209</sup>

Child protection legislation is generally silent on who may access records of notifications. Presumably, information could be requested through the relevant jurisdictions' 'prescribed bodies' information sharing arrangements (discussed below). For example, in New South Wales, the KiDS database which records details of any notifications, could be accessed by agencies as part of carer assessments through a request made under s 248 of the NSW child protection legislation.<sup>210</sup>

## 5.3 Referrals

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Legislation provides for a number of different referrals upon receipt of a mandatory or voluntary report of alleged or suspected child abuse. Legislation in some jurisdictions is framed to ensure that whoever receives the report passes it on to the head of the child protection agency.<sup>211</sup> In some jurisdictions, the report or 'risk notification' may be referred to a community-based family service to provide services and support. The head of the child protection agency is then authorised to provide certain information to that service in order to be able to provide the necessary support.<sup>212</sup>

In a number of jurisdictions, there is a positive obligation on the child protection agency to refer a report immediately to the police where the report contains allegations of harm that may involve a criminal offence.<sup>213</sup> For example, in Queensland, if the head of the child protection agency reasonably believes alleged harm to a child may involve the commission of a criminal offence relating to the child, the head **must** immediately provide details to the Police Commissioner, regardless of whether the head of the child protection agency suspects the child is in need of protection.<sup>214</sup> However, this obligation is not consistent across all jurisdictions. In this regard, the CREATE Foundation noted that 'there should be **clear processes around referring on allegations of abuse** (consistent with State and Territory legislative requirements) to police' [*CREATE's emphasis*].<sup>215</sup>

In addition, in the Northern Territory, the head of the child protection agency **must** report to the Police Commissioner as soon as practicable if an investigation discloses that a child has suffered harm or exploitation while in the head of the child protection agency's care.<sup>216</sup>

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209 NSW Office of the Children's Guardian, Submission No 61 to the Royal Commission into Institutionalised Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care* 15.

210 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248.

211 *Children and Young People Act 2008* (ACT) s 359(1),(2); *Care and Protection of Children Act* (NT) s 28(1); *Children, Youth and Families Act 2005* (Vic) s 33; *Children and Community Services Act 2004* (WA) s 124B.

212 *Children, Young Persons and their Families Act 1997* (Tas) s 17A; *Children, Youth and Families Act 2005* (Vic) s 30(1)–(2).

213 *Children and Young People Act 2008* (ACT) s 361; *Child Protection Act 1999* (Qld) s 14(2); *Children's Protection Act 1993* (SA) s 52X(3); *Children, Youth and Families Act 2005* (Vic) ss 83, 187(3).

214 *Child Protection Act 1999* (Qld) s 14(2),(3).

215 CREATE Foundation, Submission No 35 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

216 *Care and Protection of Children Act* (NT) s 84C.



## 5.4 Assessment and investigation

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All jurisdictions have provisions requiring an initial assessment, inquiry and/or investigation upon receipt of a notification or report of suspected child abuse. An investigation may also be conducted if the head of the child protection agency believes or suspects on reasonable grounds that a child is at risk.<sup>217</sup>

Investigations may be conducted by the head of the child protection agency or their delegate, or police.

Across the states and territories, there are different models of responses to reports of child abuse and neglect.<sup>218</sup> Some jurisdictions have inter-agency teams<sup>219</sup>, including:

- New South Wales – the Joint Investigation Response Team (JIRT)
- Queensland – the Suspected Child Abuse and Neglect (SCAN) Team
- Western Australia – the ChildFirst Assessment and Interview Team (CAIT)
- Northern Territory – the Child Abuse Taskforce (CAT)
- Victoria – the Multi-disciplinary Centres (MDCs).

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217 *Children and Young People Act 2008* (ACT) s 360 (assessment); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30 (assessment and investigations); *Care and Protection of Children Act* (NT) ss 32, 33, 35, 36, 84A; *Child Protection Act 1999* (Qld) s 14 (whether because of notification or otherwise); *Children's Protection Act 1993* (SA) s 19 (can be conducted if the head of the child protection department suspects on reasonable grounds that a child is at risk and believes that the matters causing the child to be at risk are not being adequately addressed); *Children, Young Persons and their Families Act 1997* (Tas) s 18(1) (if the Secretary believes or suspects on reasonable grounds that a child is at risk); *Children, Youth and Families Act 2005* (Vic) s 86 (for a report under ss 81 or 82); *Children and Community Services Act 2004* (WA) ss 31, 32, 33A, 33B (unborn child).

218 See Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010) [13.116].

219 Legislation in Queensland specifically sets out the membership of the Suspected Child Abuse and Neglect (SCAN) inter-agency team, stating that its purpose is to enable a coordinated response to the protection needs of children by facilitating, among other things, information sharing between members: *Child Protection Act 1999* (Qld) s 159I. In other states and territories, the membership of inter-agency teams is found in policy. For example, the JIRT in NSW is policy-based and the roles and responsibilities of each of the agency members are outlined in a memorandum of understanding between them.

All inter-agency teams include, as core members, the child protection agency and the police in each state and territory. Some jurisdictions also include other agencies or persons. For example:

- JIRT comprises Community Services, NSW Police and NSW Health professionals<sup>220</sup>
- SCAN comprises the health and education departments as core team members, and Indigenous representatives and other agencies, as required<sup>221</sup>
- CAIT has included the health and justice departments in training programs
- CAT includes Indigenous representatives and other agencies as required
- MDCs include representatives from Victorian Police Sexual Offences Child Abuse Investigation Teams (SOCITs), the child protection agency and counsellors and/or advocates from Centres Against Sexual Assault.<sup>222</sup>

Differences in inter-agency team membership may affect how investigations are conducted and the amount and type of information available to, and shared between, members of the inter-agency team. A joint response means that a victim is interviewed once and the information is shared among the agencies so that appropriate services are provided to the child or young person and their non-offending family members. Not having to repeat his or her story to officers from different agencies significantly reduces trauma and distress to the abuse victim.<sup>223</sup>

In addition, as part of the investigative process in some jurisdictions, legislation specifically provides that information be obtained and shared with the relevant investigating officer<sup>224</sup>, while in other jurisdictions the legislation is silent on this point.<sup>225</sup>

Due to time and word constraints, it is not possible to detail the precise exchange of information in the investigative stage in each state and territory. Each jurisdictions' child protection legislation provides for the exchange of information between police and the child protection agency, and between the police and other nominated persons or agencies.<sup>226</sup> However, the laws differ in terms of:

- whether the obligation to share information is mandated or not
- the situations in which the information can be shared
- the type of information that can be shared
- other prescribed persons with whom the police can share information.

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220 Department of Family & Community Services (NSW), *Joint Investigation and Response Teams*, NSW Government, <[http://www.community.nsw.gov.au/docs\\_menu/for\\_agencies\\_that\\_work\\_with\\_us/child\\_protection\\_services/joint\\_investigation\\_response\\_teams.html?s=884661720](http://www.community.nsw.gov.au/docs_menu/for_agencies_that_work_with_us/child_protection_services/joint_investigation_response_teams.html?s=884661720)>.

221 *Child Protection Act 1999* (Qld) s 159K.

222 Department of Health and Human Services (Vic), *Child Protection Manual: Multidisciplinary Centres* (22 July 2015), <<http://www.cpmanual.vic.gov.au/advice-and-protocols/service-descriptions/multidisciplinary-centres>>.

223 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010) [13.121].

224 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248; *Care and Protection of Children Act* (NT) ss 34, 38, 84B; *Children's Protection Act 1993* (SA) s 19; *Children, Young Persons and their Families Act 1997* (Tas) ss 18, 19(3); *Children, Youth and Families Act 2005* (Vic) s 35.

225 Queensland, Western Australia.

226 See, for example, *Children and Young People Act 2008* (ACT) Ch 25; *Care and Protection of Children Act* (NT) ss 34, 38; *Child Protection Act 1999* (Qld) Pt 4; *Children, Young Persons and their Families Act 1997* (Tas) Pt 5A.

For example, in New South Wales and the Northern Territory, the police and the child protection agency have a mutual obligation to share requested information where they believe that the information will assist the other in providing for the safety, welfare or wellbeing of the child to whom the information relates. The situation varies in other states and territories.<sup>227</sup> This is discussed further below.

In Victoria, the Police Commissioner may give the head of the child protection agency any information held in relation to an allegation being considered by the child protection agency.<sup>228</sup> In Western Australia, where a child under the age of six has been brought into a hospital, a police officer may give the head of the child protection agency any information relating to the child that he or she reasonably believes is necessary to safeguard or promote the wellbeing of the child.<sup>229</sup>

## Consultation between police and child protection agency

Most jurisdictions have arrangements in place for interviews with children and their families to be conducted jointly with police, as well as medical assessments to be conducted when necessary. This is to ensure that charges can be laid where appropriate, that evidence is not contaminated, and that children are not burdened by multiple interviews by different agencies about the same issues.<sup>230</sup>

In Queensland, unless a matter is urgent, the police are statutorily required to consult with the child protection agency before investigating an offence against a child whom a police officer knows or suspects is a child in need of care and protection, or before initiating proceedings.<sup>231</sup> The intention of the provision is to ensure that police and the child protection agency agree on the best strategy to proceed with an investigation and to determine whether initiating proceedings would be in the child's best interests.<sup>232</sup>

In Victoria and Tasmania, police are required to consult the child protection agency before bringing a prosecution but only in relation to offences contained in the child protection legislation.<sup>233</sup>

## Medical assessment

As part of the investigative process, a child may require a medical examination and assessment. Generally, a person to whom a child is referred for a medical examination and assessment, or the agency for which the person works, must provide a written report on the examination, assessment, test or treatment to the requesting head of the child protection agency or police officer, as the case may be.<sup>234</sup>

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227 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248; *Care and Protection of Children Act* (NT) s 293E (2).

228 *Children, Youth and Families Act 2005* (Vic) s 128.

229 *Children and Community Services Act 2004* (WA) s 40(6).

230 Daryl Higgins and Rae Kaspiew, 'Child Protection and Family Law ... Joining the Dots' (National Child Protection Clearing House, *Issues Paper No 34*, May 2011).

231 *Child Protection Act 1999* (Qld) s 248B.

232 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [20.74].

233 *Children, Young Persons and Their Families Act 1997* (Tas) ss 91(2), 92(2)(b); *Children, Youth and Families Act 2005* (Vic) ss 493(2), 494(2).

234 See, for example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 173; *Children's Protection Act 1993* (SA) s 26; *Children, Young Persons and Their Families Act 1997* (Tas) s 29.

Each jurisdiction provides protection for the person making the report from:

- breach of professional etiquette or ethics or a departure from accepted standards of professional conduct
- liability for defamation because of the making of the report<sup>235</sup>
- civil liability if the report is provided in good faith.<sup>236</sup>

## Limitation of liability

Similarly, states and territories provide protection to those who provide information in good faith pursuant to provisions regarding investigative procedures, from civil or criminal liability and for breach of any professional code of conduct.<sup>237</sup> Generally, a person who provides information under these investigative procedures must not refuse or fail to comply with a request for information unless the information is privileged on the ground of legal professional privilege or would incriminate the person.<sup>238</sup>

Some jurisdictions also provide that it is a defence to a prosecution for an offence if the defendant has a reasonable excuse or the Police Commissioner certifies in writing that compliance with the request would prejudice the investigation of unlawful conduct; disclose a confidential source of information in relation to the administration of law; prejudice the effectiveness of a method or procedure in relation to the administration of law; or facilitate a person's escape from lawful custody or endanger the safety of a person.<sup>239</sup>

## Reports produced from investigations or assessments

It was noted in one submission to the Royal Commission that non-government agencies often find it difficult to learn the outcome of reported allegations.<sup>240</sup> Legislation in the Northern Territory provides that the investigating officer provide the head of the child protection agency with a report on the outcome of the investigation, although other jurisdictions remain silent on this matter.<sup>241</sup>

In the Australian Capital Territory, the child protection agency is unable to provide members of the community with feedback regarding the report. However, the agency will advise a mandatory reporter if their report will be appraised or not.<sup>242</sup> It is possible to think of both advantages and disadvantages to the extended sharing of such information.

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235 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 173(7) (notably does not mention that it needs to be given in good faith although there is a limitation of liability for the actual examination being conducted in good faith and with reasonable care).

236 *Children's Protection Act 1993* (SA) s 26; *Children, Young Persons and Their Families Act 1997* (Tas) s 29.

237 See, for example, *Care and Protection of Children Act* (NT) s 39; *Children, Young Persons and Their Families Act 1997* (Tas) s 19(8).

238 *Children, Young Persons and Their Families Act 1997* (Tas) ss 19(6)–(7).

239 *Care and Protection of Children Act* (NT) s 34(4).

240 Barnardos, Submission No 4 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

241 *Care and Protection of Children Act* (NT) ss 36(4), s 33(2) – a report must be given to the head of the child protection agency within 24 hours after completing the inquiries.

242 ACT Office for Children, Youth and Family Support, *Keeping Children & Young People Safe: A Shared Community Responsibility*, November 2014.

## Family group conferencing

In most Australian states and territories, child protection legislation includes provisions designed to facilitate negotiated solutions.<sup>243</sup> One frequently used process is family group conferencing. In organising such alternative mechanisms, there are provisions aimed at ensuring that the person facilitating or coordinating such sessions provides sufficient information about the child, and grounds for believing the child to be at risk, to the meeting.<sup>244</sup> There are also confidentiality arrangements around the sharing of outcomes from a family group conference.

## Court

In most jurisdictions, the court may order that certain information or a report about the child, or matters relevant to proceedings, be prepared and provided to the court.<sup>245</sup>

## 5.5. Out-of-home care

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All states and territories have an OOHC system that provides alternative accommodation for children and young people who are unable to live with their parents. In most cases, children in OOHC are also on a care and protection order. OOHC includes foster care, relative or kinship care, family group homes, residential care and independent living arrangements.<sup>246</sup> States and territories are responsible for funding OOHC, but non-governmental organisations (NGOs) are often contracted to provide these services. Children are placed in care either voluntarily or by court order. It should be noted that much of kinship care takes place informally outside the child protection system.

Various inquiries have been conducted into the activities of some state and territory government agencies with responsibility for the care and protection of children. In 2005, the Senate Community Affairs Committee issued a report entitled *Protecting Vulnerable Children: a National Challenge*.<sup>247</sup> The Committee noted variations across jurisdictions in definitions of when children would be regarded as at risk or in need of care and protection, as well as a lack of uniformity in the collection of data. It recommended the development of a national approach to child protection legislation and programs.

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243 *Children and Young People Act 2008* (ACT) Chapter 3 (ss77, 88) (family group conference); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 34, 37, 38; *Child Protection Act 1999* (Qld) Chapter 2 Part 3a Division 2, 3, Part 3B s 68(d)(e) (family group meeting); *Children's Protection Act 1993* (SA) Part 5 Division 1 (family care meeting); *Children, Young Persons and Their Families Act 1997* (Tas) s 11 (Voluntary care agreement) Part 5 Division 1 (Family group conference) s 52(1); *Children, Youth and Families Act 2005* (Vic) ss 11, 135, 145, 217 (short term and long term child care agreements) *Children and Community Services Act 2004* (WA) s 9(j); s 136 (pre-hearing conference).

244 *Children's Protection Act 1993* (SA) s 32; *Children, Young Persons and Their Families Act 1997* (Tas) s 34.

245 See, for example, *Children and Young People Act 2008* (ACT) ss 865, 866; *Care and Protection of Children Act* (NT) s 149; *Children, Young Persons and Their Families Act 1997* (Tas); s 61 *Children, Youth and Families Act 2005* (Vic) s 553.

246 Royal Commission into Institutionalised Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

247 Senate Standing Committee on Community Affairs, Parliament of Australia, *Protecting Vulnerable Children: A National Challenge, Second Report of the Inquiry into Children in Institutional Care* (2005).

State and territory legislation gives children and young people, their carers, parents and certain other individuals or organisations, the right to particular information about aspects of the child's care, at different stages of the OOHHC process. These stages are discussed below.

## Transition from government to non-government care in NSW

In NSW, services for OOHHC were recently transitioned from the government to the non-government sector. The focus of the plan was the transition of children and young people who enter statutory care, and those who are currently in placements provided by the child protection agency, to non-government services.<sup>248</sup> Those providing care for children were also transitioned from the government to the non-government sector. Once a carer chooses the NGO they wish to transfer to, the NGO is given access to the carer's records. The child protection agency also provides the NGO with information about the outcome of the Child Assessment Tool (CAT) for each child placed with the carer.<sup>249</sup>

A Bill before NSW Parliament at the time of writing aims to extend the information sharing provisions in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to include the sharing of information about carers and their households between agencies.<sup>250</sup> The amendment permits the Children's Guardian to disclose information to the head of the child protection agency to allow the agency head to carry out functions relating to children in need of care and protection. The information that may be disclosed includes that about a person that the Children's Guardian reasonably believes is or was an authorised carer, carer applicant, prospective adoptive parent, a guardian or prospective guardian, or an adult residing on the same property. With the transition of OOHHC services to the non-government sector, these reforms arguably offer an additional layer of protection for children while securing greater accountability from the service providers.<sup>251</sup>

## Care teams

Many states and territories have 'care teams' that are able to use and disclose personal and health information about the child where this is required to support proper care provision. A care team is usually declared to:

- coordinate or deliver services or care to a child, young person or family member
- promote, plan and manage services for a child or young person and their family
- facilitate information sharing between individuals and entities that are responsible for delivering or coordinating a service to a child, young person or their family.<sup>252</sup>

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248 Ministerial Advisory Group on Transition of Out-of-Home Care (OOHC) Service Provision in NSW to the Non-Government Sector, *OOHC Transition Plan Stage 1 – the 'Who' and the 'When'* (2011) 3.

249 Department of Family & Community Services (NSW), *OOHC Transition of Community Services Carers and Case Management Transfer of Children and Young People*, NSW Government, <[http://www.acwa.asn.au/kts/downloads/OOHC\\_Transition\\_Process\\_for\\_NGOs.pdf](http://www.acwa.asn.au/kts/downloads/OOHC_Transition_Process_for_NGOs.pdf)>.

250 **Update:** The *Child Protection Legislation Amendment Act 2015* (NSW) was passed by the NSW Parliament and assented to on 28 September 2015.

251 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2015, 1394–98 (Brad Hazzard, Minister for Family and Community Services, Second Reading Speech, *Child Protection Legislation Amendment Bill 2015*).

252 See, for example, ACT Department of Health, *Child Protection Practice Paper* (2013) 46.

The composition of a care team will vary depending on the specific case but generally is comprised of the child protection practitioner, the child's case manager, the child's carer, and parents (as appropriate).<sup>253</sup> Policy and/or legislation facilitates the sharing of information between members of a care team.<sup>254</sup>

Interestingly, Victoria provides that where there is a conflict between privacy concerns and the best interests of a child, a consultation with Legal Services Branch or a regional or central privacy officer should occur.<sup>255</sup> Potentially, such a requirement could impede the sharing of information relevant to the safety and wellbeing of a child. On its face, such a requirement appears at odds with the principle that the best interests of the child is of paramount importance.

## Care plans

Some jurisdictions provide for the development of a care plan.<sup>256</sup> A care plan will generally identify the needs of the child and outline steps to be taken to address those needs – including placement arrangements and contact between a child and people who are significant in the child's life, such as a parent or sibling. Care plans are generally required to be given to the child, each parent of the child, the child's carer and any other person considered by the head of the child protection agency to have a direct and significant interest in the wellbeing of the child.<sup>257</sup>

## Carer assessments and obligations

Each state and territory has requirements that applicants must meet before they can become carers. This is to ensure carers are suitably placed and able to care for and protect a child from harm, and will not pose any further risk to the child placed in their care.

In most states and territories, carers are approved by the child protection agency; however, in New South Wales and Victoria, carers may be approved by the relevant OOHC organisation. Queensland, South Australia and the Northern Territory allow non-government organisations to assess, but not approve carer applicants.<sup>258</sup>

All states and territories require that carer applicants be subject to pre-employment screening to work with children. All states and territories other than Western Australia and South Australia also require current screening for other adult members of the applicant's household. The information sharing arrangements concerning working with children checks are considered in detail below.

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- 253 See, for example, Department of Human Services (Vic), *Information Sharing in Out of Home Care*, Department of Human Services Advice No 1403, 5 November 2012.
- 254 See *Children and Young People Act 2008* (ACT) ss 863, 860(1)(2). The Minister for Children and Young People or the Director-General of the Community Service Directorate may give safety and wellbeing information in relation to the child or young person to an information sharing entity for a child or young person; Department of Human Services (Vic), *Information Sharing in Out of Home Care*, Department of Human Services Advice No 1403, 5 November 2012.
- 255 Department of Human Services (Vic), *Information Sharing in Out of Home Care*, Department of Human Services Advice No 1403, 5 November 2012, 4.
- 256 And subsequently, revised or modified care plans.
- 257 *Care and Protection of Children Act* (NT) ss 73, 74 (if the head of the child protection agency considers it appropriate to do so). The agency head is not required to do so if he or she considers it inappropriate or impracticable in the circumstances, having regard to the wishes of the child, any risk of harm to the child and any other matters considered relevant. *Children and Community Services Act 2004* (WA) ss 39, 89, 90.
- 258 Royal Commission into Institutional Responses to Child Sexual Abuse, *Roundtable into Preventing Child Sexual Abuse in Out of Home Care*, 16 April 2014.



For example, in NSW, the requirements for authorisation of carers are set out in the Children and Young Persons (Care and Protection) Regulation 2012. The Regulation requires NGOs, as designated agencies, to assess the suitability of an individual to be a carer, and sets out minimum screening requirements.

As discussed above, amendments proposed in NSW allow an authorised carer or a carer applicant, a guardian or a prospective guardian, or a person who resides on the same property as the carer or guardian to provide information to a designated agency about another person if the provider of information:

- has been notified by the designated agency, the Children's Guardian or the head of the child protection agency that the other person is a person to whom this section applies, or
- otherwise reasonably believes the other person to be a person to whom this section applies.

A designated agency may use such information to determine whether a person is suitable to be, or to continue to be, an authorised carer or guardian.<sup>259</sup>

A carer or prospective guardian must, as soon as practicable, notify the designated agency or head of the child protection agency, respectively, if any other person who is of or above the age of 18 years commences to reside at the carer's home and will continue to do so on a regular basis.<sup>260</sup> This includes when a minor residing at the carer's home attains the age of 18 years. A proposed amendment before NSW Parliament seeks to extend this notification requirement to 'a person residing on the same property'.<sup>261</sup> Such an amendment supports the sharing of information by broadening the range of circumstances in which the designated agency or head of the child protection agency must be notified about the presence of a person. For example, if an adult is living in a granny flat on the same property as the carer, the presence of this individual must be reported to the designated agency.

The NSW Government has indicated that designated agencies are also actively using the provisions concerning the sharing of information between prescribed bodies (Children and Young Persons (Care and Protection) Act, Chapter 16A) to share information about carer histories.<sup>262</sup>

## Carers Register

NSW is the only jurisdiction that requires the development of a Carers Register in legislation<sup>263</sup> and the Office of the Children's Guardian has developed a Carers Register pursuant to this requirement. The Register is intended to help prevent carers, who have been de-authorised by, or are involved in unresolved matters with, one agency from moving to another agency where they are authorised to carry out the same or similar work.<sup>264</sup> Notably, with the transition of OOHC from the government to the non-government sector, it was important

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259 *Child Protection Legislation Amendment Bill 2015* (NSW) sch 3, cl 245CA. **Update:** The *Child Protection Legislation Amendment Act 2015* (NSW) was passed by the NSW Parliament and assented to on 28 September 2015.

260 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 137, 79C. The Act also requires the NSW Children's Guardian to register organisations that provide or arrange Voluntary Out-of-Home Care (VOOHC): *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181(f). VOOHC is arranged on a voluntary basis by a parent and supplied by a relevant agency or an individual authorised by a relevant agency or the Children's Guardian.

261 *Child Protection Legislation Amendment Bill 2015* (NSW) sch 3, cls 79D, 137(3)–(4).

262 NSW Office of the Children's Guardian, Submission No 61 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

263 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181(1)(d).

264 Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 24, Day Two Transcript, March 2015.



to establish a centralised database of carers and household members. The Carers Register acts as a centralised database of persons who are authorised, or who apply for authorisation, to provide OOHC in New South Wales.<sup>265</sup>

The Carers Register is designed to support better information sharing between designated agencies through a secure, restricted-access database that holds information about authorised carers, individuals who apply to become authorised carers, and their household members.<sup>266</sup> It is designed to flag potential concerns relating to particular carers and their household members and provide triggers for agencies to follow up and seek further information from other designated agencies.<sup>267</sup>

A carer cannot be fully authorised until a designated agency certifies on the Register that all required carer, household member and household assessments have been completed. The Register will also contain:

- details of Working with Children Check (WWCC) applications and clearances, and will alert agencies in advance of required WWCCs that must be applied for (in the case of household members under the age of 18) or renewed
- the outcomes of carer applications and the surrendering, suspension, cancellation and cessation of authorisations
- the outcomes of internal or Administrative Decisions Tribunal reviews in these areas.

The Register will also flag the existence of in-progress reportable allegation investigations, and relevant finalised investigations. A designated agency will be able to view a prospective carer or household member's history with other agencies on the Carers Register and, as part of the assessment process, will be required to seek information from any such agencies.<sup>268</sup>

The Children's Guardian and the Ombudsman have access to the register. Designated agencies – that is, a public service agency or organisation that arranges the provision of OOHC and is accredited under the regulations – have access to the register only when they are in the process of registering someone. They are restricted to searching the register for the individual applicant they are considering.<sup>269</sup>

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265 NSW Office of the Children's Guardian, *NSW Carers Register*, <<http://www.kidsguardian.nsw.gov.au/out-of-home-care/nsw-carers-register>>.

266 NSW Office of the Children's Guardian, *Carer Register Factsheet 3: Information for Designated Agencies* (2015); NSW Office of the Children's Guardian, *Carer Register Factsheet 2: Information for Carers and Household Members: What Information is recorded?* (2015).

267 NSW Office of the Children's Guardian, *NSW Carers Register*, <<http://www.kidsguardian.nsw.gov.au/out-of-home-care/nsw-carers-register>>.

268 NSW Office of the Children's Guardian, Submission No 61 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

269 Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 24, Day Two Transcript, March 2015.

## Information provided prior to placement

Legislation in some jurisdictions<sup>270</sup> mandates the provision of any information about a child:

- to the extent that the head of the child protection agency considers appropriate for the care and safety of the child,<sup>271</sup> and/or
- to assist the carer to make an informed decision whether to accept the placement of a child.<sup>272</sup>

Often discretion is left with the head of the child protection agency to determine the type and amount of information provided to carers. For example, in Queensland, the head of the child protection agency **must** provide information relating to the child to the carer that the carer reasonably needs to provide care and ensure the safety of the child.<sup>273</sup> The phrase ‘reasonably needs’ provides a level of discretion on the part of the head of the child protection agency as to what information the carer needs to provide care. This discretion could potentially inhibit the sharing of information.

Generally, child protection legislation provides that due regard must be given to the child’s wishes before the disclosure of any information to the carer.<sup>274</sup>

In Queensland, in deciding what information should be given to the carer about the child, the head of the child protection agency must have regard to the child’s right to privacy under the charter of rights for a child in care, which are set out in the legislation.<sup>275</sup> In Victoria, policy advice states however that:

*It would be contrary to good practice for Child Protection to withhold information about a child’s history of at risk behaviour, such as sexually intrusive acts against others, from a care provider on the basis of privacy concerns alone as such information would be required to support safe and effective care planning for the child. Carers and others are not prevented by privacy legislation from advising Child Protection of information arising during placement in out of home care where this is relevant to case planning for the child. Such information could include a disclosure of abuse made by a child in care.*<sup>276</sup>

This contrast demonstrates the tension that can arise between a child’s right to privacy and the rights of other children to be safe and secure. Submissions to the Royal Commission noted that often children are placed with carers who are not fully informed of their case history and, despite legislative obligations, information provision is sometimes insufficient citing concerns about privacy and confidentiality.<sup>277</sup> Such concerns should not prevent the sharing of information where there is a risk to the safety or wellbeing of a child or children.

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270 See, for example, Victoria, Queensland, Northern Territory and New South Wales.

271 *Care and Protection of Children Act* (NT) s 80; *Child Protection Act 1999* (Qld) s 83A – information held by the head of the child protection department, relating to the child, that the carer reasonably needs to care for and ensure the safety of the child. *Children, Youth and Families Act 2005* (Vic) s 179(1) (A similar requirement is placed on an OOHC service where placing a child as part of a Part 3.5 child care agreement.)

272 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 143, 144.

273 *Child Protection Act 1999* (Qld) s 83A.

274 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 143(2), *Care and Protection of Children Act* (NT) s 80(2) *Child Protection Act 1999* (Qld) s 83A(4).

275 *Child Protection Act 1999* (Qld) s 83A(4).

276 *Victoria Information Sharing in out of Home Care*, Department of Human Services Advice No 1403, 5 November 2012, 4.

277 See Queensland Commission for Children and Young People and Child Guardian, Submission No 42 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*, 33; Act for Kids Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

Providing adequate information about a child to carers before the OOHC placement commences is critical to a stable placement and to meeting the needs of the child and other children in care. Meeting the needs of a child in OOHC requires an understanding of their history and their problems. Such failure to provide carers with comprehensive information about the child placed in their care has reportedly contributed to serious negative outcomes for other children in these homes.<sup>278</sup> For example, the Queensland Commission for Children and Young People and Child Guardian reported that in at least one instance, the failure to appropriately inform a carer about the known sexualised behaviours of a young person placed with that carer led to the own carer's child being abused.<sup>279</sup>

Interestingly, in NSW, the provisions relating to the provision of information prior to and during care are framed as rights rather than obligations.<sup>280</sup> The Children and Young Persons (Care and Protection) Act also provides that the child or young person has a *right to information* concerning the authorised carer prior to being placed with that carer.<sup>281</sup>

## Information sharing during care

Some jurisdictions provide for the provision of information during care. For example, New South Wales and Victoria specifically mandate the provision of information (including medical information or the medical status of the child) to enable the carer to provide appropriate care for the child.<sup>282</sup> In New South Wales this includes information that may be reasonably necessary to ensure the safety of the carer and other members of the authorised carer's household.<sup>283</sup> This facilitates the sharing of information that may be necessary to ensure the safety of other members of the home.

## Information sharing by the carer

There are generally restrictions on the disclosure of information obtained by the carer in their role as carer. For example, in the Northern Territory, the carer must not disclose the information otherwise than to a health practitioner for the care of the child or in other circumstances approved by the head of the child protection agency.<sup>284</sup>

In the Australian Capital Territory, child protection legislation permits the sharing of protected information (that is not sensitive information) by the carer with someone else if the carer considers it necessary for the proper exercise of their responsibilities for the child or young person, and if it is in accordance with any directions given by the head of the child protection agency.<sup>285</sup> Protected information is defined quite broadly

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278 See Queensland Commission for Children and Young People and Child Guardian, Submission No 42 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*, 33.

279 See Queensland Commission for Children and Young People and Child Guardian, Submission No 42 to Royal Commission into Institutional Responses to Child Sexual, *Issues Paper 4: Preventing Sexual Abuse of Children in Out-of-Home Care*.

280 For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 143 is framed as an 'authorised carer's right to information for the purpose of assessing placement'.

281 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 145.

282 *Children, Youth and Families Act 2005* (Vic) s 179(2) (A similar requirement is placed on an out-of-home care service where placing a child as part of a Part 3.5 child care agreement.)

283 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 144.

284 *Care and Protection of Children Act* (NT) s 80.

285 *Children and Young People Act 2008* (ACT)s 854.

and includes information about a child or their family that is received by someone involved in the administration of child protection legislation or exercising a function under the Act.<sup>286</sup>

In some jurisdictions, out-of-home carers are included as prescribed bodies and therefore can exchange information under the information sharing arrangements between prescribed bodies (discussed below). However, for those that are not, the ability to receive and disclose information about the safety and wellbeing of a child is limited. Arguably, such restrictions could prevent critical information reaching certain individuals necessary to ensure the safety of a child and to enable the carer to exercise their responsibilities in relation to the child.

## Register of placements

New South Wales is the only jurisdiction in which legislation requires the head of the child protection agency to maintain a register of the particulars of every child or young person who has been in OOHC for a continuous period of 28 days or more.<sup>287</sup> The legislation provides that each designated agency must ensure that written, photographic and other records relating to the development, history and identity of a child or young person for whom the Minister has parental and supervisory responsibility are maintained and are accessible to the child or young person.<sup>288</sup> OOHC placement service providers must enter placement information about children and young people in their care into the Minimum Data Set database.<sup>289</sup>

In addition, the head of the child protection agency and each designated agency that supervises the placement of an Aboriginal or Torres Strait Islander child in OOHC must record the date, the period and the plan for the child to leave OOHC.<sup>290</sup>

Although other jurisdictions do not legislatively provide for the development of a register *per se*, every jurisdiction is required to maintain records, which would act as a *de facto* register. For example, the *Children and Community Services Act 2004* (WA) requires the head of the child protection department to keep records containing ‘prescribed information’ in respect of every child who is or has been in the care of the child protection department.<sup>291</sup>

## 5.6 Information sharing with and between prescribed bodies

There is, to varying degrees across the Australian states and territories, legislative provision for the sharing of information related to the safety, welfare and wellbeing of children and young people between:<sup>292</sup>

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286 Ibid s 844.

287 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 159. The *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) also requires the NSW Children’s Guardian to establish a limited-access register of information about children and young people in voluntary out-of-home care: *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) cl 82.

288 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 160.

289 Department of Family and Community Services (NSW), *Out-of-Home Care Contracted Care Program Guidelines*, 11.

290 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 167.

291 See, for example, *Children and Community Services Act 2004* (WA) s 128.

292 South Australia provides for this exchange of information in policy.

- certain defined prescribed bodies or ‘information sharing entities’,<sup>293</sup> and/or
- these prescribed bodies and the child protection agency.<sup>294</sup>

There are a number of differences across jurisdictions and for each scenario including:

- the type of information that may or must be shared
- who and with whom information may or must be shared
- the proactive or mandatory sharing of information;
- for what purpose the information may or must be shared.

## Definition of ‘prescribed body’

Legislation across jurisdictions generally includes a list of people and bodies that fall within the definition of ‘prescribed body’.<sup>295</sup> A defined list is not prescribed in legislation for South Australia. In South Australia, the Information Sharing Guidelines (ISG) apply to:

*... a wide range of South Australian government agencies and non-government organisations acting under a contract with the State government, including (but not limited to) those working in health, education, policing, juvenile justice, disability, housing, mental health, family violence, drug and alcohol services, Aboriginal community controlled services, multicultural services, aged care, correctional services, and investigations and screening units.*

The ISG applies to people doing paid or volunteer work in these sectors who provide services partly or wholly to children and young people; families; pregnant women and their unborn children; and adults. However, the ISG does not apply to some specific service providers such as the Courts Administration Authority, the Crown Solicitor’s Office, the Office of the Director of Public Prosecutions, the Legal Services Commission, and members and officers of courts and tribunals.<sup>296</sup>

Prescribed entities in Queensland include the departments of health, housing and homelessness; community care services; accredited schools; persons providing services to children or families; and Mater Misericordiae Health Services.<sup>297</sup> In NSW, the list of prescribed bodies is extensive and includes the NSW Police Force, government agencies, schools, hospitals, fostering agencies, childcare services, OOH services, adoption agencies and any other organisation that is responsible for or supervises the provision of healthcare, welfare, education, children’s services, residential services or law enforcement, wholly or partly to children. The NSW child protection agency is also authorised to exchange information with certain Commonwealth agencies

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293 *Children and Young People Act 2008* (ACT) s 863; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C; *Care and Protection of Children Act* (NT) ss 293B–293E; *Child Protection Act 1999* (Qld) s 159M between prescribed bodies and service providers; *Children, Young Persons and Their Families Act 1997* (Tas) s 53B(3); *Children, Youth and Families Act 2005* (Vic) s 36; *Children and Community Services Act 2004* (WA) s 28A.

294 *Children and Young People Act 2008* (ACT) ss 859–62; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C; *Care and Protection of Children Act* (NT) ss 293B–293E; *Child Protection Act 1999* (Qld) s 159M; *Children, Young Persons and Their Families Act 1997* (Tas) s 53B; *Children, Youth and Families Act 2005* (Vic) ss 35, 192–196; *Children and Community Services Act 2004* (WA) s 28A.

295 Known as ‘information sharing entities’ (ACT); ‘prescribed bodies’ (NSW); ‘information sharing authorities’ (NT); ‘prescribed entities’ (Qld); ‘information sharing entities’ (Tas); ‘information holder’ (Vic); ‘prescribed authorities’ (WA). For ease of reference, they will be referred to as ‘prescribed bodies’ for the remainder of this section unless there is need for differentiation.

296 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 5.

297 *Child Protection Act 1999* (Qld) s 159M.

including the Family Court, the Federal Magistrates Court, Centrelink and the Department of Immigration and Citizenship.<sup>298</sup>

Importantly, in NSW, Chapter 16A of the Children and Young Persons (Care and Protection) Act envisages the sharing of information by and with organisations that have direct responsibility for or direct supervision of the provision of children's services, wholly or partly to children. It appears that this would extend to both government and non-government organisations that provide extracurricular activities for children, such as sporting and recreational clubs and coaching and tuition. Queensland appears to be similarly broad enough to encompass such organisations. However, the Northern Territory is limited to government-funded organisations. Other jurisdictions do not appear to include such organisations at all.

Both the Northern Territory and Queensland include the head of the child protection agency in their definitions of prescribed bodies while Victoria includes an employee of the child protection agency.

Other jurisdictions regulate the exchange of information with the child protection agency through specific provisions in their legislation – for example, s 248 of the Children and Young Persons (Care and Protection) Act in NSW.

### Mandatory information sharing by the child protection agency with prescribed bodies

In some circumstances, the child protection agency **must** share information with prescribed bodies. The *Child Protection Act 1999* (Qld), for example, requires the child protection agency to provide certain information to a prescribed body when asking that body to provide a service to a child in need of protection, or to a member of the child's family to help meet the child's protection and care needs and promote the child's wellbeing.<sup>299</sup> The head must give the prescribed body the information it needs to comply with the request.

In addition, as noted above, in some jurisdictions a report of suspected child abuse or a 'risk notification' may be referred to a community-based family service. The head of the child protection agency is then authorised to provide certain information to that service to obtain the necessary support.<sup>300</sup>

### Voluntary information sharing by the child protection agency with prescribed bodies

All jurisdictions allow the child protection agency to share information with prescribed bodies in certain circumstances.<sup>301</sup> In Tasmania, these provisions allow the child protection agency to share information relating to the safety, welfare or wellbeing of a child. In Western Australia, information relevant to the wellbeing of a child or children, or the performance of the child protection legislation, may be shared.

In Queensland,<sup>302</sup> the child protection agency **may** give 'relevant information'<sup>303</sup> to a 'service provider' if the head of the child protection agency reasonably believes the information may help the service provider to

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298 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245I.

299 *Child Protection Act 1999* (Qld) s 159H(2), (4).

300 *Children, Youth and Families Act 2005* (Vic) s 36.

301 *Children and Young People Act 2008* (ACT) s 860; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C; *Care and Protection of Children Act* (NT) ss 293B–293D; *Child Protection Act 1999* (Qld) s 159M; Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 5; *Children, Young Persons and Their Families Act 1997* (Tas) s 53B; *Children, Youth and Families Act 2005* (Vic) s 35; *Children and Community Services Act 2004* (WA) s 23.

302 *Child Protection Act 1999* (Qld) s 159M(4).

303 *Ibid* s 159C(c)(1).



assess or respond to the health, educational or care needs of a relevant child or otherwise make plans or decisions relating to, or provide services to, a relevant child or the child's family.

## Mandatory information sharing by prescribed bodies with the child protection agency

Prescribed bodies in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria are required to provide information relating to the safety, welfare and wellbeing of a child or young person to the child protection agency upon the request or direction of the head of the child protection agency in certain specified circumstances.<sup>304</sup>

In Queensland, this extends to information that the holder of the information reasonably believes may help to, among other things:

- investigate an allegation of harm, or risk of harm, to a child or assess a child's need for protection
- take action, or decide if he or she reasonably suspects a child is in need of protection
- investigate or assess, before the birth of a child, the likelihood that the child will need protection after he or she is born
- develop or assess the effectiveness of a child's case plan
- assess or respond to the health, educational or care needs of a relevant child.

The Queensland Government has made clear that the provision is unlikely to be used very often as the information sharing provisions under s 159M of the Child Protection Act 'allow for full collaboration and information sharing between agencies to meet the protection and care needs of children and their families'.<sup>305</sup>

## Voluntary information sharing by prescribed bodies with the child protection agency

All jurisdictions allow prescribed bodies to share information relating to the safety, welfare or wellbeing of a child or relevant person with the child protection agency.<sup>306</sup> There are prerequisites for sharing information in some jurisdictions. For example, in the Australian Capital Territory, the prescribed body must consider that giving the information is in the best interests of the child or young person. As this is an overarching principle of all child protection legislation, this would apply to other states and territories as well, although not explicitly stated in the section.

The type of information shared generally relates to the safety, welfare and wellbeing of a child or young person. There appears to be a significant limitation in Victoria, however, in that information may only be shared if it is relevant to the protection or development of a child about whom the head of the child protection agency has received a protective intervention report. That is, it does not extend to any child but only those subject to a protective intervention report.<sup>307</sup>

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304 *Children and Young People Act 2008* (ACT) s 862; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D; *Care and Protection of Children Act* (NT) ss 293E; *Child Protection Act 1999* (Qld) s 159N(1); *Children, Young Persons and Their Families Act 1997* (Tas) s 53B; *Children, Youth and Families Act 2005* (Vic) ss 195–97.

305 Queensland Government, *Child Safety Practice Manual* (2013) 601.

306 *Children and Young People Act 2008* (ACT) s 861; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C; *Care and Protection of Children Act* (NT) s 293D; *Child Protection Act 1999* (Qld) s 159M; Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 5; *Children, Young Persons and Their Families Act 1997* (Tas) s 53B; *Children, Youth and Families Act 2005* (Vic) s 35; *Children and Community Services Act 2004* (WA) s 23, 24A, 28A, 28B.

307 *Children, Youth and Families Act 2005* (Vic) s 192(1),(2); *Children, Youth and Families Regulations 2007* (Vic) reg 6.

## Mandatory information sharing between prescribed bodies

New South Wales and the Northern Territory are the only jurisdictions in which information **must** be shared between prescribed bodies upon the request of one prescribed body (the requesting authority) to the other (the requested authority), although the requirement to share is qualified in both jurisdictions. The nature of the information that must be shared is limited by the type of information requested and the purpose for which the information will be used by the requesting authority.

In New South Wales, the information must be shared if the requested body reasonably believes, after receiving sufficient information from the requesting authority, that the information may assist the requesting authority to:

- make any decision, assessment or plan, or to initiate or conduct any investigation, or
- provide any service, relating to the safety, welfare or wellbeing of the child or young person or class of children or young persons, or
- manage any risk to the child or young person (or class of children or young persons) that might arise in the agency's capacity as an employer or designated agency.<sup>308</sup>

In the Northern Territory, the provision covers information relating to the safety or wellbeing of a child, or group of children, which is held by the requested body and that the requested body reasonably believes would assist the requesting body to:

- make a decision, assessment or plan
- initiate or conduct an investigation, or
- provide a service or perform a function.<sup>309</sup>

While the mandatory requirement to provide information upon request triggers a flow of information between defined prescribed bodies, such provisions do not support a *proactive* sharing of information. This is discussed further below.

## Voluntary information sharing between prescribed bodies

It is possible to imagine circumstances in which one prescribed body may not be aware of information it could request from another prescribed body, and so does not request it. In such a situation, it is possible that the information will not be shared – potentially undermining the ability of the second body to protect the safety and wellbeing of a child or young person. This is addressed in jurisdictions that provide for the proactive sharing of information between prescribed bodies, discussed below. However, it is important to note that some jurisdictions rely more heavily on the child protection agency as a centralised 'hub' of information.<sup>310</sup> In other words, the system relies on the assumption that all information relevant to the safety, welfare and wellbeing of children and young people is held by the child protection agency and can be accessed through specific legislative provisions that enable prescribed bodies to request information from the agency.

The Wood Report was critical of this kind of structural arrangement, noting that:

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308 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D(1)-(3).

309 *Care and Protection of Children Act* (NT) s 293E(2).

310 *Children and Young People Act 2008* (ACT) ss 859–63, except where a care team has been established by the head of the child protection agency under s 863; *Children, Youth and Families Act 2005* (Vic) s 35, although a community-based child and family service may consult other relevant information holders if it has received a referral under the Act and the consultation is for the purpose of assessing a risk to a child [s 36].



*The several agencies, including NGOs, that have responsibilities for the safety, welfare and well-being of children and young persons, should be able to share information without needing to rely on DoCS as an intermediary, where that information is required to promote the safety, welfare and well-being of any such person.*<sup>311</sup>

The centralised ‘hub’ process was described as cumbersome and resulting in delay.<sup>312</sup> New South Wales has since amended the relevant legislation, enabling the direct exchange of information between prescribed bodies.<sup>313</sup>

New South Wales, the Northern Territory, Queensland, Tasmania and Western Australia, all have provisions facilitating the direct exchange of information between prescribed bodies.<sup>314</sup> In Queensland, the Child Protection Act allows the sharing of information between certain prescribed entities and service providers.<sup>315</sup> In Western Australia, heads of prescribed bodies can request relevant information from, or disclose relevant information to, other prescribed bodies.<sup>316</sup>

In these states and territories, the information that may be shared is limited by its type and the purpose for which it will be used. Generally, the type of information that may be shared under these provisions relates to the safety, welfare or wellbeing of a child or young person or relevant person. In the Northern Territory, this is expressly extended to information about a person other than the child (for example, a family member of the child) that directly or indirectly relates to the safety or wellbeing of the child.<sup>317</sup> In Western Australia, it extends to ‘information that is, or is likely to be, relevant to the wellbeing of a child or a class or group of children’.<sup>318</sup>

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311 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008), [24.173].

312 Ibid [24.98].

313 *Children and Young Persons (Care and Protection) Act 1998* (NSW) Ch 16A.

314 *Children and Young Persons (Care and Protection) Act 1998* (NSW) Ch 16A; *Care and Protection of Children Act* (NT) s 293A–293D; *Child Protection Act 1999* (Qld) s 159M; *Children, Young Persons and Their Families Act 1997* (Tas) s 53B; *Children and Community Services Act 2004* (WA) ss 28A, 28B.

315 *Child Protection Act 1999* (Qld) s 159M.

316 *Children and Community Services Act 2004* (WA) s 28B.

317 *Care and Protection of Children Act* (NT) s 293B(2).

318 *Children and Community Services Act 2004* (WA) s 28A.

Queensland allows for the exchange of ‘relevant information’, that is, information that the holder reasonably believes may help the service provider to:

- decide whether information about suspected harm, or risk of harm, to a child or about an unborn child who may need protection after birth should be given to the head of the child protection agency
- help the head of the child protection agency to offer help and support to a pregnant woman where the head reasonably suspects the unborn child may be in need of protection after he or she is born
- assess or respond to the health, educational or care needs of a child in need of protection
- otherwise make plans or decisions relating to, or provide services to, a child in need of protection or the child’s family; or
- offer help and support to a child or child’s family to stop the child becoming a child in need of protection.

Other jurisdictions also place a limit on when information may be proactively shared under these provisions.

In New South Wales, the provider must reasonably believe that the provision of the information would assist the recipient to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or wellbeing of the child or young person or to manage any risk to the child or young person that might arise in the recipient’s capacity as an employer or designate agency.<sup>319</sup>

In the Northern Territory, the following limitations are placed on the pro-active provision of information:

- the provider has specified the relevant child or group of children when giving the information
- there has been no specific request made for the information
- the provider reasonably believes that the information would assist the recipient to do any of the following that relates to the safety or wellbeing of the child or children: make a decision, assessment or plan; initiate or conduct an investigation; provide a service or perform a function.<sup>320</sup>

Tasmania requires that the receiving body be involved with, or likely to be involved with, the relevant person or a significant person to the relevant person, to which the information relates.<sup>321</sup>

NSW legislation specifically states that information provided under the direct sharing of information provisions may be provided whether or not it has been requested.<sup>322</sup> Inclusion of such a phrase in legislation would appear to support the proactive sharing of information although it does not require that the information be proactively shared in this way.

In New South Wales, Chapter 16A and s 248 of the Children and Young Persons (Care and Protection) Act operate to reinforce each other. Where a request under Chapter 16A has been declined, the child protection agency can direct a range of agencies – including non-government services providing welfare, children’s services and residential services – to provide information related to the safety, welfare and wellbeing of a child or young person under s 248. This is probably due to the fact that s 248 will only be used in exceptional circumstances – for example, where a request for information by the child protection agency under Chapter 16A has been declined and no mutually acceptable solution has been reached.<sup>323</sup>

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319 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C.

320 *Care and Protection of Children Act* (NT) s 293D–293E.

321 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B(3)(b).

322 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C(2).

323 Department of Family and Community Services, *NSW Interagency Guidelines: Exchange of Information under Section 248*, <[http://www.community.nsw.gov.au/kts/guidelines/info\\_exchange/section\\_248.htm](http://www.community.nsw.gov.au/kts/guidelines/info_exchange/section_248.htm)>.

## Consent

Consent to share information relating to child safety or wellbeing is generally not required by law. In some jurisdictions, however, it is considered best practice to seek the consent of the parent or child, provided it does not place the child, their family or the professional at increased risk of harm.<sup>324</sup> It is still allowable to share information even if the parent or young person refuses to give consent. Reasons for doing so should be documented.<sup>325</sup> In addition, policy generally requires staff to inform clients that their information may be shared with other agencies if there are concerns for the safety or wellbeing of children.<sup>326</sup>

For example, the Child Wellbeing and Child Protection – NSW Interagency Guidelines state: ‘... while consent is not necessary, it should be sought where possible. Organisations should at a minimum advise children, young people and their families that information may be shared with other organisations.’<sup>327</sup> When a child’s safety, welfare or wellbeing is at issue and consent is not able to be obtained or is withheld, Chapter 16A of the Children and Young Persons (Care and Protection) Act provides specific legislative authority for the sharing of relevant information. In Queensland, s 159M of the Child Protection Act enables direct referrals without consent. The Queensland Guidelines state that sharing information takes precedence over a parent’s right to confidentiality or privacy because the safety, welfare and wellbeing of the child is paramount.<sup>328</sup> In WA, policy states that in circumstances where obtaining consent is not possible or professional judgement indicates it is not appropriate for safety reasons, this should be discussed with a line manager and a request for information under s 24A of the Children and Community Services Act considered.<sup>329</sup>

## Privacy

As discussed in section 4.3, all privacy legislation across Australia, and the SA Instructions, allow agencies and organisations to use or disclose information where it is required or authorised by law, although there is a level of inconsistency in how the provisions are framed.<sup>330</sup>

Generally, the information sharing arrangements detailed above would fall under this exception – that is, as authorised by law. NSW child protection legislation makes it clear that the information sharing provisions in Chapter 16A and s 248 of the Children and Young Persons (Care and Protection) Act override any provision contained in any other law (including state, territory and Commonwealth privacy legislation and the law

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324 See, for example, Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 14–16; Department of Health (WA), *Information Sheet 11: Information Exchange Between Prescribed Government Authorities When there is Protection of Children Concerns*; Department of Communities, Child Safety and Disability Services (Qld), *Protecting Children and Supporting Families, A Guide to Reporting Child Protection Concerns and Referring Families to Support Services* (2014).

325 Department of Health (NT), *Information Sharing Relating to the Safety and Wellbeing of a Child or Young Person* (2012); Department of Health (WA), *Information Sheet 11: Information Exchange Between Prescribed Government Authorities When there is Protection of Children Concerns*.

326 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 5.

327 See also, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(a).

328 Department of Communities, Child Safety and Disability Services (Qld), *Protecting Children and Supporting Families, A Guide to Reporting Child Protection Concerns and Referring Families to Support Services* (2014).

329 Department for Child Protection (WA), *Working Together for a Better Future for At Risk Children and Families*, 2012.

330 *Privacy Act 1988* (Cth) APP6.2(b); *Information Privacy Act 2014* (ACT) TPP6.2(b); *Privacy and Personal Information Protection Act 1998* (NSW) s 25; *Information Act* (NT) IPP1(f); *Information Privacy Act 2009* (Qld) IPP11.1(d), HPP2.1(f); *Information Privacy Principles Instruction 2013* (SA) cl 4(10)(d); *Personal Information Protection Act 2004* (Tas) PPIP2.1(f); *Privacy and Data Protection Act 2014* (Vic) IPP2.1(f).

relating to confidentiality and defamation) which prohibits or restricts the disclosure of that information.<sup>331</sup> A prescribed body therefore cannot refuse to release information on the basis that the privacy law prohibits it from doing so. However, as discussed above, there are limitations on the type of information that may or must be shared, and the purpose for doing so. For example, information sought by an agency must relate directly to that agency's work in relation to the safety, welfare and wellbeing of a particular child or young person, or class of children or young people.<sup>332</sup> A prescribed body will be required to comply with a request for information when it believes this will assist the requesting body in providing for the safety, welfare and wellbeing of the child and/or young person to whom the information relates.<sup>333</sup>

While these arrangements are provided for in legislation, in practice, staff may be reluctant to share such information if they are not fully aware of the relevant exception under privacy law. For example, Australian Capital Territory policy recognises that in relation to vulnerable or at risk children and young people, the balance between protecting their privacy and sharing information in order to protect them can sometimes be tricky for staff. When in doubt, the *best interest of the child* should always be the overarching guiding principle and paramount consideration. Confidentiality and privacy are important but should never override the safety of the child or young person.<sup>334</sup>

## Refusal to provide information

In those jurisdictions that require prescribed bodies to provide information to each other upon request – that is, New South Wales and the Northern Territory – a prescribed body can refuse to provide information on certain limited grounds.<sup>335</sup> A request for information may be refused where, for example, the requested authority reasonably believes that giving the information could:

- prejudice the investigation of a contravention (or possible contravention) of a law
- prejudice a coronial inquest or inquiry
- prejudice any proceedings in a court or tribunal
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of a law
- contravene any legal professional or client legal privilege
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained
- endanger a person's life or physical safety
- prejudice the public interest.<sup>336</sup>

The requested body must give the requesting body written reasons for refusing to give any or all of the requested information.

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331 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245H, 248(5).

332 *Ibid* s 245D(2).

333 *Ibid* s 245D(3).

334 ACT Health *Child Protection Practice Paper* (2013).

335 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D(4); *Care and Protection of Children Act* (NT) s 293E(5),(6).

336 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D (4), (5).

## Protection from liability

Each jurisdiction's legislation protects those providing information in good faith in accordance with these arrangements from liability<sup>337</sup>, including protection from:

- any civil or criminal action, including for defamation, malicious prosecution or conspiracy
- disciplinary action for breach of a code of professional etiquette or ethics
- disciplinary action for departing from accepted standards of professional conduct.

The protection from liability supports a level of confidence in sharing information under these arrangements.

It is also necessary to ensure that information is shared for the designated purpose and that the information is then handled and stored in a secure manner. For example, in New South Wales, the receiving agency must use the information for the safety, welfare or wellbeing of the child or young person (or class of children or young persons) to whom the information relates.<sup>338</sup> All personal and health information held in relation to a particular child must be maintained pursuant to an organisation's obligations under relevant privacy legislation, except to the specific extent permitted by Chapter 16A of the Children and Young Persons (Care and Protection) Act. The Guidelines advise:

*Information must be handled and stored in a secure way. A written record of exchanges of information under Chapter 16A should be made and stored in a way that is consistent with the existing legislation (including the State Records Act 1998, Privacy and Personal Information Protection Act 1998 and the Health Records and Information Protection Act 2002).*

In addition, in all states and territories, reporter identity still needs to be protected. This means that those requesting information may still receive redacted versions of reports. The protection of the reporter's identity is discussed below.

## Restriction on further disclosure of information

Most states and territories restrict any prescribed body that receives information under the various information sharing arrangements from further using or disclosing the information for any purpose that is not associated with the safety, welfare or wellbeing of the child or young person (or class of children or young persons) to whom the information relates.<sup>339</sup> This means that the information should be shared only with practitioners within that prescribed body who 'need to know' in order to do their job to protect or support a child or young person.<sup>340</sup>

## Effectiveness of Chapter 16A

As Chapter 16A of the Children and Young Persons (Care and Protection) Act is unique across all jurisdictions, the effectiveness of the regime is briefly considered here. Recent research indicated that although the passing

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337 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245G(1),(2)(3), 248(3); *Care and Protection of Children Act* (NT) s 293F; *Child Protection Act 1999* (Qld) s 159Q; *Children, Young Persons and their Families Act 1997* (Tas) s 53B(4); *Children and Community Services Act 2004* (WA) ss 23(5), 28A(6).

338 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245F.

339 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245F; *Care and Protection of Children Act* (NT) 293G(1).

340 Department of Family and Community Services (NSW), *Information Exchange – Long Fact Sheet for Human Services Workers*.

of Chapter 16A (and training and organisational support for these changes) has improved information sharing, many agencies still experience considerable difficulties regarding information sharing, and practice is variable across agencies, sectors and geographical locations. The process for sharing information is perceived as being cumbersome and bureaucratic and there is still considerable anxiety around sharing information and the reluctance of some agencies and professionals to do so. There is also evidence that agencies in other jurisdictions in Australia, some of which have far more prescriptive requirements than New South Wales, manage to share relevant information efficiently and safely.<sup>341</sup>

As discussed above, Chapter 16A provides a mechanism by which information can be shared proactively without the need to receive a request.<sup>342</sup> However, notwithstanding that such proactivity is permitted, there does not appear to be any statement of policy that encourages individuals and institutions to proactively share wherever appropriate.<sup>343</sup>

The NSW Ombudsman has noted, however, that the benefits of Chapter 16A have been significant in all areas of child protection practice in that state. The ability of government agencies and non-government organisations 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 vulnerable children and better tailor appropriate responses.<sup>344</sup>

## 5.7 Children's commissioners and guardians

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Generally, a children's commissioner works to improve and ensure better services for all children, whereas a children's guardian works predominantly to help improve the services for children in the care of an agency. Not all states and territories have a commissioner *and* a guardian. In most states and territories, the commissioner also acts as the guardian. Queensland and New South Wales have separate commissioners and guardians. South Australia has a children's guardian but no children's commissioner. It also has the Council for the Care of Children, established under the Childrens Protection Act, with primary functions similar to that of a children's commissioner.<sup>345</sup>

The roles and activities of children's commissioners and guardians differ between jurisdictions. Some take a broad focus and represent all children and young people, while others focus on children and young people who are at risk, or those who come into contact with child protection systems.

For example, in the Northern Territory, the commissioner's role is to act as an advocate for, and to ensure the wellbeing of, vulnerable children, particularly Indigenous children, and to represent their interests at all levels of government and in the community. In New South Wales, the Advocate for Children and Young People focuses on all children and young people – for example, advocating for and promoting the participation of children and young people in decision-making; providing input into laws and policies that affect children and young people; undertaking research to improve the awareness and understanding of issues affecting children and young people. In comparison, the Children's Guardian's role focuses on children in OOHC, the

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341 Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015).

342 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245C(2).

343 Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015).

344 NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities – A Report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012) section 14.6.

345 *Children's Protection Act 1993* (SA) s 52J.



implementation of the WWCC system, administering the Child Sex Offender Counsellor Accreditation Scheme and other similar functions.

## Children's guardians

A number of provisions in child protection legislation mandate the provision of information about the safety and wellbeing of a child – including allegations of sexual abuse – to the Children's Guardian. Jurisdictions differ as to who is required to provide this information. It may be the head of the child protection agency, welfare services, organisations providing services to children or agencies providing OOHC.<sup>346</sup>

Generally, information about individual cases disclosed to the Children's Guardian is to be kept confidential.<sup>347</sup> However, information about suspected offences or suspected child abuse or neglect may be disclosed to the appropriate authorities.<sup>348</sup> For example, in NSW, the Children's Guardian may refer to the Police Commissioner, the Ombudsman, the head of the child protection agency or any other investigative or government agency any information obtained by the Children's Guardian in the course of exercising any function<sup>349</sup>, being information relating to a possible criminal offence under any law or to grounds for possible disciplinary action under any law.<sup>350</sup>

In addition, in New South Wales, the Children's Guardian may also share safety information with the head of the child protection agency, authorised carers and agencies responsible for the provision of OOHC.<sup>351</sup>

## Children's Commissioners

As discussed above, the NSW system requires OOHC agencies (both government and non-government) to report allegations of abuse in care, including sexual abuse, to the Ombudsman's Office within 30 days of becoming aware of an allegation and to subsequently report on the investigation of that allegation, including advising on action taken or proposed.<sup>352</sup> The Ombudsman, in turn, may disclose certain information to the NSW Children's Guardian for the purpose of the exercise of the Guardian's functions under the *Child Protection (Working with Children) Act 2012* (NSW).<sup>353</sup> This may include information that the Ombudsman believes may cause an employee to be a disqualified person or subject to an assessment requirement under the working with children legislation.

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346 See, for example, *Children and Young People Act 2008* (ACT) s 879; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 185(1)(b); *Care and Protection of Children Act* (NT) s 84C; *Child Protection Act 1999* (Qld) ss 13J, 189AA; *Children's Protection Act 1993* (SA) ss 52C, 52CA(1), (2), (5).

347 *Children's Protection Act 1993* (SA) ss 52E, 52L (Council for the Care of Children).

348 Ibid s 52L.

349 Other than information obtained in the course of exercising functions under s 40A of the *Child Protection (Working with Children) Act 2012* (NSW) (the power to audit declarations made by exempt workers).

350 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 186A.

351 Ibid s 185(1)(a)(6).

352 *Ombudsman Act 1974* (NSW) pt 3A. Designated agencies include most relevant government agencies (Community Services, Ageing Disability and Home Care, Juvenile Justice, NSW Health, local government) and non-government organisations (including government and non-government schools, child care centres, out-of-home-care) in the child-related employment sphere.

353 *Ombudsman Act 1974* (NSW) s 25DA. Reportable conduct investigations often take place once a criminal investigation is completed. The reportable conduct investigation may have additional outcomes in terms of criminal proceedings and/or a child protection response.



## 5.8 Cross-jurisdictional sharing

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The inter-jurisdictional information sharing arrangements in child protection legislation include arrangements for:

- interstate officers;
- prescribed bodies; and
- the transfer of orders or court proceedings.

The NSW Ombudsman has noted that ‘given the ease with which alleged perpetrators can travel between states, any weakness in the regime for exchanging information between states can pose significant risks to children.’<sup>354</sup> For example, in New South Wales, 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 the state or outside. However, where the alleged conduct has occurred outside the state, 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 risk.<sup>355</sup>

### Interstate officers

All states and territories, with the exception of Queensland and Victoria, provide that the head of the child protection agency may disclose to an interstate officer<sup>356</sup> any information that has come to his or her notice in the exercise of functions under child protection legislation if they consider it necessary to allow the person to administer the law.<sup>357</sup>

In addition, the *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance April 2009* (Transfer Protocol) has been agreed to by all states and territories, and New Zealand, and provides guidelines for the transfer of casework and the transfer of orders and proceedings. The Transfer Protocol supports the various jurisdictions’ child protection legislation and provides guidelines for sharing information, obtaining interstate assessments, transferring case work and transferring orders and proceedings between all Australian states, territories and New Zealand. The Transfer Protocol reiterates that the best interests of the child are paramount.

The Transfer Protocol can be used as a vehicle for obtaining information from other states. One of its aims is to ‘provide for cooperation between jurisdictions to facilitate the care and protection of children and young people’. To this end, it provides for (among other things) information sharing between state child protection

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354 NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities – A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012) section 14.6.

355 NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities – A report under Part 6A of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (2012) section 14.6.

356 That is, any person who is exercising a function, or otherwise engaged in the administration of, a provision of a law of a state corresponding (or substantially corresponding) to a provision of the state’s Child Protection Act.

357 *Children and Young People Act 2008* (ACT) s 852 (protected information); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 231v(1); *Care and Protection of Children Act* (NT) s 181; *Children’s Protection Act 1993* (SA) s 54U; *Children, Young Persons and their Families Act 1997* (Tas) s 77Z; *Children and Community Services Act 2004* (WA) s 184(1).

authorities. However, the provisions in the Transfer Protocol specifically related to information sharing only refer to relevant child protection agencies providing information to their interstate counterparts.<sup>358</sup>

Relevantly, clause 25 of the Transfer Protocol provides that, subject to confidentiality/privacy provisions in a state or territory's legislation:

- a Department will provide information it holds relevant to a particular child if requested to do so by another interstate Department for the purpose of enabling the interstate Department to undertake its responsibilities under that State's child protection legislation
- a Department will provide information it holds relevant to the safety, welfare and wellbeing of a child or children to any or all States party to this protocol as agreed between the Departments of the respective States, and
- a Department will provide information it holds relevant to assist other interstate Departments to assess the suitability of carers for children in OOHC.

The Transfer Protocol further provides that subject to contrary provisions in a state's legislation, if a departmental officer receives information from an interstate department pursuant to this clause, the information should be dealt with as if it had been directly obtained by the departmental officer in that state.

In addition, the Child Protection Legislation Amendment Bill 2015 currently before the Parliament of New South Wales aims to strengthen information sharing arrangements between the state and assessing bodies in other jurisdictions. The exchange may only be made in accordance with protocols made by the Minister, in consultation with the NSW Privacy Commissioner.<sup>359</sup>

There are a number of concerns about the above arrangement. First, it relies on the child protection agencies being a 'hub' of information. All interstate requests for information must go through the relevant child protection agency. This assumes that the child protection agency holds the information in the first place. Secondly, there is an element of discretion in the provision of information between interstate officers – that is, where the giving of the information is necessary to allow the person to administer the relevant child protection law.

The NSW Ombudsman further noted that the state's child protection agency has taken the view that it should not make a request to a 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). Furthermore, the Ombudsman noted that particular interstate child protection agencies 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 within their own state.<sup>360</sup> The Ombudsman noted that as part of the work plan to implement the *National Framework for Protecting Australia's Children*, the possibility of extending the Transfer Protocol for sharing information about children at risk was being investigated.<sup>361</sup>

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358 *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance April 2009*, cl 25 (as amended 2011).

359 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2015, 1394–98 (Brad Hazzard, Minister for Family and Community Services, Second Reading Speech, *Child Protection Legislation Amendment Bill 2015*). **Update:** The *Child Protection Legislation Amendment Act 2015* (NSW) was passed by the NSW Parliament and assented to on 28 September 2015.

360 NSW Ombudsman, *2013–2014 Annual Report* (2014) 85.

361 *Ibid.*

Clause 22 of the Transfer Protocol relates to the interstate notification of a child in need of protection. Pursuant to cl 22, a state department that believes a known child has moved interstate may deem it appropriate to notify the relevant department in the state where the child now resides about concerns relating to the protection of that child, so it can take such action as it considers appropriate. If the exact interstate whereabouts of the child is unknown, the notifying department should raise an alert in those jurisdictions where it is suspected the child may now be living.

## Transfer of court proceedings and court orders

Each jurisdiction provides for the transfer of child protection orders between jurisdictions in legislation.<sup>362</sup> Written notice about the decision to transfer an order must be provided to the child (if above a certain age or of sufficient maturity), the guardian or parents of the child and, in some jurisdictions, other persons who the head of the child protection agency considers ought to be notified, or who has a direct and significant interest in the wellbeing of the child.<sup>363</sup> This must be done as soon as practicable but in any event no later than three working days after the decision to transfer has been made. Consent from the child (if of sufficient maturity/age), parent and person responsible for the child is also generally required.

Under the Transfer Protocol, all jurisdictions are required to appoint one or more Interstate Liaison Officers. Clause 12 of the protocol provides that prior to the transfer of a child protection order or proceeding or interstate placement of a child, the Interstate Liaison Officer of the sending state must provide their counterpart in the receiving state with the comprehensive, accurate and up to date information necessary for the request to be considered. The protocol outlines other requirements for the transfer of protection orders or court proceedings.<sup>364</sup>

## 5.9 Confidentiality

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A number of provisions in state and territory child protection legislation impose restrictions on the disclosure or sharing of information about child sexual abuse in institutional contexts and related matters. These are often referred to as ‘confidentiality’ or ‘secrecy’ provisions. These include provisions that:

- make it an offence to disclose the identity of a notifier – including anything that would lead to disclosure of the notifier’s identity
- make it an offence for child protection staff to disclose information obtained during the course of their work
- make it an offence to disclose the identity of a child<sup>365</sup>

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362 *Children and Young People Act 2008* (ACT) ss 643, 644, 645; *Children and Young Persons (Care and Protection) Act 1998* (NSW) Ch 14A; *Care and Protection of Children Act* (NT) s 155; *Child Protection Act 1999* (Qld) ss 207, 209; *Children’s Protection Act 1993* (SA) ss 54A, 54B; *Children, Young Persons and Their Families Act 1997* (Tas) ss 77A, 77B; *Children, Youth and Families Act 2005* (Vic) Schedule 1; *Children and Community Services Act 2004* (WA) ss 158, 159.

363 *Children and Young People Act 2008* (ACT) ss 646, 658; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 231F; *Care and Protection of Children Act* (NT) s 158; *Child Protection Act 1999* (Qld) s 210; *Children’s Protection Act 1993* (SA) s 54D; *Children, Young Persons and Their Families Act 1997* (Tas) s 77D; *Children, Youth and Families Act 2005* (Vic) Schedule 1; *Children and Community Services Act 2004* (WA) s 161.

364 *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance April 2009*, cl 13 (as amended 2011).

365 See, for example, *Care and Protection of Children Act* (NT) s 301; *Child Protection Act 1999* (Qld) s 189.

- otherwise limit the disclosure of information.<sup>366</sup>

While protecting confidentiality and limiting disclosure of such sensitive information is necessary to protect children and young people, in some circumstances greater sharing of information may help to protect the safety and wellbeing of children. As noted in the ALRC Family Violence Report, the investigation and prosecution by law enforcement agencies of serious offences alleged to have been committed against a child or young person may be hampered by laws that do not clearly permit relevant information to be shared with the police. Consequently, the ability of the criminal justice system to protect the safety not only of the alleged victim but also of other children and young people may be compromised.<sup>367</sup> The general prohibitions on disclosure have substantial implications for the capacity of agencies to share information about a child or young person for the purpose of investigating allegations of abuse and neglect. Requiring the police to seek a court order to authorise a child protection agency to disclose protected information is an obstacle to the timely and effective investigation of allegations of child abuse and neglect.<sup>368</sup>

## Identity of a notifier

In all jurisdictions, it is an offence to disclose the identity of a notifier or reporter, or information that may reveal the notifier's identity.<sup>369</sup> There are limited exceptions to the offence. Disclosure may be made:

- in the course of administering the child protection legislation<sup>370</sup>
- when giving evidence in court.<sup>371</sup> Often, the court may grant leave only if satisfied that the notifier's identity is critically important to the proceedings, and that not disclosing it would 'prejudice the proper administration of justice'<sup>372</sup>
- where the notifier consents to the disclosure.<sup>373</sup>

366 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245F, 245G; *Care and Protection of Children Act* (NT) s 293G(1); *Child Protection Act 1999* (Qld) s 188.

367 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [20.42].

368 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper 1 (2010) Ch. 13.

369 *Children and Young People Act 2008* (ACT) s 857; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f); *Care and Protection of Children Act* (NT) s 150(1); *Child Protection Act 1999* (Qld) s 186(2); *Children's Protection Act 1993* (SA) s 13(2); *Children, Young Persons and their Families Act 1997* (Tas) s 16(2); *Children, Youth and Families Act 2005* (Vic) s 41; *Children and Community Services Act 2004* (WA) ss 141(1), 124F, 240.

370 *Children and Young People Act 2008* (ACT) ss 846-847; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f)(i), 29(4), (4A); *Care and Protection of Children Act* (NT) s 150(2)(c); *Child Protection Act 1999* (Qld) s 186(2); *Children's Protection Act 1993* (SA) s 13(2)(a); *Children, Young Persons and their Families Act 1997* (Tas) s 16(2)(a); *Children, Youth and Families Act 2005* (Vic) s 41; *Children and Community Services Act 2004* (WA) s 124F(2)(a).

371 *Children's Protection Act 1993* (SA) s 13.

372 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(d) (report is not admissible, except in certain proceedings, including care proceedings and family court proceedings) s 29(2); *Children, Youth and Families Act 2005* (Vic) s 190; *Child Protection Act 1999* (Qld) s 186; *Children's Protection Act 1993* (SA) s 13(3)–(5); *Children and Community Services Act 2004* (WA) s 240; *Children, Young Persons and their Families Act 1997* (Tas) s 16; *Children and Young People Act 2008* (ACT) Part 25.5; *Care and Protection of Children Act* (NT) s 27(2).

373 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(f)(i); *Children's Protection Act 1993* (SA) s 13(2)(c); *Children, Young Persons and their Families Act 1997* (Tas) s 16(2)(b); *Children, Youth and Families Act 2005* (Vic) ss 41(2), 190, 191; *Children and Community Services Act 2004* (WA) s 124(f)(2)(b) (in relation to sexual abuse).

In addition, in the Australian Capital Territory, the identity of a mandated person or voluntary reporter is classified as sensitive information and therefore cannot be disclosed to any other person.<sup>374</sup> Western Australia provides the least restrictive version – the disclosure can be made in administering the relevant Act, to the police, with the consent of the notifier, and where the disclosure is made by an officer for the purposes of a matter or proceedings relating to the child arising under Part VII *Family Law Act 1975* (Cth) or the *Family Court Act 1997* Part 5.<sup>375</sup>

In the context of a possible criminal prosecution, the concern is that these provisions may prevent the disclosure to police of information that might assist in a prosecution.<sup>376</sup>

Where child protection workers and police officers are working together as part of an integrated joint response team, such as Queensland's SCAN, collaborative arrangements between police and child protection agencies are generally governed by agreement. However, it seems that there may be some confusion in practice when the matter falls outside the brief of a joint interagency team. In a recent inquiry into child protection services in Victoria, the Victorian Ombudsman found that child protection workers were confused about what information they could and could not share. One misapprehension was that child protection workers could not disclose the identity of reporters to Victoria Police when investigating allegations of physical or sexual abuse against children.<sup>377</sup> This is despite an express provision in the Victorian legislation that allows a protective intervener – defined as the head of the child protection agency or a member of the police force – to share information, including the identity of a reporter, with another protective intervener or a person in connection with a court proceeding, including proceedings in the Family Court.

Recent amendments to the Children and Young People (Care and Protection) Act in New South Wales, to implement recommendations from the Wood Report<sup>378</sup>, were designed to avoid this uncertainty. The legislation now provides that information from which a reporter's identity may be revealed can be shared with a law enforcement agency in clearly defined circumstances.

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374 *Children and Young People Act 2008* (ACT) s 845.

375 *Children and Community Services Act 2004* (WA) s 124F(2)(g).

376 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [20.45].

377 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009) [78]–[79].

378 New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report* (2008), [24.173].

Those circumstances are:

- where the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person
- where the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person (whether or not the victim of the alleged offence).<sup>379</sup>

However, this disclosure without the consent of the reporter is not permitted unless a senior officer of the law enforcement agency to which the disclosure is to be made has certified in writing that obtaining the reporter's consent would prejudice the investigation of the serious offence, or the person or body making the disclosure has certified in writing that it is impractical to obtain the consent of the reporter.<sup>380</sup>

Child protection legislation in Western Australia was also amended in 2008 to broaden the circumstances in which identifying information about a reporter can be disclosed. Among the circumstances listed, the Children and Community Services Act provides that identifying information can be disclosed to, or by, a police officer for the purpose of, or in connection with, an investigation of a suspected offence, or for the conduct of a prosecution of an offence, relating to the child.<sup>381</sup> The provision is narrower than the New South Wales provision as it is confined to the investigation and prosecution of an offence alleged to have been committed against the child who is the subject of the report.

The ALRC Family Violence Report recommended that state and territory child protection legislation should authorise a person to disclose to a law enforcement agency – including federal, state and territory police – the identity of a reporter, or the contents of a report from which the reporter's identity may be revealed, where:

- the disclosure is in connection with the investigation of a serious offence alleged to have been committed against a child or young person, and
- the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person, whether or not the child or young person is the victim of the alleged offence.

The information should only be disclosed where:

- the information is requested by a senior law enforcement officer, who has certified in writing beforehand that obtaining the reporter's consent would prejudice the investigation of the serious offence concerned, or
- the agency that discloses the identity of the reporter has certified in writing that it is impractical to obtain the consent.

The person who discloses the identity of the reporter, or the contents of a report from which the identity of a reporter may be revealed, should notify the reporter as soon as practicable of this fact, unless to do so would prejudice the investigation.<sup>382</sup>

The ALRC Family Violence Report also recommended that state and territory law enforcement, child protection and other relevant agencies should, where necessary, develop protocols that provide for consultation about

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379 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4A).

380 *Ibid* s 29(4B). The Act also requires the reporter to be advised of the fact that his or her identity has been disclosed, or that the contents of their report have been disclosed, except in certain circumstances: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4C).

381 *Children and Community Services Act 2004* (WA) ss 124F(2)(c), 240(2)(iii).

382 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) Rec 20-1.



law enforcement responses when police are investigating allegations of abuse or neglect of a child for whom they have care and protection concerns.<sup>383</sup>

## Disclosure of information in the course of work

In each state and territory, the child protection legislation contains provisions for protecting the confidentiality of information collected by child protection agencies or for precluding such information from being admissible in another proceeding.<sup>384</sup> Various child protection legislation provides that it is an offence to disclose information obtained in the administration of child protection legislation for other purposes, except in certain circumstances including:

- with the consent of the person from whom the information was obtained
- or ‘with other lawful excuse’<sup>385</sup>
- ‘except as provided by this Part’<sup>386</sup>
- if authorised or required to do so by law
- when divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates
- if authorised or required to do so by an employer.

The Law Reform Commissions made a number of recommendations in this area, in particular that:<sup>387</sup>

- state and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances<sup>388</sup>
- state and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.<sup>389</sup>

## 5.10 Conclusion

The information sharing arrangements, legislation and terminology in the child protection context differ markedly across jurisdictions. This is likely to create impediments to information sharing due to lack of clarity and understanding among those with responsibilities in this area. It would be worth considering working towards greater consistency to better facilitate and support appropriate information sharing, particularly where information must be shared across jurisdictions, as has been done, for example, in the early childhood services sector (see section 8).

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383 Ibid Rec 20–2.

384 *Children and Young People Act 2008* (ACT) ss 846, 868–71; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29; *Care and Protection of Children Act* (NT) ss 150, 195, 221; *Child Protection Act 1999* (Qld) ss 186–8; *Children’s Protection Act 1993* (SA) ss 13, 52L; *Children, Young Persons and Their Families Act 1997* (Tas) ss 16, 103; *Children, Youth and Families Act 2005* (Vic) ss 41, 129–130; *Children and Community Services Act 2004* (WA) ss 23, 124F, 141, 240–241.

385 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 254(1)(e).

386 *Children, Youth and Families Act 2005* (Vic) ss 205, 206.

387 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) recs 30-3, 30-9, 30-10 and 30-11.

388 Ibid Rec 30–4.

389 Ibid Rec 30–12.



The most varied information sharing arrangements are those relating to the sharing of information between prescribed bodies. Notably, some jurisdictions continue to rely on the child protection agency as a centralised hub of information for intra-jurisdictional sharing.<sup>390</sup> New South Wales is perhaps the most permissive jurisdiction in relation to non-centralised information sharing – allowing a long list of prescribed bodies to share information about the safety and wellbeing of children laterally under its child protection legislation. This approach overcomes the issues associated with relying on the child protection agency as a central repository of information.

While the issue of intra-jurisdictional information sharing has been addressed in most jurisdictions, problems remain when it comes to inter-jurisdictional information sharing. The state and territory child protection agencies are relied on as hubs of information when it comes to sharing information across jurisdictional boundaries. Generally, and with limited exceptions, information can only be shared between the various child protection agencies.

States and territories differ as to the information provided prior to placement of a child in OOHC. As discussed above, ensuring carers have adequate information about a child before OOHC placement is critical to the stability of the placement and to meeting the needs of the child. The NSW Carers Register appears to be a positive development, enabling certain information about carers to be shared with designated agencies – that is, those responsible for OOHC.

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390 *Children and Young People Act 2008* (ACT) ss 859–63, except where a care team has been established by the head of the child protection agency under s 863; *Children, Youth and Families Act 2005* (Vic) s 35, although a community-based child and family service may consult other relevant information holders if it has received a referral under the Act and the consultation is for the purpose of assessing a risk to a child [s 36].

## 6. Working with children legislation

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### 6.1 Introduction

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All Australian jurisdictions have employment screening procedures to check the criminal histories of individuals wishing to work with children or in positions that may involve contact with children.<sup>391</sup> There are three main types of screening checks: police checks, used in South Australia; Working with Children Checks (including police checks), used in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia; and Working with Vulnerable People background checks, used in the Australian Capital Territory and Tasmania. These screening processes are collectively referred to here as ‘working with children checks’ (WWCC).

In New South Wales, the working with children check is administered by the Office of the Children’s Guardian. Queensland operates the BlueCard service under the Public Business Safety Agency.<sup>392</sup> In all other states and territories, responsibility falls within a government department. WWCCs are overseen by different bodies in different jurisdictions – for example, the Office of the Children’s Guardian in New South Wales; and the Department of Justice and Regulation in Victoria. For the sake of consistency, the term ‘overseeing body’ will be used in this report.

### 6.2 A national approach

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A nationally consistent approach to WWCCs is being progressed under the *National Framework for Protecting Australia’s Children 2009–2014*.<sup>393</sup> As noted by the Royal Commission, a national approach to WWCCs would help address some of the main problems with the current approach to information sharing.<sup>394</sup>

One of the actions under *Supporting Outcome 6* of the National Framework (sexual abuse and exploitation is prevented) is the implementation of a national framework for inter-jurisdictional exchange of criminal history for people working with children. The Council of Australian Government’s (COAG’s) *National Framework for Protecting Australia’s Children 2009–2020* has a goal of developing ‘a nationally consistent approach to Working with Children Checks and child safe organisations across jurisdictions’.<sup>395</sup>

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391 *Working with Vulnerable People (Background Checking) Act 2011* (ACT); *Child Protection (Working with Children) Act 2012* (NSW); *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Registration to Work with Vulnerable People Act 2013* (Tas); *Working with Children Act 2005* (Vic); *Working with Children (Criminal Record Checking) Act 2004* (WA). In the Northern Territory and South Australia it is contained in the children’s protection legislation: *Care and Protection of Children Act* (NT); *Children’s Protection Act 1993* (SA).

392 The Commission for Children and Young People and Child Guardian (CCYPCG) ceased operation on 30 June 2014 and responsibility for the Blue Card system was transferred.

393 The national framework lists this approach as action under Outcome 2 ‘Children and families access adequate support to promote safety and intervene early’.

394 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015). However, given the timing of that report, the Royal Commission’s recommendations have not been considered in detail in this research report.

395 Council of Australian Governments, *National Framework for Protecting Australia’s Children 2009–2020* (2009).

A working group set up to examine WWCCs noted that:

*... the variation between state and territory systems makes it difficult to recognise and accept safety checks of volunteers and workers who move across borders. In addition, the lack of cross-jurisdictional infrastructure means that any change to the suitability status of the person cannot be effectively actioned and communicated to any relevant employers or organisations accessing that person's services.*<sup>396</sup>

State and territory governments are at different stages of implementing national exemption arrangements for workers and volunteers who cross jurisdictional borders for work for up to 30 days in any 12-month period.<sup>397</sup>

In 2009, COAG committed to trial the inter-jurisdictional *Exchange of Criminal History Information for People Working with Children* (the Exchange). This was followed by an MoU between all states and territories for the exchange of criminal history information including spent convictions, pending charges, non-conviction charges (except Victoria) and further information held by police to clarify the circumstances of the offence or alleged offence. In 2013, COAG agreed to a permanent inter-jurisdictional exchange of criminal history information for screening people working with children. The Exchange operates under the *Intergovernmental Agreement for the Exchange* and applies to screening units authorised by law to participate in the Exchange (listed in Schedule 2 of the Agreement). Under the Agreement, there are strict conditions on the receipt, use, storage and destruction of the expanded criminal history information. For instance, the Agreement only authorises participating screening units to request and receive the expanded criminal history information. The receipt or disclosure of expanded criminal history by or to any other person, even if it is for the purpose of screening people who may be working with children, is not authorised by the Agreement nor the legislative provisions that support the Agreement and may involve criminal sanctions.<sup>398</sup>

## 6.3 Types of information used for assessment

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WWCCs are conducted by the relevant overseeing body, drawing on various information to assess the person's suitability for working with children. Information used for assessment varies across jurisdictions and can be drawn from a wide variety of sources. It may include details of:

- convictions – whether or not they are spent, and whether or not an order has been made that a conviction should not be recorded<sup>399</sup>
- apprehended violence orders
- criminal charges – whether or not heard, proven, dismissed, withdrawn or discharged<sup>400</sup>
- any relevant allegations or police investigations involving the individual

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396 Department of Social Services (Cth), *Position Paper: Toward a Nationally Consistent Approach to Working With Children Checks* (2011).

397 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 128.

398 Council of Australian Governments, *Intergovernmental Agreement for a National Exchange of Criminal History Information for People Working with Children* (2013).

399 *Child Protection (Working with Children) Act 2012* (NSW) s 33.

400 Ibid.

- information relating to offences<sup>401</sup>
- any relevant employment proceedings or disciplinary information from professional organisations.

This can include information that relates to events that occurred when the person was under the age of 18.<sup>402</sup> Tasmania has made provision for old convictions not to be treated as annulled in relation to various child-related employment roles, which makes these convictions available for consideration when conducting criminal records checks.<sup>403</sup>

In addition, as mentioned above, the NSW Ombudsman plays a unique role in relation to WWCCs. Under Part 3A of the *Ombudsman Act 1974* designated agencies and organisations are required to report certain ‘reportable conduct’ – that may not amount to behaviour covered by mandatory reporting – to the Ombudsman. The Ombudsman, in turn, may disclose certain information to the NSW Children’s Guardian for the exercise of the Guardian’s functions under the *Child Protection (Working with Children) Act 2012*.<sup>404</sup> This material may then be considered in granting, suspending or cancelling a WWCC. In its submission to the Royal Commission, the Australian Childhood Foundation expressed the view that ‘this level of compliance in NSW is more robust and effective in its intent to protect children from abuse and exploitation within organisations’.<sup>405</sup>

The Royal Commission’s *Working with Children Checks Report* summarises the types of information checked during a WWCC (see Appendix E).

The different background information used to conduct WWCCs across jurisdictions creates difficulties in cross-jurisdictional or national employment. In addition, criticisms relate to the nature of the information relied upon in conducting WWCCs. The nature of checking criminal history relies on the person having already come to the attention of police and justice systems. Tilbury notes that research has consistently found that much abusive behaviour has historically gone unreported, and the majority of sexual abuse perpetrators detected do not have prior convictions for any form of child maltreatment.<sup>406</sup> However, it is acknowledged that to a certain extent the schemes are preventative in that there are people who do not apply as they believe they are not likely to be approved.<sup>407</sup> On the other hand, there may be a lack of consideration of balancing a person’s right to move past an old or minor conviction and the protection of children<sup>408</sup> and the disproportionate effect on Aboriginal and Torres Strait Islander people because of their disproportionate involvement in the criminal justice system.<sup>409</sup>

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401 *Child Protection (Working with Children) Act 2012* (NSW) s 33.

402 Ibid.

403 *Annulled Convictions Act 2003* (Tas) s 9, and sch 1.

404 *Ombudsman Act 1974* (NSW) s 25DA. The Children’s Guardian may also share information relating to a possible criminal offence or grounds for disciplinary action with the Ombudsman under section 186A and, more generally, under Ch 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

405 Australian Childhood Foundation, Submission No 38 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 3: Child Safe Organisations*, 17 October 2013.

406 Tilbury, C, ‘Working with Children Checks – Time to Step Back?’ (2014) 49(1) *Australian Journal of Social Issues*, 87, 92.

407 Ibid.

408 Ibid, 94: Tilbury cites two case examples of prior convictions and the issues concerning ‘sexting’.

409 Ibid, 95.

As noted in the Royal Commission's *Interim Report*:

*There are limits to the effectiveness of screening as a prevention activity because it tends to focus on those who have already left traces of their abuse activity in criminal and other records. But it is likely that a majority of perpetrators will not have been previously detected or left such records. In response, the literature highlights that the majority of offenders detected also had histories of substance abuse and violence. Because of this, pre-employment screening for criminal histories involving substance abuse and violence is practised in some Australian states and territories.*<sup>410</sup>

Submissions to the Royal Commission highlighted other information that may be useful to include in WWCCs, including non-conviction information that has been tested or validated through a formal process, such as domestic violence orders, personal protection orders, child protection orders, outcomes of the disciplinary proceedings of professional registration bodies and outcomes of professional misconduct proceedings during previous employment.<sup>411</sup>

Additional measures suggested include agencies and organisations considering the particular risks and reducing any potential opportunities for children to be exposed to abuse in the context of that agency's or organisation's activities and location. The agency or organisation then develops a risk management strategy designed to address those risks. This was identified as best practice in the 2005 report produced by the Community and Disability Services Ministers' Advisory Council entitled *Creating Child Safe Environments*.<sup>412</sup>

## 6.4 Who is subject to a working with children check?

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The Australian Institute of Family Studies provides a concise summary of the individuals subject to WWCCs in its publication, *Pre-Employment Screening: Working with Children Checks and Police Checks*.<sup>413</sup> However, it is important to note that, consistent with the proposed amendments to notifications regarding adults residing with an out-of-home carer, discussed above, a Bill before the New South Wales Parliament at the time of writing also proposes to extend the requirement for a WWCC for adults residing at the home of an authorised carer<sup>414</sup> to any person 'residing on the same property' as the carer.<sup>415</sup>

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410 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Working with Children Checks* (2014) 131.

411 ACT Children and Young People Commissioner, Submission No 4 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Check*, August 2013.

412 Department of Social Services (Cth), *Position Paper: Toward a Nationally Consistent Approach to Working with Children Checks* (2011) 8.

413 Australian Institute of Family Studies, *Pre-Employment Screening: Working with Children Checks and Police Checks* (Oct 2014), <<https://aifs.gov.au/cfca/publications/pre-employment-screening-working-children-checks-and-p>>.

414 *Child Protection (Working with Children) Act 2012* (NSW) s 10.

415 *Child Protection Legislation Amendment Bill 2015* (NSW) sch 2. **Update:** The *Child Protection Legislation Amendment Act 2015* (NSW) was passed by the NSW Parliament and assented to on 28 September 2015.

## 6.5 Information sharing for assessment

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Provisions within legislation authorise information relevant to an assessment of whether a person poses a risk to the safety of children to be provided to the overseeing body upon request. Such authorised persons include:

- the Police Commissioner
- the Director of Public Prosecutions
- a prescribed body
- any government agency or person.<sup>416</sup>

Other provisions enable the sharing of information that would allow regulated persons under the relevant legislation to be monitored. For example, Western Australia provides that a regulated person – that is, a person who employs or carries on a child-related business or who is an education provider – must provide specified information or documents that the overseeing body reasonably needs to establish that the regulated person has complied with the legislation.<sup>417</sup>

Provision exists to protect those who provide information from contravening any duty of confidentiality.<sup>418</sup>

## 6.6 Confidentiality

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Disclosing information obtained in exercising a power or performing a function under the relevant working with children legislation is generally prohibited unless a specified exception applies.<sup>419</sup> Queensland has a further provision targeting quite specific information and the circumstances in which that information is gained.<sup>420</sup>

In New South Wales, a reporting body is required to report to the overseeing body the name and other identifying particulars of any child-related worker it has found to have engaged in sexual misconduct against, with or in the presence of a child, including grooming of a child.<sup>421</sup> In addition, Schedule 1 of the Children and Young Persons (Care and Protection) Act enables the Ombudsman to make a notification concern to the overseeing body.

In its submission to the Royal Commission, the Australian Human Rights Commission noted that:

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416 *Child Protection (Working with Children) Act 2012* (NSW) ss 31, 32: The DPP is, on receipt of a notice under s 31, authorised to disclose to the Children's Guardian information or other documents that may contain information in addition to the information required by the notice, whether or not that information or those documents are subject to legal professional privilege or other restrictions on disclosure. This section has effect despite any other Act or law. *Registration to Work with Vulnerable People Act 2013* (Tas) s 29.

417 *Working with Children (Criminal Record Checking) Act 2004* (WA) s 42.

418 *Registration to Work with Vulnerable People Act 2013* (Tas) s 29(2).

419 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) s 65; *Child Protection (Working with Children) Act 2012* (NSW) s 45; *Care and Protection of Children Act* (NT) s 195; *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 385; Children's Protection Regulations 2010 (SA) reg 13; *Registration to Work with Vulnerable People Act 2013* (Tas) s 54; *Working with Children Act 2005* (Vic) s 40(1); *Working with Children (Criminal Record Checking) Act 2004* (WA) s 39.

420 *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 384.

421 Which generally includes schools, religious bodies such as churches, and OOHC agencies: *Child Protection (Working with Children) Regulations 2013* (NSW) reg 25; *Child Protection (Working with Children) Act 2012* (NSW) s 35.

*It is important to protect the integrity of check systems by ensuring that information used for WWCCs is used for the purpose for which it is collected, and not shared for other purposes related to broader or individual child protection concerns. In this context, further work should progress on establishing protocols and laws to allow information exchange across and within jurisdictions and between government and non-government agencies when risks to children or a class of children are identified. Part of this work has begun under the National Framework for Protecting Australia's Children, where more information can be exchanged between child protection agencies and between relevant Commonwealth agencies and child protection agencies; however, further work is required to ensure comprehensive protection of children through information exchange.*<sup>422</sup>

## 6.7 Cross-jurisdictional sharing

The provisions in relation to the sharing of information between jurisdictions varies. For example, New South Wales legislation allows the disclosure, for the purposes of interstate child-related work screening, of information relating to any criminal history of persons, and, at the request of an approved interstate screening agency, information relating to the circumstances of any offence or alleged offence.<sup>423</sup> An agency to whom information is disclosed may share that information with an approved interstate screening agency for the purposes of interstate child-related work screening.<sup>424</sup> Similar provisions exist in Queensland, South Australia, Tasmania and Western Australia.<sup>425</sup>

In February 2015, Australia and New Zealand signed a Memorandum of Understanding (MoU) to give employers greater trans-Tasman access to individual criminal history checks for employment, training and registration purposes. Under the new MoU, eligible New Zealand agencies will be able to request Australian criminal information from CrimTrac through New Zealand Police. Similarly, eligible Australian agencies may request criminal history information from New Zealand Police.<sup>426</sup>

## 6.8 Register

New South Wales is the only jurisdiction that legislatively provides that the overseeing body must establish a working with children register.<sup>427</sup> The Regulations provide that certain information on the register may be made available to a person's employer or proposed employer if requested.<sup>428</sup>

This information includes:

- the application number of any application for a clearance made by the person

422 Australian Human Rights Commission, Submission No 12 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Check*, 12 August 2013.

423 Information that may be disclosed includes spent convictions, information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged and information relating to offences.

424 *Child Protection (Working with Children) Act 2012* (NSW) s 34.

425 *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 320; *Children's Protection Regulations 2010* (SA) reg 9; *Registration to Work with Vulnerable People Act 2013* (Tas) s 45; *Working with Children (Criminal Record Checking) Act 2004* (WA) s 37.

426 Australian Institute of Family Studies, *Pre-Employment Screening: Working with Children Checks and Police Checks* (Oct 2014), <<https://aifs.gov.au/cfca/publications/pre-employment-screening-working-children-checks-and-police-checks>>.

427 *Child Protection (Working with Children) Act 2012* (NSW) s 25(1).

428 *Ibid* s 25(5).



- the current clearance status of an applicant or holder
- the number, class and expiry date of any clearance held by a person.<sup>429</sup>

The Regulations further provide that the following information about an employer held in a database maintained by the overseeing body may be made publicly available:

- the trading name or registered business name, if any, of the employer
- the child-related work for which the employer engages a child-related worker
- the postcode or name of the place in which the business of the employer is located
- whether any requests for information about clearance status were made to the overseeing body by the employer within a specified period.<sup>430</sup>

Although other jurisdictions do not legislatively provide for the development of a register *per se*, every jurisdiction is required to maintain records which would act as a *de facto* register.

## 6.9 Conclusion

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The information used for WWCCs is limited and varies across jurisdictions. This lack of consistency and the absence of a national WWCC creates a range of issues. Alleged offenders and offenders can move freely between jurisdictions with a degree of anonymity. Submissions to the Royal Commission highlighted the problems caused by volunteers and workers moving across borders. While some information is exchanged under the *Memorandum of Understanding for a National Exchange of Criminal History for People Working with Children*, one of the key limitations to this approach is that it occurs only when check assessments are being undertaken.<sup>431</sup>

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429 Child Protection (Working with Children) Regulations (NSW) Reg 23(1).

430 Ibid Reg 23(3).

431 Australian Human Rights Commission, Submission No 12 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Check*, 12 August 2013.

## 7. Child sex offenders

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### 7.1 Introduction

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Each state and territory has a register of sex offenders, usually maintained by the relevant Police Commissioner. Legislation requires certain information about registered sex offenders to be included on these registers. There are also reporting requirements for each registered offender. This report does not consider the individual reporting requirements of registered offenders under state and territory legislation – for example, a reportable offender’s obligation to report his or her personal details to the Police Commissioner.<sup>432</sup> Further, due to time and resource constraints, this review does not consider information sharing arrangements under relevant serious sex offender legislation.<sup>433</sup>

For the purposes of this report, the term ‘Police Commissioner’ will be used to define the head of the Police, and ‘registered offender’ or ‘reportable offender’ to define a person who has been sentenced for a registrable offence or is the subject of a child sex offender registration order.<sup>434</sup>

### 7.2 National system

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At the Commonwealth level, CrimTrac is responsible for the *National Child Sex Offender System* and *Child Exploitation Tracking System*. The *National Child Offender System* (NCOS) is a web-based application that allows the national recording of, searching and access to child offender information. It consists of the *Australian National Child Offender Register* (ANCOR) and the *Managed Person System* (MPS).

ANCOR is used for alerting law enforcement agencies to the movements of registered offenders across jurisdictional borders. Interstate movements are flagged on the system, alerting the registrar in the destination jurisdiction. ANCOR is also used by the Australian Federal Police to generate alerts about registered offenders travelling overseas.<sup>435</sup> A proposal for a public national sex offenders register was rejected at the recent Council of Australian Governments (COAG) meeting.<sup>436</sup>

The Office of the Victorian Privacy Commission, in its submission to the Victorian Law Reform Commission’s (VLRC’s) Inquiry into the Victorian Register, noted issues relating to the inter-jurisdictional sharing of databases via ANCOR (and CrimTrac). The Office noted that:

*... although CrimTrac is a Commonwealth agency, subject to the Privacy Act 1988 (Cth) and whose actions are reviewable by the Office of the Australian Privacy Commissioner, it operates primarily as a repository of Registry information. In effect, collection and use of Register information occurs in each jurisdiction at the*

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432 *Sex Offenders Registration Act 2004* (Vic) s 12; *Community Protection (Offender Reporting) Act 2004* (WA) s 24.

433 For example, *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

434 See, for example, *Sex Offenders Registration Act 2004* (Vic) s 6(1); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 8; *Child Protection (Offenders Registration) Act 2000* (NSW) s 3A(1).

435 Victorian Law Reform Commission, *Sex Offenders Register: Final Report* (2012) 127.

436 ABC News, *Federal Government Resisting Internal Pressure to Create National Sex Offender Register: NT Register Introduced after National System Rejected at COAG*, (16 October 2014), <<http://www.abc.net.au/news/2014-10-16/government-resists-pressure-for-national-sex-offender-register/5817112>>.

state level. It is likely, in the event of a privacy breach relating to Register information; the relevant state legislation will apply.

The Office of the Victorian Privacy Commission noted that while secrecy provisions offer some protection, such protection also relies on state and territory privacy legislation. As South Australia and Western Australia have no state privacy legislation, in effect, it is possible that an offender could have their information loaded into ANCOR, accessed by Western Australian Police, have the information disclosed in an unauthorised manner and be without a remedy under privacy legislation for any damage or loss suffered as a result.<sup>437</sup>

## 7.3 Sex Offenders Register

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Laws in each jurisdiction provide for child sex offender registration<sup>438</sup>, the primary purpose of which is to require certain sexual offenders to keep police informed of their whereabouts and other personal details for a period of time, to reduce the likelihood of reoffending and facilitating the investigation of future offences they may commit.<sup>439</sup> Other purposes of the registers are:

- to prohibit certain offenders from working in child-related employment
- to enable courts to make orders prohibiting certain offenders from engaging in specified conduct.

The VLRC stated, in relation to the Victorian Register, that ‘although the Register was initially designed as a law enforcement tool<sup>440</sup>, it has now become a source of information for child protection authorities and a means of cooperating with other Australian agencies – via CrimTrac – to monitor the movement of registered sex offenders into and out of Victoria’. The VLRC concluded that ‘the Sex Offenders Registration Act does not facilitate the timely flow of this information’.<sup>441</sup> However, amendments have since been made to the Victorian Act that address some of the concerns raised in the VLRC’s report.

The stated purposes of the New South Wales legislation are to:

- protect children from serious harm (including physical and psychological harm caused by physical or sexual assault)
- ensure the early detection of offences by recidivist child sex offenders
- monitor persons who are registrable persons
- ensure that registrable persons comply with the Act.<sup>442</sup>

These purposes are broader than other jurisdictions and arguably more facilitative of the exchange of information.

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437 Office of the Victorian Privacy Commissioner, Submission No 10 to Victorian Law Reform Commission, *Sex Offenders Registration: Information Paper* (29 July 2011).

438 *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA).

439 *Community Protection (Offender Reporting) Act 2005* (Tas), Long Title; *Child Protection (Offender Reporting and Registration) Act 2004* (NT), Long Title; *Sex Offenders Registration Act 2004* (Vic) s 1; *Child Protection (Offender Reporting) Act 2004* (Qld) s 3.

440 *Sex Offenders Registration Act 2004* (Vic) s 1(a); Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1850 (Andre Haermeyer, Minister for Police and Emergency Services).

441 Victorian Law Reform Commission, *Sex Offenders Register: Final Report* (2012) 126.

442 *Child Protection (Offenders Registration) Act 2000* (NSW) s 2A.

## Establishment of the Register

Each jurisdiction mandates that the Police Commissioner (or equivalent) must establish and maintain (or arrange for another entity to establish and maintain) a Child Protection Offender Register<sup>443</sup> and, with the exception of New South Wales, restrict access to the Register and the information contained in it.<sup>444</sup> It is largely left to the discretion of the Police Commissioner to determine who may have access to the Register and for what purpose.<sup>445</sup>

Legislation generally does not expressly limit or define the people who the Police Commissioner may authorise to access the Register other than in one instance – access to information about a protected witness must be authorised by the person responsible for the day-to-day operation of the witness protection program. In all jurisdictions except Tasmania, the Police Commissioner must ensure that any information in the Register about a protected witnesses, whose identity is apparent or can reasonably be ascertained from that information, cannot be accessed other than by a person authorised by the officer responsible for the day-to-day operation of the witness protection program.<sup>446</sup>

Currently, no Register is available to the public. The Western Australian Register provides a three-tier access system for information, rather than open access. However, the Northern Territory Sex Offender Public Website (Daniel's Law) Bill goes a step further than Western Australia. Based on Megan's Law in the US, the proposed Northern Territory serious sex offender website will be publicly accessible, allowing anybody, anywhere to access the information contained on it. A private member's Bill – the Child Protection (Nicole's Law) Bill 2015 – is before NSW Parliament, which would allow the public to be notified of the identity and residential address of convicted child sex offenders.

## Placement on the Register

Generally, any person sentenced for a registrable offence, or who is the subject of a child sex offender registration order, is placed on the Register. Each jurisdiction's legislation therefore generally makes provision

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443 *Child Protection (Offender Reporting and Registration) Act 2004* (NT) s 64; Also known as **Register of Sex Offenders Crimes (Child Sex Offenders) Act 2005** (ACT) s 117(1); **Child Protection Register: Child Protection (Offenders Registration) Act 2000** (NSW) s 19; *Child Protection (Offenders Registration) Regulation 2009* (NSW) Reg 21; *Child Protection (Offender Reporting) Act 2004* (Qld) s 68; **Register of registrable offenders: Child Sex Offenders Registration Act 2006** (SA) s 60; **Community Protection Offender Register: Community Protection (Offender Reporting) Act 2005** (Tas) s 43; *Community Protection (Offender Reporting) Act 2004* (WA) s 80; **Register of Sex Offenders: Sex Offenders Registration Act 2004** (Vic) s 62.

444 *Crimes (Child Sex Offenders) Act 2005* (ACT) ss 118, 120; *Crimes (Child Sex Offenders) Regulation 2005* (ACT) Reg 16A; *Child Protection (Offender Reporting and Registration) Act* (NT) s 65; *Child Protection (Offender Reporting) Act 2004* (Qld) s 69; *Child Sex Offenders Registration Act 2006* (SA) s 61; *Community Protection (Offender Reporting) Act 2005* (Tas) s 44; *Sex Offenders Registration Act 2004* (Vic) s 63; *Community Protection (Offender Reporting) Act 2004* (WA) s 81.

445 *Community Protection (Offender Reporting) Act 2004* (WA) s 81(4); *Child Sex Offenders Registration Act 2006* (SA) s 61(2); *Sex Offenders Registration Act 2004* (Vic) s 63(2); *Child Protection (Offender Reporting) Act 2004* (Qld) s 69(2); *Child Protection (Offender Reporting and Registration) Act* (NT) s 65(3); *Crimes (Child Sex Offenders) Act 2005* (ACT) s 118(2).

446 *Crimes (Child Sex Offenders) Act 2005* (ACT) s 119; s 120; *Child Protection (Offenders Registration) Act 2000* (NSW) s 19A; *Child Protection (Offender Reporting and Registration) Act* (NT) s 67; *Child Protection (Offender Reporting) Act 2004* (Qld) s 72; *Child Sex Offenders Registration Act 2006* (SA) s 62; *Sex Offenders Registration Act 2004* (Vic) s 65; *Community Protection (Offender Reporting) Act 2004* (WA) s 83.

for the court which makes such a sentence or order to provide such details of that order or sentence to the Police Commissioner.<sup>447</sup>

## 7.4 Disclosure of personal information

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Unauthorised disclosure of personal information from the Register is an offence in all jurisdictions.<sup>448</sup> Additionally, in Western Australia, it is considered an aggravated offence for a person to disclose personal information contained on the Register for a benefit.<sup>449</sup> In the Australian Capital Territory, it is an offence for a person to access the Register if not lawfully authorised to do so.<sup>450</sup>

Exceptions to this offence differ among jurisdictions.<sup>451</sup> A person may access the Register:

- for the purposes of disclosure to CrimTrac. For example, as Victoria maintains its own registry, Victorian legislation facilitates the sharing of information to CrimTrac.<sup>452</sup> Other jurisdictions use ANCOR to host their registries.<sup>453</sup> In South Australia, the Regulations provide for the registered offender to report a change of travel plans while out of South Australia by writing to the ANCOR section of the South Australian police<sup>454</sup>
- in the course of the person's duties<sup>455</sup>
- for the purpose of proceedings for an offence under the relevant Act or a protection order<sup>456</sup>
- for purposes of law enforcement. For example, in the Australian Capital Territory, any information disclosed for law enforcement functions or activities may only be disclosed to an entity prescribed by Regulation.<sup>457</sup> The Regulations provide an exhaustive list of agencies and persons to whom information may be disclosed.<sup>458</sup> Other jurisdictions do not have similar restrictions on the type of body for which disclosure can be made for law enforcement purposes<sup>459</sup> or to which the Police Commissioner may authorise disclosure.<sup>460</sup>

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447 See, for example, *Community Protection (Offender Reporting) Act 2004* (WA) s 68; *Sex Offenders Registration Act 2004* (Vic) s 51; *Community Protection (Offender Reporting) Act 2005* (Tas) s 37; *Child Protection (Offender Reporting) Act 2004* (Qld) s 55; *Child Protection (Offender Reporting and Registration) Act* (NT) s 53.

448 *Crimes (Child Sex Offenders) Act 2005* (ACT) s 121; *Child Protection (Offenders Registration) Act 2000* (NSW) s 21E; *Child Protection (Offender Reporting and Registration) Act* (NT) s 66; *Child Protection (Offender Reporting) Act 2004* (Qld) s 70; *Child Sex Offenders Registration Act 2006* (SA) s 67; *Community Protection (Offender Reporting) Act 2005* (Tas) s 45; *Sex Offenders Registration Act 2004* (Vic) s 64; *Community Protection (Offender Reporting) Act 2004* (WA) s 82.

449 *Community Protection (Offender Reporting) Act 2004* (WA) s 82(1).

450 *Crimes (Child Sex Offenders) Act 2005* (ACT) s 120.

451 See, for example, *Sex Offenders Registration Act 2004* (Vic) s 62(1).

452 *Sex Offenders Registration Act 2004* (Vic) s 64(3) addresses the concern raised by the Victorian Law Reform Commission, *Sex Offenders Register: Final Report* (2012) 128.

453 Victorian Law Reform Commission, *Sex Offenders Register: Final Report* (2012) 127.

454 *Child Sex Offenders Registration Regulations 2007* (SA) reg 11.

455 *Community Protection (Offender Reporting) Act 2004* (WA) s 82(1).

456 *Ibid* s 82(1).

457 *Crimes (Child Sex Offenders) Act 2005* (ACT) s 118(1)(b).

458 *Crimes (Child Sex Offenders) Regulation 2005* (ACT) reg 16A.

459 *Child Protection (Offenders Registration) Act 2000* (NSW) s 21E(1).

460 *Child Protection (Offender Reporting and Registration) Act* (NT) s 66(1)(d); *Child Protection (Offender Reporting) Act 2004* (Qld) s 70(1)(a); *Community Protection (Offender Reporting) Act 2005* (Tas) s 44(2); *Community Protection (Offender Reporting) Act 2004* (WA) s 81(1)(b).

- as required by or under any Act or law<sup>461</sup>
- with the written authority of the Minister or Police Commissioner or the person to whom the information relates.<sup>462</sup>

The Australian Capital Territory Ombudsman noted in its submission to the VLRC's inquiry that 'in order to manage offenders effectively, there must be good communication between police, judiciary, corrective services and offenders ... to enable the timely transfer of information such as dates of conviction, release from prison and government custody.' The Victorian Ombudsman noted that in Victoria, this generally happens on an informal basis.<sup>463</sup>

In comparison, New South Wales specifically enables designated government agencies to collect and use personal information about a person on the Register and to exchange such information with other designated government agencies. Before information can be exchanged, a written authorisation must be in place between the agencies. Such an authorisation may only be issued where the agency is satisfied:

- that there is a risk of 'substantial adverse impact'<sup>464</sup> on the registered person (or some other person or class of persons) if such information is not collected, used or disclosed;
- that the collection, use or disclosure of such information is likely to assist in developing, or giving effect to, a case management plan for the registrable person.<sup>465</sup>

The list of designated agencies includes, amongst others, the NSW Police Force; the Department of Family and Community Services, including Housing NSW; the Department of Corrective Services; the Department of Education; and the Department of Health.<sup>466</sup> Information sharing between these agencies extends to sharing of information from the Register where a child or group of children would be at risk of a substantial adverse impact if the information is not disclosed.

Victoria's sex offender legislation enables the Police Commissioner, if the Police Commissioner considers it appropriate to do so, to provide to any person information in the Register in respect of one or more registrable offenders if the information is de-identified information.<sup>467</sup>

In addition to these exceptions, different jurisdictions also authorise disclosure of information held in the Register:

- to the corresponding Registrar of Births, Deaths and Marriages;<sup>468</sup>
- to the Secretary of the Department of Justice with information for the purposes of administering the *Working with Children Act 2005* (Vic);<sup>469</sup>
- to the Police Commissioner of another jurisdiction if the reportable offender has reported an intention to travel to that other jurisdiction,<sup>470</sup> and

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461 Ibid s 82(1)(b).

462 See, for example, *Community Protection (Offender Reporting) Act 2004* (WA) s 81(1),(2).

463 Australian Capital Territory Ombudsman, Submission No 12 to Victorian Law Reform Commission, *Sex Offenders Registration: Information Paper* (August 2011), 2.

464 'Substantial adverse impact' is defined to include serious physical or mental harm, sexual abuse, significant loss of benefits or other income, imprisonment, loss of housing or the loss of a carer.

465 *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BA.

466 Ibid sch 1.

467 *Sex Offenders Registration Act 2004* (Vic) s 64A(1).

468 Ibid s 63(1A).

469 Ibid s 63(2).

470 Child Protection (Offender Reporting and Registration) Regulations (NT) reg 12.

- to the Head of an Agency if the Agency has responsibilities in relation to the reportable offender or children, and the Police Commissioner considers the disclosure is appropriate to assist the Agency in meeting a duty of care in relation to those responsibilities.<sup>471</sup>

## Registrar of Births, Deaths and Marriages

In all jurisdictions, the Police Commissioner may notify the Registrar for Births, Deaths and Marriages of certain details concerning reportable offenders including:

- the name (including any previous name of a reportable offender);
- date of birth; and
- address.

In Victoria and Tasmania, this is a voluntary notification.<sup>472</sup>

In some jurisdictions, the overseeing body or Police Commissioner must notify the Registrar as soon as practicable after the registrable offender ceases to be a registrable offender.<sup>473</sup>

## Change of name

In some jurisdictions, the Police Commissioner must notify the Registrar of any application made to the Commissioner to approve a change of name application.<sup>474</sup>

The reverse is also true in some jurisdictions. For example, the Western Australian Registrar for Births, Deaths and Marriages may notify the Police Commissioner of an application made to the Registrar to register a change of name that the Registrar suspects may relate to the name of a registered offender.<sup>475</sup> In Tasmania the Registrar must notify the Police Commissioner of any application received from a registered offender for a change of name.<sup>476</sup> Notably, South Australian law has recently changed to ensure that anyone on the register will only be able to change their name with consent from the Police Commissioner.

## Child protection agencies

Interestingly, only a few jurisdictions expressly authorise the Police Commissioner to disclose information to the respective head of the child protection agency.

For example, child protection legislation in Victoria provides for the non-mandatory mutual exchange of information between the head of the child protection agency; the head of the justice agency; and the Police Commissioner; information about a registrable offender that they have received during the course of their work in relation to a child who has, or has had, contact with a registrable offender.<sup>477</sup>

The head of the child protection agency may disclose to any other person certain information, if the head of the child protection agency believes on reasonable grounds that such disclosure is in the interests of the safety

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471 Child Protection (Offender Reporting and Registration) Regulations (NT) Reg 12.

472 *Sex Offenders Registration Act 2004* (Vic) s 70I(1)(a); *Community Protection (Offender Reporting) Act 2005* (Tas) s 44A(1).

473 *Sex Offenders Registration Act 2004* (Vic) s 70I(1)(b).

474 *Community Protection (Offender Reporting) Act 2004* (WA) s 80G(1).

475 *Ibid* s 80G(2).

476 *Ibid* s 44A(2).

477 *Children, Youth and Families Act 2005* (Vic) ss 42B, 42C.



and wellbeing of the child referred to in the information. Before doing so, the head of the child protection agency must take reasonable steps to notify the registrable offender of their intention to do so unless they believe on reasonable grounds that doing so would endanger the life or safety of any person.<sup>478</sup>

In the Northern Territory, the Child Protection (Offender Reporting and Registration) Regulations state that the Commissioner may disclose information to the head of an agency if that agency has responsibilities in relation to the reportable offender or children and the Commissioner considers the disclosure is appropriate to assist the agency in meeting a duty of care in relation to those responsibilities.<sup>479</sup> Presumably this would include the child protection agency.

Aside from these specific provisions, there are several alternative mechanisms through which such disclosure may possibly occur:

- Through mandatory reporting requirements. As police are generally included as mandatory reporters, certain information would flow under the mandatory reporting requirements in each jurisdiction. For example, this would attract the operation of exception of disclosure of personal information under the Register to a government department when 'required by or under any Act or law'.<sup>480</sup> However, in order to trigger mandatory reporting requirements, the police would generally need to be satisfied of the specific grounds that trigger mandatory reporting requirements. For example, the police may need to be satisfied on reasonable grounds that a child is at risk of harm from sexual abuse from the registered sex offender and the child's parent is unlikely to protect them from that harm. In Victoria, the Children in Contact with Sex Offenders practice note states that a report from the Register or a compliance manager constitutes a mandatory report from police relating to concerns of likelihood of sexual abuse.<sup>481</sup>
- Through 'prescribed bodies' information sharing arrangements in child protection legislation. However, police officers may be restricted from sharing by the offence of disclosing personal information in the Register.

To overcome these restrictions and ambiguities, the VLRC was of the view that the Police Commissioner should have clear legislative authority to pass information to the head of the child protection agency about a registered sex offender's contact with an identified child or children.<sup>482</sup> The Victorian Ombudsman has made similar recommendations regarding the sharing of information in the Register.<sup>483</sup>

## Restriction on publication

In addition to the offence of disclosing personal information from the Register, there is generally a broad prohibition on the publication of certain information, in particular, identifying information – both of the registrable offender and the victim of a registrable offence.<sup>484</sup> However, in some circumstances – including if

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478 Ibid s 42D.

479 Child Protection (Offender Reporting and Registration) Regulations (NT) reg 12.

480 See, for example, *Sex Offenders Registration Act 2004* (Vic) s 64(2)(b).

481 Department of Human Services (Vic), *Children in Contact with Sex Offenders Advice* (2012).

482 Victorian Law Reform Commission, *Sex Offenders Register: Final Report* (2012) 131.

483 Ombudsman Victoria, *Whistleblowers Protection Act 2001 – Investigation into the Failure of Agencies to Manage Registered Sex Offenders* (2011) recs 1-3.

484 *Child Protection (Offender Reporting and Registration) Act* (NT) s 88; *Community Protection (Offender Reporting) Act 2004* (WA) s 106; *Child Sex Offenders Registration Act 2006* (SA) s 66; *Community Protection (Offender Reporting) Act 2004* (WA) s 85M; *Child Protection (Offender Reporting and Registration) Act* (NT) s 88; *Child Sex Offenders Registration Act 2006* (SA) s 68.

a registered offender fails to meet his or her reporting obligations – <sup>485</sup> details of a registered offender may be published or released.<sup>486</sup>

## Oversight bodies

The Victorian Act contains provisions which task the Office of Police Integrity with monitoring and reporting on compliance with any guidelines issued by the Police Commissioner in relation to the access and disclosure of personal information in the Register.<sup>487</sup> Likewise, in other jurisdictions there are independent bodies, with more generic oversight of police and/or with more generic oversight of government information management, which are empowered to investigate complaints about the manner in which police or another agency with access to information on the register has handled or used that information.<sup>488</sup>

## Parents and guardians

Although it is beyond the scope of this report to consider the sharing of information with parents and guardians in detail, it is interesting to note that in some jurisdictions, a registrable offender who is to reside in the same household as that in which a child generally resides or stay overnight in a household in which a child is also staying overnight, must before doing so, tell each parent or guardian of the child who generally resides in the same household as the child that he or she is a registrable offender and what the offence(s) were that resulted in becoming a registrable offender.<sup>489</sup>

In Western Australia, a person may apply to the Police Commissioner to be informed whether or not a person is a reportable offender. If the Commissioner is satisfied that the specified person has regular unsupervised contact with a child of whom the applicant is a parent or guardian, the Commissioner may inform the applicant whether or not the specified person is a reportable offender.<sup>490</sup>

## 7.5 Monitoring registered offenders

Legislation provides for authorities to supervise sex offenders that have completed their sentences, but are still considered to pose an unacceptable risk of harm to the community by what are described in legislation as ‘supervising authorities’.

In all jurisdictions, the supervising authority must notify the Police Commissioner of certain events.<sup>491</sup> The types and extent of relevant events varies across jurisdictions. For example, in Tasmania, the supervising

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485 See for example, *Child Sex Offenders Registration Act 2006* (SA) s 66F; *Community Protection (Offender Reporting) Act 2004* (WA) s 85F.

486 *Child Protection (Offenders Registration) Act 2000* (NSW) s 21D; *Child Protection (Offender Reporting) Act 2004* (Qld) s 71; *Child Sex Offenders Registration Act 2006* (SA) s 66F; *Community Protection (Offender Reporting) Act 2005* (Tas) s 44A; *Sex Offenders Registration Act 2004* (Vic) s 71A; *Community Protection (Offender Reporting) Act 2004* (WA) s 85F.

487 *Sex Offenders Registration Act 2004* (Vic) ss 66A–66D.

488 See, for example, *Ombudsman Act* (ACT) 1989 s 4A.

489 *Child Sex Offenders Registration Act 2006* (SA) s 66L.

490 *Community Protection (Offender Reporting) Act 2004* (WA) s 85J.

491 *Child Protection (Offender Reporting and Registration) Act* (NT) s 55; *Child Sex Offenders Registration Act 2006* (SA) s 51; *Community Protection (Offender Reporting) Act 2005* (Tas) s 38(1) (only if ceases to be in government custody); *Sex Offenders Registration Act 2004* (Vic) s 53; *Community Protection (Offender Reporting) Act 2004* (WA) s 70(2).

authority is only required to notify when a reportable offender ceases to be in government custody. Other jurisdictions are more comprehensive requiring notification of when a reportable offender ceases to be subject to a supervised sentence or ceases to be subject to a condition of parole requiring the person to be subject to supervision.

In order for a supervising authority to be able to provide such information to the Police Commissioner, some jurisdictions specifically provide that the Police Commissioner may inform a supervising authority whether or not a person is a reportable offender.<sup>492</sup>

In Queensland, the Police Commissioner may require a supervising authority who the Police Commissioner reasonably considers has the personal details of a reportable offender to give the details to the Police Commissioner.<sup>493</sup> Similarly, Australian Capital Territory and Northern Territory legislation contain provisions mandating, upon the request of the Police Commissioner, a government agency must give any information held by that agency that the Police Commissioner considers to be reasonably necessary to assess whether the person poses a risk to the lives or sexual safety of one or more children, or of children generally.<sup>494</sup>

In Western Australia, a public authority is required, upon the direction of the Police Commissioner, to provide any information it holds that is relevant to the assessment and management of a reportable offender or to the Police Commissioner's determination whether to make an application or respond to an application.<sup>495</sup>

## 7.6 Cross-jurisdictional sharing

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The operation of ANCOR is designed to facilitate the exchange of information across jurisdictions. In addition, there are some unique provisions within state and territory legislation for the cross-border exchange of information.

In Queensland, the Police Commissioner may release personal information in the Register to a corresponding registrar for the purposes of a corresponding Act.<sup>496</sup>

In the Northern Territory, the Police Commissioner is required to provide the Commissioner of the Australian Federal Police details of any proposed travel out of Australia which is reported to the Commissioner by a reportable offender.<sup>497</sup> In addition, the Northern Territory Regulations provide that the Police Commissioner may disclose personal information from the Register in relation to a reportable offender to the Police Commissioner of another jurisdiction if the reportable offender has reported an intention to travel to that other jurisdiction.<sup>498</sup>

As stated above, the Child Protection (Offender Reporting and Registration) Regulations (NT) state that the Police Commissioner may disclose information to the head of an agency if that agency has responsibilities in

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492 *Child Protection (Offender Reporting and Registration) Act* (NT) s 55(4); *Community Protection (Offender Reporting) Act* 2005 (Tas) s 38(2); *Community Protection (Offender Reporting) Act* 2004 (WA) s 70(4).

493 *Child Protection (Offender Reporting) Act* 2004 (Qld) s 57.

494 *Crimes (Child Sex Offenders) Act* 2005 (ACT) s 132ZM; *Child Protection (Offender Reporting and Registration) Act* (NT) s 43(4) s 87.

495 *Community Protection (Offender Reporting) Act* 2004 (WA) s 110A.

496 *Child Protection (Offender Reporting) Act* 2004 (Qld) s 71.

497 *Child Protection (Offender Reporting and Registration) Act* (NT) s 24.

498 *Child Protection (Offender Reporting and Registration) Regulations* (NT).

relation to the reportable offender or children and the Commissioner considers the disclosure is appropriate to assist the agency in meeting a duty of care in relation to those responsibilities.<sup>499</sup>

In the Australian Capital Territory, the Police Commissioner may give a prescribed entity the person's name and date of birth, the term of the order, including details of the conduct prohibited by the order. The Police Commissioner may also share any other information they reasonably consider necessary to allow the prescribed entity to identify the person, to ensure the safety of a child or children in the prescribed entity's care or the safety of the person.<sup>500</sup>

## 7.7 Conclusion

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While there are some similarities across jurisdictions in the disclosure, and restrictions on the disclosure, of information under the child sex offender regime, there are also a number of differences. Currently, no Sex Offender Register is available to the public, although there are two Bills before two different states proposing a public register. It is largely left to the discretion of the Police Commissioner to determine who may have access to the Register and for what purpose, although any guidelines produced by Police Commissioners are not readily available.

Interestingly, only a few jurisdictions expressly authorise the Police Commissioner to disclose information to the head of the child protection agency. Arguably, there are certain circumstances in which information on the Register would be important to the child protection agency in ensuring the safety, welfare and wellbeing of children and young people.

New South Wales appears to have the most permissive framework for sharing information. Legislation in that state specifically enables designated government agencies to collect and use personal information about a person on its Register and to exchange such information with other designated government agencies. Information may be shared if there is a risk of 'substantial adverse impact' on the registered person (or some other person or class of persons); and where the collection, use or disclosure of such information is likely to assist in developing, or giving effect to, a case management plan for the registrable person.<sup>501</sup> With appropriate safeguards in place, this sharing of information could promote the safety and wellbeing of children and young people.

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499 Ibid reg 12.

500 *Crimes (Child Sex Offenders) Act 2005* (ACT) s 132ZN.

501 *Child Protection (Offenders Registration) Act 2000* (NSW) s 19BA.

## 8. Early childhood services

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### 8.1 The Education and Care Services National Law

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#### Introduction

The *Education and Care Services National Law* (National Law) and the Education and Care Services National Regulations (National Regulations) establish the regulatory structure for education and care services provided on a regular basis to children under 13 years of age, including most long day care, family day care, outside school hours care, and pre-schools and kindergartens across Australia. The National Law was originally passed as a law of Victoria in 2010 and has been subsequently adopted by corresponding legislation in each state and territory. It is intended to establish ‘a jointly governed, uniform and integrated national approach to the regulation and quality assessment of education and care services’.<sup>502</sup>

The Australian Children’s Education and Care Quality Authority (ACECQA) is the national body established under the National Law and is responsible for overseeing the implementation of the National Quality Framework across Australia. The ACECQA is governed by a 13-member board, one member drawn from each state and territory, four members nominated by the Commonwealth and an independent chair. One of the roles of the ACECQA is to establish and maintain national registers of approved providers, approved education and care services, and certified supervisors, and to publish those registers.<sup>503</sup> Registers are an important information sharing mechanism.

The objectives of the legislation directly relevant to information sharing are to:

- ensure the safety, health and wellbeing of children attending education and care services
- establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the national education and care services quality framework
- improve public knowledge, and access to information, about the quality of education and care services
- reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.<sup>504</sup>

A Regulatory Authority is nominated in each jurisdiction to administer the National Law. In Victoria, the Regulatory Authority is the Department of Education and Training.<sup>505</sup> The National Law establishes a system of approvals and certificates that provide Regulatory Authorities with the opportunity to assess whether

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502 Australian Children’s Education and Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2014), 9.

503 *Education and Care Services National Law Act 2010* (Vic) sch 1, s 225.

504 Ibid sch s 3(2)(a), (d), (e) and (f). References to the National Law in this report are to provisions of legislation as passed in Victoria, as this was the original law that was adopted by the other states and territories, unless otherwise indicated.

505 In the Australian Capital Territory, the Regulatory Authority is the Education and Training Directorate; in NSW, the Northern Territory and Tasmania it is the Department of Education; in Queensland and Victoria it is the Department of Education and Training; and in Western Australia it is the Department of Local Government and Communities.

providers, services and supervisors involved in the provision of early childhood services meet and maintain minimum quality requirements.

It is possible that in deciding whether to approve, suspend or cancel an approval or certificate under the National Law a Regulatory Authority will collect information relevant to institutional child sexual abuse. This is because applications for approvals and certificates require Regulatory Authorities to consider whether a person is fit and proper to be involved with the provision of education and care services, and they involve the collection and consideration of a wide range of information including criminal history, working with children checks and disciplinary records. This section of the report considers the mechanisms available for sharing information relevant to child sexual abuse under the National Law and National Regulations.

As discussed in the section *Limits of this research*, this report does not address mandatory and non-mandatory reporting obligations, which may initially bring information about institutional child sexual abuse to the attention of authorities, in detail. However, there is a brief discussion of these arrangements in section 5.2 *Child Protection: Notification*.

## Coverage and exclusions from the National Law system

The National Law currently covers the largest services in terms of numbers of children. The *Guide to Education and Care Services National Law and the Education and Care Services National Regulations 2011* (Guide to the National Law) notes that given the range and diversity of education and care services, an ‘all-encompassing national system will take a number of years to achieve’.<sup>506</sup>

The National Law includes a number of express exclusions, which the Guide to the National Law indicates are unlikely to be brought under the National Law in the future. These include schools providing full-time education; personal arrangements; services principally conducted to provide instruction in a particular activity (for example, sport, dance, music, culture, language or religious instruction); services providing education and care to patients in hospital or patients of a medical or therapeutic care service; and care provided under a child protection law of a participating jurisdiction.<sup>507</sup> A number of these areas are discussed in other parts of this report, including section 11 *Extracurricular activities*.

Where services are currently excluded by the National Regulations, the Guide to the National Law notes that they may be brought into the scheme in the future<sup>508</sup> and this may be an area for future research. The National Regulations exclude a range of services such as short-term or casual occasional care services; services that provide education and care for no more than four weeks per calendar year during school holidays; and transition to school services. The National Regulations also exclude home-based care, except in Western Australia, other than where care is provided as part of a family day care service.<sup>509</sup>

## Role of Regulatory Authorities

Regulatory Authorities in each jurisdiction have responsibility for administering the National Quality Framework; monitoring and enforcing compliance with the National Law; and authorising, suspending and

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506 Australian Children’s Education and Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2014), 11.

507 *Education and Care Services National Law Act 2010* (Vic) sch s 5(1).

508 Australian Children’s Education and Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2014), 12.

509 Education and Care Services National Regulations (NSW) reg 5.

cancelling approvals and certificates required for persons providing and managing education and care services. Regulatory Authorities also appoint authorised officers to enter, assess and monitor services. Authorised officers are given powers to investigate services where an offence may have been committed against the National Law.<sup>510</sup> Regulatory Authorities have extensive powers to obtain information, documents and evidence from education and care services.<sup>511</sup> They may also issue prohibition notices to exclude certain persons such as management, staff and volunteers from remaining at an education, and care service where ‘there may be an unacceptable risk of harm to a child or children’.<sup>512</sup> The Regulatory Authorities also maintain public registers of approved providers, approved services and certified supervisors.<sup>513</sup>

## Authorising, suspending and cancelling a provider approval

In order to provide education or care services under the National Law, a person or entity must apply to become an approved provider. A provider approval is valid in all jurisdictions across Australia. An applicant must satisfy the Regulatory Authority that he or she is a fit and proper person to be involved in the provision of an education and care service.<sup>514</sup> Where the applicant is an entity, it must satisfy the Regulatory Authority that each person with management or control of a service to be operated by the applicant is a fit and proper person to be involved in providing education and care services.<sup>515</sup>

In determining whether a person is a fit and proper person, Regulatory Authorities must consider a wide range of issues arising in relation to applicants under education and care services law; children’s services law; education law; working with children legislation; criminal law; and any decisions to refuse, renew, suspend, or cancel a person’s licence, approval, registration or certification under such laws.<sup>516</sup> This provides a broad base of information on which to decide whether a provider is a fit and proper person and to exclude potential providers who may pose a risk to children. Once a provider approval is granted, it continues in force until it is cancelled or suspended<sup>517</sup>, although the Regulatory Authority may assess at any time whether the approved provider continues to be a fit and proper person.<sup>518</sup>

Approved providers are responsible for ensuring that unauthorised persons – that is, those who are not parents or carers or staff, for example – do not remain at an education and care service, unless they are under the direct supervision of a staff member.<sup>519</sup> Approved providers must inform the Regulatory Authorities of changes in management personnel, and where a supervisor has his or her teachers registration or working with children check suspended or cancelled, or where he or she is facing disciplinary proceedings under an education law.<sup>520</sup> Approved providers are also required to notify the Regulatory Authority when there is a change relevant to whether the approved provider is a fit and proper person<sup>521</sup> and where there is a serious

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510 *Education and Care Services National Law Act 2010* (Vic) sch 1, s 199.

511 *Ibid* sch 1, s 215.

512 *Ibid* sch 1, s 182.

513 *Ibid* sch 1, s 261(2).

514 *Ibid* sch 1, s 12.

515 *Ibid* sch 1, s 12(2).

516 *Ibid* sch 1, s 13. These laws are defined for each jurisdiction in the relevant Education and Care Services National Law Act. See, for example, *Education and Care Services National Law Act 2010* (Vic) ss 9–14.

517 *Education and Care Services National Law Act 2010* (Vic) sch 1, s 17.

518 *Ibid* sch 1, s 21.

519 *Ibid* sch 1, s 170.

520 *Education and Care Services National Law Act 2010* (Vic) sch s 173(2)(a).

521 *Ibid* sch s 174(1)(a).



incident at the service or a complaint alleging ‘that the safety, health or wellbeing of a child or children was or is being compromised’.<sup>522</sup>

Regulatory Authorities may suspend a provider approval for up to 12 months on a range of grounds, including that the person has been charged with an indictable offence, or any other circumstance that indicates that the person may no longer be a fit and proper person to operate an education and care service.<sup>523</sup> Regulatory Authorities may cancel a provider approval on a range of grounds including that the person has been found guilty of an indictable offence; the Authority is satisfied that the person is not a fit and proper person to be involved in the provision of an education and care service; or that there is an unacceptable risk to the safety, health or wellbeing of a child or children being educated or cared for by the provider. Generally, a provider approval may only be suspended or cancelled once the person has been notified and been given an opportunity to respond. A Regulatory Authority may, however, suspend a provider approval immediately and without prior notification for up to six months if it is satisfied that there is an ‘immediate risk to the safety, health or wellbeing of a child or children’.<sup>524</sup>

Where a Regulatory Authority suspends or cancels a provider’s approval, the authority **may** notify the parents of children enrolled at the education and care service about the suspension or cancellation<sup>525</sup> or **may** require the provider to notify parents of children enrolled in the service in writing.<sup>526</sup>

## Authorising, suspending or cancelling a service approval

Approved providers must also apply to a Regulatory Authority for a service approval to operate an education and care service. There are two types of service approvals: centre-based services such as long day care, preschool and outside school hours care; and family day care services. These approvals relate to premises, policies and procedures in place in relation to the service and so are less likely to involve collection of information relating directly to child sexual abuse that would need to be shared between institutions or across jurisdictions, although the fact that a service approval has been suspended or cancelled is potentially relevant. A service approval is granted subject to a number of conditions including that the education and care service is operated in a way that ensures the safety, health and wellbeing of the children being educated or cared for by the service. Where a service approval is suspended or cancelled, the Regulatory Authority **may** require the approved provider to give written notice of the suspension or cancellation, and its effects, to the parents of children enrolled at the service.<sup>527</sup> In addition, if a service approval is suspended or cancelled this information **may** be published on the relevant register.<sup>528</sup>

## Authorising, suspending or cancelling a supervisor certificate

In order to be placed in day-to-day charge of an approved education and care service under the National Law, a person must apply to the Regulatory Authority for a supervisor certificate. A supervisor certificate is valid in all jurisdictions across Australia. An applicant must satisfy the Regulatory Authority that he or she is a fit and proper person to be involved in the provision of an education and care service. In determining whether a

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522 Ibid sch s 174(2).

523 Ibid sch s 25.

524 Ibid sch s 28.

525 Ibid sch s 35.

526 Ibid sch s 36(2).

527 Ibid sch s 84.

528 Ibid sch s 270(5)(a).

person is a fit and proper person, Regulatory Authorities must consider a wide range of information arising in relation to applicants under education and care services law, children's services law, education law, working with children legislation, criminal law and any decisions to refuse, renew, suspend, or cancel a person's licence, approval, registration or certification under such laws.<sup>529</sup>

Registered teachers and those holding a current working with children check clearance are taken, in the absence of evidence to the contrary, to be fit and proper persons.<sup>530</sup> If a teacher's registration is suspended or cancelled, then the person's supervisor certificate is also suspended or cancelled. If a person's working with children clearance check is suspended or cancelled, then the person's supervisor certificate is also suspended or cancelled.<sup>531</sup>

Those holding a supervisor certificate may be nominated as the nominated supervisor of an education and care service and be the responsible person present at the service in the absence of the approved provider or the nominated supervisor.<sup>532</sup>

Regulatory Authorities may suspend or cancel a supervisor certificate on a range of grounds including that the Regulatory Authority is of the opinion that the person is no longer a fit and proper person to be a supervisor of an education and care service.<sup>533</sup> Generally, a supervisor certificate may only be suspended or cancelled once the person has been notified and been given an opportunity to respond. A Regulatory Authority may, however, suspend a supervisor certificate immediately and without prior notification if it is satisfied that there is an 'immediate risk to the safety, health or wellbeing of a child or children'.<sup>534</sup>

## Disclosure of information provisions

The National Law establishes a clear framework for information sharing between relevant agencies and across jurisdictions. Part 13 of the National Law deals with Information, Records and Privacy. Division 6 of Part 13 is called *Disclosure of Information*, thus clearly identifying the need for disclosure in appropriate circumstances and setting out the circumstances in which disclosure may, must or must not occur. The National Law does impose a general duty of confidentiality on those exercising functions under the law, but also makes it clear that the duty does not operate if the information is disclosed in the exercise of functions under or for the purposes of the National Law or where the disclosure is required or authorised by any law of a participating jurisdiction and in a range of other circumstances.<sup>535</sup>

Section 271 provides that Regulatory Authorities, government departments, public authorities and local authorities **may** disclose information about education and care services to each other for the purposes of the *National Law*. The section also provides that Regulatory Authorities **may** disclose information to ACECQA, Regulatory Authorities in other jurisdictions, or the Commonwealth for the purposes of the National Law or National Regulations, including in relation to compliance and disciplinary action. This establishes a permissive framework within which relevant information **may** be shared.

Division 6 also identifies where information **must** be shared. Where a regulatory authority is notified that a nominated or certified supervisor has had their working with children clearance or teacher registration

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529 *Education and Care Services National Law Act 2010* (Vic) sch s 109.

530 *Ibid* sch s 108(2).

531 *Ibid* sch s 128.

532 *Ibid* sch s 117.

533 *Ibid* sch s 123.

534 *Ibid* sch s 126.

535 *Ibid* sch s 273.

suspended or cancelled, the Regulatory Authority **must** disclose the information to Regulatory Authorities in other jurisdictions.<sup>536</sup>

Regulatory Authorities **may** disclose to the head of a government department responsible for administering the working with children law, any prohibition notice issued under the National Law.<sup>537</sup>

The National Law also **allows** Regulatory Authorities to disclose information to an education and care service in some circumstances. An approved provider may request information about whether an individual is subject to a prohibition notice issued under the National Law or whether a family day care educator has been suspended from providing education and care as part of a family day care service.<sup>538</sup>

## Registers

This National Law establishes a system of national and jurisdiction-based registers of approved providers, approved services and certified supervisors.<sup>539</sup> These registers are an important information sharing mechanism. The ACECQA **must** publish on its website the register of approved providers and the register of certified supervisors and **may** publish the register of approved education and care services kept by Regulatory Authorities.<sup>540</sup> Regulatory Authorities **must** publish on their websites the registers of approved education and care services.

The National Law also **allows** Regulatory Authorities to publish a wider range of information including information about enforcement actions such as the issue of compliance notices, prosecutions, and suspension or cancellation of approvals or certificates. Regulatory Authorities are not, however, required to publish such information.<sup>541</sup>

This is intended to allow families, the community and other Regulatory Authorities to access information about the quality of the service provided, 'including any history of action that has been or is being taken to address non-compliance with the legislative requirements'.<sup>542</sup> It would perhaps be more helpful, in this regard, if information about enforcement actions was required to be published.

## Privacy regulation

The National Law has taken a unique approach to the issue of complex and inconsistent privacy legislation across Australia by developing a national, consistent privacy framework that applies to the ACECQA and the Regulatory Authorities. This has been achieved by excluding the operation of state and territory privacy legislation in relation to the operation of the National Quality Framework and the work of the ACECQA and the Regulatory Authorities. Section 5 of the *Education and Care Services National Law Act 2010* (Vic) provides, for example, that the *Privacy and Data Protection Act 2014* (Vic) does not apply to the *Education and Care Services National Law* or the instruments made under that law. This provision is replicated in other jurisdictions with appropriate reference to the relevant state or territory privacy legislation.

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536 Ibid sch s 271(4).

537 Ibid sch s 271(5).

538 Ibid sch s 272.

539 Ibid sch pt 13, Div 4.

540 Ibid sch s 270.

541 Ibid sch s 270(5).

542 Australian Children's Education and Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2014), 146.

In addition, the federal *Privacy Act 1988* is amended and applied as a law of each participating jurisdiction.<sup>543</sup> The National Law also establishes a specialist Office of the National Education and Care Services Privacy Commissioner.<sup>544</sup>

## 8.2 Other legislation specific to early childhood services

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Specific legislation in New South Wales, Queensland, South Australia, Tasmania and Western Australia regulates some of the early childhood services not covered by the National Law.<sup>545</sup> There is inconsistency across these jurisdictions in relation to which early childhood services are covered and the approach taken to regulation. Two examples, New South Wales and Queensland, are discussed in detail below to illustrate these differences.

In New South Wales, the *Children (Education and Care Services) Supplementary Provisions Act 2011* (NSW) provides for the regulation of a range of education and care services that are not subject to the National Law and aligns the regulation of those services, where practicable, with the National Law. These services are referred to as ‘state regulated education and care services’ and include, for example, home-based education and care services and mobile education and care services. The legislation provides for a system of approval and certification for service providers, services and supervisors by the NSW Regulatory Authority but the provisions of the National Law that relate specifically to the national scheme are set aside, such as, the provisions relating to the ACECQA. Some of the information sharing arrangements remain in place, however, including the register of approved providers, services and supervisors and the capacity for the NSW Regulatory Authority to share information with interstate Regulatory Authorities.

The education and care services covered by the *Children (Education and Care Services) National Law* (NSW) and ‘state regulated education and care services’ covered by the *Children (Education and Care Services) Supplementary Provisions Act 2011* (NSW) are prescribed bodies for the purposes of sharing information under Chapter 16A and s 248 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).<sup>546</sup>

In Queensland, the *Education and Care Services Act 2013* (Qld) provides for the regulation of a range of education and care services that are not subject to the National Law. These services are referred to as ‘Queensland education and care services’. The definition of a Queensland service excludes a range of services including extra-curricular activities, holiday care, and mobile services.<sup>547</sup> Thus the range of services covered by this supplementary legislation differs in New South Wales and Queensland.

The Queensland legislation provides for the approval of service providers and services.<sup>548</sup> The legislation provides that the Department of Education must keep registers of approved providers and services and the register must be available for inspection. The Department of Education **may** publish information about enforcement actions including the suspension or cancellation of a provider or service approval or a prohibition

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543 *Education and Care Services National Law Act 2010* (Vic) sch s 263(1).

544 *Ibid* sch s 263.

545 *Children (Education and Care Services) Supplementary Provisions Act 2011* (NSW); *Education and Care Services Act 2013* (Qld); *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA); *Child Care Act 2001* (Tas); *Child Care Services 2007* (WA).

546 *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) reg 8.

547 *Education and Care Services Act 2013* (Qld) s 8.

548 *Education and Care Services Act 2013* (Qld) pt 2, pt 3.

notice on the departmental website.<sup>549</sup> Those involved in administering the Act **may** use and disclose information in a range of circumstances including for the purpose of the Act; for a purpose directly related to a child's protection or welfare; or where expressly permitted or required under another Act.<sup>550</sup> They may also share information with officers of departments in other states or the Commonwealth responsible for the administration or enforcement of a law about education and care.<sup>551</sup> They may also report matters of concern, which may involve the contravention of another Act, where relevant to ensuring the safe and appropriate provision of education and care to a child to the head of the department responsible for administering that Act.<sup>552</sup>

## 8.3 Conclusion

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The National Law establishes a unique national regulatory scheme for early childhood services with well-developed information sharing arrangements. These arrangements are facilitated by the setting aside of state and territory privacy laws and the adoption of nationally consistent privacy legislation, in the form of the Privacy Act, and well-defined information sharing arrangements.

It is important to note, however, that a number of early childhood services currently fall outside the national scheme including occasional care services offered on a short term or casual basis; services that provide education and care for no more than four weeks per calendar year during school holidays; and transition to school services. The National Regulations also exclude home-based care, except in Western Australia. While some of these services are covered by separate legislation in some jurisdictions, as discussed above, the approach across Australia to the regulation and information sharing arrangements of these services is not uniform.

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549 Ibid s 204.

550 Ibid s 217.

551 Ibid s 218.

552 Ibid s 219.

## 9. Schools

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### 9.1 Introduction

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As noted above, schools providing full time education are not covered by the *Education and Care Services National Law* (National Law). There are, however, a number of regulatory regimes applying to primary and secondary schools in Australia – including a nationally consistent teacher accreditation and registration framework – which include information sharing arrangements. While the essential elements of the teacher registration framework are shared across Australia, the legislation implementing the scheme in each state and territory is different. This legislative framework is discussed in detail below.

In addition, there is legislation in each state and territory regulating education in schools, for example, the *Education Act 2004* (ACT) and the *Education Act 1990* (NSW). This legislation generally provides for the operation and governance of government schools and the registration of non-government schools and home education. This legislation is also discussed below where it includes specific information sharing arrangements.

This section also deals with sharing information about other staff – such as administrative and support staff in schools – where they are specifically covered by legislation, as they are in New South Wales,<sup>553</sup> as well as sharing information about students between schools and across jurisdictions. Where there is no specific legislation regulating the sharing of information about staff and students, the exchange will be primarily governed by privacy legislation – which gives rise to the issues of complexity and fragmentation discussed above – or by the child protection legislation in each state and territory where schools are ‘prescribed bodies’ for the purposes of that legislation.

As discussed in the section dealing with the *Limits of this research*, this report does not address mandatory and non-mandatory reporting obligations, which may initially bring information about institutional child sexual abuse to the attention of authorities, in detail. There is, however, a brief discussion of these arrangements above at section 5.2 *Child Protection: Notification*.

### 9.2 Registration and sharing information about teachers

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In October 2011, Education Ministers endorsed a national framework for consistency in teacher registration. The *Australian Professional Standards for Teachers* (Australian Standards) were adopted as the basis for this national approach. The Australian Institute for Teaching and School Leadership (AITSL) is responsible for developing and maintaining these standards and for implementing a system of national accreditation for teachers based on the standards.<sup>554</sup>

Every state and territory in Australia has a teacher Registering Authority, which is responsible for implementing the national approach.<sup>555</sup> Only registered teachers may be employed to teach in schools,

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553 *Education (School Administrative and Support Staff) Act 1987* (NSW).

554 Australian Institute for Teaching and School Leadership, *Induction and Registration* (2014), <<http://www.aitsl.edu.au/induction-registration>>.

555 *ACT Teacher Quality Institute Act 2010* (ACT); *Teachers Accreditation Act 2004* (NSW); *Teacher Registration (Northern Territory) Act* (NT); *Education (Queensland College of Teachers) Act 2005* (Qld); *Teachers Registration and Standards Act 2004* (SA); *Teachers Registration Act 2000* (Tas); *Education and Training Reform Act 2006* (Vic); and *Teacher Registration Act 2012* (WA).

although there is provision for short term permits in each jurisdiction to address workforce shortages and the need to place trainee teachers. There are two forms of registration available: provisional and full registration. Upon graduation, for example, a new teacher is granted provisional registration. To be granted full registration teachers are required to demonstrate that they meet certain proficiency standards. Registration is for a fixed period of not more than five years. After this teachers are required to demonstrate their ongoing proficiency and suitability to teach in order to renew their registration. Under mutual recognition legislation at the Commonwealth level and in each jurisdiction, a person registered to practice as a teacher in one jurisdiction is entitled to apply for registration in another jurisdiction.<sup>556</sup>

The common agreed elements of the framework for registration include a requirement that applicants be 'suitable' to both work with children and be a teacher based on an assessment of character and criminal history. The *Australian Standards* require that a national criminal history check be undertaken where an individual is applying for registration as a teacher and that all teachers must have an up-to-date national criminal history record check, that is a check completed within the last five years, to maintain registration. Overseas criminal history checks are also required where an applicant or teacher has resided overseas as an adult. Registering Authorities may take other information into account in determining 'suitability'.<sup>557</sup>

Registering Authorities may impose sanctions or withdraw a teacher's registration if they fail to meet the required standards of personal or professional conduct or professional performance. It is of interest to note that the AITSL guide to teacher registration in Australia states that:

***Where permitted, jurisdictions will share information with regard to discipline and de-registration of teachers. A jurisdiction may request from another jurisdiction where a teacher has been registered, information about unfinished investigations and any conditions that may currently apply to the teacher's registration [emphasis added].***<sup>558</sup>

This reflects the fact that information sharing is not as straight forward in the schools sector as suggested by a nationally consistent teacher accreditation and registration framework. The national framework does not include specific provision for information sharing, unlike the early childhood services sector regulatory arrangements. The information sharing arrangements in relation to teachers depend, therefore, on the teachers registration legislation in each state and territory. The teacher registration arrangements apply to both government and non-government schools and are discussed in detail below.

## Australian Capital Territory

In the Australian Capital Territory, the Registering Authority is the ACT Teacher Quality Institute (TQI), established by the *ACT Teacher Quality Institute Act 2010* (ACT). The TQI may grant, refuse, renew, suspend or cancel a teacher's registration and maintains the register of teachers working or intending to work in the Australian Capital Territory.<sup>559</sup>

The teacher's register must include details of any suspension or cancellation including the grounds for suspension or cancellation.<sup>560</sup> Information in the register **must** be made available to a teacher's employer, or prospective employer, on request, although the TQI **must not** share the grounds for suspension or

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556 See, for example, *Mutual Recognition Act 1992* (Cth).

557 Australian Institute for Teaching and School Leadership, *Induction and Registration* (2014), <<http://www.aitsl.edu.au/induction-registration>>.

558 Australian Institute for Teaching and School Leadership, *Teacher Registration in Australia* (2014).

559 *ACT Teacher Quality Institute Act 2010* (ACT) s 11.

560 *Ibid* s 43.



cancellation.<sup>561</sup> The basis for this limitation is not apparent. Information in the register, including information that is not available to the public, **may** be shared with a corresponding Registering Authority in another jurisdiction.<sup>562</sup> Where the TQI suspends or cancels a person's registration the TQI **must** inform each corresponding Registering Authority and this includes providing information about the grounds for suspension or cancellation.<sup>563</sup> Thus, more detail is provided to the Registering Authorities in other states and territories than to a prospective school employer.

An employer **must** notify the TQI if the employer has reasonable grounds for believing that a teacher has contravened a condition of his or her registration or permit to teach or where disciplinary action has been taken against the teacher.<sup>564</sup>

It is an offence to use or disclose personal information collected under the Act, unless the information is used or disclosed under the Act or other law; in relation to the exercise of a function under the Act or other law; in a court proceeding; or to a person administering or enforcing a corresponding law in another jurisdiction that regulates teachers in that jurisdiction, that is, another Registering Authority.<sup>565</sup>

An applicant for teacher registration in the Australian Capital Territory is also required to be registered under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT).<sup>566</sup>

## New South Wales

In New South Wales, the Registering Authority is the Board of Studies Teaching and Educational Standards NSW (the Board) established by the *Board of Studies, Teaching and Educational Standards Act 2013* (NSW). The arrangements for teacher accreditation in New South Wales are more complex than in the Australian Capital Territory, with different teacher accreditation authorities in relation to government and non-government schools. However, these accreditation authorities **must** notify the Board of their decisions to grant, revoke or suspend accreditation.<sup>567</sup> The Board is required to maintain a roll of teachers under the Act, which includes a list of accredited teachers.<sup>568</sup>

The accreditation list must include details of any decision to refuse, revoke or suspend a teacher's accreditation.<sup>569</sup> The Board is authorised to request and receive such information from teacher accreditation authorities and **may** also provide information to such authorities as well as to the Registering Authority in another jurisdiction.<sup>570</sup> Information in the roll **may** also be shared with any other person or body prescribed by the regulations, although none are prescribed in the current regulations.<sup>571</sup> It is interesting to note the difference between the TQI in the Australian Capital Territory, which **must** share information about suspensions and cancellations with Registering Authorities in other jurisdictions, while the New South Wales Board **may** share such information.

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561 *ACT Teacher Quality Institute Act 2010* (ACT) s 42.

562 *Ibid* s 44.

563 *Ibid* s 66.

564 *Ibid* s 67.

565 *Ibid* s 92.

566 *Ibid* s 32.

567 *Teacher Accreditation Act 2004* (NSW) s 22.

568 *Ibid* s 16.

569 *Ibid* s 18.

570 *Ibid* s 18.

571 *Ibid* s 18(3)(iii).

An employer **must** notify the Board if the employer dismisses a teacher for any reason for which their accreditation may be revoked under the Act or that would justify including the person in the list of persons maintained under the *Teaching Service Act 1980* (NSW), which regulates teachers working in government schools, as a person who is not to be employed in the NSW Government Teaching Service.<sup>572</sup>

An applicant for teacher accreditation in New South Wales is also required to hold a working with children check clearance under the *Child Protection (Working with Children) Act 2012* (NSW).<sup>573</sup> Where a teacher in a New South Wales government school has his or her working with children check clearance cancelled, the employer **must** report that fact to the Registering Authority.<sup>574</sup> There is no equivalent provision relating to teachers in non-government schools, although the fact that a person no longer held a working with children check clearance means that he or she was no longer eligible to be accredited.

## Northern Territory

In the Northern Territory, the Registering Authority is the Teacher Registration Board (TRB), established by the *Teacher Registration (Northern Territory) Act* (NT). The TRB may grant, renew, refuse, suspend or cancel a teacher's registration and maintains the register of teachers working or intending to work in the Northern Territory.<sup>575</sup> Any person may, on payment of a fee, inspect the register, but may only have access to the teacher's name, registration number and the date on which registration fees were paid.<sup>576</sup>

The teacher's register must include details of any suspension or cancellation.<sup>577</sup> The Northern Territory legislation makes specific reference to sexual offences and a teacher who is committed for trial or found guilty of a sexual offence must inform the TRB. If found guilty, the teacher ceases to be registered. The TRB **must** note in the register that the teacher's registration is cancelled and must notify the teacher, his or her employer and other Registering Authorities in Australia and New Zealand.<sup>578</sup>

The TRB **must** notify a teacher's employer, and may notify a former employer, if the TRB suspends or cancels a teacher's registration.<sup>579</sup> The TRB **must** inform each corresponding Registering Authority if the TRB suspends or cancels a teacher's registration.<sup>580</sup> Interestingly, the TRB **may** also, on request, notify a registering authority outside Australia and New Zealand if the TRB has suspended or cancelled a person's registration.

An employer **must** notify the TRB if the employer dismisses the person; the person resigns in circumstances that call into question the person's fitness to teach; or the employer takes any action against the person in relation to serious misconduct or lack of competence or fitness to teach.<sup>581</sup> The notice must include full details of the event and the circumstances involved.

The TRB **must** also inform the Commissioner of Police if the TRB receives a complaint about a teacher and it appears to the TRB that the matter should be investigated by the police.<sup>582</sup> The Commissioner of Police **must**

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572 *Teacher Accreditation Act 2004* (NSW) s 42B.

573 *Ibid* s 25A.

574 *Teaching Service Act 1980* (NSW) s 44.

575 *Teacher Registration (Northern Territory) Act* (NT) s 26.

576 *Ibid* s 29.

577 *Ibid* s 26.

578 *Ibid* s 69.

579 *Ibid* s 67(1).

580 *Ibid* s 67(4).

581 *Ibid* s 67A.

582 *Ibid* s 75

in turn inform the TRB if the Commissioner receives information about a teacher and he or she considers that the TRB should investigate the matter.<sup>583</sup>

It is an offence for a TRB member to disclose information obtained in the course of his or her duties, unless the information is disclosed in the course of those duties.<sup>584</sup> A person is protected from civil and criminal liability for giving information under the Act and in good faith to the TRB.<sup>585</sup>

An applicant for teacher registration in the Northern Territory is also required to hold a clearance notice under the Care and Protection of Children Act.<sup>586</sup>

## Queensland

In Queensland, the Registering Authority is the Queensland College of Teachers (QCT), established by the *Education (Queensland College of Teachers) Act 2005*. The QCT may grant, renew, refuse, suspend or cancel a teacher's registration and maintains the register of teachers working or intending to work in Queensland.<sup>587</sup>

The teacher's register must include details of any suspension or cancellation.<sup>588</sup> Any person may inspect the register, and the public may have access to certain information including the teacher's name, registration details, if the teacher's registration is suspended, the period of the suspension and, where the teacher's registration was cancelled, whether it was cancelled on disciplinary grounds.<sup>589</sup> The information that is publically available in Queensland is more comprehensive than in a number of other jurisdictions – particularly the Australian Capital Territory, New South Wales and the Northern Territory – in particular in relation to suspension and cancellation.

The Queensland legislation makes specific reference to a teacher who is convicted of a serious offence or is subject to, for example, a sexual offender order. The QCT **must**, once it becomes aware of the matter, cancel the teacher's registration and notify the teacher and his or her employer.<sup>590</sup>

Detailed information sharing provisions in the Queensland legislation allow for arrangements to be established between the QCT and other relevant agencies, including government departments and interstate Registering Authorities. Under the information sharing arrangements, the QCT and the relevant agencies **may** share information that helps the QCT or the relevant agency to perform their functions. The provision also states that such information sharing arrangements operate 'despite any other Act or law of the State' – including the provisions of state privacy legislation – and allows the QCT, relevant agencies and Registering Authorities to request, receive and disclose information.<sup>591</sup>

Detailed and specific provisions also deal with information sharing between the QCT and the chief executive of the department in which the *Working with Children (Risk Management and Screening) Act 2000* (Qld) is administered. The QCT **may** inform the chief executive about disciplinary matters, where relevant, and **must**

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583 *Teacher Registration (Northern Territory) Act* (NT) s 75.

584 *Ibid* s 21.

585 *Ibid* s 76A.

586 *Care and Protection of Children Act* (NT) s 185(2)(c).

587 *Education (Queensland College of Teachers) Act 2005* (Qld) s 230.

588 *Ibid* s 288.

589 *Ibid* s 289.

590 *Ibid* s 56.

591 *Ibid* s 287.

respond to requests for more information about such matters.<sup>592</sup> The QCT **must** inform the chief executive where a teacher's registration is suspended or cancelled, including information about the grounds on which it was suspended or cancelled.<sup>593</sup>

There are also detailed and specific provisions dealing with information sharing between the QCT and the Commissioner of Police, which also provide for the QCT and the commissioner to enter into an information sharing arrangement.<sup>594</sup>

It is an offence for a person to disclose information obtained in performing functions under the Act, unless the information is disclosed to perform functions under the Act or where authorised or required by law and in a specific range of other circumstances.<sup>595</sup>

Registered teachers in Queensland are exempt from the requirement to hold a 'blue card' under the Working with Children (Risk Management and Screening) Act, unless they are also providing other child-related services such as coaching a local sporting team or tutoring outside the school.<sup>596</sup>

## South Australia

In South Australia, the Registering Authority is the Teachers Registration Board (TRBSA), established by the *Teachers Registration and Standards Act 2004* (SA). The TRBSA may grant, renew, refuse, suspend or cancel a teacher's registration or special authority to teach, and maintains the register of persons registered under the legislation.<sup>597</sup>

Certain information on the register is available to the public including the teacher's name, qualifications and registration details, but this does not include details of disciplinary action such as suspension or cancellation of registration.<sup>598</sup>

The teacher's register must include information about the outcome of any action taken against the person by the TRBSA, including whether a teacher's registration has been suspended or cancelled.<sup>599</sup> The TRBSA **must** inform the following agencies and organisations of any inquiry into the conduct of a teacher and the outcome of that inquiry: the teacher's employer, the Department of Education and Child Development, the Director of Children Services, the Catholic Education Office, the Association of Independent Schools of South Australia and the interstate Registering Authorities in Australia and New Zealand.<sup>600</sup>

An employer **must** notify the TRBSA if the employer dismisses the teacher, or the teacher resigns, in response to allegations of unprofessional conduct.<sup>601</sup>

It is an offence to disclose personal information collected under the Act, unless the information is disclosed as required or authorised by or under the Act or other law, in connection with the administration of the Act, to

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592 Ibid s 285.

593 Ibid s 285A.

594 Ibid s 286.

595 *Education (Queensland College of Teachers) Act 2005* (Qld) s 283.

596 *Working with Children (Risk Management and Screening) Act 2000* (Qld) sch 1, s 3(2).

597 *Teachers Registration and Standards Act 2004* (SA) s 28.

598 Ibid s 28(6)(a).

599 Ibid s 28(2)(g).

600 Ibid s 40.

601 Ibid s 37.

an interstate Registering Authority or to another Commonwealth, state or territory statutory authority for the proper performance of its functions.<sup>602</sup>

A number of provisions provide for specific information sharing arrangements. The Commissioner of Police **must** provide the TRBSA with information about criminal convictions and other information relevant to a person's fitness to be a registered teacher.<sup>603</sup> The TRBSA, the Director of Public Prosecutions and the Commissioner of Police **must** establish information sharing arrangements where charges are laid against a person who is or was a registered teacher that raise serious concerns about the person's fitness to be a registered teacher.<sup>604</sup>

Government and non-government schools in South Australia are required to undertake 'relevant history assessments' before a person is appointed under the *Children's Protection Act 1993* (SA).<sup>605</sup>

## Tasmania

In Tasmania, the Registering Authority is the Teachers Registration Board of Tasmania (TRBTas), established by the *Teachers Registration Act 2000* (Tas). The TRBTas may grant, renew, refuse, suspend or cancel a teacher's registration or limited authority to teach, and maintains the register of persons registered under the legislation.<sup>606</sup>

Certain information on the register is available to the public including the teacher's name and registration details, but does not include details of disciplinary action such as suspension or cancellation of registration.<sup>607</sup>

The teacher's register must include details of any suspension of registration or limited authority.<sup>608</sup> The TRBTas **may** inform the following agencies and organisations of any such suspension on request: the Department of Education, the Catholic Education Office in Hobart, TasTAFE or a non-government school.<sup>609</sup> The TRBTas **may** provide any information it has in relation to a registered teacher or a person who has applied for registration to an interstate Registering Authority.<sup>610</sup>

Where the TRBTas makes a decision as a result of a disciplinary inquiry, the TRBTas **must** inform the person, the person's employer and all other interstate Registering Authorities.<sup>611</sup> It is an offence to publish information in respect of an inquiry unless the TRBTas determines that the public interest requires such publication.<sup>612</sup>

A number of provisions provide for specific information sharing arrangements. The Commissioner of Police **must** provide the TRBTas with information that may be relevant to determining a person's application for registration.<sup>613</sup> The TRBTas **must** inform a teacher's employer and each other interstate Registering Authority

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602 *Teachers Registration and Standards Act 2004* (SA) s 53.

603 *Ibid* s 50.

604 *Ibid* s 51.

605 *Children's Protection Act 1993* (SA) s 8B.

606 *Teachers Registration Act 2000* (Tas) s 25.

607 *Ibid* s 25(4).

608 *Ibid* s 25(2)(m).

609 *Ibid* s 25(5).

610 *Ibid* s 32A.

611 *Ibid* s 24A.

612 *Ibid* s 22D.

613 *Ibid* s 17L.

where a teacher has been found guilty of a prescribed offence in Tasmania or elsewhere, although no offences are currently prescribed.<sup>614</sup>

Tasmania is currently phasing in working with children registration, and anyone who starts work or continues to work as a registered teacher after 1 January 2017 will have to be registered under the *Registration to Work with Vulnerable People Act 2013* (Tas).

## Victoria

In Victoria, the Registering Authority is the Victorian Institute of Teaching (VIT), established by the *Education and Training Reform Act 2006* (Vic). The VIT may grant, renew, refuse, suspend or cancel a teacher's registration to teach, and maintains the register of persons registered under the legislation.<sup>615</sup> The VIT also maintains a Register of Disciplinary Action in relation to current or formerly registered teachers, which includes a much wider range of information than the teachers' register, and appears to be unique in Australia.<sup>616</sup>

The teachers' register must include details of any suspension or cancellation of registration.<sup>617</sup> It is of interest that the VIT **must** make this register available for inspection by the public and may publish the whole, or any part of the Register in any manner – for example, on its website.<sup>618</sup>

The details in the Register of Disciplinary Action **must** (although this is qualified below) include details of any disciplinary action imposed in relation to a registered teacher, such as the imposition of conditions, limitations, or restrictions on the teacher's registration; cautioning of the teacher; reprimanding of the teacher; suspension and cancellation of registration; the cessation of the teacher's registration if convicted or found guilty of a sexual offence; and disqualification from teaching in a school if convicted of a sexual offence.<sup>619</sup> The VIT **must** make the Register of Disciplinary Action available for inspection by the public and **may** publish the whole, or any part, of the Register in any manner – for example, on its website.<sup>620</sup> The VIT may, however, decide to exclude information from the Register of Disciplinary Action in certain circumstances, including where the VIT is of the view that it is in the public interest to do so.<sup>621</sup> The VIT may also decide to publish its findings, reasons or a determination where it has held a formal hearing into a disciplinary matter.<sup>622</sup>

Where the VIT makes a formal determination imposing conditions, limitations or restrictions on a teacher's registration, or suspending or cancelling the registration, the VIT **must** publish a notice of the determination in the *Government Gazette*; and **must** notify a range of agencies and organisations including the Registering Authorities in all other states and territories and New Zealand, the teacher's employer and the head of the Department of Justice. The VIT **must** also provide this information to overseas Registering Authorities on request.<sup>623</sup>

A number of provisions provide for specific information sharing arrangements in Victoria. The Chief Commissioner of Police **must** provide the VIT with information on the criminal record of a registered teacher

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614 *Teachers Registration Act 2000* (Tas) s 27A.

615 *Education and Training Reform Act 2006* (Vic) s 2.6.3(1)(g).

616 *Ibid* s 2.6.3(1)(ga).

617 *Ibid* s 2.6.24.

618 *Ibid* s 2.6.25.

619 *Ibid* s 2.6.54C.

620 *Ibid* s 2.6.54B.

621 *Ibid* s 2.6.54E.

622 *Ibid* s 2.6.49A.

623 *Ibid* s 2.6.51.

on request.<sup>624</sup> Where the VIT makes a decision to suspend a teacher on the basis that the teacher has been charged with a sexual offence, the VIT **must** inform the person and the person's employer.<sup>625</sup> Where a person is convicted of a sexual offence their registration ceases automatically and they are disqualified from teaching in a school. An employer **must** inform the VIT if the employer takes any disciplinary action against a teacher and must immediately notify the VIT if the employer becomes aware that the teacher has been charged with or convicted of a sexual offence. The Chief Commissioner of Police must also immediately notify the VIT if he or she becomes aware that a teacher has been charged with or convicted of a sexual offence, or a range of other offences.<sup>626</sup>

The VIT must ensure that a national criminal history check is conducted in respect of each registered teacher.<sup>627</sup> Registered teachers are, however, exempt from the working with children check under the *Working with Children Act 2005* (Vic).

## Western Australia

In Western Australia, the Registering Authority is the Teachers Registration Board of WA (TRBWA), established by the *Teachers Registration Act 2012* (WA). The TRBWA may grant, renew, refuse, suspend or cancel a teacher's registration, and maintains the register of persons registered under the legislation.<sup>628</sup>

The teachers' register **must** include details of any conditions imposed on a teacher's registration and any order made by a disciplinary committee or the State Administrative Tribunal, including orders that a teacher be cautioned, reprimanded or fined and orders to impose conditions on, or suspend or cancel, a teacher's registration.<sup>629</sup>

Limited information on the register is available to the public, including the teacher's name and registration details, but not details of disciplinary action such as suspension or cancellation of registration.<sup>630</sup> More detailed information, including information about disciplinary action, **may** be made available to registered teachers, employers, principals and others at the discretion of the TRBWA.<sup>631</sup>

The TRBWA **may** give notice of a finding, order, decision or other action in relation to the registration of teachers, or matters that may adversely affect student interests, to another state or territory or a New Zealand Registering Authority; any relevant professional association or trade union; the employer of a registered teacher; or any other person the TRBWA considers should be made aware of the matter, where it is in the public interest to do so.<sup>632</sup> The *Teacher Registration Act 2012* (WA) provides that a person or body with functions under the Act must, in the performance of those functions, regard the best interests of the child as the paramount consideration.<sup>633</sup> This ensures that the best interests of the child are given due weight in any

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624 *Education and Training Reform Act 2006* (Vic) s 2.6.22(3).

625 *Ibid* s 2.6.27(7).

626 *Ibid* s 2.6.31.

627 *Ibid* s 2.6.22A.

628 *Teachers Registration Act 2012* (WA) s 36.

629 Teachers Registration (General) Regulations 2012 (WA) reg 21A.

630 *Teachers Registration Act 2012* (WA) s 37.

631 *Teachers Registration Act 2012* (WA) s 37(3); Teachers Registration (General) Regulations 2012 (WA) reg 21B.

632 *Teachers Registration Act 2012* (WA) s 118.

633 *Ibid* s 5.



consideration of what is in the public interest. No civil or criminal liability is incurred by the TRBWA, or any other person, where information is shared under the relevant provision in good faith.<sup>634</sup>

A number of provisions provide for specific information sharing arrangements in Western Australia. The Director of Public Prosecutions or the Commissioner of Police **must, where practicable**, inform the TRBWA when a registered teacher is charged with a sexual offence involving a child, or is convicted of an indictable offence in Western Australia.<sup>635</sup> An employer must inform the TRBWA of any investigation into the conduct of a teacher where the teacher is suspended or dismissed, or resigns.<sup>636</sup>

It is an offence to disclose information obtained in performing functions under the Act except in a range of specified circumstances, including where the information is disclosed as required or authorised by or under the Act or other written law, for the purpose of performing a function under the Act or another written law, or for the purpose of investigating a suspected offence or the conduct of proceedings against the person under the Act or another written law.<sup>637</sup>

Teachers in Western Australia are required to have a working with children check clearance under the *Working with Children (Criminal Record Checking) Act 2004* (WA).

## Conclusion

The arrangements for sharing information about teachers between schools and across jurisdictions in Australia rely primarily on the registration system established by the national framework for teacher accreditation and registration. As discussed above, the framework is implemented in each state and territory by legislation that establishes a Registering Authority with responsibility for granting, refusing, renewing, suspending or cancelling teacher registrations and maintaining an up-to-date register of this information. Registers are a key mechanism for sharing information but the efficacy of such mechanisms depends on what information is captured in the register and who may access the information.

The information kept in every state and territory teachers' register **must** include personal details of all registered teachers and information about the suspension or cancellation of a teacher's registration. However, the extent to which this information is shared differs from jurisdiction to jurisdiction. The registers in Queensland and Victoria, for example, make a significant amount of information available to the public and this means that information will be available to parents and schools who may be considering employing a particular individual. For example, in Queensland, the public may have access to information including whether the teacher's registration is suspended, the period of the suspension and, where a teacher's registration has been cancelled, whether it was cancelled on disciplinary grounds.<sup>638</sup> In Victoria, the Register of Disciplinary Action is available for inspection by the public, although the VIT can decide whether or not to include information in the register based on a public interest test.<sup>639</sup> This could mean that schools seeking to rely on publicly available information in the register are not accessing complete information.

In terms of sharing information between schools, the register provides a central repository of information about disciplinary and other matters potentially relevant to institutional child sexual abuse. The level of access to information by, for example, schools considering employing a person differs widely from jurisdiction to

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634 *Teachers Registration Act 2012* (WA) s 118.

635 *Ibid* s 41.

636 *Ibid* s 42.

637 *Teachers Registration and Standards Act 2004* (SA) s 53.

638 *Education (Queensland College of Teachers) Act 2005* (Qld) s 289.

639 *Education and Training Reform Act 2006* (Vic) s 2.6.54B.

jurisdiction. While schools will generally be able to access basic information about whether or not a person is registered, more detailed information about disciplinary matters may not be readily available to schools in every jurisdiction. For example, in the Australian Capital Territory, while information in the register **must** be made available to a teacher's employer, or prospective employer, on request, the TQI **must not** share the grounds for suspension or cancellation.<sup>640</sup> In New South Wales, while there is provision for sharing information with 'any other person or body prescribed by the regulations', none are prescribed in the current regulations.<sup>641</sup> This appears to preclude sharing information on the register directly with schools.

In terms of sharing information across jurisdictions, all the states and territories provide for sharing some information with the Registering Authorities in other states and territories. In some jurisdictions, Registering Authorities **must** share information about suspensions and cancellations with the other states and territories<sup>642</sup> and in some jurisdictions they **may** share such information.<sup>643</sup> Again, the level of detail in the information that may or must be shared across jurisdictions differs depending on the relevant state and territory legislation.

One other point of interest is the fact that some jurisdictions include a clear statement about the best interests of the child being a paramount consideration in decision making under the legislation.<sup>644</sup> This is intended to ensure that when decision makers are exercising discretion in relation to sharing information, the best interests of children will be given due weight.

## 9.3 Sharing information about other school staff members

School staff members include teachers, administrative staff, contractors and volunteers. Sharing information about teachers is regulated by specific legislation in all jurisdictions because of the national framework for regulation of teachers, but this is not the case in relation to other categories of staff. Where there is no specific legislation regulating the sharing of information about other categories of staff, this will be governed by privacy legislation, working with children checks or child protection legislation.

### Australian Capital Territory

The Australian Capital Territory has no legislation that specifically regulates the sharing of information about administrative and support staff in schools. Such staff members are, however, required to hold a working with children check clearance under the *Working with Vulnerable Children (Background Checking) Act 2011* (ACT) where they have contact with children as part of their duties.<sup>645</sup>

Under the *Children and Young People Act 2008* (ACT), government and non-government schools must provide assistance, facilities or services relevant to the physical or emotional wellbeing of a child or young person on request by the head of the Community Services Directorate.<sup>646</sup> This might include sharing information about

<sup>640</sup> ACT Teacher Quality Institute Act 2010 (ACT) s 42.

<sup>641</sup> Teacher Accreditation Act 2004 (NSW) s 18(3)(iii).

<sup>642</sup> ACT Teacher Quality Institute Act 2010 (ACT) s 66; Teacher Registration (Northern Territory) Act (NT) s 67(4); Teachers Registration and Standards Act 2004 (SA) s 40; Teachers Registration Act 2000 (Tas) s 24A; Education and Training Reform Act 2006 (Vic) s 2.6.51.

<sup>643</sup> Teacher Accreditation Act 2004 (NSW) s 18; Education (Queensland College of Teachers) Act 2005 (Qld) s 287; Teachers Registration Act 2012 (WA) s 118.

<sup>644</sup> See, for example, Teachers Registration Act 2012 (WA) s 5.

<sup>645</sup> Working with Vulnerable People (Background Checking) Act 2011 (ACT) sch 1, 1.4.

<sup>646</sup> Care and Protection of Children Act (NT) s 293B.

administrative and support staff in schools with the Directorate. Sharing of information with other agencies and organisations will be regulated by privacy legislation.

## New South Wales

In New South Wales, the *Education (School Administrative and Support Staff) Act 1987* (NSW) regulates the employment of administrative and support staff in government schools and includes a number of provisions related to sharing information about issues that might include institutional child sexual abuse. Section 7A of the Act provides that the protection of children is to be the primary consideration in taking any action in relation to a member of staff. Section 7D provides that an employer **must** notify the head of the Department of Education and Training when a member of the school administrative or support staff is charged with, or found guilty of, a serious offence.<sup>647</sup> The head of the Department **may** also maintain a list of persons who the head determines are not to be employed as school administrative or support staff, although it is unclear who may have access to this list.<sup>648</sup>

Administrative and support staff in government and non-government schools are required to hold a working with children check clearance under the *Child Protection (Working with Children) Act 2012* (NSW) where they are engaged in work that involves direct contact with children.<sup>649</sup>

In New South Wales, government and non-government schools are designated as prescribed bodies for the purposes of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and so **may** share information with other prescribed bodies that promotes the ‘safety, welfare or wellbeing of children’ in providing services to children or to assist in managing any risk to children.<sup>650</sup> This may include information about administrative and support staff members at schools who may pose a risk to the safety, welfare or wellbeing of a child or young person.<sup>651</sup> In addition, a prescribed body **must** share information with another prescribed body upon request, except in limited circumstances set out in the legislation and discussed above.<sup>652</sup>

## Northern Territory

The Northern Territory has no legislation that specifically regulates the sharing of information about administrative and support staff in schools.

Such staff are, however, required to hold a working with children check clearance under the *Care and Protection of Children Act* (NT) where their work involves, or may potentially involve, contact with children.<sup>653</sup>

Under the *Care and Protection of Children Act*, principals and teachers are defined as ‘information sharing authorities’.<sup>654</sup> Information sharing authorities **may** share information that relates to the safety or wellbeing of a child, which includes information about a person other than the child that directly or indirectly relates to

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647 *Education (School Administrative and Support Staff) Act 1987* (NSW) s 7D.

648 *Ibid* s 7E.

649 *Child Protection (Working with Children) Act 2012* (NSW) s 6; *Education (School Administrative and Support Staff) Act 1987* (NSW) ss 32D, 32K.

650 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245A, 245C.

651 Catholic Education Commission NSW, Association of Independent Schools NSW and the Department of Education and Communities (NSW), *Information Sharing Between Principals and Schools* (2014) 2.

652 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245D. Discussed above in relation to mandatory information sharing between prescribed bodies.

653 *Care and Protection of Children Act* (NT) s 185.

654 *Ibid* s 293C.

the safety or wellbeing of the child.<sup>655</sup> This may include information about administrative and support staff at schools who may pose a risk to the safety or wellbeing of a child. In addition, an information sharing authority **must** share information with another information sharing authority upon request, except in limited circumstances set out in the legislation and discussed above.<sup>656</sup>

## Queensland

Queensland has no legislation that specifically regulates the sharing of information about administrative and support staff in schools. This will be primarily regulated by privacy legislation and child protection legislation. Under the *Child Protection Act 1999* (Qld), the CEO of the Department of Education and the principals of non-government schools are defined as ‘prescribed entities’.<sup>657</sup> Prescribed entities **may** share information that may help with the investigation of, or response to, an allegation of harm, or risk of harm, to a child, or to help assess the health, education or care needs of a child in need of protection. Relevant information includes details about a child, the child’s family or ‘someone else’, and may be comprised of facts or opinion.<sup>658</sup> This may include information about administrative and support staff at schools who may pose a risk of harm to a child.

Employees other than registered teachers and parent volunteers, who provide services at schools that are directed mainly towards children or conduct activities at a school that mainly involve children, must also have a working with children check clearance under the *Working with Children (Risk Management and Screening) Act 2000* (Qld).<sup>659</sup> Administrative staff who provide services directed to the operation of the school, rather than services that are directed mainly towards children, do not require a clearance.

## South Australia

South Australia has no legislation that specifically regulates the sharing of information about administrative and support staff in schools.

The SA *Information Sharing Guidelines for Promoting Safety and Wellbeing* (ISG) provide that information should be shared by government schools if the person sharing the information believes, on reasonable grounds, that the disclosure is necessary to, for example, divert a person from offending; to protect a person or group of people from potential harm, abuse or neglect; and to help service providers more effectively address risks to safety and wellbeing.<sup>660</sup> This might include information about administrative and support staff in government schools where staff present a risk to the safety, welfare or wellbeing of students.

The sharing of information about administrative and support staff in non-government schools will be regulated by the *Privacy Act 1988* (Cth).

Such staff are also required to have a ‘relevant history check’ under the *Children’s Protection Act 1993* (SA) where their work involves regular contact with children or working in close proximity to children on a regular basis unless the contact is directly supervised at all times.<sup>661</sup>

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655 *Care and Protection of Children Act* (NT) s 293B.

656 *Ibid* s 293E. Discussed above in relation to mandatory information sharing between prescribed bodies.

657 *Child Protection Act 1999* (Qld) s 159D.

658 *Ibid* s 159C.

659 *Working with Children (Risk Management and Screening) Act 2000* (Qld) sch 1, s 3.

660 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 6.

661 *Children’s Protection Act 1993* (SA) s 8B.

## Tasmania

Tasmania has no legislation that specifically regulates the sharing of information about administrative and support staff in schools.

Such staff are not yet required to have a working with children check clearance under the *Registration to Work with Vulnerable People Act 2013* (Tas). Those working in non-government schools will require clearance by 1 October 2015 and those working in government schools will require clearance by 1 July 2016.<sup>662</sup>

Principals and teachers in government and non-government schools are ‘information sharing entities’ under the *Children, Young Persons and Their Families Act 1997* (Tas) and may share information relating to the safety, welfare or wellbeing of a student with other information sharing entities.<sup>663</sup> This might include information about administrative and support staff in schools where staff present a risk to the safety, welfare or wellbeing of students.

## Victoria

The *Education and Training Reform Act 2006* (Vic) includes some information sharing provisions covering the entire ‘teaching service’, which includes administrative and support staff in schools.<sup>664</sup> A person is not eligible for employment as an administrative or support staff member in Victoria if they have been convicted or found guilty of a sexual offence.<sup>665</sup> The head of the Department of Education may request information concerning the criminal record of administrative or support staff in government schools and the chief Commissioner of Police **must** provide the information within 14 days.<sup>666</sup>

Administrative and support staff in schools are required to have a working with children check clearance under the *Working with Children Act 2005* (Vic) where their work usually involves direct contact with a child who is not supervised by another person.<sup>667</sup> The *Commission for Children and Young People Act 2012* (Vic) provides that the Commission **must** be given access to records kept under the Working with Children Act and any other information held by the Department of Education and Early Childhood Development or a school in relation to any person or service that is the subject of a Commission inquiry.<sup>668</sup> This might include information about administrative and support staff in schools.

Employees of the Department of Education, principals and teachers are defined as ‘information holders’ under the *Children, Youth and Families Act 2005* (Vic).<sup>669</sup> Where the head of the Department of Community Services has received a report about a child, the head **may** consult and share information with information holders in order to seek advice on or assess a risk to a child.<sup>670</sup> The head of the Department of Human Services may also share information with information holders or direct them to provide information relevant to the protection or development of a child in respect of whom a protection order is in place.<sup>671</sup> Community-based child and

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662 Department of Justice (Tas), *Working with Children Registration: A Guide to the 3-Year Phased in Approach for Child-related Sectors* (2013).

663 *Children, Young Persons and their Families Act 1997* (Tas) s 53B.

664 *Education and Training Reform Act 2006* (Vic) s 2.4.3.

665 *Ibid* s 2.4.7.

666 *Ibid* s 5.3.4.

667 *Working with Children Act 2005* (Vic) s 9.

668 *Commission for Children and Young People Act 2012* (Vic) s 42.

669 *Children, Youth and Families Act 2005* (Vic) s 3(1).

670 *Ibid* ss 35.

671 *Ibid* s 195.

family services may also consult with information holders to assess a risk to a child.<sup>672</sup> Information about administrative or support staff in schools may be shared under these arrangements.

## Western Australia

Western Australia has no legislation that specifically regulates the sharing of information about administrative and support staff in schools and there is no privacy legislation in place in Western Australia.

Such staff are required to have a working with children check clearance under the *Working with Children (Criminal Record Checking) Act 2004* (WA) where their usual duties involve, or are likely to involve, contact with a child.<sup>673</sup>

The *Children and Community Services Act 2004* (WA) provides that the head of the Department for Child Protection and Family Support may disclose or request information that is, or is likely to be, relevant to the wellbeing of a child or group of children from a public authority or service provider, which includes the Department of Education and others providing education services. In addition, there are arrangements for sharing such information more generally between prescribed authorities and for authorised entities, including the governing bodies of registered schools, to disclose information to a prescribed authority.<sup>674</sup>

## Privacy legislation

In addition to the specific legislation discussed above, government schools in Australia are generally covered by state and territory privacy legislation in those jurisdictions in which such legislation exists. Non-government schools with an annual turnover of more than \$3 million are generally covered by the *Privacy Act 1988* (Cth). In the absence of more specific legislation dealing with the sharing of personal information about administrative and support staff in schools, the privacy legislation will regulate the collection, use and disclosure of such information.

The Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>675</sup> sets out the requirements of the Privacy Act for non-government schools, including the need for a privacy policy that sets out the kinds of information the school collects and the purposes for which it collects, uses and discloses the information.

The *Privacy Compliance Manual* suggests that schools send job applicants an Employment Collection Notice stating that the school is required, for example, to conduct a criminal record check under child protection laws and that the school may collect other sensitive personal information where the collection is required by law, which includes the common law duty of care.<sup>676</sup> This might include collection of information from third parties such as referees and previous employers. The Manual also suggests that the Employment Collection Notice should indicate the circumstances in which the school will share this information and the types of organisations with which such information is usually shared. The Manual suggests that contractors and volunteers be sent a modified version of the Employment Collection Notice.<sup>677</sup> Standard Collection Notices ensure that individuals are aware of the usual range of uses and disclosures.

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672 Ibid s 36.

673 *Working with Children (Criminal Record Checking) Act 2004* (WA) s 6.

674 *Children and Community Services Act 2004* (WA) ss 23, 28A, 28B.

675 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

676 Ibid [9.13.2].

677 Ibid [9.14].



This approach would also be generally consistent with the requirements of state and territory privacy legislation because it is based on privacy principles that require individuals to be informed about what information is being collected about them, that sensitive personal information will be collected with consent or as required by law, how that information will be used and to whom it will be disclosed. As noted above in the discussion of privacy legislation, federal privacy legislation and that in the Australian Capital Territory is more restrictive in relation to the collection of sensitive personal information than in other jurisdictions.

The *Privacy Compliance Manual* also notes that New South Wales legislation, including Chapter 16A of the Children and Young Persons (Care and Protection) Act, authorises disclosure of personal information relating to a student, prospective student, staff member, volunteer or parent for child protection purposes.<sup>678</sup> The *Guide for NSW Non-Government Schools on Reporting, Disclosing or Exchanging Personal Information for the Purposes of Child Wellbeing* sets out the details of this regime.<sup>679</sup>

## Conclusion

The arrangements for sharing information about administrative and support staff in schools differ from jurisdiction to jurisdiction, but are only specifically addressed by legislation in New South Wales in relation to government schools, under the Education (School Administrative and Support Staff) Act. This legislation provides an additional level of oversight of these staff members in government schools and ensures that some information, in particular about criminal offences, is disclosed to the Department of Education and stored centrally. In Victoria, provisions in the Education and Training Reform Act 2006 extend to administrative and support staff in government schools, allowing the head of the Department of Education to seek information about the criminal records of administrative and support staff from the Commissioner of Police.

In every jurisdiction, except Tasmania, administrative and support staff in government and non-government schools who have direct contact with children are required to have a working with children check clearance. Such checks are to be phased in under the Registration to Work with Vulnerable People Act over 2015/16.

Information about administrative and support staff in schools may also be shared under child protection legislation in every jurisdiction, but the sharing arrangements are quite limited in regard to administrative and support staff in some jurisdictions. For example, in the Australian Capital Territory, information relevant to the physical or emotional wellbeing of a child must be provided to Community Services Directorate on request, and this may include information about administrative and support staff members who pose a risk, but the arrangements do not contemplate sharing between schools. By contrast, in New South Wales, government and non-government schools are 'prescribed bodies' for the purposes of Chapter 16A of the Children and Young Persons (Care and Protection) Act and so may share information with other prescribed bodies that promotes the 'safety, welfare or wellbeing of children' in providing services to children or to assist in managing any risk to the children.<sup>680</sup> This offers an opportunity to share information between schools and among other agencies about administrative and support staff who may pose a risk. The child protection legislation in the Northern Territory, Queensland and Tasmania also provides for this lateral sharing of information between schools and other agencies.

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678 Ibid [10.7.2].

679 Association of Independent Schools of NSW and Catholic Education Commission NSW, *A Guide for NSW Non-Government Schools on Reporting, Disclosing or Exchanging Personal Information for the Purposes of Child Wellbeing* (2014).

680 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245A, 245C.



Where the sharing of information about administrative and support staff is not specifically addressed in other legislation, such information may be shared under privacy legislation in appropriate circumstances. The guidance provided in this regard by the Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>681</sup> provides advice on how sensitive personal information about administrative and support staff in schools may be collected, used and disclosed in compliance with privacy principles. Although the Manual specifically sets out the requirements under the federal Privacy Act, the approach suggested also would be generally consistent with the requirements of state and territory privacy legislation because it is based on privacy principles that require individuals to be informed about what information is being collected about them, that sensitive personal information will be collected with consent or as required by law, how that information will be used and to whom it will be disclosed.

## 9.4 Sharing information about students within a jurisdiction

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Schools collect a great deal of information about students, including some sensitive personal information, such as about physical and mental health. Some of this information may relate to child sexual abuse, either because the student has been a victim of abuse or because the student is a risk to other students. The need to share such information between institutions and across jurisdictions will arise in a number of circumstances including when a student transfers, or is transferred, from one school to another.

### Australian Capital Territory

The sharing of information about students in Australian Capital Territory government schools is largely regulated by the *Information Privacy Act 2014* (ACT). Information collected about students in government schools must be registered in the Education and Training Directorate's records management system.<sup>682</sup> These records may include personal details, reports about student progress, correspondence with parents and carers, records of suspension, disciplinary records, transfer notes, health records and documentation of alleged misconduct and formal grievances. One of the purposes of collection listed in the Directorate's *Personal Information Digest 2014* is to expedite the transfer of student's records between government schools within the territory.

The *Suspension, Exclusion or Transfer of Students in ACT Public Schools Policy* provides that in relation to government schools, the head of the Department of Education and Training or the principal must notify the head of the child protection agency when suspending or considering transferring or excluding a child in the department's care, but does not deal with sharing information between schools.<sup>683</sup> The *Education Act 2004* (ACT) provides that the head of the Department of Education and Training must establish a student transfer register, but it is unclear what information is included in the register and who may have access to the information.<sup>684</sup>

The sharing of information about students in non-government schools is regulated by the federal Privacy Act. The Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance*

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681 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

682 ACT Government Education and Training Directorate, *Personal Information Digest 2014* (2014).

683 ACT Government, *Suspension, Exclusion or Transfer of Students in ACT Public Schools Policy* (2010).

684 *Education Act 2004* (ACT) s 146A.

*Manual*<sup>685</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

Under the *Children and Young People Act 2008* (ACT) government and non-government schools must provide assistance, facilities or services relevant to the physical or emotional wellbeing of a child or young person on request by the head of the Community Services Directorate.<sup>686</sup> This might include sharing information about students who are, for example, at risk of abuse or neglect or pose a risk to other students.

## New South Wales

The sharing of information about students in New South Wales government and non-government schools is regulated by Part 5A of the *Education Act 1990* (NSW) and Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), as well as New South Wales privacy and health privacy legislation and the federal Privacy Act.

Chapter 16A of the Children and Young Persons (Care and Protection) Act provides legislative authority for government and non-government schools and other prescribed bodies to share information relating to the safety, welfare or wellbeing of students. This might include, for example, a student's educational, welfare or counselling records.<sup>687</sup>

The NSW Department of Education and Communities' Privacy Code of Practice allows for the use and disclosure of information where that would promote a safe and disciplined learning environment in government schools.

More specifically, under Part 5A of the Education Act the Department of Education and Communities, government and non-government schools can request a relevant agency to provide information about a student to assist a school in assessing whether the student is likely to constitute a risk to the health or safety of any person and to develop strategies to eliminate or minimise the risk. Relevant agencies include schools, the Department, non-government school authorities, TAFE, public health organisations, the Department of Ageing, Disability and Home Care, the Department of Community Services, the Department of Juvenile Justice, the Department of Corrective Services and the Police. Part 5A allows schools to pro-actively share information with other schools, although a report by the Social Policy Research Centre at the University of NSW (SPRC Report) notes that relevant policy documents do not encourage staff to proactively share information.<sup>688</sup> Where a school seeks information under Part 5A, however, a relevant agency **must** provide the information.

Part 5A of the Act makes it clear that a person acting in good faith and with reasonable care will not be liable for any civil or disciplinary action for providing relevant information. The Act also states that any other Act that prohibits the disclosure of information does not operate to prevent the provision of information under Part 5A. This provision provides protection from civil liability rather than criminal liability. This makes the relationship with privacy legislation clear.

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685 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

686 *Children and Young People Act 2008* (ACT) s 25.

687 Catholic Education Commission NSW, Association of Independent Schools NSW and the Department of Education and Communities (NSW), *Information Sharing Between Principals and Schools* (2014) 2.

688 Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015) 55.

In addition, the sharing of information about students in the state's non-government schools is regulated by the federal Privacy Act. The Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>689</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

## Northern Territory

The sharing of information about students in Northern Territory government and non-government schools is regulated by the *Care and Protection of Children Act* (NT), as well as territory privacy legislation and the federal Privacy Act. The Department of Education and Children's Services Data Access Protocol<sup>690</sup> provides some guidance on the operation of the *Information Act* (NT), noting that information may be shared with the Office of Children and Families under the *Care and Protection of Children Act*.<sup>691</sup> The protocol does not specifically address the sharing of information between schools.

The sharing of information about students in the territory non-government schools is regulated by the Privacy Act. The Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>692</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

Principals and teachers of government and non-government schools are defined as 'information sharing authorities' under the *Care and Protection of Children Act*.<sup>693</sup> Information sharing authorities may give information about a child to another such authority where the information would assist with making decisions, conducting investigations or providing services to the child.<sup>694</sup>

## Queensland

The sharing of information about students in Queensland government and non-government schools is regulated by the *Education (General Provisions) Act 2006* (Qld) and the *Child Protection Act 1999* (Qld) as well as Queensland privacy legislation and the federal Privacy Act.

The *Education (General Provisions) Act*, uniquely in Australia, expressly provides for the creation of 'transfer notes', which are a mechanism for sharing information about students between principals in government and non-government schools when students transfer between schools. The aim is to provide information that will help principals ensure continuity of education for the student and meet the principal's duty of care obligations in relation to the student and the school community.<sup>695</sup> A principal may request a transfer note about a new or transferring student and the old school principal **must** provide the note within 10 days and any documents relating to the student mentioned in the note. The new school principal must generally inform the student and/or the student's parents that such a request has been made.<sup>696</sup>

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689 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

690 Department of Education and Children's Services (NT), *Data Access Protocol* (2013).

691 Ibid 7.

692 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

693 *Care and Protection of Children Act* (NT) s 293C.

694 Ibid s 293D.

695 *Education (General Provisions) Act 2006* (Qld) s 385.

696 Ibid s 387.

Transfer notes may include information about the student's results and behavioural issues, although the information is required to be factual, succinct and objective.<sup>697</sup> Transfer notes may also include custody or guardianship orders and medical details.<sup>698</sup>

In addition, under the Education (General Provisions) Act, the head of the Department of Education **may** ask the Police Commissioner for information if he or she reasonably suspects that a student at a government school has been charged with or convicted of an offence.<sup>699</sup> The Police Commissioner **must** supply the information.<sup>700</sup>

There are also provisions in this legislation dealing with the exchange of information about mature-age students' criminal history. A principal at a government school **must** request a report from the Police Commissioner about a mature-age student applicant's criminal history, and **may** ask for information about criminal charges, before deciding to admit the student.<sup>701</sup>

The sharing of information about students in Queensland non-government schools is also regulated by the federal Privacy Act and the *Privacy Compliance Manual*<sup>702</sup>, as discussed below. The requirements discussed in the Manual will be modified by legislative provisions authorising or requiring disclosure, in particular by the provisions in the Education (General Provisions) Act that call for the creation of transfer notes.

The head of the Queensland Department of Education and principals of non-government schools are considered prescribed entities under the Child Protection Act, allowing them to share information with a range of institutions including other relevant departments, health services and the police.<sup>703</sup> These agencies are also part of the Suspected Child Abuse and Neglect (SCAN) system.

In Queensland, the SCAN Team System is designed to enable a coordinated, multi-agency response where a child is in need of protection, including timely information sharing between SCAN core members. SCAN core team members are Child Safety Services; the Queensland Police Service; Queensland Health; the Department of Education, Training and Employment; and certain recognised entities where an Aboriginal or Torres Strait Islander child is being discussed.<sup>704</sup> Other institutions may also be invited to participate in SCAN team discussions for a particular child.

## South Australia

The sharing of information about students in South Australian government schools is regulated by the *Information Privacy Principles Instruction 2013* (SA) (SA Instructions), the *Information Sharing Guidelines for Promoting Safety and Wellbeing* (ISG) and the *Children's Protection Act 1993* (SA). The sharing of information about students in South Australian non-government schools is regulated by the Children's Protection Act and the federal Privacy Act.

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697 Ibid s 384.

698 Education (General Provisions) Regulation 2006 (Qld) s 24.

699 Education (General Provisions) Act 2006 (Qld) s 280C.

700 Ibid s 280D.

701 Ibid ss 175D, 175F.

702 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

703 Child Protection Act 1999 (Qld) s 159M(1)(c)(iv), (e).

704 Ibid s 159K.

The Privacy Committee of South Australia has issued guidance on the *Information Privacy Principles and Child Protection*<sup>705</sup> which makes clear that the Information Privacy Principles set out in the SA Instructions ‘should not represent a barrier to the collection, use and disclosure of information necessary to promote the protection of children and young people’.<sup>706</sup> The ISG provides that information should be shared by government schools if the person sharing the information believes, on reasonable grounds, that the disclosure is necessary to, for example, divert a person from offending; to protect a person or group of people from potential harm, abuse or neglect; and to help service providers more effectively address risks to safety and wellbeing.<sup>707</sup>

In addition, the sharing of information about students in South Australian non-government schools is regulated by the federal Privacy Act. The *Privacy Compliance Manual*<sup>708</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

Under the Children’s Protection Act, government and non-government schools **must**, at the request of the Guardian for Children and Young Persons, provide the Guardian with information relevant to the performance of the Guardian’s functions.<sup>709</sup> Representatives from the Department of Education and non-government schools may also be involved in a family care meeting under the legislation.<sup>710</sup>

## Tasmania

The sharing of information about students in Tasmanian government schools is regulated by the *Personal Information Protection Act 2004* (Tas) and the *Children, Young Persons and Their Families Act 1997* (Tas). The sharing of information about students in Tasmanian non-government schools is regulated by the *Children, Young Persons and Their Families Act* and the federal Privacy Act.

The *Privacy Compliance Manual*<sup>711</sup> sets out the requirements of the *Privacy Act 1988* (Cth) for non-government schools across Australia and is discussed below.

The Department of Education’s *Personal Information Protection (PIP) and Your Right to Information Policy* provides that personal information about students in government schools is collected and will be used and disclosed for a range of reasons including keeping students and staff safe and providing students with the best available educational opportunities.<sup>712</sup> It may also be used and disclosed where required or authorised by law.

Under the *Children, Young Persons and Their Families Act* principals and teachers in government and non-government schools are considered ‘information sharing entities’ who **must** share information relevant to the safety, welfare and wellbeing of a child with the head of the child protection agency on request and **may** share information with other information sharing entities involved with, or likely to be involved with, the student or

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705 Privacy Committee of South Australia, *Information Privacy Principles and Child Protection* (2014).

706 Ibid 1.

707 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 6.

708 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

709 *Children’s Protection Act 1993* (SA) s 52CA.

710 Ibid s 31.

711 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

712 Department of Education (Tas), *Personal Information Protection (PIP) and Your Right to Education Policy* (2012) 3.

a parent or carer.<sup>713</sup> However, this provision only applies where the head of the child protection agency or a community-based intake service has received information about the child under the Act; or where there is an assessment, or care and protection order in force, in relation to the child.<sup>714</sup> Where a person shares information in good faith under these provisions, the person is protected from civil or criminal liability and cannot be held to have breached any code of professional ethics or to have departed from any accepted standards of professional conduct.<sup>715</sup> In addition, family group conferences may involve representatives from the Department of Education or a person nominated by the principal of a non-government school.<sup>716</sup>

Where a person applies to attend a government school, the head of the Department of Education may require the Commissioner of Police to provide a report in respect of any convictions or proceedings taken against the applicant.<sup>717</sup>

## Victoria

The sharing of information about students in Victorian government schools is regulated by Victorian privacy and health privacy legislation, as well as by the *Education and Training Reform Act 2006* (Vic), the *Children, Youth and Families Act 2005* (Vic) and the *Commission for Children and Young People Act 2012* (Vic). The sharing of information about students in Victorian non-government schools is regulated the federal Privacy Act, as well as the Education and Training Reform Act, the Children, Youth and Families Act and the Commission for Children and Young People Act.

The Education and Training Reform Act establishes a register of Victorian students and assigns each student a Victorian Student Number. The register is designed to assist with monitoring and ensuring student enrolment and attendance, the distribution of resources and other statistical and research work, but due to the limited nature of the information on the register, it is likely to be of limited utility in addressing institutional child sexual abuse. The register must, however, include information about the cancellation of the enrolment of a student.<sup>718</sup> Education providers may have access to the register.

The Victorian Department of Education and Training *School Policy and Advisory Guide* provides advice to Victorian Government schools on sharing information about students.<sup>719</sup> The guide notes that schools may provide information to the Department of Human Services in the circumstances discussed below. It also notes that when a student transfers between schools, including government and non-government schools, the transferring school should send the receiving school a transfer note and any relevant information, such as about any foreseeable risk, including the nature of the risk and any actions known to lessen or remove the risk. The guide notes that parents and guardians must be informed but that their consent is not required for documenting foreseeable risk information or including this information in a transfer note for duty of care purposes.<sup>720</sup>

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713 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B.

714 *Ibid* s 53A.

715 *Ibid* s 53B(4).

716 *Ibid* s 32.

717 *Education Act 1994* (Tas) s 47D.

718 *Education and Training Reform Act 2006* (Vic) pt 5.3A.

719 Department of Education and Training (Vic), *School Policy and Advisory Guide* (16 April 2015), Victorian State Government, <<http://www.education.vic.gov.au/school/principals/spag/Pages/spag.aspx>>.

720 Department of Education and Training (Vic), *School Policy and Advisory Guide* (16 April 2015) Victorian State Government, <<http://www.education.vic.gov.au/school/principals/spag/participation/Pages/transfers.aspx>>.

The sharing of information about students in Victorian non-government schools is also regulated by the federal Privacy Act. The *Privacy Compliance Manual*<sup>721</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

The Commission for Children and Young People Act provides that the Commission for Children and Young People **must** be given access to any information held by the Department of Education or a school relevant to a Commission inquiry. This might include information relevant to institutional child sexual abuse.<sup>722</sup>

Employees of the Department of Education, principals and teachers are defined as ‘information holders’ under the Children, Youth and Families Act.<sup>723</sup> This means that the head of the child protection agency may consult with them and share information or direct them to provide information for the purpose of seeking advice on or assessing a risk to a child in respect of whom a protection order is in place.<sup>724</sup> In addition, a community-based child and family service may consult with information holders for the purpose of assessing a risk to a child.<sup>725</sup>

## Western Australia

The sharing of information about students in Western Australian government and non-government schools is regulated by the federal Privacy Act, as well as the *School Education Act 1999* (WA), the *Children and Community Services Act 2004* (WA) and the *Commissioner for Children and Young People Act 2006* (WA). Western Australia has no privacy legislation.

The School Education Act provides that certain information must be provided when applying to enrol in a school, including details of any condition that may call for special steps to be taken for the benefit or protection of the student or other persons in the school.<sup>726</sup> A person must not use or disclose official information except in the course of their duties; under and in accordance with the Act or any other law; for the purpose of proceedings for an offence under the Act; with the authority of the Minister; or the consent of the people to whom the information relates.<sup>727</sup>

The Western Australian Public Sector Commissioner’s Circular, *Policy Framework and Standards for Information Sharing Between Government Agencies*, makes it clear that all government agencies, including the Department of Education, have a duty to all clients, especially children, and that information held by other agencies can be crucial to safeguarding the welfare and safety of clients.<sup>728</sup> The Department of Education *Child Protection Policy* notes that staff may provide information in the best interests of the child regarding possible child sexual abuse to the Department of Education or other agencies directly involved in responding to, investigating or supporting the child, and that this will not breach the confidentiality provisions in the School Education Act discussed above.

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721 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

722 *Commission for Children and Young People Act 2012* (Vic) ss 3, 42.

723 *Children, Youth and Families Act 2005* (Vic) s 3(1).

724 *Ibid* ss 35, 36.

725 *Ibid* s 36.

726 *School Education Act 1999* (WA) s 16.

727 *Ibid* s 242.

728 Public Sector Commission (WA), *Policy Framework and Standards for Information Sharing Between Government Agencies* (2014).



The sharing of information about students in Western Australian non-government schools is regulated by the federal Privacy Act. The *Privacy Compliance Manual*<sup>729</sup> sets out the requirements of the Act for non-government schools across Australia and is discussed below.

The Children and Community Services Act provides that the head of the Department for Child Protection may disclose or request information that is, or is likely to be, relevant to the wellbeing of a child or group of children from a public authority or service provider. This includes the Department of Education and others providing education services including non-government schools.<sup>730</sup>

The Commissioner for Children and Young People Act provides that the Commissioner may require a government agency, including the Department of Education, to disclose information relevant to the performance of the Commissioner's functions.<sup>731</sup>

## Privacy legislation

Where there are no specific legislative provisions dealing with sharing personal information about students in the schools sector, this will be regulated by privacy legislation. As noted above, generally, government schools will be covered by state or territory privacy legislation, and non-government schools with an annual turnover of more than \$3 million will be covered by the federal Privacy Act.

The Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>732</sup> sets out the requirements of the federal Act for non-government schools across Australia, including the need for a privacy policy that sets out the kinds of information schools collect and the purposes for which they collect, use and disclose the information.

The *Privacy Compliance Manual* makes it clear that schools should not collect sensitive personal information except in specific circumstances. These include where the individual consents to the collection (for example, where a student or parent provides the information); where the collection is required or authorised by law, which includes the common law duty of care; or it is necessary to prevent or lessen a serious threat to the life, health or safety of the individual.<sup>733</sup> Schools have a common law duty of care to their staff and to their students. This duty of care may require schools to collect certain personal information, including sensitive personal information relating to child sexual abuse, or to use and disclose the information. The Manual notes that one school may, for example, advise a second school about health issues relating to a student in order for the second school to exercise its duty of care in relation to that student.<sup>734</sup>

The *Privacy Compliance Manual* also suggests that schools inform individuals about the way the information will be used and disclosed in their privacy policies as part of the Standard Collection Notices.<sup>735</sup> In particular, the Manual suggests that the Standard Collection Notice – which should form part of the school's privacy policy and be reproduced on the school's website and in enrolment forms – should state that the school will disclose personal and sensitive information for administrative and educational purposes including to facilitate

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729 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

730 *Children, Young Persons and their Families Act 1997* (Tas) s 53B.

731 *Commissioner for Children and Young People Act 2006* (WA) s 22.

732 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

733 Ibid [9.2].

734 Ibid [9.2.2].

735 Ibid [9.2.6].

the transfer of a student to another school. Information may be disclosed to other schools, government departments, medical practitioners, and people providing services to the school such as visiting teachers, coaches, volunteers and counsellors. The Manual also suggests that schools make it clear that information will be regularly disclosed to parents and guardians.<sup>736</sup>

This approach would also be consistent with state and territory privacy legislation because it is based on privacy principles that require individuals to be informed about what information is being collected about them, how that information will be used and to whom it will be disclosed.

The *Privacy Compliance Manual* also notes that New South Wales legislation, including Chapter 16A of the Children and Young Persons (Care and Protection) Act, authorises disclosure of personal information relating to a student, prospective student, staff member, volunteer or parent for child protection purposes.<sup>737</sup> The *Guide for NSW Non-Government Schools on Reporting, Disclosing or Exchanging Personal Information for the Purposes of Child Wellbeing* sets out the details of this regime.<sup>738</sup>

## Conclusion

The arrangements for sharing information about students between institutions within a state or territory differ from jurisdiction to jurisdiction and by context. For example, arrangements are in place for sharing information between schools when a student transfers, and other arrangements under education and child protection legislation apply either when the student is at risk, or poses a risk, or more broadly as is the case under Chapter 16A of the Children and Young Persons (Care and Protection) Act.

In some jurisdictions, such as the Australian Capital Territory, South Australia, Tasmania and Victoria, the sharing of information about students between government and non-government schools is primarily regulated by privacy legislation at the federal and state and territory level.

Schools have access to advice in most jurisdictions in the form of policies and manuals about how to share information between schools in a way that is consistent with privacy principles. Where the ‘purposes of collection’ expressly include fulfilling the school’s duty of care to students and staff and to expedite transfer of students between schools, personal information may be used and disclosed for those purposes. For example, the Australian Capital Territory Education and Training Directorate’s *Personal Information Digest 2014* notes that one of the purposes of collection is to expedite the transfer of students’ records between government schools within the territory. The Department of Education’s *Personal Information Protection (PIP) and Your Right to Information Policy* provides that personal information about students in government schools is collected, and will be used and disclosed, to keep students and staff safe and provide students with the best available educational opportunities.<sup>739</sup>

The advice provided by the Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*<sup>740</sup> and discussed above is valuable in this regard.

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736 Ibid [9.11.1].

737 Ibid [10.7.2].

738 Association of Independent Schools of NSW and Catholic Education Commission NSW, *A Guide for NSW Non-Government Schools on Reporting, Disclosing or Exchanging Personal Information for the Purposes of Child Wellbeing* (2014).

739 Department of Education (Tas), *Personal Information Protection (PIP) and Your Right to Education Policy* (2012) 3.

740 Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual* (2013).

The Queensland Education (General Provisions) Act, uniquely in Australia, expressly provides for the creation of ‘transfer notes’, which are a mechanism for sharing information about students between principals in government and non-government schools when a student transfers between schools. The aim is to provide information that will help principals ensure continuity of education for the student and meet the principal’s duty of care obligations in relation to the student and the school community.<sup>741</sup> While these aims could be achieved under privacy legislation, as discussed above, this legislative regime provides clarity and certainty and parallels the interstate transfer note system discussed further below.

Information about students may also be shared under child protection legislation in every jurisdiction, but the sharing arrangements are quite limited in some jurisdictions. For example, in the Australian Capital Territory, information relevant to the physical or emotional wellbeing of a child must be provided to Community Services Directorate on request but the arrangements do not contemplate sharing between schools. By contrast, in New South Wales, government and non-government schools are considered prescribed bodies for the purposes of Chapter 16A of the Children and Young Persons (Care and Protection) Act and so may share information with other prescribed bodies that promotes the ‘safety, welfare or wellbeing of children’ in providing services to children or to assist in managing any risk to children.<sup>742</sup> This provides an opportunity to share information between schools and among other agencies about students who may be at risk or who may pose a risk. The child protection legislation in the Northern Territory and Tasmania also provides for this lateral sharing of information between schools and other agencies.

The SPRC Report found that, in New South Wales, the existing legislation supports information sharing between schools when the information concerns the welfare of the child and noted that, generally, information is shared appropriately.<sup>743</sup> The report did not identify any significant legal or policy barriers to information sharing between schools in New South Wales. The report noted, however, that there was a lack of awareness about the relevant legislation and some confusion about how to share information in practice. In addition, the report noted that ‘where there was trust and/or familiarity between schools and with other agencies, sharing information become much more efficient’.<sup>744</sup>

## 9.5 Sharing information about students across jurisdictions

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The Interstate Student Data Transfer Note (ISDTN) and Protocols is a joint initiative between the Australian Government, state and territory education departments, and the independent and Catholic education sectors, developed under the auspices of the Council of Australian Governments (COAG) Standing Council on School Education and Early Childhood, now the Education Council.

All education authorities have agreed to implement this national system for the transfer of information between schools when children move from one state or territory to another. The ISDTN may include information in three broad areas:

- school information
- student progress and support needs

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741 *Education (General Provisions) Act 2006* (Qld) s 385.

742 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 245A, 245C.

743 Matthew Keeley et al, ‘Opportunities for Information Sharing: Case Studies’ (Report, Social Policy Research Centre University of NSW, April 2015) 4.

744 *Ibid* 5.

- student behaviour and management issues.

Some of this information may relate to child sexual abuse, indicating either that the child has been the victim of abuse or may be a risk to other children. The ISDTN protocols note that the safety of students and staff is paramount.

Where a student is moving to or from a government school, the new school is required to gain the consent of parents/guardians and students, where appropriate, before requesting information from the previous school. Where students are under 16 years of age, the consent of parents or guardians is sufficient.<sup>745</sup> Without this consent, the new school cannot request information from the previous school. The ISDTN protocol for use by government schools states that:

*In certain situations the principal of the school that the student is leaving may have reasonable concerns that transfer of some information is needed to prevent a serious risk to the student and/or public health and safety. In these cases the principal should contact the Privacy Officer in their state and territory education authority for advice about the transfer of information without parent/guardian or student consent.*<sup>746</sup>

The situation is different where a student is moving from one non-government school to another. In this situation, schools are not required to gain the consent of the parent/guardian or student before requesting information from the previous school if that school has in place a standard data collection notice that complies with the guidelines in the Independent Schools Council of Australia and National Catholic Education Commission *Privacy Compliance Manual*.<sup>747</sup> This is made more straightforward because non-government schools across Australia are regulated by the federal Privacy Act and are therefore in a position to adopt a nationally consistent approach to information sharing.

Paragraph 9.11 of the *Privacy Compliance Manual* discusses the content of a standard collection notice, which aims to ensure that individuals are reasonably aware that the school has collected certain information about them; the purposes of collection; with whom information is usually shared. This includes disclosure to other schools to facilitate the transfer of a student to that school, government departments, Catholic education institutions and parents/guardians.

## Conclusion

It is of interest to note that the arrangements in relation to sharing information about students across jurisdictions between government schools are more restrictive than those relating to non-government schools. Although it is not clear, this may be a result of the complex web of state and territory privacy and health privacy legislation that applies to government schools across Australia. This situation also contrasts with the arrangements under the *Education and Care Services National Law*, discussed above, which establishes a clear framework for information sharing between relevant Regulatory Authorities and across jurisdictions, and expressly sets aside state and territory privacy legislation.

Another possible approach would be to develop a standard data collection notice that complied with privacy legislation at federal, state and territory level and provided a firmer foundation for transferring information about students between government and non-government schools across jurisdictions. This would address

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745 Education Council, *Interstate Student Data Transfer Note: Form 4 – Interstate Student Data Transfer Note Protocol for Use by Government Schools* (2006).

746 Ibid.

747 Independent Schools Council of Australia and National Catholic Education Commission, *Privacy Compliance Manual* (2013) [9.11].

the issue of a student who posed a risk moving from a government school in one jurisdiction to a government school in another jurisdiction. If personal information was expressly collected for the purpose of facilitating such transfers and for meeting duty of care obligations, then the information could be used for these purposes without further consent being required.

The arrangements for sharing information about students with other agencies, such as child protection agencies or the police, will depend on the child protection legislation in each jurisdiction. This legislation is discussed in detail in section 5.8, *Child protection: Cross-jurisdiction sharing*.

# 10. Juvenile detention

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## 10.1 Introduction

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This section deals with sharing information about children<sup>748</sup> and staff in the juvenile justice detention system where children may be victims/survivors or be at risk of institutional child sexual abuse. This risk may arise in a number of ways. A child may pose a risk to other children in detention. Staff and others at juvenile justice detention facilities may also pose a risk to children in detention. The Commission of Inquiry into the Abuse of Children in Queensland Institutions (Forde Inquiry) found that incidents of abuse had occurred in government and non-government facilities in Queensland, including youth detention facilities.<sup>749</sup> In 2013–14, 951 children were held in detention facilities across Australia and more than 50 per cent of them were Indigenous.<sup>750</sup> This section covers the way information about these children is collected and shared with other institutions, including where a child is transferred to an interstate detention facility. The section also covers the role of official visitors who inspect juvenile justice detention facilities and may receive complaints from children in detention and their parents.

The independent *Northern Territory Review into Youth Detention Centres*, which was instituted following a number of serious incidents in the former Don Dale Youth Detention Centre in the territory, reported in January 2015.<sup>751</sup> The review identified a range of issues in the administration of these centres including some issues related to the sharing of information. In particular, the Review noted that the classification and case management processes did not involve an appropriate range of people such as relevant health professionals, Department of Education staff and other persons from within the Centre or Community Corrections or Family Responsibility Centres who may have information relevant to a particular detainee.<sup>752</sup> Other problems included incomplete record keeping, inadequate staff training and a heavy reliance on casual staff.<sup>753</sup> These issues have the potential to affect the sharing of information about institutional child sexual abuse, and highlight that although the legislative provisions for information sharing may be adequate, they will not be effective unless they are put into practice by trained and competent staff.

As discussed above in section 1.3, *Limits of this research*, this report does not address mandatory and non-mandatory reporting obligations in detail. There is, however, a brief discussion of these arrangements above in section 5.2, *Child Protection: Notification*.

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748 Generally, across Australia, children under the age of 10 cannot be charged with a criminal offence and so are not the subject of this section of the report.

749 Queensland, Commission of Inquiry into Child Abuse in Queensland Institutions, *Final Report* (1999).

750 Australian Institute of Health and Welfare, *Youth Justice System in Australia* (2015), <<http://www.aihw.gov.au/youth-justice/youth-justice-system-in-Australia/>>.

751 Michael Vita, Report to the Attorney-General and Minister for Correctional Services (NT), *Review of the Northern Territory Youth Detention System Report*, January 2015.

752 Ibid 24.

753 Ibid 26.

## 10.2 Relevant legislation

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### Australian Capital Territory

There is only one juvenile justice detention facility in the Australian Capital Territory, the Bimberi Youth Justice Centre, which provides detention facilities for children and young people between the ages of 10 and 21. Chapter 5 of the *Children and Young People Act 2008* (ACT) deals with children and young people in the criminal justice system, including juvenile detention, as well as child protection more generally. The head of Community Services is responsible for both functions including ‘working with other government agencies and community organisations, to coordinate and promote the care and protection of children and young people, including young offenders’.<sup>754</sup>

The head of the child protection agency must keep a register of juvenile detainees, which must include a range of information including ‘details of any known condition of the young detainee that requires, or is likely to require, a health service’ and ‘anything else the [head of department] considers necessary or appropriate for the proper management of the young detainee’.<sup>755</sup> This might include information about whether the child is a survivor of sexual abuse or poses a risk to other detainees or staff. Community Services **may** ask for a report about a juvenile detainee’s health from another agency and that agency **must** provide the information, which is included in the detainee’s case management plan.<sup>756</sup>

Chapter 25 of the *Children and Young People Act*, entitled *Information, Secrecy and Sharing*, states that information obtained under the Act may be shared with consent<sup>757</sup>; in the exercise of a function under the Act<sup>758</sup>, such as the transfer of a juvenile detainee interstate<sup>759</sup>; under another territory law or in the exercise of a function under another territory law<sup>760</sup>; and where, in the view of the Minister or the head of Community Services, sharing the information is in the best interests of a child or young person.<sup>761</sup>

The Act also establishes a regime for sharing information between ‘information sharing entities’ – including a wide range of government agencies and non-government community-based services that provide services to children or their families – and the Community Services Directorate.<sup>762</sup> Information may be shared between the head of Community Services and an information sharing entity where it is relevant to the safety, welfare and wellbeing of a child<sup>763</sup> and **must** be provided to Community Services on request.<sup>764</sup> This information might relate to a juvenile or to staff at a juvenile justice facility.

The Act also provides for the establishment of ‘care teams’ for a particular child, and the team may include a person responsible for the administration of a juvenile detainee’s sentence. Members of a care team **may** share information relevant to the safety and wellbeing of the child with other members of the care team.<sup>765</sup>

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754 *Children and Young People Act 2008* (ACT) s 22.

755 *Ibid* s 185.

756 *Ibid* s 186.

757 *Ibid* s 849.

758 *Ibid* s 847.

759 *Ibid* pt 5.2.

760 *Ibid* s 848.

761 *Ibid* s 851.

762 *Ibid* s 859.

763 *Ibid* s 860.

764 *Ibid* s 862.

765 *Ibid* s 863.



Information **must** also be shared with the courts and investigative entities, such as the police, where required under the Act or another territory law.<sup>766</sup>

Where information is shared honestly and without recklessness under the Act, the person will not incur civil or criminal liability and it will not be considered a breach of confidence, professional etiquette, rules or ethics.<sup>767</sup> The Act is expressed to apply despite other laws restricting or prohibiting the sharing of information, including the *Health Records (Privacy and Access) Act 1997* (ACT); the *Information Privacy Act 2014* (ACT) and the *Privacy Act 1988* (Cth).<sup>768</sup>

The Children and Young People Act and the *Official Visitor Act 2010* (ACT) provide for the appointment of official visitors to juvenile justice facilities who would be available to talk with juvenile detainees, and others, with concerns or complaints about the facility.<sup>769</sup> The head of Community Services must approve the appointment of official visitors as 'suitable entities' and this must include a consideration of whether they have any convictions or findings of guilt for offences relating to children and young people. The official visitor **must** report certain matters that are not in accordance with the relevant legislation – including matters relating to the treatment and living conditions of juvenile detainees – to the Minister and **may** report them to the relevant head of agency, the public advocate and the official visitors board.<sup>770</sup>

Staff at juvenile detention centres and others conducting activities and providing services under the Children and Young People Act in relation to juvenile detainees, including official visitors, are required to have a working with children check clearance under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT).<sup>771</sup>

## New South Wales

In New South Wales, children may be detained in detention centres under the *Children (Detention Centres) Act 1987* (NSW), or in juvenile correctional centres under the *Crimes (Administration of Sentences) Act 1999* (NSW). Juvenile correctional centres are administered by Corrective Services NSW under the same provisions as adult correctional facilities. Children aged 16 and 17 may be transferred to a juvenile correctional centre in a range of circumstances including when the head of the Department of Attorney General and Justice is satisfied that the detainee's behaviour warrants the transfer and the Commissioner of Corrective Services agrees.<sup>772</sup> Such centres can accommodate detainees up to the age of 21. Only one juvenile correctional centre, Kariong Juvenile Correctional Centre at Gosford, is administered in this way. There are seven juvenile justice detention centres in New South Wales. This section deals with both kinds of facilities, which are jointly referred to as juvenile justice centres.

The Children (Detention Centres) Act provides that information obtained in connection with the Act must not be disclosed except in a range of circumstances including with consent, in connection with the administration of the Act and with other lawful excuse.<sup>773</sup> The Crimes (Administration of Sentences) Act provides that information obtained in connection with the Act must not be disclosed except in a range of specific

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766 Ibid s 865.

767 Ibid s 874.

768 Ibid s 875.

769 *Children and Young People Act 2008* (ACT) pt 2.3; *Official Visitors Act 2010* (ACT) s 14.

770 *Official Visitors Act 2010* (ACT) s 16.

771 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) sch 1, pt 1.1 s 1.2.

772 *Children (Detention Centres) Act 1987* (NSW) s 28.

773 Ibid s 37D.

circumstances including with consent, in connection with the administration of the Act, in connection with the administration of an interstate law where an inmate is transferred interstate, and with other lawful excuse.<sup>774</sup> The *Children (Interstate Transfer of Offenders) Act 1988* (NSW) also provides for the exchange of reports from those responsible for the young offender or who have custody, care or control of the young offender, between New South Wales and the transferring state or territory.<sup>775</sup>

The *Children (Detention Centres) Act* and *Crimes (Administration of Sentences) Act* provide for the appointment of official visitors who **may** enter and inspect juvenile justice facilities, confer privately with staff and detainees, and provide reports to the Minister and the Inspector of Custodial Services.<sup>776</sup>

Chapter 16A of the *Children and Young Persons (Care and Protection) Act* provides legislative authority for prescribed bodies including NSW Police, a Division of the Government Service or a public authority to share information relating to the safety, welfare or wellbeing of juvenile detainees.<sup>777</sup> This includes Corrective Services NSW and Juvenile Justice NSW, which administers juvenile justice centres in New South Wales.

Staff at juvenile detention centres and correctional centres who have direct contact with children are required to have a working with children check clearance under the *Child Protection (Working with Children) Act 2012* (NSW).<sup>778</sup>

## Northern Territory

There are three juvenile justice detention facilities in the Northern Territory: the Alice Springs Youth Detention Centre, the Alice Springs Correctional Centre and an interim facility called the Holtze Youth Detention Facility. The independent *Northern Territory Review into Youth Detention Centres*, which was instituted following a number of serious incidents in the former Don Dale Youth Detention Centre, reported in January 2015 and is discussed in section 10.1.<sup>779</sup>

The *Youth Justice Act* (NT) and Youth Justice Regulations (NT) are administered by the Attorney-General and Minister for Justice and provide that the superintendent of a youth detention centre must keep a register containing a range of information about each detainee, including the reason for admission.<sup>780</sup> This might include information about whether the detainee poses a risk to other detainees. Information obtained in exercising a power or performing a function under the Act must not be shared except in a range of specific circumstances that include where it is shared with consent; with a police officer in the performance of his or her duties, in exercising a power or performing a function under the Act, or where the Minister has certified in writing that the disclosure is in the public interest.<sup>781</sup>

The Youth Justice Act provides that the Minister **may** provide reports from the superintendent of a detention centre to an interstate Minister, where a detainee is to be transferred to that state.<sup>782</sup> Where a detainee is transferred, the Minister **must** send the interstate Minister a copy of the transfer order, a copy of the order

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774 *Crimes (Administration of Sentences) Act 1999* (NSW) s 257.

775 *Children (Interstate Transfer of Offenders) Act 1988* (NSW) s 19.

776 *Children (Detention Centres) Act 1987* (NSW) s 8A; *Crimes (Administration of Sentences) Act 1999* (NSW) s 228.

777 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248.

778 *Child Protection (Working with Children) Act 2012* (NSW) s 6.

779 Michael Vita, Report to the Attorney-General and Minister for Correctional Services (NT), *Review of the Northern Territory Youth Detention System Report*, January 2015.

780 *Youth Justice Act* (NT) s 158; Youth Justice Regulations (NT) reg 33.

781 *Youth Justice Act* (NT) s 214.

782 *Ibid* s 186.

under which the detainee was detained in the Northern Territory and a report in relation to the detainee including a copy of any record relating to the conduct of the detainee while in detention in the Northern Territory.<sup>783</sup> The Minister may also consider reports from an interstate detention centre when deciding whether or not to accept the transfer of a detainee.<sup>784</sup>

The Youth Justice Act provides for the appointment of official visitors who are required to inquire into the treatment and behaviour of detainees and the conditions in youth detention centres and **must** report to the Minister.<sup>785</sup> Detainees may complain about matters that affect them to the superintendent, and such complaints may be lodged with any member of staff. If the superintendent believes the complaint is about a matter that could be the subject of a complaint under the Children's Commissioner Act, the superintendent **may** refer the matter to the Children's Commissioner. Alternatively, the superintendent **must** give written notice to the Commissioner that the complaint will be dealt with under the Youth Justice Regulations (NT).<sup>786</sup>

Under the *Care and Protection of Children Act* (NT), the head of a public sector agency and public sector employees, who are acting under a law of the Northern Territory in relation to a child, are defined as 'information sharing authorities'.<sup>787</sup> This includes the head and staff of the Department of Correctional Services who administer and work in youth detention centres. Information sharing authorities **may** share information that relates to the safety or wellbeing of a child with other information sharing authorities and **must** provide information on request in certain circumstances.<sup>788</sup> Information relating to a child may include information about a person other than the child that directly or indirectly relates to the safety or wellbeing of a child.<sup>789</sup> This will include sharing information about juvenile detention centre staff and detainees who may pose a risk to the safety or wellbeing of a child.

Staff at juvenile detention facilities are required to hold a working with children check clearance under the Care and Protection of Children Act where their work involves, or may potentially involve, contact with children.<sup>790</sup>

## Queensland

As noted above, the Forde Inquiry found that incidents of abuse had occurred in youth detention facilities in Queensland.<sup>791</sup> In response to these findings, the Queensland Government amended the *Juvenile Justice Act 1992* (Qld) – now the *Youth Justice Act 1992* (Qld) – to address shortcomings in relation to the treatment of children in detention and to establish a Charter of Youth Justice Principles. There are two juvenile justice detention facilities in Queensland – the Brisbane Youth Detention Centre and the Cleveland Youth Detention Centre – which are managed by the Department of Justice and Attorney-General. This responsibility was transferred from the Department of Community Services in 2012.

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783 Ibid s 188.

784 Ibid s 186.

785 Ibid s 170.

786 *Youth Justice Act* (NT) s 163; *Youth Justice Regulations* (NT) reg 66.

787 *Care and Protection of Children Act* (NT) s 293C.

788 Ibid s 293E.

789 Ibid s 293B.

790 Ibid s 185(2)(d).

791 Queensland, Commission of Inquiry into Child Abuse in Queensland Institutions, *Final Report* (1999).

In Queensland, only those under the age of 17 are dealt with under the Youth Justice Act.<sup>792</sup> There has been criticism of the fact that 17-year-olds are sentenced as adults and held in adult correctional facilities in Queensland, on the basis that this is inconsistent with the provisions of the *United Nations Convention on the Rights of the Child*.<sup>793</sup> Queensland is the only Australian jurisdiction in which this occurs. Juvenile detainees are transferred to adult correctional facilities when they turn 17 if they have more than six months remaining on their sentence.<sup>794</sup>

The Youth Justice Act and the Youth Justice Regulations 2003 (Qld) apply to children aged between 10 and 16, and provide that the head of the Department of Justice and Attorney-General must collect information about children dealt with under the Act.<sup>795</sup> That information must include details of any report about harm caused, or suspected of being caused, to a child in detention or a breach of the youth justice principles set out in the Act.<sup>796</sup>

Part 9 of the Youth Justice Act deals with confidentiality under the Act. It provides that information relating to a child who is being dealt with under the Act must not be used or disclosed except in a specific range of circumstances, including where it is used or disclosed for the purposes of the Act, where expressly permitted or required under another Act, and in relation to certain police and court processes.<sup>797</sup> The Act includes a range of provisions allowing disclosure in specific circumstances, including disclosure by the head the Department of Justice and Attorney-General to the Commissioner of Police, where this is in the public interest<sup>798</sup>; where it is necessary to ensure a person's safety<sup>799</sup>; to an interstate officer in a department responsible for the administration and enforcement of a law about child offenders<sup>800</sup>; and under arrangements with the head of the child protection agency for the purposes of the *Child Protection Act 1999* (Qld).<sup>801</sup>

The Youth Justice Act provides that detention centre and 'boot camp' employees **must** report to the head of the department if they become aware, or reasonably suspect, that a child has suffered harm while in the detention centre. This includes any significant detrimental effect on the child's physical, psychological or emotional wellbeing.<sup>802</sup> The legislation provides, however, that it is a reasonable excuse for the employee not to report the matter if reporting might tend to incriminate the employee.<sup>803</sup> Children or their parents may also

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792 A 'child' is defined for the purposes of the *Youth Justice Act 1992* (Qld) as 'a person who has not turned 17 years', although there is provision for changing this by regulation to 'a person who has not turned 18 years': *Youth Justice Act 1992* (Qld) sch 4 Dictionary. This change has not been made.

793 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37. See: United Nations Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [85]; Anti-Discrimination Commission Queensland, Submission No 17 to the Legal Affairs and Community Safety Committee, *Inquiry into the Youth Justice and Other Legislation Amendment Bill 2014*, February 2014, 12.

794 *Youth Justice Act 1992* (Qld) s 276B.

795 *Ibid* s 303.

796 Youth Justice Regulations 2003 (Qld) reg 36.

797 *Youth Justice Act 1992* (Qld) s 289.

798 *Ibid* s 289AA.

799 *Ibid* s 292.

800 *Ibid* s 294.

801 *Ibid* s 297.

802 *Youth Justice Act 1992* (Qld) ss 268, 282F.

803 *Ibid* ss 268(4), 282F(4).

lodge complaints about matters that affect the child with the head of the department, a community visitor for children or a child advocacy officer.<sup>804</sup>

The Youth Justice Act provides that the head of the department may ask the Commissioner of Police to provide a report about the criminal history of anyone visiting, or applying to visit, a detention centre.<sup>805</sup> This information is to be used only to assess the risk of harm to a child or member of staff in a detention centre or any risk to security.<sup>806</sup>

The Office of the Public Guardian is responsible for the community visitor program in juvenile detention facilities in Queensland under the *Public Guardian Act 2014* (Qld).<sup>807</sup> Community visitors may visit and inspect detention centres and boot camp centres or a corrective services facility where a child is staying.<sup>808</sup> Community visitors inspect such centres and report on the accommodation and services as well as advocating on behalf of children ‘by listening to, giving voice to, and facilitating the resolution of, the child’s concerns and grievances’.<sup>809</sup>

The *Young Offenders (Interstate Transfer) Act 1987* (Qld) also provides for the exchange of reports from those with custody, care or supervision of the young offender, between the Queensland head of department and the Minister in the transferring state or territory.<sup>810</sup>

Detention centre staff are required to have a working with children check clearance under the *Working with Children (Risk Management and Screening) Act 2000* (Qld).<sup>811</sup> Staff employed or people performing functions under the *Corrective Services Act 2006* (Qld), and job applicants under the Act, are not required to have a working with children check clearance under the *Working with Children (Risk Management and Screening) Act*.<sup>812</sup> This is relevant because children aged 17 may be dealt with under the *Corrective Services Act* rather than the *Youth Justice Act*.

The head of a number of departments with responsibilities in relation to youth justice are considered prescribed entities under the state’s *Child Protection Act*, allowing them to share information with a range of institutions including other relevant departments, health services and the police.<sup>813</sup>

## South Australia

There are currently two juvenile justice detention facilities in South Australia, forming part of the Adelaide Youth Training Centre: the Jonal Drive and Goldsborough Road Campuses. The *Young Offenders Act 1993* (SA) includes very limited provisions for the sharing of personal information relating to young offenders, although the Act does provide for the sharing of information and a report on a young offender with interstate authorities where the young offender is transferred to another state or territory.<sup>814</sup> The sharing of information about young offenders in South Australia will therefore be governed by the *Information Privacy Principles*

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804 Ibid s 277.

805 Ibid s 273.

806 Ibid s 274.

807 *Public Guardian Act 2014* (Qld) ch 4, pt 2.

808 Ibid s 51.

809 Ibid s 56.

810 *Young Offenders (Interstate Transfer) Act 1987* (Qld) s 12.

811 *Working with Children (Risk Management and Screening) Act 2000* (Qld) sch 1, s 1.

812 Ibid sch 1, s 27.

813 *Child Protection Act 1999* (Qld) s 159D.

814 *Young Offenders Act 1993* (SA) s 44.

*Instruction 2013* (SA) (SA Instructions), the *Information Sharing Guidelines for Promoting Safety and Wellbeing* (ISG) and the *Children's Protection Act 1993* (SA).

The Privacy Committee of South Australia's *Information Privacy Principles and Child Protection* guidance sheet<sup>815</sup> makes it clear that the Information Privacy Principles set out in the SA Instructions 'should not represent a barrier to the collection, use and disclosure of information necessary to promote the protection of children and young people'.<sup>816</sup> The ISG provides that information should be shared by those working in juvenile justice if the person sharing the information believes, on reasonable grounds, that the disclosure is necessary to, for example, divert a child from offending or harming him or herself; to protect a child or group of children from potential harm, abuse or neglect; and to help service providers more effectively address risks to safety and wellbeing.<sup>817</sup>

The Office of the Guardian for Children and Young People is responsible for the community visitor program in juvenile detention facilities in South Australia under the *Children's Protection Act 1993* (SA).<sup>818</sup> The Guardian is tasked with acting as an advocate for the interests of children in detention and 'in particular, for any such child who has suffered, or is alleged to have suffered, sexual abuse', and monitoring the circumstances of children in detention.<sup>819</sup> The Office sends a team of two advocates every month to review records relating to safety and wellbeing, and speak to detainees in the Adelaide Youth Training Centre.<sup>820</sup>

Under the Children's Protection Act, government departments, agencies and instrumentalities, including the Attorney-General's Department, the Department for Communities and juvenile justice detention facilities **must**, at the request of the Guardian for Children and Young Persons, provide the Guardian with information relevant to the performance of the Guardian's functions.<sup>821</sup> Representatives from these agencies may also be involved in a family care meeting under the legislation.<sup>822</sup>

Staff and others working in juvenile detention facilities are also required to have a 'relevant history check' under the Children's Protection Act where their work involves regular contact with children or working in close proximity to children on a regular basis unless the contact is directly supervised at all times.<sup>823</sup>

## Tasmania

There is currently one juvenile justice detention facility in Tasmania, the Ashley Youth Detention Centre, which is managed by Children and Youth Services, an operational unit of the Department of Human Services and Health. The same department is responsible for administering both juvenile justice and child protection in Tasmania. The *Youth Justice Act 1997* (Tas) makes it clear that a person who shares information on behalf of an 'information sharing entity' under the *Children, Young Persons and their Families Act 1997* (Tas) or a government agency with another information sharing entity or government agency for the purpose of the

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815 Privacy Committee of South Australia, *Information Privacy Principles and Child Protection* (2014).

816 Ibid 1.

817 Ombudsman SA, *Information Sharing Guidelines for Promoting Safety and Wellbeing* (2013) 6.

818 *Children's Protection Act 1993* (SA) ch 4, pt 2.

819 Ibid s 52C.

820 Office of the Guardian for Children and Young People (SA), *How the Office Monitors Wellbeing*, Government of South Australia, <<http://www.gcyp.sa.gov.au/about-2/monitoring-childrens-wellbeing/>>.

821 *Children's Protection Act 1993* (SA) s 52CA.

822 Ibid s 31.

823 Ibid s 8B.



rehabilitation of a young offender or a related purpose does not incur civil, criminal or administrative liability and is not taken to have broken any professional oath, code or standard of ethics or etiquette.<sup>824</sup>

The Youth Justice Act provides that a detainee, or a member of the detainee's family may complain to the head of the department about a matter that affects or is connected with the detainee.<sup>825</sup> In addition, the Office of the Commissioner for Children acts as an advocate for children detained under the Act.<sup>826</sup>

The Act also provides for the sharing of information and reports from any person who has custody or supervision of a young offender with interstate authorities where the young offender is transferred to another state or territory.<sup>827</sup>

Under the Children, Young Persons and Their Families Act, the Department of Health and Human Services **may** provide an 'information sharing entity' with information relevant to the safety, welfare and wellbeing of a child or may require an information sharing entity to provide such information. Information sharing entities may also provide the head of the department with information whether or not the head has requested it. Information sharing entities may also share information among themselves where the entity is likely to be involved with the child or their family.<sup>828</sup> Where a person shares information in good faith under these provisions, the person is protected from civil or criminal liability and cannot be held to have breached any code of professional ethics or to have departed from any accepted standards of professional conduct.<sup>829</sup>

Staff and others working at the Ashley Youth Detention Centre are not yet required to have a working with children check clearance under the *Registration to Work with Vulnerable People Act 2013* (Tas). They will require clearance by 1 October 2015.<sup>830</sup>

## Victoria

The two juvenile justice detention facilities in Victoria – the Malmsbury Youth Justice Precinct and the Parkville Youth Justice Precinct, which includes the Melbourne Youth Justice Centre and the Parkville Youth Justice Centre – are managed by the Department of Human Services. In Victoria, the *Children, Youth and Families Act 2005* (Vic) deals with children and young people in the criminal justice system, including juvenile detention, as well as child protection more generally. The head of Community Services is, thus, responsible for both functions.

There are two levels of detention in Victoria depending on age: detention in a youth residential centre for those aged 10 to 14; and detention in a youth justice centre for those aged 15 to 20.<sup>831</sup>

Schedule 2 of the Children, Youth and Families Act provides for the exchange of reports from those with custody or supervision of a young offender between the Victorian head of department and the Minister in the transferring state or territory.<sup>832</sup>

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824 *Youth Justice Act 1997* (Tas) s 167A.

825 *Ibid* s 137.

826 *Children, Young Persons and their Families Act 1997* (Tas) s 79.

827 *Youth Justice Act 1997* (Tas) s 155.

828 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B.

829 *Ibid* s 53B(4).

830 Department of Justice (Tas), *Working with Children Registration: A Guide to the 3-Year Phased in Approach for Child-related Sectors* (2013).

831 *Children, Youth and Families Act 2005* (Vic) ss 410, 412.

832 *Young Offenders (Interstate Transfer) Act 1987* (Qld) s 12.



A range of people involved in the administration of juvenile justice are defined as ‘information holders’ under the Children, Youth and Families Act, including an employee of the Department of Human Services or another department, a member of the police force and a wide range of health service providers.<sup>833</sup> Where the head of the Department of Community Services has received a report about a child from someone who has a significant concern for the wellbeing of the child, the head **may** consult and share information with information holders to seek advice on or assess a risk to a child.<sup>834</sup> The head of the Department of Human Services may also share information with information holders or direct them to provide information relevant to the protection or development of a child in respect of whom a protection order is in place.<sup>835</sup> It is possible that information about detainees and staff in juvenile detention centres may be shared under these arrangements.

Those working in youth residential centres and youth justice centres are required to have a working with children check clearance under the *Working with Children Act 2005* (Vic) where their work usually involves direct contact with a child that is not supervised by another person.<sup>836</sup> The *Commission for Children and Young People Act 2012* (Vic) provides that the Commission **must** be given access to records kept under the Working with Children Act and any other information held by the Department of Human Services in relation to any person or service that is the subject of a Commission inquiry.<sup>837</sup> This might include information about staff or juveniles in detention. The Commission also runs the Independent Visitor Program for youth justice centres in Victoria.<sup>838</sup>

## Western Australia

There is currently only one juvenile justice detention facility in Western Australia, the Banksia Hill Detention Centre, which is managed by the Department of Corrective Services, and takes detainees aged between 10 and 17. Following a ‘mass disorder’ incident at the detention centre in January 2013, the Commissioner for Children and Young People in Western Australia recommended that responsibility for juvenile justice should be transferred to the Department of Child Protection and coordination and collaboration between agencies working with young people in the justice system should be improved.<sup>839</sup> These issues have the potential to impact on the sharing of information about institutional child sexual abuse and highlight that although the legislative provisions and policies for information sharing may be adequate, they will not be effective unless they are put into practice.

The *Young Offenders Act 1994* (WA) provides that the head of the Department of Corrective Services must keep records of every young person detained, although this information is limited.<sup>840</sup> Other provisions in the Act allow the exchange of information relevant to the administration of the Act. The head of department may request such information from a public authority such as another state department, agency or instrumentality; a body established by law or a court or tribunal; or a contractor, and they may disclose such information when

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833 *Children, Youth and Families Act 2005* (Vic) s 3(1).

834 *Ibid* ss 35.

835 *Ibid* s 195.

836 *Working with Children Act 2005* (Vic) s 9.

837 *Commission for Children and Young People Act 2012* (Vic) s 42.

838 Commission for Children and Young People (Vic), *Independent Visitor Programs*, Victorian Government, 18 August 2015, <<http://www.cyp.vic.gov.au/independentvisitors.htm>>.

839 Commissioner for Children and Young People (WA), Submission to Inspector of Custodial Services, *Inquiry into the Banksia Hill Incident* (2013) 3.

840 *Young Offenders Act 1994* (WA) s 14.

requested.<sup>841</sup> Information may be disclosed despite any law relating to confidentiality or secrecy and where information is disclosed, no civil or criminal liability will be incurred and the disclosure will not be regarded as a breach of confidentiality or secrecy or of professional ethics or standards or as unprofessional conduct.<sup>842</sup>

The Young Offenders Act also provides that it is an offence to disclose personal information obtained under the Act except in a range of circumstances, including with consent, in the course of performing a function under the Act, or under the Act or another law.<sup>843</sup>

Official visitors are appointed under the *Inspector of Custodial Services Act 2003* (WA) and are referred to as 'independent detention centre visitors'.<sup>844</sup> Their functions include inspecting the detention centre at least every three months, and recording complaints made to the visitor by or on behalf of detainees and reporting them to the Inspector of Custodial Services. The visitor may also communicate directly with the head of Department.<sup>845</sup> The Inspector is required to report to the Minister<sup>846</sup> and to inspect the detention centre at least every three years.<sup>847</sup>

The Inspector of Custodial Services Act provides that it is an offence to disclose information obtained under the Act except in a range of circumstances, including in the course of performing a function of the Inspector, and as authorised by the Act.<sup>848</sup>

Those working in the detention centre are required to hold a working with children check clearance under the *Working with Children (Criminal Record Checking) Act 2004* (WA) where the usual duties of their work involve, or are likely to involve, contact with a child.<sup>849</sup>

The *Children and Community Services Act 2004* (WA) provides that the head of the Department for Child Protection and Family Support may disclose or request information that is, or is likely to be, relevant to the wellbeing of a child or group of children from a public authority or a service provider, which includes the Department of Corrective Services and others providing services at the detention centre.<sup>850</sup> The head of the Department for Child Protection and Family Support may also request a 'prescribed report' from the head of the Department of Corrective Services, and the head is required to provide the report.<sup>851</sup> Information may be disclosed despite any law relating to confidentiality or secrecy and, where information is disclosed, no civil or criminal liability will be incurred and the disclosure will not be regarded as a breach of confidentiality or secrecy or of professional ethics or standards or as unprofessional conduct.<sup>852</sup>

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841 Ibid s 16.

842 Ibid s 16A.

843 Ibid s 17.

844 *Inspector of Custodial Services Act 2003* (WA) s 42.

845 Ibid s 42.

846 Ibid s 43.

847 Ibid s 19.

848 Ibid s 47.

849 *Working with Children (Criminal Record Checking) Act 2004* (WA) s 6(1)(a)(viii).

850 *Children and Community Services Act 2004* (WA) s 23.

851 Ibid s 24A.

852 Ibid s 23.

## 10.3 Conclusion

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The Forde Inquiry found that incidents of abuse had occurred in juvenile justice detention facilities.<sup>853</sup> It is important, therefore, to consider the range of legislative and policy mechanisms in place to allow the sharing of information to prevent, identify and respond to child sexual abuse in these facilities. These mechanisms include working with children check clearances, information sharing arrangements under young offenders legislation and child protection legislation, and the provision of access to official visitors.

Staff and others working at juvenile justice detention facilities are subject to working with children check clearances in all jurisdictions except Tasmania. The provisions of the Tasmanian Registration to Work with Vulnerable People Act will, however, extend to staff and others working in juvenile detention facilities from 1 October 2015. In Queensland, children aged 17 may be dealt with under the state's Corrective Services Act rather than its Youth Justice Act. Staff employed under the Corrective Services Act are not required to have a working with children check clearance.

A noticeable difference across the jurisdictions is that in some jurisdictions juvenile justice and child protection are the responsibility of the same agency. This is the case in the Australian Capital Territory (Community Services Directorate), South Australia (Department for Communities and Social Inclusion), Tasmania (Department of Human Services and Health) and Victoria (Department of Human Services). In the other jurisdictions, responsibility for child protection and juvenile justice rest with different agencies, and this may create barriers to information sharing that do not exist where the two matters are handled by the same agency.

In New South Wales, this issue has been addressed by Chapter 16A of the state's Children and Young Persons (Care and Protection) Act, which provides a regime for sharing information between prescribed bodies including the Department of Family and Community Services, NSW Police, Corrective Services NSW and Juvenile Justice NSW, which administer juvenile justice centres in the state.<sup>854</sup> Arrangements are also in place in the Northern Territory under the territory's Care and Protection of Children Act that allow the sharing of information among a wide range of 'information sharing authorities' including public sector employees 'acting under a law of the Territory in relation to a child'.<sup>855</sup>

The arrangements for sharing information in other jurisdictions are set out in detail above, but notable points include the fact that 17-year-olds in Queensland are dealt with as adults in the criminal justice system, and held in adult correctional facilities, and so the information sharing arrangements under Queensland's Youth Justice Act will not apply to these detainees. Under the state's Child Protection Act, however, the head of the department responsible for adult corrective services is included as a prescribed entity and so may exchange information with other prescribed entities and other service providers. It is also of interest to note that responsibility for juvenile justice in Queensland was transferred from the Department of Communities to the Department of Attorney-General and Justice in 2012.

Official or community visitors are appointed to visit juvenile justice detention facilities in every jurisdiction.

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853 Queensland, Commission of Inquiry into Child Abuse in Queensland Institutions, *Final Report* (1999).

854 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248.

855 *Care and Protection of Children Act* (NT) s 293C.

# 11. Extracurricular activities

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## 11.1 Introduction

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As noted in section 8, *Early childhood services*, extracurricular activities are excluded from coverage under the *Education and Care Services National Law* and Regulations. This means that there is no specific regulatory regime for activities such as sport, dance, music, culture, language or religious instruction where these take place outside the early childhood services and school context. These are, however, areas of concern as it is clear from the work of the Royal Commission that allegations of child sexual abuse do arise in these non-government organisational contexts.<sup>856</sup>

In the absence of a specific regulatory regime, information sharing related to child sexual abuse in the context of extra-curricular activities may be regulated by mandatory and non-mandatory reporting requirements, the working with children check (WWCC), and child protection and privacy legislation. The primary mechanisms for sharing information in the context of non-government delivery of extracurricular services are the WWCC and privacy legislation, although there are some reporting and child protection provisions that extend to this area and are discussed below.

## 11.2 Reporting

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As discussed in section 1.3, *Limits of this research*, this report is not intended to consider in detail the points at which information about institutional child sexual abuse is initially collected – for example, through mandatory or non-mandatory reporting, complaints or investigations. It focuses on the sharing of that information between institutions after the information has been collected. However, section 5.2, *Notification*, briefly describes the mandatory and non-mandatory reporting provisions in state and territory legislation, and this section considers how those provisions extend, or could potentially extend, to those involved in extracurricular activities.

In a number of jurisdictions, mandatory reporting obligations are limited to particular professionals in particular contexts such as child protection, health and education, and so will not extend to those involved in, or to the provision, of extracurricular services.<sup>857</sup> Other jurisdictions, however, include provisions that are wide enough to potentially capture some extracurricular service providers – for example, the *Children and Young People Act 2008* (ACT) includes ‘a person who, in the course of the person’s employment, has contact with or provides services to children, young people and their families and is prescribed by regulation’.<sup>858</sup> For the purposes of this section, ‘work’ is defined as activities including paid and unpaid work, but the term

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856 Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 29 Jehovah’s Witnesses* (July 2015); Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 21 Satyananda Yoga Ashram* (December 2014); Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 15 Swimming Australia Ltd* (July 2014); Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 2 YMCA* (October 2013); Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 1 Scouts* (September 2013).

857 See, for example, *Child Protection Act 1999* (Qld) s 13E; *Children, Youth and Families Act 2005* (Vic) s 182.

858 *Children and Young People Act 2008* (ACT) s 356.

‘employment’ is not defined. In order to extend to extracurricular services, such services would have to be prescribed by regulation, and this has not been done.

The *Children’s Protection Act 1993* (SA) is wider again, covering employees and volunteers in government and non-government institutions that provide health, welfare, education, sporting or recreational, childcare or residential services wholly or partly for children, as well as ministers of religion and employees and volunteers in religious or spiritual organisations.<sup>859</sup> These individuals are mandatory reporters for the purposes of the legislation.

The widest provision is found in the Northern Territory where any person who believes on reasonable grounds that a child has suffered, or is likely to suffer, harm or exploitation, or has been, or is likely to be, a victim of a sexual offence, **must** report that belief to the head of the child protection agency or the police.<sup>860</sup> This provision essentially makes every member of the community a mandatory reporter, with failure to report a criminal offence.

A number of jurisdictions also provide for non-mandatory or voluntary reporting.<sup>861</sup> Again, the provisions differ between the jurisdictions. For example, under the *Children and Young People Act 2008* (ACT) any person who believes or suspects that a child or young person is being abused or neglected, or is at risk of abuse or neglect, **may** report the belief or suspicion to the head of the child protection agency. A person who provides such information honestly and not recklessly will be protected from civil liability and for breach of professional ethics, although giving false and misleading information is an offence.<sup>862</sup> In New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* provides that a person who believes on reasonable grounds that a child is at risk of harm, **may** notify the head of the child protection agency.<sup>863</sup> Provisions such as these provide an avenue for those with concerns, including those working or volunteering in the context of extracurricular activities, to report their concerns.

## 11.3 Working with children checks

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One of the mechanisms relied on to help prevent child sexual abuse in the provision of extracurricular services to children are WWCCs. All Australian jurisdictions have WWCC procedures, and these are discussed in general terms in section 6, *Working with children legislation*. The question in relation to extracurricular services is whether or not persons involved in the delivery of these services are subject to a WWCC. In all Australian states and territories, individuals working in some extra-curricular contexts, including paid and non-paid work, are required to have a WWCC, but the coverage differs from jurisdiction to jurisdiction.

In the Australian Capital Territory, a limited range of services are covered – that is, those that are provided specifically for children by a commercial entity, which is an entertainment or party service, a gym or play facility, a photography service, or a talent or beauty competition.<sup>864</sup>

In New South Wales, the coverage is much wider, including clubs, associations, movements, societies or other bodies – including bodies of a cultural, recreational or sporting nature – providing programs or services for

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859 *Children’s Protection Act 1993* (SA) ss 6, 10, 11.

860 *Care and Protection of Children Act* (NT) s 26.

861 See, for example, *Children and Young People Act 2008* (ACT) s 354; *Child Protection Act 1999* (Qld) s 13A; *Children’s Protection Act 1993* (SA) s 56.

862 *Children and Young People Act 2008* (ACT) s 354.

863 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24.

864 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) sch 1, pt 1.7.

children; private coaching or tuition of children; sporting, cultural or other entertainment venues used primarily by children and entertainment services for children; and religious organisations.<sup>865</sup> The legislation in New South Wales applies to ‘workers’ – that is, those engaged as employees, contractors, subcontractors, volunteers, those undertaking practical training and ministers, priests, rabbis and other religious leaders and officers of religion where their work involves direct contact with children.<sup>866</sup>

In the Northern Territory, Queensland, Victoria and Western Australia, the legislation also applies broadly to extracurricular activities and includes employees and volunteers.<sup>867</sup>

In South Australia, the system is slightly different and requires employers and responsible authorities to obtain relevant history checks, but this also extends to non-government organisations that provide services including sporting, recreation, religious or spiritual services.<sup>868</sup> Tasmania is currently phasing in working with children checks and since 1 April 2015 has required those working or volunteering in extra-curricular services to have a WWCC.<sup>869</sup>

While the WWCC arrangements in each jurisdiction provide some preventive protection in the context of extracurricular activities, they have their limitations. In addition, there is no national system in place, and the information used in assessing a person for a WWCC clearance differs across jurisdictions. There is also limited sharing of information across jurisdictions under the *Memorandum of Understanding for a National Exchange of Criminal History for People Working with Children*. These general issues with the WWCC system are discussed in more detail in section 6.

## 11.4 Child protection

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The child protection legislation across the Australian states and territories includes provision for sharing information between prescribed bodies and/or between prescribed bodies and the child protection agency. These provisions are described in detail in section 5.6, *Information sharing with and between prescribed bodies*.

In most jurisdictions, these information sharing arrangements are limited to relevant government agencies and a limited range of non-government organisations working in specific areas such as child protection, health and education. In a number of jurisdictions, however, the provisions are potentially broad enough to include those providing extracurricular services. In particular, the Children and Young Persons (Care and Protection) Regulations 2012 (NSW) include ‘any other organisation the duties of which include direct responsibility for, or direct supervision of, the provision of ... welfare, education, children’s services ... wholly or partly to children’.<sup>870</sup> This provision has the potential to extend to non-government organisations that provide extracurricular activities for children, such as sporting or recreational clubs, although ‘children’s services’ is not defined.

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865 *Child Protection (Working with Children) Act 2012* (NSW).

866 *Ibid* ss 5, 8.

867 *Care and Protection of Children Act* (NT) s 185; *Commission for Children and Young People and Child Guardian Act 2000* (Qld) sch 1; *Working with Children Act 2005* (Vic) s 9; *Working with Children (Criminal Record Checking) Act 2004* (WA) s 6.

868 *Child Protection Act 1993* (SA) ss 8BA, 8C.

869 Registration to Work with Vulnerable People Regulations 2014 (Tas) reg 4.

870 Children and Young Persons (Care and Protection) Regulation 2012 (NSW) reg 8.

The *Child Protection Act 1999* (Qld) includes ‘service providers’ in the information sharing arrangements. A service provider is defined as a ‘person providing a service to children or families’,<sup>871</sup> which again is potentially broad enough to cover non-government organisations providing extracurricular services to children. Under these provisions, service providers may provide information to the head of the child protection agency or to each other for a range of reasons, including to help the agency or another service provider assess or respond to the health, educational or care needs of a child in need of protection.<sup>872</sup>

The *Care and Protection of Children Act* (NT) may also be broad enough to capture some non-government organisations providing extracurricular services to children in the information sharing arrangements. An ‘information sharing authority’ under the Act includes ‘a person in charge of an organisation that receives funding from the Commonwealth or Territory to provide a service, or perform a function, for or in connection with children’.<sup>873</sup> Clearly, this will be limited to those organisations receiving government funding.

## 11.5 Privacy

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In the absence of specific information sharing regulation and in light of the limited coverage under child protection legislation, the sharing of personal information between institutions involved in the provision of extracurricular services and across jurisdictions will be regulated by privacy legislation, in particular, the *Privacy Act 1988* (Cth). This discussion focuses on the federal legislation on the basis that extracurricular activities of interest to the Royal Commission are provided by non-government organisations.

The Privacy Act applies to non-government organisations across Australia including individuals, bodies corporate, partnerships, unincorporated associations and trusts. It does not apply to small businesses with an annual turnover of \$3 million or less. This means that some extracurricular service providers that carry on a small business that falls below this threshold will not be covered. Individuals in such organisations may still be subject to common law or equitable duties of confidence in the circumstances discussed in section 4.1, but they will not be subject to statutory privacy regulation. Where an individual is acting in a non-business capacity, that individual will not be covered by the legislation.<sup>874</sup>

In addition, there is an interesting exemption that relates to non-profit organisations in relation to the collection of sensitive information. A ‘non-profit organisation’ is one that engages in activities for cultural, recreational, political, religious, philosophical, professional, trade or trade union purposes.<sup>875</sup> The Privacy Act Australian Privacy Principle (APP) 3.3 provides that an organisation must not collect sensitive information about an individual unless the individual consents and the information is reasonably necessary for one or more of the organisation’s functions or activities.<sup>876</sup> There are a number of exceptions to this, including where the collection is required or authorised by or under an Australian law or a court or tribunal order. Non-profit organisations are allowed to collect sensitive personal information without meeting the requirements imposed by APP 3.3, where the information relates to the activities of the organisation and the information relates solely to a member of the organisation, or to individuals who have regular contact with the organisation in connection with its activities.<sup>877</sup>

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871 *Child Protection Act 1999* (Qld) s 159D.

872 *Ibid* s 159C.

873 *Care and Protection of Children* (NT) s 293C.

874 *Privacy Act 1988* (Cth) s 7B

875 *Ibid* s 6.

876 *Ibid* APP3.3.

877 *Privacy Act 1988* (Cth) APP3.4(e).



Those organisations covered by the Privacy Act may collect and share information about workers and children in accordance with the APPs. This includes sharing with each other across jurisdictions, as the Privacy Act applies across Australia. Where an organisation seeks to share information with a government agency, the disclosure by the organisation will be regulated by the Privacy Act, and the collection by the agency will be regulated by the relevant state and territory legislation where it exists.

## 11.6 Conclusion

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Non-government organisations providing extracurricular services for children are not a highly regulated sector, although most of those working in the sector are now required to have a WWCC. Persons working for such organisations are not defined as mandatory reporters except in the Northern Territory and South Australia. Organisations are not included in the information sharing arrangements under child protection legislation, except possibly in New South Wales, Queensland and the Northern Territory.

In the absence of other regulation, the sharing of personal information by such organisations is regulated by privacy legislation, in particular by the federal Privacy Act. This is generally a permissive regime, under which information may be shared in accordance with the APPs, which is discussed in detail in section 4.3.

## Appendix A: Glossary

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ACECQA	Australian Children's Education and Care Quality Authority
ACT	Australian Capital Territory
Agency	Government agency
AIHW	Australian Institute of Health and Welfare
AISA	Approved Information Sharing Agreements (New Zealand)
AITSL	The Australian Institute for Teaching and School Leadership
ALRC	Australian Law Reform Commission
ALRC Family Violence Report	Australian Law Reform Commission, <i>Family Violence – A National Legal Response</i> , Report No 114 (2010)
ALRC Privacy Report	Australian Law Reform Commission, <i>For Your Information: Australian Privacy Law and Practice</i> , Report No 108 (2008)
ALRC Secrecy Report	Australian Law Reform Commission, <i>Secrecy Laws and Open Government in Australia</i> , Report No 112 (2009)
ANCOR	Australian National Child Offender Register
APP	Australian Privacy Principle
AustLII	Australasian Legal Information Institute
Australian Standards	<i>Australian Professional Standards for Teachers</i>
CAIT	ChildFirst Assessment and Interview Team (WA)
CAPTA	<i>Child Abuse Prevention and Treatment Act 42 USC 5101</i>
CAT	Child Abuse Taskforce (NT)
COAG	Council of Australian Governments
CRC	<i>United Nations Convention on the Rights of the Child</i>
CSMAC	Community Services Ministers' Advisory Council
Cth	Commonwealth
Forde Inquiry	Queensland, Commission of Inquiry into Child Abuse in Queensland Institutions, <i>Final Report</i> (1999)
Guide to the National Law	Australian Children's Education and Care Quality Authority, <i>Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011</i> (2014)
HRIP Act	<i>Health Records and Information Privacy Act 2002 (NSW)</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
Implementation of Recommendations Report	Parenting Research Centre, 'Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into

	Institutional Responses to Child Sexual Abuse' (Final Report, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015)
Institution	Government agencies and non-government organisations
ISDTN	Interstate Student Data Transfer Note
ISG	Ombudsman SA, <i>Information Sharing Guidelines for Promoting Safety and Wellbeing</i> (2013)
JIRT	Joint Investigation Response Team (NSW)
LSCB	Local Safeguarding Children Board (United Kingdom)
MDC	Multidisciplinary Centre (Vic)
MoU	Memorandum of Understanding
MPS	Managed Person System
Munro Review	Eileen Munro, 'The Munro Review of Child Protection Final Report: A Child-Centred System' (Report for the Department of Education, 2011)
National Law	<i>Education and Care Services National Law</i>
National Regulations	Education and Care Services National Regulations
NCOS	National Child Offender System
NGO	Non-government organisation
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
OECD Guidelines	Organisation for Economic Co-operation and Development, <i>Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data</i> (11 July 2013)
OOHC	Out-of-home care
Organisation	Non-government organisation
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i> (NSW)
QCT	Queensland College of Teachers
Qld	Queensland
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
SA	South Australia
SA Instructions	<i>Information Privacy Principles Instruction 2013</i> (South Australia)
SCAN Team	Suspected Child Abuse and Neglect Team (Qld)
SOCIT	Sexual Offences and Child Abuse Investigation Unit (Vic)
SPRC Report	Matthew Keeley et al, 'Opportunities for Information Sharing: Case Studies' (Report, Social Policy Research Centre University of NSW, April 2015)
Tas	Tasmania
The Board	Board of Studies Teaching and Educational Standards (NSW)

The Exchange	<i>Exchange of Criminal History Information for People Working with Children</i>
TQI	Teacher Quality Institute (ACT)
Transfer Protocol	<i>Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance April 2009</i>
TRB	Teacher Registration Board (NT)
TRBSA	Teachers Registration Board (SA)
TRBTas	Teachers Registration Board of Tasmania
TRBWA	Teachers Registration Board of WA
UNICEF	United Nations Children's Fund
UK	United Kingdom
UK Information Sharing Advice	United Kingdom Government, <i>Information Sharing: Advice for Practitioners Providing Safeguarding Services to Children, Young People, Parents and Carers</i> (2015)
US	United States of America
Vic	Victoria
VIT	Victorian Institute of Teaching
VLRC	Victorian Law Reform Commission
WA	Western Australia
Wood Report	New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, <i>Report</i> (2008)
WWCC	Working with children check

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*Privacy and Personal Information Protection Act 1998*

*Teacher Accreditation Act 2004*

*Teaching Service Act 1980*

### ***Northern Territory***

*Care and Protection of Children Act*

*Child Protection (Offender Reporting and Registration) Act*

*Child Protection (Offender Reporting and Registration) Regulations*

*Information Act*

*Teacher Registration (Northern Territory) Act*

*Youth Justice Act*

*Youth Justice Regulations*

### ***Queensland***

*Child Protection Act 1999*

*Child Protection (Offender Reporting) Act 2004*

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*Education and Early Childhood Services (Registration and Standards) Act 2011*

*Information Privacy Principles Instructions 2013*

*Teachers Registration and Standards Act 2004*

*Young Offenders Act 1993*

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*Child Care Act 2001*

*Children, Young Persons and Their Families Act 1997*

*Community Protection (Offender Reporting) Act 2005*

*Education Act 1994*

*Personal Information Protection Act 2004*

*Registration to Work with Vulnerable People Act 2013*

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## **Victoria**

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# Appendix C: Methods

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## How the team identified the relevant legislation, policies and guidelines

This report is a doctrinal and comparative analysis of the legislative – and related key policy and operational – frameworks in Australian states and territories for sharing information about child sexual abuse in institutional contexts between institutions and across Australian jurisdictions. The research team initially relied on a comprehensive overview of relevant legislation provided by the Royal Commission to identify legislation for consideration in this report. The research team also interrogated the Australasian Legal Information Institute (AustLII) database, primarily by browsing, and also using key word searches, to identify legislation relevant to the particular areas of focus in this report. Key words were drawn from the search strings identified below. The AustLII database was chosen because the information on the site is drawn from authoritative Commonwealth, state and territory government sites and, in addition, has greater functionality than some of the federal, state and territory government databases.

The report examines legislation in the areas of child protection and out-of-home care, child sex offenders, working with children check clearances, early childhood services, schools, juvenile justice, and privacy and health privacy legislation. It examines those areas of government and non-government activity for which there are specific regulatory regimes, such as out-of-home care, early childhood services, schools and juvenile justice. The report also examines the extent to which child protection, child sex offender and working with children check clearance legislation regulate activities that do not have specific regulatory frameworks such as extracurricular activities.

Due to time and resource constraints, the report does not consider in detail legislation of general application, which was included in the overview of legislation referred to above – such as legislation regulating the employment of public sector employees–. Relevant provisions in such legislation might include, for example, the general duty of a public sector employee not to share information obtained in the course of his or her employment without appropriate authorisation. The report does consider privacy and health privacy legislation – despite that fact that such legislation is of general application – as this legislation was expressly identified as requiring specific consideration in discussions with the Royal Commission.

In order to identify relevant policy and operational documents, the team interrogated the websites of relevant agencies in each state and territory by browsing and also using key word searches including the following terms: information sharing, sharing information, information exchange, exchange of information, collaboration, inter-agency, child protection, child abuse and child sexual exploitation. Relevant agencies included those with responsibility for child protection, health, early childhood services, schools and justice, including juvenile justice.

## How the team identified the relevant literature

The team also conducted a limited literature search to identify academic and grey literature relevant to the legislative framework in the Australian states and territories, and in a number of comparative international jurisdictions: the United Kingdom, the United States, Canada and New Zealand.

Searches were undertaken using the Macquarie University Library resources, Google Scholar and Google. The Macquarie University Library uses Multisearch, a tool that provides one-stop searching across the Library's resources, including books and articles, online journal collections and Library databases such as FAMILY:

Australian Family and Society Abstracts Database, APAIS: Australian Public Affairs Information Service, and JSTOR: the scholarly journal archive. The Library has access to more than 14,000 journals. Google and Google Scholar were used to help identify resources that have not found their way into the Library collection – for example, material from government websites. The team also used the ‘articles citing this article’ and the ‘search for related content’ tools to identify other relevant resources. Search terms used to identify relevant material included:

- (“information sharing” OR “sharing information” OR “information exchange”) AND (“child protect\*” OR “child sexual exploit\*” OR “child abuse”) AND (relevant jurisdiction)
- (Collaboration OR interagency OR “inter-agency” OR “interstate” OR “inter-state”) AND (“child protect\*” OR “child sexual exploit\*” OR “child abuse”) AND (relevant jurisdiction)
- privacy AND (“child protect\*” OR “child sexual exploit\*” OR “child abuse”) AND (relevant jurisdiction).

Much of the literature identified related to cultural and organisational issues that support or impede effective information sharing between institutions that was not directly relevant to this report. There was very limited academic literature dealing expressly with Australian legislative and policy frameworks, although a number of recent inquiries and reports proved useful and are referred to in this report. Researchers identified a number of academic articles and government reports addressing the legislative and policy frameworks for sharing information in comparable overseas jurisdictions, which are reflected in the discussion of international resources in section 3.