



2020-2021

# Annual Report

National Education and Care  
Services Freedom of Information  
Commissioner, Privacy  
Commissioner & Ombudsman



National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

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## National Education & Care Services FOI & Privacy Commissioners & Ombudsman

### Letter of Transmittal

Hon Alan Tudge MP  
Minister for Education and Youth  
Chair  
Education Ministers' Meeting

Dear Minister

In accordance with Regulations 198, 207 and 221 of the *Education and Care Services National Law Regulations* (the ECS Regulations) I am pleased to present to the Education Ministers' Meeting (formerly the COAG Education Council) the National Education and Care Services Freedom of Information Commissioner, National Education and Care Services Privacy Commissioner, and Education and Care Services Ombudsman (the ECS Commissioners) Annual Report for the period 1 July 2020 to 30 June 2021.

The Annual Report is the tenth such report from the office of the ECS Commissioners since its establishment in January 2012.

The Annual Report has been prepared in accordance with the requirements of the ECS Regulations. I am satisfied that the ECS Commissioners' Office has financial and governance procedures and processes in place that meet the specific needs of the Office and that comply with the ECS Regulations applying to the Office.

Regulations 198, 207 and 221 of the ECS Regulations require the Education Ministers' Meeting to arrange for the tabling of this Annual Report in the State, Territory and Commonwealth Parliaments.

Yours sincerely

**Lesley Foster**

National Education and Care Services Freedom of Information & Privacy Commissioners & Ombudsman

## Overview

### Appointment of the ECS Commissioners

The National Education and Care Services Freedom of Information Commissioner, the National Education and Care Services Privacy Commissioner, and the Education and Care Services Ombudsman (the ECS Commissioners) are independent statutory officers established under national applied laws legislation – the *Education and Care Services National Law* and the associated *Education and Care Service National Regulations*.

The two Commissioners' and the Ombudsman's positions are established and operate independently of each other for the purposes of the National Law. The Education Ministers Meeting (EMM) - formerly the COAG Education Council - is responsible for appointments to the positions and it has resolved to appoint one person to undertake the three roles.

The Education Ministers' Meeting recently re-appointed Lesley Foster to each of the three positions for the three-year period 2021 to 2024.

### The National Quality Framework (NQF)

The ECS Commissioner positions were established in 2012 as part of reforms by the then Council of Australian Governments (COAG) to create a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia.

The system is referred to as the National Quality Framework for Early Childhood Education and Care (the NQF). The NQF applies to most long day care, family day care, outside school hours care, and preschool/kindergarten services in Australia.

The National Law established the Australian Children's Education and Care Quality Authority (ACECQA) and early childhood education and care Regulatory Authorities in each of the eight Australian states and territories (**the NQF agencies**) to implement and manage the national system.

ACECQA oversees the implementation of the NQF and works with all governments to provide guidance, resources, and services to improve outcomes for children in education and care services. State and territory Regulatory Authorities are responsible for granting education and care provider and service approvals, undertaking quality assessment and rating of services, and ensuring services meet their obligations under the National Law the ECSNL and the ECS Regulations.

### Legislative Framework

The ECS Commissioners operate within a complex legislative framework of national applied laws. Victoria passed the *Education and Care Services National Law Act 2010* (ECSNL) and each state and territory passed legislation applying the national law to their jurisdiction, or enacted corresponding legislation, with some variations to accommodate local requirements. The *Education and Care Services National Regulations 2011* amplify the ECSNL.

Sections 263 and 264 of the ECSNL apply the *Commonwealth Privacy Act 1988* and *Freedom of Information Act 1982* as laws of participating jurisdictions for the purposes of the National Quality Framework. In applying these Commonwealth laws, the states and territories set aside their own privacy and information laws for the purposes of the NQF. Section 282 of the ECSNL in combination with ECS Regulation 222 applies the *Commonwealth Ombudsman Act 1976* to ACECQA.

These three Commonwealth Acts are modified by Part 6.2 Divisions 1, 2, and 4 of the National Regulations and confer specified jurisdiction on the ECS Commissioners.

## The NQF Agencies and the NQF regulated education and care sector

The eight state and territory Regulatory Authorities are identified in their respective jurisdictional legislation. In most cases the Regulatory Authority is defined as the person heading the government department that has responsibility for early childhood education and care. Administrative units within the relevant departments carry out the day to day functions of the Regulatory Authorities. Details can be found in **Attachment 1** to this Report.

Together with ACECQA, state and territory Regulatory Authorities regulate and support a total of 16,452<sup>1</sup> approved education and care services and 7,286 approved providers across Australia under the National Quality Framework. The vast majority of these services are centre based – i.e. long day care, preschool/kindergarten and outside school hours care; 3 percent are family day care services.

## Vision and Purpose of the ECS Commissioners

The ECS Commissioners' vision is to support public confidence in the integrity and fairness of the agencies responsible for the regulation and quality assurance of early childhood education and care services in Australia.

Our purpose is to ensure that the information access and privacy rights of the community are upheld by the NQF agencies and the administrative actions of ACECQA are lawful, fair and proportionate.

The ECS Commissioners provide independent, fair and accessible complaint-handling, review, investigation and advisory services and work with the NQF agencies to support their decision making and practices where necessary.

## Reflections on 2020-2021

### *COVID-19 impacts*

The coronavirus (COVID -19) pandemic has continued to bring challenges for the ECS Commissioners' office and for the NQF agencies we work with. Remote working continues to be the norm and in person meetings have been replaced by telecommunications.

During the reporting period the office again received a steady stream of enquiries - mostly by telephone - about COVID-19 related matters that were outside the jurisdiction of the Commissioners. These were referred to other relevant government bodies.

In response the Commissioners have included information on their website linking to relevant Commonwealth, state and territory governments' COVID-19 related information.

Remote working across all government agencies heightens challenges to ensuring that security is maintained in the handling of personal information and decision-making is appropriately recorded, documented, and stored.

NQF agencies have needed to consider how changed working arrangements might impact on the handling of personal information and pose privacy risks, and put in place mitigation strategies to ensure personal information is not subject to unauthorised access, disclosure or loss.

The COVID-19 pandemic has demanded decisions by governments that affect public health, and the economic security and civil liberties of both individuals and communities. This in turn heightens the importance of transparent well

<sup>1</sup> ACECQA NQF Snapshot Q2 2021. August 2021

documented decision-making and appropriate access to information by the public.

In September 2020 the Information Access Commissioners and Ombudsmen from across Australia and New Zealand issued a joint statement to mark “International Access to Information Day”, reflecting on the increased importance of access to information by the public in the time of COVID-19. A copy of the statement is available [here](#). The ECS Commissioners support the sentiment and intent of this statement and continue to work to support NQF agencies to meet their access to information obligations under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The ECS Commissioners recognise that the COVID-19 pandemic may affect the ability of the NQF agencies to comply with the statutory timeframes set out in the FOI Act. Advice has been provided to the agencies about the options available to them to seek extensions of time to process FOI applications.

The ECS Freedom of Information Commissioner is deciding requests from the agencies for an extension of time to process FOI requests on a case-by-case basis. Factors which may challenge agencies to meet the timeframes at this time, including the availability of relevant staff and impediments to accessing hard copies of documents during lockdowns, are taken into consideration.

### *Review of the Privacy Act 1988*

In November 2019 the Australian Government committed to a review of the *Privacy Act 1988*. The Review is part of the government’s response to the report of the Australian Competition and Consumer Affairs Commission’s *Digital Platform Inquiry*. The Review responds to technological innovations in communications and service delivery that have led to the increased amount of personal information that is collected, stored, used and shared. It seeks to determine whether

the Privacy Act remains “fit for purpose” in the digital age in protecting the handling of personal information about individuals by the entities subject to the Act, which includes the NQF agencies.

The Review is being led by the Commonwealth Attorney General’s office. An [Issues Paper](#) for which submissions were sought was released in October 2020. The issues paper signals potential reforms to the Privacy Act including: an updated, broader definition of ‘personal information’ to include online identifiers and technical data; stricter requirements for when and how consent to use and disclose personal information is obtained; additional protections in relation to de-identified information; stronger enforcement powers for regulators; and enhanced rights for individuals to take actions and seek recompense for breaches of privacy.

A Discussion Paper is expected to be released during 2021. The ECS Privacy Commissioner is monitoring the review and will advise Ministers and NQF agencies in due course about its outcomes and implications, if any, for the agencies.

### *Provision of guidance materials*

The legislated functions of the Commissioners are set out in the next section of this report. They can broadly be categorised as reactive and proactive functions.

The nature of the reactive functions of the roles – broadly defined as responding to and investigating complaints and undertaking reviews – means that there are inevitable peaks and troughs in the demand for the services of the Commissioners.

In last year’s report I reflected on the variable time available to the ECS Commissioners, to undertake the more proactive functions - such as the development of guidance materials and the

conduct of Commissioner own-motion investigations - and the strategies being employed to address this.

The ECS FOI and Privacy Commissioners continue to gradually build a suite of resources for the NQF agencies to support them in carrying out their responsibilities under the respective Acts.

As reported last year, the ECS FOI Commissioner also formally adopted, by written instrument, relevant sections of the Australian Information Commissioner Guidelines on the interpretation, operations, and administration of the FOI Act for use by the NQF agencies when performing their duties or functions under the FOI Act.

The ECS Privacy Commissioner has now similarly adopted by written instrument the Australian Privacy Principles Guidelines<sup>2</sup> for use by the NQF agencies in carrying out their responsibilities under the *Privacy Act 1988*.

These two sets of Guidelines reflect accumulated knowledge derived from practice and relevant case law. The formal adoption of them is intended to ensure consistency in the interpretation and application of the legislation across agencies that are subject to the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) and remove any uncertainty for NQF agencies or the public as to the expectations of the ECS Commissioners in the application of the two Acts.

A copy of the instrument adopting the Australian Privacy Principles Guidelines is at **Attachment 2**.

Guidance materials particular to the NQF agencies will continue to be developed by the ECS Commissioners where required.

### *Office re-location*

Until recently the ECS Commissioners have been co-located with the former COAG Education Council Secretariat. In May 2020 the Prime Minister announced that the Council of Australian Governments (COAG) would cease. New architecture for federal relations was established which included the Education Ministers Meeting (EMM) to replace the COAG Education Council as a forum for collaboration and decision making on education, including early childhood education and care. The EMM is chaired by the Commonwealth Minister for Education.

During 2020 to 2021, the Education Council Secretariat was wound up and secretariat support for the Education Ministers Meeting was established in the Commonwealth Department of Education, Skills and Employment.

As a result, the ECS Commissioners have re-located their office to the Education Ministers' company, Education Services Australia.

The ECS Commissioners would like to acknowledge both the support of the former Education Council Secretariat staff over the past few years, and the welcome and assistance provided by the Chief Executive Officer and staff of Education Services Australia to the Commissioners.

### **Priorities for 2021-2022**

The Strategic Plan for 2021-2024 for the ECS Commissioners is at **Attachment 3**. The Strategic Plan covers the period July 2021–July 2024. It presents a three-year outlook and identifies key challenges, proposed responses and measures of success for the period.

The powers, functions and jurisdiction of the Commissioners and Ombudsman are well defined by legislation; the roles are part-time. The objectives of the office and many of the strategies

<sup>2</sup> Australian Privacy Principle Guidelines. OAIC July 2019



remain constant over the years. The focus is on quality, timely service delivery and support for agencies and the public.

In addition to carrying out their legislated complaint handling, review and investigation responsibilities, the key priorities for the ECS Commissioners for 2021-2022 are to:

(1) Develop support materials and guidance for the NQF agencies on the application of the Disclosure Log and Information Publication Scheme provisions of the *Freedom of Information 1982* (Cth). The promotion of the proactive disclosure and publication of information by the NQF agencies can help build trust in the agencies and may reduce the impact of FOI requests on them.

(2) Increase the awareness and understanding of the roles of the ECS Commissioners and the application of the Commonwealth laws to the NQF agencies with relevant stakeholders and the public.

(3) Foster stronger links with other relevant external bodies including information access, privacy, and ombudsman offices as appropriate.

(4) Continue to identify and resolve any gaps in policy documents and support material provided by the office, including building of the office's knowledge banks and systems.

(5) Further develop the Commissioners' website with a focus on:

- increasing information and resources available to members of the public about their rights with respect to both the protection of their personal information and access to government held information; and
- increasing information and linkages to other relevant dispute resolution bodies in response to the many out of jurisdiction enquiries received by the Commissioners.

## Functions of the ECS Commissioners

### Education and Care Services Ombudsman

The Education and Care Services Ombudsman has the power to investigate, either in response to a complaint received or on the Ombudsman's own motion, administrative actions taken by an employee, agent, staff member or contractor of the Australian Children's Education and Care Quality Authority (ACECQA).

Administrative actions are any action taken, or not taken, in relation to ACECQA's duties, functions or powers.

The Ombudsman may make findings and recommendations for actions to be taken or decisions to be made by ACECQA but may not override the decisions of ACECQA. The Ombudsman cannot compel ACECQA to comply with her recommendations nor change the law. However, having concluded an investigation and reported on findings and recommendations, the Ombudsman may forward the report to the nominated member of the Education Ministers' Meeting responsible for overseeing the National Law. In addition, if appropriate action is not taken by ACECQA in response to an investigation, the Ombudsman may also formally report to the Parliaments of the Commonwealth and the states and territories.

The ECS Ombudsman does not have powers in relation to how state and territory Regulatory Authorities exercise their powers or functions under the National Law. Complaints about Regulatory Authorities are directed to the Ombudsman in the state or territory in which the regulatory authority is located.

This continues to prove a source of confusion both for complainants approaching the Education and Care Services Ombudsman for services and



the respective state/territory Ombudsman offices. Advice included on the Office website and targeted communication to state/territory Ombudsman offices aims to mitigate this confusion.

## National Education and Care Services Freedom of Information Commissioner

The *Freedom of Information Act 1982* (Cth) provides the public with a general right of access to documents in the possession of the NQF agencies subject to limited exceptions and exemptions.

Each of the NQF Agencies is bound by, and must comply with, the requirements of the FOI Act when dealing with formal requests for access to documents under freedom of information.

The NECS FOI Commissioner has powers to investigate the performance of functions, or the exercise of powers, by the NQF agencies under the FOI Act, either in response to a complaint received or by the Commissioner's own motion.

The Commissioner also has the power to review the freedom of information decisions made by these agencies. The Commissioner may affirm, vary, or set aside and substitute a decision of an agency.

## National Education and Care Services Privacy Commissioner

The NECS Privacy Commissioner has the power to investigate complaints alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles by the NQF agencies. The Commissioner may also conduct own motion investigations into whether these agencies are complying with their obligations under the *Privacy Act 1988* (Cth). The Commissioner may make various enforceable determinations resulting from these investigations.

Each of the NQF agencies is bound by, and must comply with, the requirements of the Privacy Act in relation to how they collect, use, store and otherwise handle personal information about individuals.

## Complaints and Enquiries

For the purposes of reporting here, "complaints" are defined as matters that fall within the jurisdiction of one or more of the ECS Commissioners.

There continues to be a pleasingly low level of complaints received by the office in relation to the administrative actions of ACECQA.

During the 2020/21 reporting period three complaints were received by the office of the ECS Ombudsman in relation to ACECQA. Each of the three sought a review of ACECQA's assessment of their early childhood qualifications. In two instances the complainants provided insufficient information to enable the ECS Ombudsman to conduct a review and they did not respond to repeated requests for further information. In the third case, the ECS Ombudsman found that ACECQA's assessment of the complainant's qualifications was consistent with the standards adopted and published by ACECQA and that ACECQA had acted lawfully and consistently in that assessment.

No complaints were received by the NECS Privacy Commissioner in relation to the NQF agencies carrying out their responsibilities under the Privacy Act. No complaints were received by the NECS Freedom of Information Commissioner with respect to the NQF agencies carrying out their responsibilities under the FOI Act.

For the purposes of reporting here, "enquiries" are defined as matters raised with the office that fall outside the jurisdiction of the ECS Commissioners. The office continued to receive a steady stream of such enquiries during the reporting period.

Forty-two percent of these enquiries related to childcare fees including the debt recovery methods used by some childcare providers; fee charging during child absences from a service; fee charging under COVID-19 lockdowns; and issues related to the Commonwealth Child Care Subsidy.

The volume of enquiries related to childcare fees continues the pattern of preceding years for the office. Anecdotally, there appears to be some evidence of poor or untimely communication between some services and providers with parents regarding childcare fees; insufficient awareness of the importance of maintaining the currency of the Complying Written Arrangements between providers and families contracting childcare; and a lack of understanding by some parents of their obligations under the Child Care Subsidy to keep information that may affect the level of subsidy available to them up-to-date.

The ECS Commissioners will add links on their website to information about childcare fees and the Child Care Subsidy in an attempt to direct parents to both relevant material and the avenues open to them for handling any complaint. The matter will also be raised with the Early Childhood Policy Group of the Education Ministers' Meeting for consideration and any action they deem appropriate.

Other enquiries received by the office related to the health and safety of children in childcare services; the operations of childcare services; childcare workers' employment conditions; and family court related matters. Matters raised that were unrelated to early childhood education and care included the quality of courses provided by training providers; local government planning; and the actions of higher education staff. In all cases such complaints were redirected to relevant bodies.

General enquiries were also made to the office about its operations.

## Freedom of Information (FOI)

The NECS Freedom of Information Commissioner is required each financial year to report on the operation of the *Freedom of Information Act 1982* (Cth) as modified by the *Education and Care Services National Law* and *Education and Care Services Regulations* (the FOI Act).

Each of the NQF agencies is required to report to the Commissioner on freedom of information matters relating to its jurisdiction including: the number of FOI requests for access to documents received and their outcomes; the number of requests received for amendment to personal information and their results; the total charges collected during the year; and the number of requests for internal review of FOI decisions and the results.

There was a small overall percentage decrease (6.25 percent) in the total number of *new* FOI requests received by the NQF agencies in 2020/21 compared to the last reporting period. Data by jurisdiction for the 2020/2021 reporting period is provided in Table 1 of **Attachment 5** to this report. In summary the nine NQF agencies collectively received 60 FOI requests and had a further 6 requests in hand from the previous reporting year – a total of 66 requests requiring decision during 2020/21.

Fifty-four requests, or 82 percent, were finalised by 30 June 2021. Of those finalised, 7.4 percent were granted access in full, 57.4 percent were granted partial access, 16.7 percent were refused access in full, 18.5 percent of requests were withdrawn, one request of which was subsequently dealt with administratively.

An NQF agency has discretion as to whether or not to impose a charge for access to a document under the *Freedom of Information (Charges) Regulations 1982*. A charge can be imposed for the staff time (over and above the first five hours

which are free) and resources expended in processing a FOI request and for costs such as postage, photocopying, or reducing information to a written document. No fees can be charged for making a FOI request or requesting an amendment to personal records, or for seeking an internal review or review by the NECS FOI Commissioner. The Regulations set out the maximum charges rates that apply and no agency may exceed those levels - although they may impose a lower charge (consistent with 'lowest reasonable cost' objective of the FOI Act).

Two jurisdictions reported they imposed charges, and collected a total of \$570 for the reporting period.

No applications for amendment to personal information were reported for the period. One agency received one application for an internal review of an FOI decision.

Collectively, the NQF agencies reported that 89 percent of FOI decisions were made within the statutory time of 30 days, 7 percent were up to 30 days overdue, and 4 percent were over 30 days overdue.

### *Exemptions and Conditional Exemptions*

Section 11A of the FOI Act requires access to be given to a document unless the document at the time of the request is an exempt document. An exempt document includes documents that meet the criteria for an exemption provision under Part IV of the FOI Act. Divisions 2 and 3 of the Act set out the Exemptions and Conditional Exemptions provisions which can be applied by a decision maker when considering a freedom of information request. The Act sets out ten Exemptions provisions and eight Conditional Exemptions provisions.

If a requested document meets the criteria of one of the Exemptions provisions an agency can refuse to release it. If a document meets the criteria of a Conditional Exemption provision the decision

maker must apply "a public interest test" to determine if giving access to the document would be contrary to the public interest. Access cannot be refused simply because a document falls within a conditional exemption provision. It must also be contrary to the public interest to release the document, otherwise access must be granted. The FOI Act is weighted towards disclosure of information and redactions may be applied to parts of a document to enable its partial release.

During the reporting period the NQF agencies applied Exemptions or Conditional Exemptions provisions to FOI requested documents a total of 80 times. Table 2 of **Attachment 5** details the Exemptions and Conditional Exemptions provisions that were applied and the frequency of their use. It is important to note that more than one Exemption or Conditional Exemption may be applied to a document.

Overall, four Exemption provisions and four Conditional Exemption provisions were applied by the agencies.

Of these, the most frequently applied Exemption provision related to "documents containing material obtained in confidence" (7.5 percent of the total). Section 45 of the FOI Act exempts a document from disclosure in circumstances where a person who provided confidential information to an agency would be able to bring an action under the general law for breach of confidence to prevent the disclosure of the information, or seek compensation for loss or damage arising from disclosure.

The second most frequently applied Exemption provisions related equally to "documents affecting law enforcement or the protection of public safety" and "documents subject to legal professional privilege" (each 2.5 percent of the total).

Section 37 of the FOI Act applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public

safety in any of a number of circumstances that are listed in the section. These include: prejudice the conduct of an investigation of a breach, or possible breach, of the law; prejudice the enforcement, or the proper administration, of the law in a particular instance; endanger the life or physical safety of any person; and prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

The Section 37 exemption applies where an agency has a function connected with investigating breaches of the law, its enforcement or administration.

Section 42 of the FOI Act exempts documents from disclosure if they are of such a nature that they would be privileged from production in legal proceedings on the grounds of legal professional privilege. The protection provided by legal professional privilege does not apply to all communications between legal advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself, that is determinative. The document must have been made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

The most frequently applied Conditional Exemption provision related to “personal privacy” (37.5 percent of the total). Section 47F of the FOI Act conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This exemption is intended to protect the personal privacy of individuals. Personal information means information or an opinion about an identified individual or an individual who is reasonably identifiable. The definition applies whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not.

The second most frequently applied Conditional Exemption provision related to the business of an individual or organisation (22.5 percent of the total).

Section 47G of the FOI Act conditionally exempts documents from disclosure where such disclosure “*would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking...*” and the disclosure of the information “*would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;*” or “*could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency.*”

### *Volume of FOI applications and outcomes over three years*

Table 3 in **Attachment 5** provides a snapshot of FOI applications over the three reporting years from 2018/19 to 2020/21. There has been an overall 5.7 percent *decrease* in the number of applications *requiring decision* over the three-year period (that is requests in hand from the previous reporting year plus new requests received during the reporting year). There was a 6.25 percent decrease in the total number of *new* FOI requests received by the agencies during the 2020/21 reporting period over the previous year (2019/20). This compares to a 3.2% *increase* in the total number of new FOI requests received between the two previous reporting years (2018/19 and 2019/20). The variation between the years is small and it is not possible to determine the causes, including any possible impacts of COVID-19.

ACECQA, Queensland and Victoria have recorded significant percentage decreases in the number of

FOI requests requiring decision over the three-year period - at 43, 60 and 23 percent respectively. The ACT, South Australia and Western Australia, have recorded significant percentage increases in such requests - at 133, 200 and 250 percent respectively.

## National Education and Care Services Freedom of Information Commissioner Reviews

The National Education and Care Services Freedom of Information Commissioner has the power to review Freedom of Information decisions that have been made by NQF agencies with respect to either access to documents or decisions regarding the amendment of, or annotation to, personal records.

No requests for NECS FOI Commissioner Reviews of decisions made by the NQF agencies under the FOI Act were received during the reporting period.

Parties to a NECS FOI Commissioner review have the right to appeal the Commissioner's decision at the relevant administrative appeals tribunal. Each state and territory relevant Administrative Appeals Tribunal (as listed in Regulation 210 of the *Education and Care Services National Regulations*) is required to provide information to the Commissioner on applications received by the Tribunal for a review of a Commissioner's decision

No applications for a Tribunal review of a NECS FOI Commissioner Review Decision were reported for the period – confirming the fact that there were no applications for Tribunal reviews carried over from the 2019/20 reporting period and consistent with no NECS FOI Commissioner Reviews being conducted during the reporting period.

## Audited Financial Report and Budget

The financial report has been audited by Grant Thornton Audit Pty Ltd and the audit statement is at **Attachment 4**.

The office has continued to operate within a tight annual budget over the past 5 years and has maintained a small but diminishing surplus over that time. The ECS Commissioners were pleased to receive a modest increase of \$55,000 to the annual budget from the Education Ministers Meeting, effective from 1 July 2021

Salary and on costs, legal fees, and website maintenance remain the bulk of the office costs. With the aforementioned re-location of the office to Education Services Australia, office rental costs will reduce by a modest amount.

The increased annual budget will enable the development of further information for, and enhancements to, the Commissioners' website and augment the legal contingency fund held by the office.

The ECS Commissioners have considered the options available for the development of a new case management system, but have determined that the current system is fit for purpose and expenditure on a bespoke system is not warranted.

## ATTACHMENTS

Attachment 1: State and Territory Regulatory Authorities and administrative units

Attachment 2: Instrument adopting the Australian Privacy Principles Guidelines

Attachment 3: NECS Commissioners' Strategic Plan 2021-2024

Attachment 4: Audited Financial Report

Attachment 5: ACECQA and Regulatory Authorities' Freedom of Information Data Summary

## State and Territory *Education and Care Services National Law* - Regulatory authorities and administrative units

*State and territory Regulatory Authorities are defined in their respective jurisdiction's national law. Units within the relevant department or agency are responsible for carrying out the day to day functions of the Regulatory Authority.*

Jurisdiction	State/territory National Law/Application Acts	Section of state/territory legislation defining the Regulatory Authority for the purposes of the National Law	Regulatory Authority administrative units
<b>ACT</b>	Education and Care Services National Law (ACT) Act 2011	<b>Section 10</b> - the Director-General [of the Education Directorate]	Children's Education and Care Assurance, Early Childhood Policy and Regulation, Education Directorate
<b>NSW</b>	Children Education & Care Services National Law (Application) Act 2010	<b>Section 9</b> - the Secretary of the Department of Education	Early Childhood Education Directorate, Department of Education
<b>NT</b>	Education and Care Services (National Uniform Legislation) Act 2011	<b>Section 9</b> - the Chief Executive Officer [of the Department of Education]	Quality Education and Care Northern Territory
<b>QLD</b>	Education and Care Services National Law (Queensland) Act 2011	<b>Section 14</b> - the chief executive [Department of Education]	Regulation, Assessment and Service Quality, Early Childhood and Education Improvement, Department of Education
<b>SA</b>	Education and Early Childhood Services (Registration and Standards) Act 2011	<b>Section 13 (9)</b> - the Education and Early Childhood Services Registration and Standards Board	Education Standards Board of South Australia
<b>TAS</b>	Education and Care Services National Law (Application) Act 2011	<b>Section 9</b> the Secretary of the department responsible for the administration of the <i>Education Act 1994</i>	Education and Care Unit, Department of Education
<b>VIC</b>	Education and Care Services National Law Act 2010	<b>Section 8</b> the Secretary of the Department of Education	Quality Assessment & Regulation Division, Department of Education and Training
<b>WA</b>	Education and Care Services National (WA) Act 2012	<b>Section 8</b> - the chief executive officer of the department principally assisting in the administration of the <i>Child Care Services Act 2007</i>	Education and Care Regulatory Unit, Department of Communities





## NECS Privacy Commissioner Guideline 1/2021

### Guideline adopting parts of the AIC Australian Privacy Principles Guidelines

#### Terms

The following terms and acronyms are used in this Guideline:

**ACECQA** means the Australian Children's Education and Care Quality Authority.

**APP Guidelines** or the **Australian Privacy Principles Guidelines** mean the Australian Privacy Principles Guidelines issued by the Australian Information Commissioner under s28 of the *Privacy Act 1988* (Cth).

**Australian Information Commissioner or the Information Commissioner, or AIC** means the Australian Information Commissioner as defined in the Privacy Act and the *Australian Information Commissioner Act 2010* (Cth).

**ECS Agency/ies** means ACECQA and/or the Regulatory Authorities of the participating jurisdictions.

**ECSNL** means the *Education and Care Services National Law* as set out in the following provisions:

In respect of Australian Capital Territory - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education & Care Services National Law (ACT) Act 2011*.

In respect of New South Wales - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Children (Education and Care Services National Law Application) Act 2010* (NSW).

In respect of Northern Territory - Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services (National Uniform Legislation) Act 2011*.

In respect of the Queensland - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Queensland) Act 2011*.

In respect of South Australia – the Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011*.

In respect of Tasmania - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Application) Act 2011*.

In respect of Victoria – the Schedule to the *Education and Care Services National Law Act 2010* (Vic).

In respect of Western Australia - the Schedule to the *Education and Care Services National Law (WA) Act 2012*.

**ECSNL Regulations** means the *Education and Care Services National Law Regulations*.

**Privacy Act** means the *Commonwealth Privacy Act 1988*.

**NECS Privacy Commissioner** means the National Education and Care Services Privacy Commissioner.

**NECS Privacy Guideline** mean this Guideline.

**OAIC** means the Office of the Australian Information Commissioner

**Regulatory Authority** means the State or Territory early childhood education and care Regulatory Authority of each participating jurisdiction under the *Education and Care Services National Law*.

## Preamble

Section 263 of the ECSNL applies the Commonwealth *Privacy Act 1988* (with modifications) as a law of a participating jurisdiction for the purposes of the National Quality Framework.

Section 263(2)(b) of the ECSNL modifies the Privacy Act so that a reference to the *Information Commissioner* is to be construed as a reference to the *National Education and Care Services Privacy Commissioner*.

Section 263(2)(c) of the ECSNL provides that the Privacy Act applies with any other modifications made by the ECSNL Regulations. Regulation 199(a) and (b) of the ECSNL Regulations provide that the Privacy Act only applies to the National Authority (which is ACECQA) and to the Regulatory Authority of each participating jurisdiction. In this Guideline, ACECQA and the Regulatory Authorities are referred to collectively as the ECS Agencies.

Section 28(1)(a) of the Privacy Act (as modified by the ECSNL) enables the NECS Privacy Commissioner to issue guidelines to ECS Agencies on the Privacy Act for the purpose of the ECSNL.

The Australian Information Commissioner administers the Privacy Act in respect to APP entities, which cover most Australian Government agencies and some private sector organisations. Under s28(1) of the Privacy Act, the AIC has issued guidelines to the Australian Privacy Principles set out in Schedule 1 of the Privacy Act. The APP Guidelines outline:

- the mandatory requirements in the APPs;
- the AIC's interpretation of the APPs, including the matters that the AIC may take into account when exercising functions and powers relating to the APPs;
- examples that explain how the APPs may apply to particular circumstances; and
- good privacy practice to supplement compliance with the mandatory requirements.

The APP Guidelines have traditionally been referenced by the ECS Agencies in applying the Privacy Act for the purposes of the ECSNL, and by the NECS Privacy Commissioner when exercising functions under that Act.

## Purpose of this NECS Privacy Commissioner Guideline

The purpose of this NECS Privacy Commissioner Guideline is to:

- i. provide clarification as to the guidelines on the implementation of the Australian Privacy Principles that apply for the purposes of the ECSNL;

- ii. ensure consistency in the interpretation and application of the Privacy Act; and
- iii. remove any uncertainty for agencies or the public as to the expectations of the Office of the NECS Privacy Commissioner in the application of the Privacy Act for the purposes of the ECSNL.

## Adoption of Parts of the APP Guidelines

1. Pursuant to section 28(1)(a) of the Privacy Act (as modified by the ECSNL), and **subject to the matters stated in paragraphs 2 to 18 below**, I hereby adopt the following Parts of the APP Guidelines as NECS Privacy Guidelines for the purposes of the ECSNL.

### General matters

Part 1	Consideration of personal privacy information
Part 2	Collection of personal information
Part 3	Dealing with personal information
Part 4	Integrity of personal information
Part 5	Access to, and correction of, personal information

2. The APP Guidelines being adopted are those published in the combined July 2019 edition of the APP Guidelines, available at <https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/>
3. Revisions by the Australian Information Commissioner to the July 2019 edition of the APP Guidelines will be considered and, if relevant, included in updates to this NECS Privacy Commissioner Guideline. Pending any such updates, ECS Agencies should consider whether any revisions to the APP Guidelines are relevant, and if so, should be applied for the purposes of the ECSNL.
4. References in the APP Guidelines to the Australian Information Commissioner exercising a power or performing a duty or function should generally be read to mean the NECS Privacy Commissioner exercising the power or performing the duty or function in relation to the ECS Agencies.
5. ECS Agencies must note that the APP Guidelines are not legally binding and do not constitute legal advice about how an ECS Agency should comply with the Australian Privacy Principles in particular circumstances. ECS Agencies may wish to seek independent legal advice where appropriate.

## Exclusions - tax file numbers, credit reporting, and emergencies and disasters

6. ECSNL Regulations 196(d) and 201(o) exclude the following matters from the functions of the NECS Privacy Commissioner. Accordingly, the APP Guidelines on those matters are excluded from this NECS Privacy Guideline. The excluded matters comprise the following:
  - (a) ECSNL regulation 196(d) excludes matters relating to tax file numbers (set out in s17 and s18 of the Privacy Act);

- (b) ECSNL regulation 196(d) excludes matters relating to credit reporting (set out in s19 to s21W of the Privacy Act);
- (c) ECSNL Regulation 201(o) excludes matters relating to emergencies and disasters (set out in s80F to s80T of the Privacy Act).

### Exclusions - medical research, health information and genetic information

- 7. The making of guidelines about medical research, health information and genetic information are also excluded from the functions of the NECS Privacy Commissioner by ECSNL Regulation 201(q). Accordingly, this NECS Privacy Guideline does not adopt the APP Guidelines on those matters.
- 8. ECS Agencies will nevertheless have to comply with the Privacy Act provisions on medical research, health information and genetic information, where those provisions apply to *Agencies, APP entities, or Entities*. For example, APP 3.3(a)(i) deals with the collection of *sensitive information* by an *agency*, and sensitive information is defined in s6 of the Privacy Act to include *health information*. ECS Agencies should therefore have regard to the APP Guidelines on medical research, health information and genetic information where the Privacy Act provisions (as modified by the ECSNL) apply to them. (See paragraphs 11 to 15 of this Guideline for more details).

### Exclusion – Privacy Regulations made under the Privacy Act

- 9. ECSNL Regulation 203 states that the regulations made under the Privacy Act do not apply. Accordingly, any APP Guidelines which implement or rely on those regulations do not apply to this NECS Privacy Guideline.

### Exclusion - paragraphs A29 to A32 of the APP Guidelines

- 10. Paragraphs A29 to A32 of the APP Guidelines are to be disregarded. Those paragraphs note that the ACT *Information Privacy Act 2014* regulates how personal information is handled by ACT public sector agencies, and that under an arrangement between the ACT Government and the Australian Government, the Australian Information Commissioner is exercising some of the functions of the ACT Information Privacy Commissioner.

### Provisions of the Privacy Act applying to an Agency, APP Entity or Entity will also apply to ECS Agencies.

- 11. ECSNL Regulation 199 states that the Privacy Act only applies to *agencies*, and the *agencies* are the *National Authority* and *each Regulatory Authority of a participating jurisdiction*. The Privacy Act uses the following definitional terms:
  - (a) **Agency** - which is defined in s6 of the Privacy Act to mean a Minister, or a Department (and includes a long list of other Government bodies).
  - (b) **APP entity**, which is defined in s6 of the Privacy Act to mean 'an **agency** or organisation'.

- (c) **Entity** - which is defined in s6 of the Privacy Act to mean 'an **agency**, organisation or small business operator.
  - (d) **Organisation** - which is defined in s6C of the Privacy Act to include a number of bodies, but most relevantly a person or body that is not a **small business**, namely a business that has an annual turnover of \$3million or less.
12. In applying ECSNL Regulation 199, ECS Agencies should note the following:
- (a) The Privacy Act applies different parts of the Act to different bodies.
  - (b) Not all of the Privacy Act applies to **Agencies**.
  - (c) The definitions in the Privacy Act of *APP entity* and *entity* **include** an *Agency*.
13. The sections of the Privacy Act that apply to an Agency, APP Entity or Entity, will also apply to ECS Agencies. For example:
- (a) Section 13(a) of the Privacy Act states that an act of an **APP entity** is an interference with the privacy of an individual if it breaches an Australian Privacy Principle, or breaches a registered APP code that binds that entity. As the definition of an APP entity includes an Agency, that section will apply to ECS Agencies.
  - (b) Section 15 of the Privacy Act states an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle. As the definition of an APP entity includes an Agency, that section will apply to ECS Agencies.
  - (c) Section 16A of the Privacy Act lists some permitted general situations in relation to the collection, use or disclosure of personal information. The situations are listed in a table to that section, and column 1 of that table lists the entities that are given the relevant permissions. Items 1 to 6 list an *APP entity*. As the definition of an APP entity includes an Agency, those items will apply to ECS Agencies. Item 7 lists the Defence Force, which will not include an ECS Agency.
  - (d) The above points are illustrative examples only and are not intended as an exhaustive list of the sections of the Privacy Act that apply to the ECS Agencies.
14. The sections of the Privacy Act which **do not** apply to an Agency, APP Entity or Entity, will **not** apply to ECS Agencies. Whilst the following examples refer to the credit reporting matters excluded by ECSNL regulation 196(d) - and discussed in paragraph 6 above – they provide appropriate examples to illustrate this definition:
- (a) Part 111A of the Privacy Act (comprising s19 to 20ZA) applies to *credit reporting bodies*. Those bodies are defined in s6 to mean an organisation, or an agency prescribed by regulations (ie by the Privacy Regulations (Cth)) that carries on a credit reporting business. The first body is not an Agency. The second body (an agency prescribed by the regulations) will not include an ECS Agency, because (as stated earlier in paragraph 6) ECS regulation 203 states the Privacy Regulations do not apply.
  - (b) Division 3 of Part 111A of the Privacy Act (comprising sections 21 to 21W) applies to *credit providers*. Those bodies are defined in s6G to 6K to mean an organisation, a

small business operator, or an agency prescribed by regulations. The first two bodies are not an Agency. For the same reason expressed in the previous example, the third body will not include an ECS Agency, because ECS regulation 203 states the Privacy Regulations do not apply.

- (c) The above points are illustrative examples only and are not intended as an exhaustive list of the sections of the Privacy Act that do not apply to the ECS Agencies.
15. The approach in paragraphs 11 to 14 to determining the provisions of the Privacy Act which do, and do not, apply to the ECS Agencies also applies to the application of the Australian Privacy Principles listed in Schedule 1 to the Privacy Act. For example:
- (a) **Most** of the Australian Privacy Principles are expressed to impose obligations on *APP entities*. As the definition of an APP entity includes an Agency, those Principles which impose obligations on APP entities also apply to ECS Agencies.
  - (b) **Some** of the Australian Privacy Principles are expressed to **only apply to an organisation**. Some examples are APPs 3.2, 6.4 and 12.8, which only apply if the APP entity is an *organisation*. Similarly, APP 7 deals with direct marketing and only applies to *organisations*, as does APP 9 which deals with *government related identifiers*. The definition of organisation falls outside the meaning of agency, and therefore those APPs **do not** apply to ECS Agencies.

### Further modifications made by the ECSNL Regulations

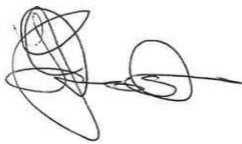
16. In applying the APP Guidelines, ECS Agencies will need to be mindful of all the modifications made to the Privacy Act by the ECSNL Regulations, and in particular the following.
- (a) As required by ECSNL Regulation 201(i), a reference to a contracted service provider is to be applied as if it were a reference to a person who provides goods or services under a contract with the National Authority or a Regulatory Authority (of a participating jurisdiction), or a subcontract for that contract.
  - (b) As required by ECSNL Regulation 201(j), a reference to a Commonwealth contract, a government contract or a State contract, is to be applied as if it were a reference to a contract under which goods or services are to be, or were to be, provided to the National Authority or a Regulatory Authority (of a participating jurisdiction).
  - (c) As required by ECSNL Regulation 201(h), a reference to the Ombudsman is to be applied as if it were a reference to the ECS Ombudsman.
  - (d) As required by ECSNL Regulation 201(p), the provisions relating to transferring complaints to the Ombudsman do not apply to complaints made about a Regulatory Authority of a participating jurisdiction.
  - (e) As required by ECSNL Regulation 201(e), a reference to the Administrative Appeals Tribunal is to be applied as if it were a reference to a *relevant administrative*

*tribunal*. (Note: ECS Regulation 202 lists the relevant administrative tribunal of the participating jurisdictions).

- (f) As required by ECSNL Regulation 201(f), a reference to the Federal Court is to be applied as if it were a reference to the Supreme Court of a participating jurisdiction.
- (g) As required by ECSNL Regulation 201(g), a reference to the Federal Magistrates Court is to be applied as if it were a reference to the Magistrates Court or Local Court of a participating jurisdiction. (Note: Federal Magistrates Courts have been renamed Federal Circuit Courts.)

#### References in APP Guidelines to other OAIC guides and material.

17. The guides and material referred to in the APP Guidelines form part of this NECS Guideline. For example, footnote 1 to the APP Guidelines on APP1 refers to the *OAIC Guide to Undertaking Privacy Impact Assessments*, and footnote 2 refers to the *OAIC Data Breach preparation and Response*. The relevant guides and material can be found on the OAIC website at <https://www.oaic.gov.au> under the *Privacy Tab*.
18. The adoption of the APP Guidelines is not intended to preclude the NECS Privacy Commissioner from issuing further guidance material to ECS Agencies on the operations of the Privacy Act (as modified) as necessary.



**Lesley Foster**  
National Education and Care Services Privacy Commissioner





National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## Strategic Plan 2021-2024

The Strategic Plan covers the period July 2021–July 2024. It presents a three-year outlook and identifies key challenges, proposed responses and measures of success for the period.

The powers, functions and jurisdiction of the Commissioners and Ombudsman are well defined by legislation; the roles are part-time. The objectives of the office and many of the strategies remain constant over the years. The focus is on quality, timely service delivery and support for agencies and the public.

### Setting

The Education and Care Services Ombudsman and the National Education and Care Services Freedom of Information and Privacy Commissioners (**the ECS Commissioners**) are independent, statutory officers appointed by the Education Ministers' Meeting (formerly the COAG Education Council) under national applied laws legislation - the *Education and Care Services National Law Act 2010* and the *Education and Care Services National Regulations*. The ECS Commissioners' positions are established and operate independently of each other for the purposes of the National Law. One person has been appointed to the three positions.

The positions were established in 2012 as part of reforms by COAG to create a national uniform regulatory and quality assurance system for education and care services across Australia under the National Quality Framework for Early Childhood Education and Care (the NQF). In order to implement the system, the National Law established the Australian Children's Education and Care Quality Authority (ACECQA) and early childhood education and care Regulatory Authorities in each of the 8 Australian states and territories - **the NQF agencies**.

ACECQA works with all governments to provide guidance, resources and services under the NQF to support the education and care sector to improve outcomes for children. State and territory Regulatory Authorities are responsible for granting education and care service and provider approvals, carrying out the quality assessment and rating of services, and ensuring providers and services meet their obligations under the national law.

The role of the ECS Commissioners is to provide ombudsman, privacy and freedom of information oversight of the NQF agencies. Ombudsman services are provided with respect to the administrative actions of ACECQA, and freedom of information and privacy complaint, review and investigation services are provided in relation to actions taken in these areas by each of the state and territory Regulatory Authorities and ACECQA. The ECS Commissioners also play an important role in promoting public and service provider confidence in integrity and fairness of the NQF agencies responsible for the regulation and quality assurance of early childhood education and care services in Australia.

### Legislative Framework

The ECS Commissioners operates within a complex legislative framework. Victoria passed the *Education and Care Services National Law Act 2010*, and each state and territory passed legislation applying the National Law, or enacted corresponding legislation, with some variations to accommodate local requirements. The *Education and Care Services National Regulations 2011* amplify the National Law.

The National Law confers specified jurisdiction on the ECS Commissioners that is derived from the following Commonwealth Acts as in force from time to time: *Ombudsman Act 1976*, *Freedom of Information Act 1982*, and *Privacy Act 1988*. These Commonwealth Acts are modified by the *Education and Care Services National Regulations 2011* to apply in participating states and territories and to ACECQA for the purposes of the National Quality Framework.

## Vision

To support public confidence in the integrity and fairness of the agencies responsible for the regulation and quality assurance of early childhood education and care services in Australia.

## Purpose

To provide independent, fair and accessible review, investigation and advisory services in relation to: the NQF agencies' handling of personal information and information access requests; and the administrative actions of ACECQA.

## Guiding Principles

### Fairness and Impartiality

We are independent and impartial. We respond to complaints without bias and we give everyone the chance to have their say. We do not act as an advocate for any party.

### Integrity and Respect

We are open, honest and transparent in our actions and decisions. We take actions and make decisions based on our independent assessment of the facts, the law and the public interest. We maintain high professional standards when delivering our services and we treat complainants and agencies with dignity and respect.

### Accessibility and Responsiveness

We are responsive and adapt our approaches to meet people's individual needs. Our services are free, and we strive to ensure everyone can access and use our information and services. We respond to complaints quickly. If we are unable to assist, we explain why and try to suggest alternative actions. We are committed to making our written material easy to read and understand, and to developing simple processes that are easy to navigate. We help people to clarify the details of their complaints to enable a speedy resolution.

### Proportionality and Value-adding

We establish processes and seek resolutions that are appropriate to the complaint and ensure complainants are given realistic expectations about what can be achieved. We aim to identify practical solutions to problems, resolve issues by mediation and conciliation wherever possible, and bring about improvements in the processes of the NQF agencies where necessary.

## Key challenges for the period

Key challenges facing the office during the period are:

- Establishing stronger relationships with other complaint handling bodies to ensure sharing of information and consistency of practice where appropriate.
- Ensuring the role of the office is known, understood and valued by stakeholders and the public.
- Developing resources to support the NQF agencies in their responsibilities under the FOI and Privacy Acts.
- Ensuring effective policies, procedures and systems are in place to support the work of the office.

## Objectives\*

\* The objectives, strategies and performance indicators refer to each of the Commissioners' and Ombudsman's roles unless otherwise identified. The term "legislation" refers collectively to the legislation identified under *Legislative Framework* above.

<p><b>1. Provide independent, fair and timely complaint handling and review services</b></p> <p><b>Outcome</b></p> <p>Independent and accessible complaint, review and investigation that is recognised as fair and reasonable by those involved.</p> <p><b>Strategies</b></p> <p>Provide timely and effective assessment and investigation of complaints and requests for FOI Decision Review.</p> <p>Establish comprehensive case and knowledge management systems to support timely, accurate decision-making.</p> <p>Resolve complaints using flexible approaches.</p> <p>Engage with NQF agencies to support their understanding of their responsibilities under the legislation and the role and investigation and review processes of the office.</p> <p><b>Key performance indicators</b></p> <p>Percent of receipt of complaints/review requests acknowledged within 3 working days (100%).</p> <p>Percent of preliminary assessments of complaints review requests completed within 10 days (100%).</p>	<p><b>2. Empower individuals to resolve complaints with the NQF agencies and through the ECS Commissioners' office.</b></p> <p><b>Outcome</b></p> <p>Individuals have the support, advice and information necessary to manage their complaints with the NQF agencies and the ECS Commissioners.</p> <p><b>Strategies</b></p> <p>Identify, and provide information to, key early childhood education and care stakeholders about the role and jurisdiction of the office and the obligations of NQF agencies under the legislation.</p> <p>Provide information and assistance to the community and NQF agencies through the inclusion of online resources and relevant external links on the office website, and the enquiry service line.</p> <p>Support NQF agencies to provide clear information about the rights of clients to seek review of their decisions or complain about their actions.</p> <p>Redirect premature complaints made to the office back to the NQF agencies in the first instance when appropriate.</p> <p>Refer complaints not within the jurisdiction of the ECS Commissioners to other relevant bodies.</p>
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<p>Percent of verbal/email progress reports provided to clients fortnightly (100%).</p> <p>Percent of complaints finalised within 1 months (98%).</p> <p>Percent of FOI Reviews finalised within 3 months.</p> <p>Percent of complaints open after 12 months from lodgement (0%).</p> <p>Percent of ECS Commissioners decisions upheld following any Tribunal or Court review (100%).</p>	<p><b>Key performance indicators</b></p> <p>Number of new resources developed and made publicly available.</p> <p>Level of stakeholder awareness of the role and jurisdiction of the office</p> <p>Level of client satisfaction with online resources.</p>
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<p><b>3. Support NQF agencies to exercise their responsibilities under the legislation.</b></p> <p><b>Outcome</b></p> <p>The office's investigations and advisory services and materials assist the NQF agencies to meet their legislated obligations.</p> <p><b>Strategies</b></p> <p>Develop, or identify external, resources and guidance material to assist the NQF agencies to fulfil their obligations under legislation.</p> <p>Conduct as necessary assessments of the NQF agencies compliance their legislated obligations.</p> <p>Work with the NQF agencies to rectify any identified systemic weaknesses in decision-making, processes or practices.</p> <p><b>Key performance indicators</b></p> <p>Number of resources and guidance material provided to agencies over the period</p> <p>Number and outcome of assessments of NQF agencies' compliance under the legislation</p> <p>Level of agency satisfaction with resources and assistance provided by the office</p>	<p><b>4. Ensure appropriate policies, processes and systems are in place to support the work of the ECS Commissioners.</b></p> <p><b>Outcome</b></p> <p>Robust case and document management systems, up to date policies, and comprehensive quality information and guidance materials available to the public and the NQF agencies.</p> <p><b>Strategies</b></p> <p>Maintain and upgrade the office website at <a href="http://www.necopic.edu.au">www.necopic.edu.au</a> including ongoing content review and updates, additional resource materials, links to other complaint handling bodies, and the incorporation of feedback mechanisms.</p> <p>Maintain and refine the complaints and knowledge management systems.</p> <p>Identify and fill gaps in office policies and resource material.</p> <p>Develop client satisfaction measurement tools.</p> <p><b>Key performance indicators</b></p> <p>Website information is current and relevant to identified needs.</p> <p>Complaints and knowledge management systems effectively support the responsibilities of the ECS Commissioners.</p> <p>Office policies are up to date and new policies are developed where gaps identified.</p>
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## Success

We are successful when we:

- Undertake our responsibilities in an efficient and timely manner
- Provide individuals with information and support to enable them to confidently pursue a complaint, or seek a review through the office or with the NQF agencies
- Provide information and resources that assist agencies to fulfil their obligations under the legislation and encourage sound practice
- Settle complaints informally through advice, consultation and mediation wherever possible
- Increase public trust and confidence in the protection of their personal information by the NQF agencies and their rights to access information held by those agencies
- Establish and maintain positive relationships with key stakeholders
- Establish and maintain effective relationships with other complaint-handling bodies, in particular the Commonwealth Ombudsman's Office and Australian Information Commissioner to ensure sharing of information and consistency of practice where appropriate.
- Provide an effective referral system for general enquiries.

## Accountability

The ECS Commissioners are formally accountable to the Education Ministers' Meeting and submit reports as necessary to the senior officials' group of the EMM (currently the Australian Education Senior Officials Committee – AESOC). Information about the performance of the Commissioners is also publicly available in our annual reports posted on our website and tabled in each of the Commonwealth, State and Territory Parliaments.

The NECS Freedom of Information Commissioner is required to make NECS FOI Commissioner Review Decisions public and the NECS Privacy Commissioner is required to keep a register of any Privacy Commissioner Determinations and make it publicly available. In both cases these will be published on the office website.

The ECS Commissioners aim to keep individuals and agencies within their jurisdiction informed about actions and outcomes of investigations and reviews at all times through timely, appropriate communication.

### *Review of a NECS Freedom of Information Commissioner Review Decision*

If a party to a NECS FOI Commissioner Review is dissatisfied with the outcome of the review they may apply under section 57A of the *Freedom of Information Act 1982* to have the merits of the decision reviewed by the relevant Tribunal. The relevant Tribunals are listed on our website at [www.necsopic.edu.au](http://www.necsopic.edu.au). The Tribunal provides independent merits review of administrative decisions and has the power to set aside, vary or affirm a NECS FOI Commissioner Review Decision.

A party to a NECS FOI review may also appeal against the NECS FOI Commissioner Review Decision on a question of law to a relevant Court. A list of the relevant Courts is available on our website at [www.necsopic.edu.au](http://www.necsopic.edu.au).

### *Review of a NECS Privacy Commissioner Determination*

A party to a NECS Privacy Commissioner Privacy Determination may apply under s 96 of the *Privacy Act 1988* to have a decision made under s52(1) or (1A) of the Act reviewed by the relevant Tribunal. The Tribunal provides

independent merits review of administrative decisions and has the power to set aside, vary, or affirm a privacy determination.

A complainant can also apply under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* to the relevant Court for a review of a decision or determination by the NECS Privacy Commissioner if they think that:

- a decision by the Commissioner not to investigate, or not to further investigate, a complaint under the *Privacy Act 1988* is not legally correct; or
- a determination by the Commissioner under section 52 of the *Privacy Act 1988* following the investigation of a complaint, is not legally correct.

### *Review of NECS Ombudsman Decisions*

If a complainant disagrees with the final decision of the NECS Ombudsman, and believes that the Ombudsman has not taken into consideration all the available evidence, or they have additional information, the complainant can request one further consideration of the matter. Such a request must be made in writing within 28 days of the date of the decision. The NECS Ombudsman will endeavor to complete a further consideration of the matter within thirty days.

Complainants and ACECQA may seek judicial review of a NECS Ombudsman decision from a Supreme Court, or another competent court of a participating jurisdiction, alleging such things as an error of law, failure to consider all relevant matters, bias or some other grounds upon which a judicial review could be sought, such as the NECS Ombudsman having exceeded their jurisdiction.

### *Strategic Plan Review*

Progress against the Strategic Plan will be monitored during the period and the Plan will be updated if necessary. The Plan will be revised in June 2024.



**Annual Financial Statements for the Education and Care Services Ombudsman,  
the National Education and Care Services Privacy Commissioner and the  
National Education and Care Services Freedom of Information Commissioner**

**Statement of Funding and Expenditure for the year ended 30 June 2021**

		<b>Actual</b>	<b>Budget</b>	<b>Variance</b>
		<b>\$</b>	<b>\$</b>	<b>\$</b>
<b>Funding</b>				
	FY20-21 Funding	145,000	145,000	0
		<b>145,000</b>	<b>145,000</b>	<b>0</b>
<b>Expenditure</b>				
	Domestic Travel account for Projects	0	2,000	2,000
	Investigation Contingency	0	0	0
	Website Development & Hosting Cost	1,099	5,000	3,901
	Retainer	20,000	20,000	0
	Rent - Ombudsman	20,000	20,000	0
	Sundry	4,231	10,000	5,769
	Project Legal fees	12,320	29,000	16,680
	Salary & On Costs	70,191	59,000	(11,191)
		<b>127,840</b>	<b>145,000</b>	<b>17,160</b>
Surplus/(Deficit)		<b>17,160</b>		
Prior years unspent funding		<b>74,495</b>		
<b>Total Balance of funds remaining</b>		<b>91,655</b>		



**Annual financial statements for the Education and Care Services Ombudsman,  
the National Education and Care Services Privacy Commissioner and the  
National Education and Care Services Freedom of Information Commissioner**

**Statement of Financial Position as at 30 June 2021**

<b>CURRENT ASSETS</b>	<b>\$</b>
Cash at bank	91,655
<b>Total Current Assets</b>	<b>91,655</b>
<b>Total Non-Current Assets</b>	<b>0</b>
<b>TOTAL ASSETS</b>	<b>91,655</b>
<b>CURRENT LIABILITIES</b>	
Income received in advance	91,655
<b>Total Current Liabilities</b>	<b>91,655</b>
<b>NON-CURRENT LIABILITIES</b>	
<b>Total Non-Current Liabilities</b>	<b>0</b>
<b>TOTAL LIABILITIES</b>	<b>91,655</b>
<b>NET ASSETS</b>	<b>0</b>

## **Notes to the annual financial statements for the year 1 July 2020 to 30 June 2021**

### **Note 1: Basis of Preparation**

The financial statements for the year ended 30 June 2021 is drawn up as a special purpose report to fulfil the requirements of regulations 198, 207 and 221 of the Education and Care Services National Regulations under the Education and Care Services National Law.

#### **Basis of preparation**

The financial statements have been prepared on an accruals basis and are based on historical costs. All amounts are presented in Australian dollars which is the Company's functional and presentation currency, unless otherwise noted.

#### **Significant accounting policies**

The significant accounting policies that have been used in the preparation of these financial statements are summarised below.

##### **(i) Funding**

Funding is measured at the fair value of the consideration received or receivable and is recognised as it becomes due for payment. All amounts are stated net of any applicable goods and services tax (GST).

##### **(ii) Operating expenses**

Operating expenses are recognised upon utilisation of the service or at the date of their origin. All amounts are stated net of any applicable goods and services tax (GST).

##### **(iii) Cash and Cash Equivalents**

Cash comprises the portion of Education Services Australia Limited's operating bank account balance attributed to this funding agreement that has been received but not yet spent.

##### **(iv) Other liabilities**

At 30 June 2021, amounts shown as Other Liabilities represent the un-spent portion of all Funding received or receivable. It is possible that on completion of project work, balances that have not been fully expended could be returned to the Department of Education.

**Independent Auditor's Report to the Education and Care Services Ombudsman,  
the National Education and Care Services Privacy Commissioner and the  
National Education and Care Services Freedom of Information Commissioner**

***Opinion***

We have audited the accompanying financial statements, being a special purpose financial report of the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner, which comprises the statement of financial position as at 30 June 2021, the statement of funding and expenditure for the year then ended 30 June 2021 and noted to the financial statements, including a summary of significant accounting policies. In our opinion, the Profit and Loss Statement represented by a surplus of \$17,160 presents fairly, in all material respects, in accordance with the National Law and Australian Accounting Standards and the funding was expended in accordance with the National Law.

***Basis for Opinion***

Our responsibility is to express an opinion on the special purpose financial statements based on our audit. We conducted our audit in accordance with Australian Auditing Standards. Those standards require that we comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance about whether the financial report is free from material misstatement.

We are independent of Education Services Australia in accordance with the ethical requirements of the Accounting Professional and Ethical Standards Board's APES 110 Code of Ethics for Professional Accountants ("the Code") that are relevant to our audit of the special purpose financial statements in Australia, and we have fulfilled our other ethical responsibilities in accordance with the Code. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.

***Emphasis of Matter – Basis of Accounting and Restriction on Distribution and Use***

The special purpose financial statements has been prepared for distribution to the Department of Education. We disclaim any assumptions of responsibility for any reliance on this report or on the information to which it relates to any persons other than Education Services Australia and the Department of Education, or for any purpose other than that for which it was prepared. Our opinion is not modified in respect of this matter.

***Responsibility of Management and the Directors (together referred to as Management) for the  
Acquittal Statement***

The Education Services Australia Management is responsible for the preparation and fair presentation of the special purpose financial statements in accordance with the National Law and Australian Accounting Standards and the funding was expended in accordance with the National Law. This responsibility includes determining that the basis of accounting is an acceptable basis for the preparation of the special purpose financial statements in the circumstances and also includes such internal control as is determined necessary to enable the preparation of the special purpose financial statements that is free from material misstatement, whether due to fraud or error.

***Auditor's Responsibility for the Audit of the Statement of Income and Expenditure***

Our objectives are to obtain reasonable assurance about whether the special purpose financial statements as a whole is free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes our opinion. Reasonable assurance is a high level of assurance, but is not a guarantee that an audit conducted in accordance with Australian Auditing Standards will always detect a material misstatement when it exists. Misstatements can arise from fraud or error and are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of the special purpose financial statements. As part of an audit in accordance with Australian Auditing Standards, we exercise professional judgement and maintain professional scepticism throughout the audit. We also:

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- Identify and assess the risks of material misstatement of the special purpose financial statements, whether due to fraud or error, design and perform audit procedures responsive to those risks, and obtain audit evidence that is sufficient and appropriate to provide a basis for our opinion. The risk of not detecting a material misstatement resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the override of internal control.
- Obtain an understanding of internal control relevant to the audit in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of internal control.
- Evaluate the appropriateness of accounting policies used and the reasonableness of accounting estimates and related disclosures made by the Education Services Australia Management.

We communicate with the Education Services Australia Management regarding, among other matters, the planned scope and timing of the audit and significant audit findings, including any significant deficiencies in internal control that we identify during our audit.



**PKF**  
**Melbourne, 30 July 2021**



**Kenneth Weldin**  
**Partner**

## Freedom of Information Statistical Data 1 July 2020 to 30 June 2021

Table 1 provides details of Freedom of Information requests for access to information and amendment to personal information made to each of the state and territory Regulatory Authorities and ACECQA for the period 1 July 2020 - 30 June 2021.

**Table 1 FOI ACCESS REQUESTS AND OUTCOMES: 1 July 2020 - 30 June 2021**

Jurisdiction	No. in hand from 2019/20	No. received	No. Finalised*	Access granted (full)	Access granted (partial)	Access refused in full	Requests withdrawn by applicant	Request dealt with administratively	Internal Review	Fees Collected \$	Amendments to personal records sought
ACECQA	0	4	4	0	0	0	4	#1	0	0	0
ACT	2	5	6	0	4	1	1	0	0	0	0
NSW	3	24	20	3	11	4	2	0	1	335	0
NT	0	1	1	0	1	0	0	0	0	0	0
QLD	1	5	5	0	2	1	2	0	0	235	0
SA	0	3	3	0	3	0	0	0	0	0	0
TAS	0	1	1	1	0	0	0	0	0	0	0
VIC	0	10	10	0	6	3	1	0	0	0	0
WA	0	7	4	0	4	0	0	0	0	0	0
<b>TOTAL</b>	<b>6</b>	<b>60</b>	<b>54</b>	<b>4</b>	<b>31</b>	<b>9</b>	<b>10</b>	<b>1</b>	<b>1</b>	<b>570</b>	<b>0</b>

**Note:** \* Number finalised includes those requests that were subsequently withdrawn. # ACECQA one withdrawn request subsequently dealt with administratively.

**Table 2 Exemptions and Conditional Exemptions Claimed by ACECQA and the Regulatory Authorities**

Table 2 provides details of the numbers of times an exemption or conditional exemption allowable under Divisions 2 and 3, Part IV of the *Freedom of Information Act 1982* was applied by ACECQA and the State/Territory Regulatory Authorities and the percentage of total claims.

Section of the FOI Act	Exemption/Conditional Exemption Claimed	Number of FOI requests to which the exemption/conditional exemption was applied	Percent of total applied
<b>Exempt documents under Division 2, Part IV of the FOI Act</b>			
S37	Documents affecting law enforcement or protection of public safety	2	2.25
S42	Documents subject to legal professional privilege	2	2.25
S45	Documents containing material obtained in confidence	6	7.5
S47	Documents disclosing trade secrets or commercially valuable information	1	1.25
<b>Conditionally exempt documents under Division 3, Part IV of the FOI Act</b>			
S47C	Deliberative processes	8	10.00
S47E	Certain operations of agencies	13	16.25
S47F	Personal Privacy	30	37.50
S47G	Business (other than documents to which s47 applies)	18	22.50
<b>TOTAL</b>		<b>80</b>	<b>100</b>

**Table 3 Volume of Freedom of Information requests received by ACECQA and Regulatory Authorities for 3year period by year 2018/19 to 2020/21**

Year	ACECQA	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>2018/19</b>									
<i>Number*</i>	#7	3	31	0	15	1	0	13	0
<i>No. finalised</i>	0	3	22	0	15	1	0	11	0
<i>Access granted in full</i>	0	0	8	0	2	0	0	0	0
<i>Partial access granted</i>	0	3	7	0	9	1	0	9	0
<i>Access refused in full</i>	0	0	5	0	3	0	0	1	0
<i>Requests withdrawn</i>	2	0	2	0	1	0	0	1	0
<b>2019/20</b>									
<i>Number*</i>	#12	4	40	0	8	1	1	12	2
<i>No. finalised</i>	12	2	38	0	7	1	1	12	2
<i>Access granted in full</i>	2	0	3	0	1	0	0	1	2
<i>Partial access granted</i>	2	2	18	0	0	1	1	9	0
<i>Access refused in full</i>	2	0	13	0	4	0	0	1	0
<i>Requests withdrawn</i>	5	0	4	0	2	0	0	1	0
<b>2020/21</b>									
<i>Number*</i>	4	7	27	1	6	3	1	10	7
<i>No. finalised</i>	4	6	20	1	5	3	1	10	4
<i>Access granted in full</i>	0	0	3	0	0	0	1	0	0
<i>Partial access granted</i>	0	4	11	1	2	3	0	6	4
<i>Access refused in full</i>	0	1	4	0	1	0	0	3	0
<i>Requests withdrawn</i>	4	1	2	0	2	0	0	1	0

**Notes** \*Number = requests not finalised from the previous reporting year **plus** requests received during the reporting year. #ACECQA - 1 request dealt with administratively.