National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

NATIONAL EDUCATION AND CARE SERVICES FREEDOM OF INFORMATION & PRIVACY COMMISSIONERS & OMBUDSMAN

ANNUAL REPORT

1 July 2017 to 30 June 2018

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National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

Letter of Transmittal

Chair
COAG Education Council
PO Box 202
CARLTON SOUTH VIC 3053

Dear Minister

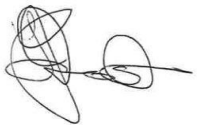
In accordance with Regulations 198, 207 and 221 of the *Education and Care Services National Law Regulations* (the ECS Regulations) I am pleased to present to the COAG Education Council the National Education and Care Services Freedom of Information Commissioner, National Education and Care Services Privacy Commissioner, and Education and Care Services Ombudsman (the ECS Commissioners), Annual Report for the period 1 July 2017 to 30 June 2018.

The Annual Report is the seventh 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 each member of the Ministerial Council to cause a copy of the Annual Report to be laid before the House of Parliament of the jurisdiction the member represents.

Yours sincerely



Lesley Foster

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

1 Commissioners' Foreword and Overview

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 (collectively known as the ECS Commissioners) are independent statutory officers established under national applied laws legislation – the *Education and Care Services National Law Act 2010* (the National Law) and the associated *Education and Care Service National Regulations* (ECS Regulations).

The two Commissioners and the Ombudsman positions are established and operate independently of each other for the purposes of the National Law. The Council of Australian Governments (COAG) Education Council is responsible for appointments to the positions and has determined to appoint one person to undertake the three roles.

The positions were established in 2012 as part of reforms by COAG to create a national, uniform regulatory and quality assurance system for early childhood education and 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.

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. ACECQA oversees the implementation of the National Quality Framework. 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 services meet the requirements of the National Law and National Regulations.

Legislative Framework

The ECS Commissioners operate within a complex legislative framework. Victoria passed the *Education and Care Services National Law Act 2010* and, except for Western Australia, each State and Territory passed legislation applying the National Law, with some variations to accommodate local requirements. Western Australia enacted corresponding legislation. *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 Part 6.2 Divisions 1, 2, and 4 of the ECS Regulations to apply in participating States and Territories and to ACECQA for the purposes of the National Quality Framework for Early Childhood Education and Care.

The Ombudsman provides services with respect to administrative actions taken by ACECQA and the Commissioners provide freedom of information and privacy complaint and review services in relation to

actions taken in these areas by each of the State and Territory early childhood education and care Regulatory Authorities and ACECQA.

The Ombudsman and Commissioners also play an important role in promoting public and service provider confidence in the integrity of the administration of the regulation of early childhood education and care.

This is my third Annual Report as the Ombudsman and Commissioners since my appointment to the positions and I continue to find the roles to be interesting, challenging and rewarding.

1.1 Achievements

During the past 12 months as ECS Commissioners while undertaking my legislative responsibilities I have continued to review the policies, systems and public face of the Office. This has included:

- ongoing refinement of the ECS Commissioners' new website to ensure it is accurate, up to date and user friendly - www.necsopic.edu.au ;
- commencement of a communications strategy about the roles of the ECS Commissioners for education and care stakeholder organisations;
- maintenance of the document and case management system using Office 365; and
- the development of summary guides to the legislative obligations of ACECQA and the Regulatory Authorities under the Commonwealth *Freedom of Information Act 1982* and the Commonwealth *Privacy Act 1988* (see **Attachments 1 & 2**); and
- the preparation of advisory material for the public, ACECQA and the Regulatory Authorities on the new Notifiable Date Breaches legislation (see **Attachment 3**).

The establishment of the new website has proven to be a particularly important development for the Office. Since it became fully operational in September 2017, there has been a marked decrease in misdirected enquiries to the Office. In particular, enquiries relating to school education have declined sharply.

The office document and case management system has continued to meet the needs of the office throughout the year and a new system has not been considered necessary at this stage.

1.2 The year ahead

The focus for the coming year includes:

- enhancements to the Office website including additional links to relevant complaint handling bodies and the incorporation of website usage analytics and feedback mechanisms;
- ongoing stakeholder engagement;
- work with ACECQA and Regulatory Authorities as necessary to assist them to meet their obligations under the Commonwealth *Freedom of Information 1982* and *Privacy Act 1988*; and
- further identification and resolution of gaps in policy documents and support material provided by the Office.

1.3 Workload

The ECS Commissioners are appointed on a 0.2EFT basis. Access to the Commissioners is provided for customers via the new online complaint and review request facilities, email, and telephone, and in face to face meetings (by appointment only). Online requests, emails and telephone messages are monitored daily

and an acknowledgement response is usually provided within 24 hours of receipt. The Commissioners also undertake the administrative work of the Office as the workload does not warrant the past practice of engaging an office manager. Financial services are purchased from the education Ministers' company, Education Services Australia Ltd, and some administrative support is provided by the Education Council Secretariat. However, it should be noted that these arrangements do constrain the amount of resource materials that can be produced by the office for ACECQA, the Regulatory Authorities and the public. This situation is mitigated to some extent by referencing material produced by the Office of the Australian Information Commissioner. Furthermore, should multiple complex complaints or reviews be required to be undertaken concurrently additional resources may be required.

2 About the ECS Commissioners

2.1 Education and Care Services Ombudsman

The Education and Care Services Ombudsman receives complaints and assists people who believe they may have been treated unfairly or inappropriately by the Australian Children's Education and Care Quality Authority (ACECQA).

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

The Ombudsman's powers extend to anything that might be regarded as reasonably incidental to the performance of administrative functions. It does not have to be an allegation of something sufficiently serious to be described as 'maladministration', but merely about any administrative action.

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 Ministerial Council responsible for overseeing the National Law. In addition, if the appropriate action is not taken and it would be appropriate in all the circumstances, the Ombudsman may also formally report to the Parliaments of the Commonwealth and the States and Territories.

The Ombudsman does not have any powers in relation to how State and Territory Regulatory Authorities exercise their powers or functions under the National Law or Regulations. 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.

2.2 National Education and Care Services Freedom of Information Commissioner

The National Education and Care Services Freedom of Information Commissioner has powers to enquire into and investigate written complaints, and undertake own motion investigations, about the performance of functions, or the exercise of powers, under the Commonwealth *Freedom of Information Act 1982* (FOI Act), as in force from time to time, by ACECQA or a State or Territory Regulatory Authority.

ACECQA and each Regulatory Authority are bound by, and must comply with, the requirements of the FOI Act (as modified by the *Education and Care Services National Regulations*) when dealing with formal requests for access to documents under freedom of information. Any person has a right to seek from ACECQA or each Regulatory Authority access to documents of those agencies under the FOI Act.

A detailed guide to the obligations of ACECQA and each of the State and Territory Regulatory Authorities under the FOI Act is provided in **Attachment 1**.

2.3 National Education and Care Services Privacy Commissioner

The National Education and Care Services Privacy Commissioner has the power to investigate complaints alleging an interference with privacy arising from an alleged breach of the Australian Privacy Principles by ACECQA or a State or Territory Regulatory Authority under the Commonwealth *Privacy Act 1988,* as in force from time to time. The Commissioner may also conduct own motion investigations into whether these agencies are complying with their obligations under the *Privacy Act*. The Commissioner may make various enforceable determinations resulting from investigations.

ACECQA and each of the State and Territory Regulatory Authorities are bound by, and must comply with, the requirements of the Privacy Act (as modified by the *Education and Care Services National Regulations*) in relation to how they collect, use, store and otherwise handle personal information about individuals.

Personal information is defined as: *information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

A detailed guide to the obligations of ACECQA and each of the State and Territory Regulatory Authorities under the *Privacy Act* is provided in **Attachment 2**.

On 22 February 2018 the Notifiable Data Breaches Scheme (NDB) came into operation. The NDB is established by the *Privacy Amendment (Notifiable Data Breaches) Act 2017* under Part IIIC of the Privacy Act. It applies to all agencies and organisations with personal information security obligations under the *Privacy Act* which include ACECQA and each of the State and Territory Regulatory Authorities. The NDB scheme places an obligation on ACECQA and State and Territory Regulatory Authorities to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm for the individual. The NECS Privacy Commissioner must also be notified. The NECS Privacy Commissioner prepared advice for ACECQA and the Regulatory Authorities on the operation of the scheme and their obligations (**Attachment 3**).

3 Complaints and Enquiries

As in past years during the 2017/18 reporting period most enquiries and complaints received by the office of the Education and Care Services Ombudsman related to the process or outcomes of the assessment of overseas qualifications by ACECQA. Generally, the complaints were resolved through:

- further clarification of the reasons for the assessment outcome by ACECQA to the complainant;
- seeking additional information and further consideration of the application by ACECQA; and
- the provision of advice by ACECQA and/or the Ombudsman to the complainant about opportunities for further study and applying for Recognition of Prior Learning.

One complaint of interest raised the issue of the different qualification assessment requirements of the Australian Children's Education and Care Quality Authority (ACECQA) and the Australian Institute for Teaching and School Leadership (AITSL) which led to an applicant wrongly assuming they could work as an early childhood education and care teacher (ECT) based on a positive skilled migration assessment outcome.

While the complainant was not critical of the assessment processes or outcomes used by either ACECQA and AITSL individually, the issue did highlight the need to ensure applicants understand that they must satisfy the requirements of both bodies if they are to enter Australia as a skilled migrant and work in a National Quality Framework approved education and care service.

ACECQA and AITSL undertake qualification assessments for different purposes.

ACECQA assesses qualifications to determine whether an applicant's education and care qualifications are equivalent to the requirements under the *Education and Care Services National Regulations* to be recognised as an early childhood teacher eligible to practice in certain education and care services in Australia under the National Quality Framework.

For ACECQA purposes, an early childhood teacher is degree qualified to teach children from birth up until they commence formal schooling. Successful applicants must have completed a relevant initial teacher education qualification, including 80 days of supervised professional experience for undergraduate qualifications or 60 days for post graduate qualifications. At least 10 of these days must be with children aged birth to under three years old, and a significant number must be in early childhood settings with children from age three until they start formal schooling. ACECQA will also consider evidence of significant work experience with children aged birth to under three years, the completion of a relevant approved diploma, or the completion of relevant non-award units to satisfy the specific birth to under three years old supervised professional experience requirement.

AITSL's skills assessment determines whether an applicant's qualifications and English language proficiency meet the requirements for a school teacher occupation listed for Australia's skilled migration program. AITSL's assessment criteria are based on the national teacher registration framework (2011) and are informed by initial teacher education program accreditation standards and requirements to achieve teacher registration to teach in Australian schools.

For AITSL's skilled migration assessment purposes, an early childhood (pre-primary school) teacher is degree qualified to teach children from birth to the age of eight in education programs prior to, and in, the early years of primary school. Successful applicants must have completed a minimum of four years higher education level study that results in a relevant initial teacher education qualification. As part of this study, at

least 45 days of supervised teaching practice with children across the designated age range must have been completed.

The Education and Care Services Ombudsman did not find deficiencies with ACECQA's qualifications assessment processes with respect to this case. Both ACECQA and AITSL have a strong working relationship and both agencies have agreed to joint work to explore the potential to further align qualification requirements and to develop improved communication materials for potential applicants to be used by both organisations.

Only one privacy related complaint was raised with the Privacy Commissioner during the period and following a request by the Privacy Commissioner for further information, the complainant did not pursue the matter further.

No complaints were received with respect to the actions of ACECQA and the State and Territory Regulatory Authorities in carrying out their legislated responsibilities under the *Freedom of Education Act 1982*. One request for a Freedom of Information Commissioner Review was received which is dealt with in Section 4 below.

Some complaints or enquiries received by the Office continue to be related to matters that do not fall within the jurisdiction of the Ombudsman or Commissioners although, as noted in the Foreword, the number of these has fallen sharply since the new website has been fully operational. They included complaints and enquiries about administrative actions of State/Territory Regulatory Authorities. Such complaints were redirected.

4 Freedom of Information (FOI)

The National Education and Care Services Freedom of Information Commissioner is required each financial year to report on the operation of the Commonwealth *Freedom of Information Act 1982* as modified by the *Education and Care Services National Law Act 2010* and its associated regulations (the FOI Act).

ACECQA and each State and Territory Regulatory Authority are required to report to the Commissioner on a number of freedom of information matters including: the number of FOI requests for access to documents received; the number of applications received for amendment to personal information and their result; the total charges collected during the year; and the number of applications for internal review of FOI decisions and their results.

There was just over a 31 percent increase in the total number of FOI requests received by ACECQA and the State and Territory Regulatory Authorities compared to the last reporting period. Data by jurisdiction for the 2017/2018 reporting period is provided in Table 1 at **Attachment 4.** In summary, three jurisdictions - the Northern Territory, South Australia and Tasmania - reported they received no FOI requests for the period. The remaining 6 agencies received a total of 63 requests and had a further 11 requests in hand from the previous reporting year – a total of 74 requests. 67, or 90.54 percent were finalised by 30 June 2018. Of the those finalised 6 (9%) were granted access in full, 38 (57%) were granted partial access, 5 (7%) were refused access in full and 18 (27%) applications were withdrawn by applicants. Three jurisdictions charged fees and collected a total of $3,570. No requests for amendment to personal information were received during the period. One application was received for an internal review of an FOI decision.

Discounting the 18 applications that were withdrawn, 49 of the FOI applications received had a decision made by 30 June 2018. 88 percent of these decisions were made within the statutory time of 30 days, 10 percent were up to 30 days overdue, and 2 percent were more than 90 days overdue.

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 ACECQA and the Regulatory Authorities applied Exemptions or Conditional Exemptions provisions to FOI requested documents a **total of 91 times**. **Table 2, Attachment 4** details the Exemptions/Conditional Exemptions provisions that were applied and the frequency of their use. Note that more than one Exemption/Conditional Exemption may be applied to a document.

Overall 5 Exemption provisions and 5 Conditional Exemption provisions were applied by the agencies. Of these, the most frequently applied Exemption provision related to *"documents affecting law enforcement or the protection of public safety*" (11 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. To be exempt under the Section a document should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This includes the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the Section

The second most frequently applied Exemption provision related to *"material obtained in confidence"* (8.8 percent of the total). Section 45 of the FOI Act provides that a document is an exempt document if its disclosure would found (in the sense of originate) an action by a person for breach of confidence. The exemption is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure. A breach of confidence is the failure of a recipient to keep confidential information which has been communicated in circumstances giving rise to an obligation of confidence.

The most frequently applied Conditional Exemption provision related to “personal privacy” (36.25 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 “certain operations of agencies” (17.6 percent of the total). Section 47E of the FOI Act conditionally exempts documents where disclosure would, or could reasonably be expected to do any of the following: prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency; prejudice the attainment of the objects of particular tests, examinations or audits conducted, or to be conducted, by an agency; have a substantial adverse effect on the management or assessment of personnel by an agency; or have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

4.1 National Education and Care Services Freedom of Information Commissioner Review

The National Education and Care Services Freedom of Information Commissioner has the power to review Freedom of Information decisions that have been made by ACECQA or a State or Territory education and care services Regulatory Authority with respect to either access to documents or decisions regarding amendment of, or annotation to, personal records. If the applicant is dissatisfied with the Commissioner’s subsequent decision, they have the right to appeal to the relevant Administrative Tribunal.

During the reporting period the Commissioner received one application for a Commissioner review of a freedom of information decision made by the Queensland Regulatory Authority. The full Commissioner Review Decision is published on the ECS Commissioners’ website at www.necsopic.edu.au as required under Section 55K(8) of the Commonwealth *Freedom of Information Act 1982* . A summary is provided below.

The Queensland Regulatory Authority (QLD RA) received a freedom of information request under the *Freedom of Information Act 1982* for documents created or received between 1 January 2014 and 14 June 2017 (including any photos/CCTV footage that related to or were attached to any documents) in relation to multi storey child care centres, namely

- any incident and/or investigation reports relating to a fire related incident that has occurred in the Metropolitan or South East Regions;
- all evacuation plans held in relation to multi storey child care centres within the Brisbane CBD; and
- any Ministerial or Departmental Briefing Notes (including attachments) that concern or relate to any fire related issues/incidents.

Following consideration of all matters, including submissions from affected third parties (identified child care centres) together with public interest considerations the QLD RA determined to:

- give the FOI Review Applicant access to 41 documents in full;
- give the FOI Review Applicant partial access to 15 documents, pursuant to section 47F of the *Freedom of Information Act 1982* – Public interest conditional exemptions - personal privacy;

- refuse access to 35 documents pursuant to section 34(1)(a)(ii) of the *Freedom of Information Act 1982* as the documents were brought into existence for the dominant purpose of submission for consideration by Cabinet; and
- refuse access to 367 documents pursuant to section 47(1)(b) of the *Freedom of Information Act 1982* as disclosure would reveal commercially valuable information

As a result of her review of the QLD RA decision the Commissioner:

- affirmed the decision of the QLD RA to provide partial access to 15 documents pursuant to s47F of the *Freedom of Information Act 1982*;
- varied the decision of the QLD RA to refuse access to 35 documents pursuant to s34 (1)(a)(ii)) by deciding that the documents are instead exempt pursuant to s34(3) of the *Freedom of Information Act 1982*; and
- affirmed the decision of the QLD RA to refuse access to 367 documents pursuant to s47(1)(b) of the *Freedom of Information Act 1982*.

Each State and Territory relevant Administrative Tribunal (as listed in Regulation 210 of the *Education and Care Services National Regulations*) is required to provide information to the Commissioner on: the number of applications received for review of "access to documents" decisions made by the Commissioner and their results; the number of applications received for review of "requests to amend/annotate personal records" decisions made by the Commissioner and their results; and the number of applications withdrawn by applicants.

No appeal was made to the relevant Administrative Appeals Tribunal to review the decision of the Commissioner.

5 Financial Statements

The financial report has been audited by Grant Thornton Audit Pty Ltd and the audit statement is found at **Attachment 5.**

6 Budget Outlook

The Commissioners and Ombudsman continue to maintain a small budget surplus built up over the past years. Now the bulk of the re-development of the website has been completed, this surplus will be held as contingency funds to address complex or multiple case investigations which require the engagement of additional investigations staff or legal support.

The budget formation for 2018/19 reflects the forward priorities for the office. Costs associated with enhanced stakeholder engagement, document and support material development, and enhancements to the website as data analytics become available on usage will be met from within existing resources.

ATTACHMENTS

Attachment 1: Obligations of ACECQA and Regulatory Authorities under the Commonwealth *Freedom of Information Act 1982*

Attachment 2: Obligations of ACECQA and State and Territory Authorities under the Commonwealth *Privacy Act 1988*

Attachment 3: Notifiable Data Breaches

Attachment 4: Freedom of Information Statistical Data

Attachment 5: Audited Financial Report

National Education and Care Services Freedom of Information Commissioner

Summary Guide to the obligations of ACECQA and State and Territory Regulatory Authorities under the Commonwealth *Freedom of Information Act 1982*

Introduction

This document summarizes the obligations of ACECQA and the State and Territory Regulatory Authorities under the Commonwealth *Freedom of Information Act 1982* in respect of their operations under the *Education and Care Services National Law Act 2010.*

The obligations under the Commonwealth *Freedom of Information Act 1982* are imposed by Section 264 of the *Education and Care Services National Law Act 2010* and Regulations 204 to 2011 of the *Education and Care Services National Law Regulations* which modify the *Freedom of Information Act 1982* to apply to ACECQA and the State and Territory Regulatory Authorities. Note that the regulations made under the Commonwealth *Freedom of Information Act 1982* do not apply other than the provisions providing for fees and charges – the *Freedom of Information (Charges) Regulations 1982* as amended from time to time (NECS Reg 211). In some instances, FOI obligations are also found in specific legislation applying in some participating jurisdictions. These are referred to in the specific cases. Where practical, the relevant legislation is cited in footnotes or in the body of the summary.

The following terms and acronyms are used in this summary:
ACECQA means the Australian Children's Education and Care Quality Authority
Agency/ies means ACECQA and/or the Regulatory Authorities of the participating jurisdictions
ECSNL Act means the *Education and Care Services National Law Act 2010.*
NECS FOI Commissioner means the National Education and Care Services Freedom of Information Commissioner
NECS Regulations/NECS Reg means *Education and Care Services National Law Regulations*
FOI means Freedom of Information
FOI Act means the Commonwealth *Freedom of Information Act 1982*
NECS means National Education and Care Services
Regulatory Authority means the Regulatory Authority of each participating jurisdiction under the Education and Care Services National Law.

This summary Guide **lists the obligations in the same order as they appear in the FOI Act**. The Guide is current at the date published and will be updated from time to time to reflect amendments to the Act.

Summary of FOI obligations of ACECQA and Regulatory Authorities

1. ***General obligations – objects, staff and records.*** Agencies have the following general obligations under the FOI Act.

   (a) To perform their functions and exercise their powers in accordance with objects stated in s3 of the FOI Act, so that, as far as possible, they facilitate and promote public access to information promptly and at the lowest reasonable cost.

   (b) To have sufficient resources, including trained staff, to process FOI requests and undertake their other obligations under the FOI Act.

   (c) To maintain proper records of documents in order to process FOI requests.

2. ***Contractor's documents***. If a contracted service provider provides services to an agency in respect of the agency's powers or functions, the agency must take contractual measures to ensure that it receives a copy of documents in the contractor's (or its subcontractor's) possession that relate to the performance of the contract, if the agency receives a request for the document. (Section 6C [1] FOI Act).

3. ***Information publication scheme***. Agencies must comply with the *information publication scheme* obligations set out in Part II[2] of the FOI Act. These obligations require an agency to do the following:

   a. Prepare a plan showing what information the agency proposes to publish for the purposes of Part II, how, and to whom, the agency proposes to publish the information, and how the agency otherwise proposes to comply with Part II. (s8(1) FOI Act and NECS reg 208(a) &(b) and reg 209(k)).

   b. Publish the plan prepared under paragraph (a) above. (s8(2)(a) FOI Act).

   c. Publish details of the structure of the agency's organization (for example, in the form of an organization chart). (s8(2)(b) FOI Act)

   d. Publish details of its functions, including its decision-making powers and other powers affecting members of the public (or any particular person or entity, or class of persons or entities). (s8(2)(c) FOI Act).

   e. Publish details of appointments of officers of the agency that are made under Acts. (s8(2)(d) FOI Act).

   f. Publish the information in annual reports prepared by the agency that are laid before the Parliaments of the Commonwealth and the participating jurisdictions. (s8(2)(e) FOI Act and NECS reg 209(b)).

[1] As amended by the definition of 'Government of a participating jurisdiction contract' in s4 of the FOI Act and by NECS reg 209(a)

[2] Sections 7A to 10B FOI Act and NECS regs

g. Publish details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made (s8(2)(f) FOI Act).

h. Publish information in documents to which the agency routinely gives access in response to requests under Part III (access to documents), except the following if it would be unreasonable to publish the information:
- personal information;
- information about the business, commercial, financial or professional affairs of any person;
- other information of a kind determined by the NECS FOI Commissioner. [3]

i. Publish information held by the agency that is routinely provided to the Parliaments of the Commonwealth and the participating jurisdictions in response to requests and orders from the Parliaments. (s8(2)(h) FOI Act and NECS Reg 209(b)

j. Publish contact details for an officer (or officers) who can be contacted about access to the agency's information or documents under the FOI Act. (s8(2)(i) FOI Act)

k. Publish the agency's operational information as required under section 8A. (s8(2)(j) FOI Act). Operational information is information held by the agency to assist it to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). Examples are the agency's rules, guidelines, practices and precedents relating to those decisions and recommendations. (s8A FOI Act)

l. Ensure that the above information (and other information it is permitted to publish under Part II) is accurate, up-to-date and complete. (s8B FOI Act)

m. Publish the above information:
- to the public generally; and
- if the agency considers that it is appropriate to do so—to particular classes of persons or entities;
- on a website by:
  - making the information available for downloading from the website; or
  - publishing on the website a link to another website, from which the information can be downloaded; or
  - publishing on the website other details of how the information may be obtained. (s8D(2) &(3) FOI Act)

n. The agency cannot impose a charge on a person accessing information from a website. If the agency imposes a charge for accessing the information other than from a website, the charge can only be to reimburse the agency's reproduction costs, or other incidental costs, incurred in giving the person access to the information, and the agency must publish details of the charge. (s8D(4) & (5) FOI Act).

[3] s8(2)(g) FOI Act), and s264(2)(b) ECSNL and 205(b) NECS Reg

o. In conjunction with the NECS FOI Commissioner, the agency must review the operation of its Part II information publication scheme every 5 years (if not earlier). (s9(1) FOI Act and NECS reg 205(a) and s264(2) ECSNL Act).

p. An agency must have regard to the objects of the FOI Act, and guidelines issued by the NECS FOI Commissioner, in performing its duties or functions under Part II, ie s7A to 10B. (s9A FOI Act and NECS reg 205(a) and s264(2) ECSNL).

4. ***No prejudice if operational information not published***. If operational information is not published in accordance with Part II of the FOI Act, a person must not be subjected to any prejudice as a result of not having access to the information. (s10 FOI Act).

5. ***Agency to grant access under FOI Act***. An agency must grant full or partial access to any documents sought under the FOI Act unless they are exempt or contain information that would reasonably be regarded as irrelevant to a request. (s11A FOI Act).

6. ***Public interest and NECS FOI Commissioner guidelines***. In working out whether access to a document would, on balance, be contrary to the public interest, an agency must have regard to any guidelines issued by the NECS FOI Commissioner for that purpose. (s11B(5) FOI Act and NECS reg 205(a) and s264(2) ECSNL).

7. ***Disclosure log - publication of information disclosed under the FOI Act.*** Agencies must publish details of information that has been released in response to each FOI access request (s11C FOI Act). The publication is generally known as the 'disclosure log' and further details are as follows.

   a. The following information is exempted:

      - personal and business information (including commercial, financial or professional affairs of any person) if it would be unreasonable to publish the information; and
      - other types of information the NECS FOI Commissioner has determined to be exempt; and
      - information that would require extensive modification to make it publishable. (s11C(1) FOI Act).

   b. The publication may be published in one of three ways:

      - making the information available for downloading from the agency's website;
      - linking to another website where the information can be downloaded, or
      - giving details of how the information may be obtained (for example, upon written request for a photocopy, for which a copying charge can be made). (s11C(3) FOI Act).

   c. The information must be published on a website within 10 days of access being granted to the FOI applicant, or details provided of how the information may be obtained. (s11C(6) FOI Act)

d. An agency may charge a person for accessing the information only if the access is not by downloading it from a website. If there is a charge, the agency must publish details of the charge in the same way as the information is published under s11, and the charge must only be to reimburse the agency for a specific reproduction cost, or other specific incidental costs, incurred in giving the person access to that particular information. (s11C(4) & (5) FOI Act)

8. ***Agency to assist applicant and process requests within timelines***. An agency must take reasonable steps to assist a person to make an FOI request (s15(3)FOI Act), and must:

a. assist the person to direct the request to another agency or Minister if appropriate (s15(4)FOI Act); and

b. within 14 days of receiving a request, take all reasonable steps to notify the applicant that the request has been received (s15(5)(a)FOI Act); and

c. take all reasonable steps to notify the applicant of its decision on the request:

- within 30 days of receiving a request (s15(5)(b)FOI Act); or
- within 60 days or more as approved by the NECS FOI Commissioner– if the NECS FOI Commissioner extends the period on the agency's application due to the complex or voluminous nature of the request (s15AB FOI Act and NECS reg 205(a) and s264(2) ECSNL); or
- within 60 days of receiving a request - provided the applicant agrees in writing, and the agency notifies the NECS FOI Commissioner of the additional 30 days "as soon as practicable after the agreement is made"; (S15AA FOI Act and NECS reg 205(a) and s264(2) ECSNL); or
- within 60 days (or 90 days with the applicant's agreement) of receiving the request - if the agency determines (and notifies the applicant of the extension) that consultation is required because the documents:
  - i. may affect relations between a State and a participating jurisdiction[4]; or
  - ii. are business documents; or
  - iii. may affect personal privacy; or
  - iv. may affect the international relations of the Commonwealth; or
  - v. may divulge information communicated in confidence by or on behalf of a foreign government or an international organization to the Commonwealth (s15(5) to (8) and 15AA FOI Act); and

d. in making a decision on a request, have regard to any guidelines issued by the NECS FOI Commissioner for that purpose. (s15 and 15AA FOI Act and NECS reg 205(a) and s264(2) ECSNL).

[4] As amended by the definition of NECS reg 209(a), which requires a reference to the *Commonwealth* (except in reference to international relations, defence, security or the national economy) to be read as a participating jurisdiction, so that s26A of the FOI Act which refers to Commonwealth - State relations, is to be read as relations between a State and a participating jurisdiction.

9. ***Transfer of requests***. Where an agency receives a request for a document that originated with, or has been received from, a body which is specified in Part I or 2 of Schedule 2 (such as the Aboriginal Land Councils and Land Trusts or Attorney General's Department) and the document is more closely connected with the functions of that body, the agency must transfer the request to that other body. (s16(2) &(3) FOI Act.)

10. ***Requests involving use of computers etc***. An agency must make a written version of a document available to an applicant, if the document is available on a computer or other equipment, and the applicant does not appear to request a computer disk or tape of the information. (s17 FOI Act). This obligation does not apply if compliance would substantially and unreasonably divert the resources of the agency from its other operations (s17(2) FOI Act).

11. ***Forms of access.*** Agencies must provide access to a document in the form requested by the applicant which complies with s20(1) of the FOI Act (eg by inspection, providing a copy etc), unless to do so:

    (a) would interfere unreasonably with the operations of the agency; or

    (b) would be detrimental to the preservation of the document; or

    (c) would not be appropriate having regard to the physical nature of the document; or

    (d) would breach copyright, provided:

    - the copyright is not owned by the Commonwealth or any agency (including ACECQA or a regulatory authority), or a State; and
    - the copyright exists in matter that does not relate to the affairs of *an agency* or of a Department of State. (s20 FOI Act and NECS Reg208(a) and (b).

12. ***Deferment of access.*** If an agency defers access due to any reason stated in s21, (eg, the document has been prepared for and is awaiting presentation to Parliament [of the Commonwealth or the participating jurisdictions - see NECS reg 209(b)], or its premature release would be contrary to the public interest), the agency must, when informing the applicant of the reasons for the decision, indicate the period of the deferment. (s21(2) FOI Act and NECS reg 209(b)]).

13. ***Access to edited copies with exempt or irrelevant matter deleted***. If an agency decides to refuse access to an exempt document or to a document that would disclose irrelevant information, and it is reasonably practical for the agency to prepare an edited copy of the document that overcame those issues, and it is not apparent the applicant would decline access to the edited copy, the agency must prepare the edited copy and give the applicant notice in writing:

    (a) that the edited copy has been prepared; and

    (b) of the grounds for the deletions; and

    (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act; and

    give the applicant access to the edited copy. (s22 FOI Act)

14. ***Power to refuse request—diversion of resources etc.*** If an agency is satisfied that a request would substantially and unreasonably divert the resources of the agency from its other operations, or insufficient information has been given to identify the document, the agency must first undertake a 'request consultation process' (under s24AB) and may only refuse access after that process if the reasons still exists. (s24 FOI Act)

(Notes: Section 24AA(2) and (3) list some matters the agency must and must not have regard to in forming the above reasons.

Section 24AB lists the requirements for the written notice and other steps the agency must do in the 'request consultation process'.

15. ***Reasons and other particulars of decisions to be given.*** When refusing or deferring access to a document, agencies must give the applicant a written notice of the decision containing the following:

(a) the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision; and

(b) in the case of a decision to refuse to give access to a conditionally exempt document—include the public interest factors taken into account in making the decision; and

(c) the name and designation of the person giving the decision; and

(d) appropriate information concerning

(i) the applicant's review rights;

(ii) the applicant's rights to make a complaint to the NECS FOI Commissioner in relation to the decision; and

(iii) the procedure for the exercise of the rights referred to in (i) and (ii); and

(iv) where applicable, the manner in which an application for internal review (Part VI) and NECS FOI Commissioner review (Part VII) may be made. (S26 FOI Act).

16. ***Consultation on documents affecting relations between a participating jurisdiction and a State***

If arrangements have been entered into between the Commonwealth and a State or arrangements have been entered into between participating jurisdictions about consultation under this section; and a FOI request relates to documents received from a State and contain State information; and the release of the documents might damage relations between a State and a participating jurisdiction or disclose information disclosed in confidence to Government, then:

a. the agency must not give the applicant access unless consultation has taken place between the participating jurisdiction and the State in accordance with the arrangements;

b. if after step (a), the agency decides to give access to the document, the agency must give written notice of the decision to the State and the applicant; and

c. the agency must not give access to the document unless, after all the opportunities of the State for review or appeal in relation to the decision to give access to the document have expired. (s26A FOI Act and NECS regs 209(a) &(c).)

17. ***Consultation on business documents.*** If a request is made to an agency for access to a document containing *business information* in respect of a person, organisation or proprietor (**an entity**), and the agency forms the view that the entity might wish to contend:

    (a) the document is exempt under s47 (trade secrets etc); or

    (b) the document is conditionally exempt under section 47G (business information) and access to the document would be contrary to the public interest for the purposes of s11A(5);

    the agency must not decide to give access to the document unless the entity is given a reasonable opportunity to make submissions in support of the above grounds, and the agency has regard to any submissions made.

    If the agency decides to give access to the document, it must give written notice of the decision to the entity and the applicant and must not give access until after all the entity's opportunities for review or appeal have expired. (s27 FOI Act)

18. ***Consultation on documents affecting personal privacy*.** If a request is made to an agency for access to a document containing personal information, and the agency forms the view that the person might wish to contend that:

    (a) the document is conditionally exempt under s47F (personal privacy); and

    (b) access to the document would be contrary to the public interest for the purposes of s11A(5);

    the agency must not decide to give access to the document unless the person is given a reasonable opportunity to make submissions in support of the above grounds, and the agency has regard to any submissions made.

    If the agency decides to give access to the document, it must give written notice of the decision to the person and the applicant and must not give access until after all the person's opportunities for review or appeal have expired. (s27A FOI Act)

19. ***Fees and Charges – notice to applicant.*** If an agency decides that an applicant is liable to pay a charge[5] as set out in the FOI regulations, it must give to the applicant a written notice stating:

    (a) that the applicant is liable to pay a charge;

    (b) the agency's preliminary assessment of the amount of the charge, and the basis on which it was assessed;

    (c) that the applicant may contend that the charge has been wrongly assessed, or should be reduced or not imposed;

    (d) the matters that the agency must take into account under s29(5) in deciding whether or not to reduce, or not impose, the charge;

    (e) the amount of any deposit the applicant will be required to pay if the charge is imposed; and

    (f) that the applicant must, within the period of 30 days (or any greater period the agency allows) notify the agency in writing of the following:
        (i) the applicant's agreement to pay the charge; or

[5] The *Freedom of Information (Charges) Regulations 1982* made under the FOI Act apply to NECS Law (NECS reg 211)

(ii) if the applicant contends that the charge has been wrongly assessed, or should be reduced or not imposed, or both—that the applicant so contends, giving the applicant's reasons for so contending; or

(iii) that the applicant withdraws the request for access to the document concerned; and

(g) that if the applicant fails to give the agency such a notice, the request for access to the document will be taken to have been withdrawn.

An agency must not impose a charge in respect of a request for access to a document, or the provision of access to a document, until the applicant has notified the agency in a manner mentioned in (f) above, or at the end of the 30 days or further period mentioned in (f) above. Sections 29 and 31 impose other obligations on agencies concerning charges. (s29 and 31 FOI Act and NECS reg 211)).

20. **Exempt and conditionally exempt documents**. - Sections 31A to 48 of the FOI Act define exempt and conditionally exempt documents. Agencies must have regard to the definitions and provisions of these sections when considering whether to grant access to documents in response to FOI requests.

21. ***Amendment and annotation of personal records.*** A person may apply to an agency to have his/her personal information amended, and the agency may amend the information on the application of the person concerned, if it considers the information to be incomplete, incorrect, out of date or misleading. But if an agency does so, it must as far as practicable, ensure that the record of information is amended in a way that does not obliterate the text of the record as it existed prior to the amendment. (s48 to s50 FOI Act).

If an agency decides not to amend the information, the agency must take reasonable steps to enable the applicant to provide a statement of the kind mentioned in s51A(c) of the FOI Act, and to annotate the relevant document by adding the statement provided by the applicant, unless it considers the statement to be irrelevant, defamatory or unnecessarily voluminous. Section 51A(c) requires an applicant's statement to state the following:

(i) whether the information is claimed to be incomplete, incorrect, out of date or misleading; and

(ii) the applicant's reasons for so claiming; and

(iii) such other information as would make the information complete, correct, up to date or not misleading. (s51 to 51B FOI Act).

22. ***Transfer of requests to amend personal information.***

22.1. If an agency (**the first agency**) receives an application under s48 of the FOI Act from a person to amend his/her personal information, but the document containing the information is not in its possession but:

(a) the document is, to the first agency's knowledge, in the possession of another agency or Minister, or

(b) the subject matter of the document is more closely connected with the functions of another agency or Minister;

the first agency may, with the agreement of the other agency or Minister, transfer the application to the other agency or Minister. (s51C(1) FOI Act).

22.2 If an agency (**the first agency**) receives an application under s48 from a person to amend his/her personal information, but the document containing the personal information:

(a) originated with, or has been received from an entity specified in Part I of Schedule 2 of the FOI Act; and

(b) is more closely connected with the functions of that other entity;

then **the first agency** must transfer the application:

- to the Department administered by the Minister who administers the Act under which the other entity is established; or
- if the application relates to a document that originated with, or has been received from, the Department of Defence listed in Division 2 of Part I of Schedule 2—to that Department. (s51C(2) FOI Act).

22.3 If an agency (**the first agency**) receives an application under s48 from a person to amend his/her personal information, and the document containing the personal information:

(a) originated in, or has been received from another agency listed in Part II of Schedule 2, or an agency that is a body corporate established by or under an Act listed in Part III of Schedule 2, and

(b) is more closely connected with the functions of the other agency in relation to documents in respect of which the other agency is exempt from the operation of the FOI Act,

the first agency must transfer the application to the other agency (s51C(3) FOI Act).

22.4 If an agency (**the first agency**) transfers an application under s51C to another agency, the first agency must:

(a) inform the person making the application of the transfer; and

(b) if it is necessary to enable the other agency or Minister to deal with the application, send the document concerned to the other agency or Minister. (s51C(4) FOI Act).

22.5 If an agency or Minister to whom an application has been transferred, decides to amend or annotate a record of personal information, the agency or Minister must, by written notice, notify the first agency who made the transfer:

(c) of that decision; and

(d) of any amendment or annotation made by the other agency in relation to that record. (51C(7) FOI Act);

and the first agency must likewise amend or annotate its documents. (s51C(8) FOI Act) .

Note: In most instances, ACECQA or a Regulatory Authority is expected to be the **first agency** when applying the above section, but it is possible that they could sometimes be the other agency.

23. ***Agencies to inform applicants of decision on person records.*** Agencies must inform applicants, seeking amendment of personal records, of their decision as soon as practicable and not later than 30 days after the day on which the request is received by the agency. (s51D FOI Act).

However, section 51DA enables the NECS FOI commissioner to extend the 30 days period on application from the agency. (s51D FOI Act and s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs.)

24. ***Internal review of access grant and access refusal decisions.*** Unless a FOI decision is made personally by the Chairperson[6] of the Board of ACECQA or the person nominated by the regulatory authority as the Chief Executive Officer[7] of the regulatory authority:

(a) FOI applicants can apply for an *internal review* of an ***access refusal decision*** (s54A FOI Act), and.

(b) affected third parties can apply for an *internal review* of an ***access grant decision*** (s54A FOI Act).

Where an application for review is made, the agency must arrange for a person (other than the person who made the original decision) to make a fresh decision within 30 days after the day on which the review application was received. (s54C FOI Act and ECS Regs 208(a) to (c)).

However, the agency may apply to the NECS FOI Commissioner for further time. (s54D FOI Act s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25. ***Reviews by NECS FOI Commissioner - access refusal decisions, and access grant decisions***

25.1 ***Access refusal decisions.***

An application may be made to the NECS FOI Commissioner by the FOI applicant for a review of the following decisions by ACECQA or a regulatory authority.

(a) an access refusal decision;

(b) a decision made by the agency on internal review of an access refusal decision;

(c) a decision refusing to allow a further period for making an application for internal review of an access refusal decision. (S54L FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs)

25.2 ***Access grant decisions***

An application may be made to the NECS FOI Commissioner:

(a) by an affected third party - for a review of an access grant decision by ACECQA or a regulatory authority; and

(b) by the person who made the request to which the decision relates - for a review of a decision made by ACECQA or a regulatory authority on internal review of an access grant decision. (S54M FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.3 ***Agencies must notify affected third party of NECS FOI Commissioner review***.

If ACECQA or a regulatory authority decides not to give access to a document for which consultation was required under:

(a) s26A, ie documents affecting relations between a participating jurisdiction and a State; or

(b) s27, ie business documents; or

(c) s27A, documents affecting personal privacy;

[6] Section 54A FOI, with principal officer as amended by NECS reg 208(c)(i)

[7] Section 54A FOI, with principal officer as amended by NECS reg 208(c)(ii)

and an application is made for an NECS FOI Commissioner review of that decision, the agency must:

(i) notify the affected third party for the document of the application, unless the NECS FOI Commissioner orders under s54Q of the FOI Act that it is not appropriate to do in respect of documents falling under s27 or 27A of the FOI Act, and

(ii) give a copy of the notice to the NECS FOI Commissioner. (S54P FOI Act s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.4 ***Affected third party has onus of justifying decision on review.*** In a review of an access grant decisions, the affected third party for the document has the onus of establishing that:

(a) a decision refusing the request is justified; or

(b) the NECS FOI Commissioner should give a decision adverse to the person who made the request. (s55D(2) FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.5 ***Agencies have onus of justifying other decision on review.*** Except for a third party's onus referred to above in 25.4, an agency has the onus of establishing that:

(a) a decision given in respect of the request or application is justified; or

(b) the NECS FOI Commissioner should give a decision adverse to the IC review applicant. (s55D(1) FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.6 ***Agencies must assist NECS FOI Commissioner to conduct review.*** The agency who made the NECS FOI reviewable decision must use its best endeavours to assist the NECS FOI Commissioner to make his or her decision on the review (S55DA FOI Act s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.7 ***Agencies must provide further reasons if required by NECS FOI Commissioner.*** If the NECS FOI Commissioner considers the reasons given by the agency under s26 of the FOI Act for its decision are inadequate, or no reasons have been provided, the Commissioner may require that adequate reasons be provided. Agencies must comply with any such requirement. (S55E FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs).

25.8 ***Agencies must inform NECS FOI Commissioner if it varies its decision.*** Section 55G(1) of the FOI Act permits an agency to vary or set aside an access refusal decision during a a NECS FOI Commissioner review if its revised decision would:

(a) give access to a document in accordance with the request; or

(b) relieve the applicant from liability to pay a charge; or

(c) require a record of personal information to be amended or annotated in accordance with the application.

An agency must notify the NECS FOI Commissioner in writing as soon as practicable after the agency makes a revised decision. (s55G(2)(a) FOI Act, s264(2)(b) ECSNL Act, and reg 205(b) NECS Regs, and NECS reg 208(a) and (b).

25.9 ***Agencies must comply with review decision of the NECS FOI Commissioner***. The Chairperson of the Board of ACECQA and the person nominated by the regulatory authority as its chief executive, must comply with a decision of the NECS FOI Commissioner on a review. (s55N FOI Act, NECS Reg 208(c), and ECSNL Act s264(2)(b) & NECS Reg 205(b)

25.10 ***Court order may enforce compliance with review decision of the NECS FOI Commissioner.*** If the Chairperson of the Board of ACECQA or the person nominated by the regulatory authority as its chief executive, fails to comply with the review decision of the NECS FOI Commissioner, the NECS FOI Commissioner or the review applicant may seek an Order from the Supreme Court, or other court of competent jurisdiction of a participating jurisdiction, directing compliance with the Commissioner's decision. Any Court order must be complied with. (s55P FOI Act, NECS Reg 208(c), and NECS Reg 209(c), ECSNL Act s264(2)(b) & NECS Reg 205(b)

26. ***Information gathering powers of the NECS FOI Commissioner.*** Agencies must comply with any written notice issued by the NECS FOI Commissioner conducting a Commissioner Review requiring a person:

(a) to give information to the NECS FOI Commissioner; or

(b) to produce a document to the NECS FOI Commissioner. (s55R(3) FOI Act)

It is an offence not to comply with any such written notice. (s55R(5) FOI Act).

27. ***Agencies to produce documents***. Agencies must comply with any requirement of the NECS FOI Commissioner for them to:

a. produce to the Commissioner for inspection any document claimed by the agency to be exempt under s33 (national security documents), 34 (Cabinet documents) or 45A (Parliamentary Budget Office documents); (s55U(3) FOI Act); and

b. produce to the Commissioner for inspection any other exempt document. (s55T(2) FOI Act)

28. ***Further search for documents.*** An agency must comply with any requirement of the NECS FOI Commissioner for them to conduct further searches for documents if:

(a) the agency refused access to a document to an applicant under s24A of the FOI Act (ie the document cannot be found, does not exist or has not been received); or

(b) the agency purported to give access amongst other documents but did not do so. (s55V FOI Act).

And to the extent that s58A(2) of the FOI Act applies to ECS Law, agencies may have to comply with any similar order of a relevant administrative tribunal on a review by a tribunal. (For the meaning of *relevant administrative tribunal* see ECS reg 209(e)(i), and 210, and s40 of the Education and Care Services National Law (Queensland) Act 2011).

29. ***Staff to attend before NECS FOI Commissioner.*** Staff of agencies must attend before the NECS FOI Commissioner if they receive a written notice issued by the Commissioner, requiring them to appear before the NECS FOI Commissioner to answer questions for the purposes of an IC review. (s55W FOI Act).

It is an offence not to comply with any such written notice. (s55W(3) FOI Act).

30. ***Staff may be required to give evidence on oath or affirmation.*** Staff appearing before the NECS FOI Commissioner may be required to give evidence on oath or by affirmation. It is an offence not to comply with that requirement. (s55X(3) FOI Act).

31. ***Investigations and complaints.***

31.1 Agencies should cooperate with the NECS FOI Commissioner conducting an investigation, by providing any information sought by the Commissioner under s76 of the FOI Act that is relevant to the investigation.

31.2 ***Providing information and producing documents***. Agencies must comply with any written notice issued by the NECS FOI Commissioner conducting an investigation requiring a person:

(a) to give information to the NECS FOI Commissioner; or

(b) to produce a document to the NECS FOI Commissioner. (s79) FOI Act)

It is an offence not to comply with any such written notice. (S79(5) FOI Act).

31.3 ***Staff to attend before NECS FOI Commissioner.*** Staff of agencies must comply with any written notice issued by the NECS FOI Commissioner conducting an investigation requiring a person to appear before the Commissioner to answer questions for the purposes of an investigation (s82 FOI Act)

It is an offence not to comply with any such written notice (S82(3) FOI Act).

31.4 ***Staff may be required to give evidence on oath or affirmation***. Staff appearing before the NECS FOI Commissioner conducting an investigation may be required to give evidence on oath or by affirmation (s83 FOI Act).

It is an offence not to comply with that requirement. (s83(3) FOI Act).

31.5 ***Agency must comply with implementation notice***. An agency must comply with an implementation notice issued to it by the NECS FOI Commissioner (s89(3) FOI Act). The notice will require the agency to:

(a) give the NECS FOI Commissioner particulars of any action the agency proposes to take to implement the investigation recommendations; and

(b) give the particulars within the time specified in the notice. (s89 FOI Act).

If the agency fails to comply with the implementation notice, the NECS FOI Commissioner may report the matter to the responsible Minister (s89A(2) FOI Act) and FOI Minister (s89(3) FOI Act), and the report is laid before the Parliaments of the Commonwealth and participating jurisdictions (s89A(5) FOI Act and NECS reg 209(b))

32. ***Vexatious applicants***.

32.1 ***Onus on agencies***. If ACECQA or a regulatory authority applies to the NECS FOI Commissioner for a declaration that a person is a vexatious applicant, the agency has the onus of establishing that the Commissioner should make the declaration. (s89K(3) FOI Act).

32.2 ***Agencies must notify vexatious applicants of refusal to process***. If a declaration is made that a person is a vexatious applicant, and ACECQA or a regulatory authority refuses to

consider any of the following if made by the person without the written permission of the NECS FOI Commissioner:

(a) a request;

(b) an application under s48 (amendment of records); or

(c) an application for internal review;

the agency must, as soon as practicable, notify the vexatious applicant of its decision.

33. ***Guidelines.*** In exercising its functions or powers under the FOI Act, agencies must have regard to any guidelines issued by the NECS FOI Commissioner (s93A FOI Act).

National Education and Care Services Privacy Commissioner

Guide to the obligations of ACECQA and State and Territory Regulatory Authorities under the Commonwealth *Privacy Act 1988*

Introduction

This Guide summarizes the obligations of ACECQA and the State and Territory Regulatory Authorities under the Commonwealth *Privacy Act 1988* in respect of their operations under the *Education and Care Services National Law Act 2010*.

The obligations under the *Privacy Act 1988* are imposed by Sections 263 and 261(2)(b) of the *Education and Care Services National Law Act 2010* and Regulations 195 to 203 of the *Education and Care Services National Law Regulations* which modify the Privacy Act to apply to ACECQA and the State and Territory Regulatory Authorities. Note that the regulations made under the Commonwealth *Privacy Act 1988* do not apply. (NECS Reg 203). Where practical, the relevant legislation is cited in footnotes or in the body of the summary.

The following terms and acronyms are used in this summary:
ACECQA means the Australian Children's Education and Care Quality Authority.
Agency/ies means ACECQA and/or the State and Territory Regulatory Authorities of participating jurisdictions.
ECSNL Act means the *Education and Care Services National Law Act 2010*
NECS Privacy Commissioner means the National Education and Care Services Privacy Commissioner.
NECS Regulations means *Education and Care Services National Law Regulations*.
NECS means National Education and Care Services.
Privacy Act means the Commonwealth *Privacy Act 1988*.
Regulatory Authority means the Regulatory Authority of each participating jurisdiction under the Education and Care Services National Law.

This summary Guide lists the obligations in the same order as they appear in the Privacy Act. The Commonwealth *Privacy Amendment (Notifiable Data Breaches) Act 2017* amended the *Privacy Act 1988* and commenced on 22 February 2018. Paragraphs 18.1 to 18.8 contain a summary of its provisions.

The Guide is current at the date published and will be updated from time to time to reflect amendments to the Privacy Act.

Summary of Privacy Act obligations of ACECQA and Regulatory Authorities

1. ***General obligations.*** Agencies have a general obligation to perform their functions and exercise their powers consistently with the privacy principles and other duties stated in the Privacy Act, and to have sufficient resources and staff, and records of documents, in order to comply with that Act.

   The following paragraphs deal with the specific duties that apply under the Privacy Act.

2. ***Australian Privacy Principles (APPs) 1 to 6, 8 and 10 to 13 apply to ACECQA and the Regulatory Authorities.*** The Privacy Act applies APPs numbers 1 to 6, 8 and 10 to 13 to Australian Privacy Principle (APP) entities, and an APP entity is defined in s6 of that Act as an *agency* or organization. NECS regulation 199 modifies the Privacy Act such that it only applies to *agencies*, and that the agencies are ACECQA and each of the State and Territory Regulatory Authorities. The combined effect of the above provisions is that APPs 1 to 6, 8 and 10 to 13 apply to ACECQA and the Regulatory Authorities.

   There are 2 other APPs, namely APPs 7 and 9. The Privacy Act states that the APPs 7 and 9, only apply to organizations. As the NECS regulations refer to ACECQA and Regulatory Authorities as agencies and **not** organizations, APPs 7 and 9 therefore do not apply to them.

3. ***Agencies not to breach privacy of individual***. ACECQA and Regulatory Authorities:

   a. must not do an act, or engage in a practice, that breaches an APP 1 to 6, 8 or 10 to 13 set out in Schedule 1 to the Privacy Act, (s15 & s13 Privacy Act), unless the collection, use or disclosure of the information is permitted for one or more of the situations listed in items 1 to 6 of columns 2 and 3 of s16A (s16A Privacy Act); and

   b. must not do an act, or engage in a practice, that breaches a registered APP code that binds ACECQA or a Regulatory Authority. (s26A Privacy Act).

4. ***Compliance with APPs 1 to 6, 8 and 10 to 13***. APPs 1 to 6, 8 and 10 to 13 are set out in Schedule 1 to the Privacy Act (s14 Privacy Act), and agencies should implement and refer to the full details of those APPs. They cover the following subject matter:

   Principle 1—open and transparent management of personal information.

   Principle 2—anonymity and pseudonymity.

   Principle 3—collection of solicited personal information.

   Principle 4—dealing with unsolicited personal information.

   Principle 5—notification of the collection of personal information.

   Principle 6—use or disclosure of personal information.

   Principle 8—cross-border disclosure of personal information.

   Principle 10—quality of personal information.

Principle 11—security of personal information.

Principle 12—access to personal information.

Principle 13—correction of personal information.

5. ***Development of APP codes***. If ACECQA or a Regulatory Authority intend to apply to the NECS Privacy Commissioner for registration of a draft APP Code, it must first:

   a. make a draft of the APP code publicly available; and

   b. give the public at least 28 days to make submissions on the draft; and

   c. consider any submissions made.

   After the above steps, any application for registration of the draft APP code must:

   d. be made in the form and manner specified by the NECS Privacy Commissioner; and

   e. be accompanied by such information as is specified by the NECS Privacy Commissioner (s26F Privacy Act)

6. ***Compliance with Commissioner's Direction to amend document.*** ACECQA and Regulatory Authorities must comply with any direction issued to them by the NECS Privacy Commissioner under s35(1) of the Privacy Act, directing them to amend a document to which an applicant has been refused access under the FOI Act. (s35(2) Privacy Act).

7. ***Privacy impact assessment.*** ACECQA and Regulatory Authorities must comply with any Direction issued to them under s33D of the Privacy Act by the NECS Privacy Commissioner, requiring them to provide to the Commissioner a privacy impact assessment about an activity or function which the Commissioner considers might have a significant impact on the privacy of individuals.

   If ACECQA or a Regulatory Authority fails to comply with the Direction, the NECS Privacy Commissioner may report the failure to the Ministerial Council (s33D Privacy Act). Also s65 and 66 of the Privacy Act create offences for various matters (see paragraph 10 below).

8. ***Compliance with Undertakings.*** ACECQA and Regulatory Authorities must comply with any undertakings given to the NECS Privacy Commissioner to take any action in order to comply with the Privacy Act. (s33E Privacy Act).

   The NECS Privacy Commissioner can apply to the courts for an order enforcing the undertaking. (s33F Privacy Act)

9. ***Preliminary inquiries***. Agencies should cooperate with the NECS Privacy Commissioner conducting any preliminary enquires under s42 of the Privacy Act into a person's complaint.

10. ***Duty to provide information and attend before the NECS Privacy Commissioner.*** Agencies must not:

    (a) refuse or fail to attend before the NECS Privacy Commissioner; or

    (b) refuse or fail to be sworn or make an affirmation when required; or

    (c) furnish information or make a statement to the NECS Privacy Commissioner knowing that it is false or misleading in a material particular; or

    (a) refuse or fail to give information when required under the Privacy Act; or

(b) refuse or fail to answer a question or produce a document or record when required under the Privacy Act.

(Sections 65 and 66 of the Privacy Act create offences for the above matters).

11. ***Compliance with written notices.*** Agencies must comply with any written notice issued to them by the NECS Privacy Commissioner under s44 of the Privacy Act requiring a person:

(a) to provide information to the NECS Privacy Commissioner in writing signed by the person or, in the case of a body corporate, by an officer of the body corporate; or

(b) to produce the document to the NECS Privacy Commissioner; or

(c) to attend before the NECS Privacy Commissioner at a time and place specified in the notice to answer questions relevant to an investigation,

(d) to provide evidence on oath under s45.

It is an offence under sections 65 and 66 to fail to comply with the above duties.

12. ***Compliance with direction to attend compulsory conference.*** Agencies must comply with any written notice issued to them by the NECS Privacy Commissioner under s45 of the Privacy Act requiring a person to attend, at a time and place specified in the notice, a conference presided over by the NECS Privacy Commissioner, or to produce documents (s46(1) and (4) Privacy Act). It is an offence not to comply with such a notice without a reasonable excuse. (s46(2) Privacy Act).

13. ***Compliance with determinations of NECS Privacy Commissioner.*** After investigating a complaint, the NECS Privacy Commissioner may make Determinations under s52 of the Privacy Act, including a Determination which makes a recommendation to the agency or requires action by the agency.

If a Determination applies in relation to an agency, s58 states that the agency:

(a) must not repeat or continue conduct that is covered by a declaration included in the Determination under s52(1)(b)(i) or s52(1A)(a); and

(b) must take the steps that are specified in a declaration included in the Determination under s52(1)(b)(ia) or s52(1A)(b) within the specified period; and

(c) must perform the act or course of conduct that is covered by a declaration included in the Determination under s52(1)(b)(ii) or s52(1A)(c).

If an agency fails to comply with s58, an application may be made by the Commissioner or the complainant to Court for an order directing the agency to comply. (s62 Privacy Act).

14. ***Obligations of Chairperson of ACECQA and the chief executive of a Regulatory Authority.*** If a Determination applies in relation to the principal executive of an agency, s59 of the Privacy Act [as modified by NECS regulation 199(c)] states that the principal executive must take all such steps as are reasonably within his or her power to ensure the following:

(a) that the terms of the Determination are brought to the notice of all members, officers and employees of the agency whose duties are such that they may engage in conduct of the kind to which the determination relates; and

(b) that no member, officer or employee of the agency repeats or continues conduct that is covered by a declaration included in the Determination under s52(1)(b)(i) or s52(1A)(a); and

(c) that the steps specified in a declaration included in the Determination under s52(1)(b)(ia) or s52(1A)(b) are taken within the specified period; and

(d) the performance of any act or course of conduct that is covered by a declaration included in the Determination under s52(1)(b)(ii) or s52(1A)(c).

If the principal executive of an agency fails to comply with s59, an application may be made by the Commissioner or the complainant to a Court for an order directing the principal executive to comply. (s59 Privacy Act)

15. ***Determinations in respect of contracted providers.*** If the NECS Privacy Commissioner makes a Determination in relation to a contracted service provider to ACECQA or a Regulatory Authority, the Commissioner may also give ACECQA or the Regulatory Authority a written recommendation of any measures that the Commissioner considers appropriate.

An agency that receives a recommendation from the Commissioner must tell the Commissioner in writing of any action the agency proposes to take in relation to the recommendation. The agency must do so within 60 days of receiving the recommendation. (s53A Privacy Act)

16. ***Assisting authorised officers and permitting entry to premises***. Agencies must:

a. permit persons authorised in writing by the NECS Privacy Commissioner to enter, at any reasonable time of the day, premises occupied by an agency, to enable the authorised person to inspect any documents that are kept at those premises and that are relevant to the performance of the Commissioner's functions; and

b. provide the authorised person with all reasonable facilities and assistance for the effective exercise of the authorised person's powers. (s68 Privacy Act).

17. ***Public interest Determinations.*** If an agency considers that its actions or practice may breach an APP or a registered APP code that binds the agency, and it considers the public interest in it doing the act, or engaging in the practice, substantially outweighs the public interest in adhering to the code or principle, the agency may apply to the NECS Privacy Commissioner for a Determination authorising it to engage in the action or practice. (s72 and s73 Privacy Act)

18. **Notifiable Data Breaches.** Since 22 February 2018, ACECQA and Regulatory Authorities have duties under the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth). These duties are summarised in the following paragraphs 18.1 to 18.8.

18.1 **An eligible data breach** (**EDB**) - **s26WE**[1]. An EDB occurs if either of the following are satisfied:

(a) there is unauthorised access to or unauthorised disclosure of personal information[2] held by ACECQA or a Regulatory Authority, and it is *reasonable to conclude* that access or disclosure of the information *would be likely* to result *in serious harm* to the individual to whom the information relates; **or**

[1] The sections refer to sections of the Privacy Act 1998 (Cth)

[2] Meaning *personal information* which ACECQA or a Regulatory Authority was required under privacy principle 11.1 to take such steps as are reasonable in the circumstances to protect the information: from misuse, interference and loss; and from unauthorised access, modification or disclosure. s26WE(1)

(b) the information is lost, and it is *reasonable to conclude* that access or disclosure of the information *would be likely* to result *in serious harm* to the individual to whom the information relates.

18.2 R**emedial action avoids an EDB - s26WF.**

(a) If there is an eligible data breach (EDB) of the type described in paragraph 18.1(a) above, and:

(i) the agency *takes action before the access or disclosure **results** in serious harm to any individual to whom the information relates*, and

(ii) as a *result of the action*, it is reasonable to conclude that access or disclosure *would not be likely to **result** in serious harm* to the relevant individual;

then the access or disclosure is not, and never was an EDB, and there is no obligation on the agency to take steps to notify[3] the individual/s concerned of the contents of a statement relating to the access or disclosure. s26WF(1)and (2)

(b) If there is an EDB of the type described in paragraph 18.1(b) above, and:

(i) the agency *takes action* in relation to the loss *before there is unauthorised access to or unauthorised disclosure of the information*, and

(ii) as a result of the action *there is no unauthorised access to or unauthorised disclosure of the information*;

then the loss is not, and never was an EDB (s26WF(4).

(c) If there is an EDB of the type described in paragraph 18.1(b) above, and:

(i) the agency takes action in relation to the loss *after there is unauthorised access to or unauthorised disclosure of the information*, and

(ii) *before* the access or disclosure results in serious harm to the relevant individual; and

(iii) it is reasonable to conclude that the access or disclosure *would not be likely to **result** in serious harm* to the relevant individual;

then the loss is not, and never was an EDB, and there is no obligation on the agency to take steps to notify the individual/s concerned of the contents of a statement relating to the loss. (s26WF(4) and (5).

18.3. **Assessment of likelihood of serious harm – s26WG**. Section 26WG states the following matters should be taken into account in assessing the likelihood of serious harm. The kind of information, its sensitivity, whether the information is protected by one or more security measures and whether those measures could be overcome, the persons who have obtained or could obtain the information, whether security technology or methodology was used in relation to the information and whether it could be circumvented, the nature of the harm and any other relevant matters.

[3] See later s26WK and 26WL for obligations to notify the individual/s concerned.

18.4. **Suspected Eligible Data Breach – s26WH**. If ACECQA or a Regulatory Authority is aware there are reasonable grounds to *suspect* there may have been an EDB of the agency, but do not reasonably *believe* the circumstances amount to an EDB of the agency, it must:

(a) carry out a *reasonable and expeditious* assessment of whether there are reasonable grounds to *believe* that the circumstances amount to an EDB of the agency; and

(b) take all reasonable steps to complete the assessment within 30 days of forming its suspicion.

Exception – EDBs of other entities - 26WJ. If ACECQA or a Regulatory Authority undertakes an assessment under the above s26WH, and the EDB is an EDB of another entity, then those provisions (ie s26WH) do not apply to the EDB of the other entity.

18.5. **Statement about an Eligible Data Breach - ss26WK and 26WL.** If ACECQA or a Regulatory Authority is aware there are reasonable grounds to *believe* there has been an EDB of its agency, it must:

(a) prepare a statement of the following matters:
  (i) the identity and contact details of the agency; and
  (ii) a description of the eligible data breach that the agency has reasonable grounds to believe has happened; and
  (iii) the kind or kinds of information concerned; and
  (iv) recommendations about the steps that individuals should take in response to the eligible data breach that the agency has reasonable grounds to believe has happened; and

(b) give a copy of the statement to the NECS Privacy Commissioner; and

(c) as soon as practicable after the completion of the preparation of the statement, and if it is practicable to do so:
  (i) take reasonable steps to notify the contents of the statement to each individual[4] to whom the relevant information relates; or
  (ii) take reasonable steps to notify the contents of the statement to each of the individuals[5] who are at risk from the EDB; or

(d) if neither paragraph (c) (i) or (ii) applies, the agency must publish a copy of the statement on the agency's website and take reasonable steps to publicize the contents of the statement.

18.6. **Exceptions for s26WK and 26WL**. Parts or all of s26WK and 26WL do not apply in the following circumstances and to the following extent.

(a) **EDBs of other entities - 26WM.** If ACECQA or a Regulatory Authority undertake an assessment under s26WK and 26WL, and the access disclosure or loss that constituted the

[4] S26WK(4) states if the entity normally communicates with a particular individual using a particular method, it may use that method.

[5] S26WK(4)states if the entity normally communicates with a particular individual using a particular method, it may use that method;

EDB of its agency is an EDB of one or more other entities, then all the provisions of s26WK and 26WL (as summarized in paragraph 18.5 above) do not apply to the EDB of the other entity/ies.

(b) **Enforcement related activities - 26WN.** If ACECQA or a Regulatory Authority is an enforcement body[6] and its CEO reasonably believes:

(i) there has been an EDB of the agency; and
(ii) compliance with s26WL, (ie the matters in paragraphs 18.5(c) and (d) above would be likely to prejudice an enforcement related activity of the enforcement body;

then the provisions in paragraphs 18.5(a)(iv) and 18.5(c) and 18.5 (d), do not apply.

(c) **Inconsistency with secrecy provisions - 26WP.** If compliance by ACECQA or a Regulatory Authority with the obligation to give a copy of the statement to the NECS Privacy Commissioner would be inconsistent with a secrecy provision, then the parts in paragraphs 18.5(a) and 18.5(b) above do not apply to the statement for the NECS Privacy Commissioner to the extent of the inconsistency.

For this section, secrecy provisions is defined to mean a law of the Commonwealth (other than the Privacy Act) that prohibits or regulates the use or disclosure of information.

If compliance by ACECQA or a Regulatory Authority with the obligation under s26WL to give a copy of the statement to the affected individuals, (ie the matters in paragraphs 18.5(c) and 18.5(d) above would be inconsistent with a secrecy provision then the parts in paragraphs 18.5(c) and 18.5 (d), do not apply to the statement to the extent of the inconsistency.

Note: Secrecy provisions can also be specified in the Privacy Regulations. Note that the regulations made under the *Privacy Act 1988* do not apply to ECSNL Act. (NECS reg 203). No regulations have been specified for the purposes of the relevant sections 26WL or 26WL as at June 2018. Section 26WP(4) to (7) contain further obligations if any such regulations are made and apply to the ECSNL Act.

(d) **Declaration by NECS Privacy Commissioner – 26WQ.** If the NECS Privacy Commissioner reasonably believes there has been an Eligible Data Breach (EDB) of ACECQA or a Regulatory Authority, or is informed by one of those agencies that there has been an EDB of it, the Commissioner may by written notice to the agency:

(i) declare that s26WK and 26WL (ie all the matters summarized in paragraph 18.5) do not apply to the EDB of the agency, and if the EDB is also an EDB of another entity, declare that s26WK and 26WL (ie all the matters summarized in paragraph 18.5) do not apply to the EDB of the other entity; **or**

[6] Within the meaning of s6 of the Privacy Act, that relevantly defines *enforcement body* in (f) to include *an agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law;* and (n) that relevantly defines *enforcement body* to include *a State or Territory authority, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law*.

(ii) declare that s26WL(3), ie the obligation to provide the statement summarized in paragraph 18.5(c) and (d), is to be given in respect of the agency (and any EDBs of other entities) before the end of the period as specified in the NECS Privacy Commissioner's declaration. Any extended period must, in the Commissioner's opinion, be considered reasonable in the circumstances having regard to the following matters:

(A) the public interest;

(B) relevant advice given to the Commissioner by an enforcement body or the Australian Signals Directorate of the Defense Department; or

(C) any other matters the Commissioner considers relevant.

The NECS Privacy Commissioner may make a declaration referred to in (d)(i) or (ii) above on the Commissioner's initiative or on application to the Commissioner by the agency. Section 26WQ(6) to (10) governs applications by an agency to the NECS Privacy Commissioner, and ACECQA and Regulatory Authorities should refer to those subsections for further details.

18.7. **NECS Privacy Commissioner may direct agencies to notify Eligible Data Breaches – s26WR.** If the Commissioner reasonably believes there has been an EDB by ACECQA or a Regulatory Authority, the Commissioner may by written notice to the agency direct it to issue a statement similar (but not the same) to that described in paragraph 18.5. Specifically, the Commissioner may by written notice to the agency direct it:

(a) to prepare a statement of the following matters:

(i) the identity and contact details of the agency; and

(ii) a description of the eligible data breach that the *Commissioner* has reasonable grounds to believe has happened; and

(iii) the kind or kinds of information concerned; and

(iv) recommendations about the steps that individuals should take in response to the eligible data breach that the *Commissioner* has reasonable grounds to believe has happened; and

(v) if the Commissioner reasonably believes that the EDB is an EDB of one or more other entities, to set out the identity and contact details of those other entities;

(b) to give a copy of a statement to the NECS Privacy Commissioner;

(c) if it is practicable for the agency to notify the contents of the statement to each of the individuals:

(i) to whom the relevant information relates, to take reasonable steps to notify the contents of the statement to each individual[7] to whom the relevant information relates; **or**

[7] S26WR(9) states if the agency normally communicates with a particular individual using a particular method, it may use that method.

(ii) who are at risk from the eligible data breach, to take reasonable steps to notify the contents of the statement to each of the individuals[8] who are at risk from the EDB; or

(d) if neither paragraph (c) (i) or (ii) applies, the agency must publish a copy of the statement on the agency's website and take reasonable steps to publicize the contents of the statement.

Before giving a direction, the Commissioner must invite the agency to make a submission to the Commissioner in relation to the direction within the period specified in the invitation. (s26WR(3).

The direction may also require the statement to set out specified information that relates to the EDB that the Commissioner reasonably believes has happened.

In deciding whether to give a direction, the Commissioner must have regard to any relevant advice given to the Commissioner by an enforcement body or the Australian Signals Directorate of the Defence Department, any submission made by the agency in response to an invitation from the Commissioner, and other matters the Commissioner considers relevant.

ACECQA and Regulatory Authorities must comply with the Commissioner's direction as soon as practicable after the direction is given. (s26WR(10).

18.8. **Exceptions for s26WR.** Parts or all of s26WR do not apply in the following circumstances and to the following extent.

(a) **Enforcement related activities - 26WS.** ACECQA or a Regulatory Authority is not required to comply with a direction of the Commissioner of the type referred to in paragraph 18.7, if the agency is an enforcement body[9] and its CEO reasonably believes that compliance with the direction would be likely to prejudice an enforcement related activity of the enforcement body.

(b) **Secrecy provisions s26WT**. If compliance by ACECQA or a Regulatory Authority with any of the obligations referred to in paragraphs 18.7(b)(c) or (d) - (ie the obligation to give a copy of the statement to the NECS Privacy Commissioner or to take steps to notify the contents of the statement to individuals) - would be inconsistent with a secrecy provision (other than a prescribed secrecy provision specified in the regulations[10] - then the s26WR(1)(b) and 26WR(2), ie the matters summarized in paragraphs 18.7(b) to (d), do not apply to the extent of the inconsistency.

For this section, *secrecy provisions* is defined to mean a law of the Commonwealth (other than the Privacy Act) that prohibits or regulates the use or disclosure of information.

Secrecy provisions can also be specified in the Privacy Regulations. Note that the regulations made under the Privacy Act 1988 (Cth) do not apply to ECS Law. (NECS reg 203). No regulations have

[8] S26WR(9)states if the agency normally communicates with a particular individual using a particular method, it may use that method;

[9] Within the meaning of s6 of the Privacy Act 1988 (Cth), that relevantly defines *enforcement body* in (f) to include *an agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law;* and (n) that relevantly defines *enforcement body* to include *a State or Territory authority, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law*.

been specified for the purposes of the relevant sections 26WT as at July 2018. Section 26WT(4) and (5) contain further obligations if any such regulations are made and apply to ECS Law.

19. **Ancillary contravention of civil penalty provisions.** Various sections of the Privacy Act (eg s65 and 66) create a civil penalty for a breach of the section (called a civil penalty provision). In addition, agencies must not:

(a) attempt to contravene a civil penalty provision; or

(b) aid, abet, counsel or procure a contravention of a civil penalty provision; or

(c) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or

(d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or

(e) conspire with others to effect a contravention of a civil penalty provision. (s80V Privacy Act)

20. **Agencies to ensure contractors do not breach Privacy Act.** If an ACECQA or a Regulatory Authority enters a contract under which goods or services are provided to them, the agency must take contractual measures to ensure that the contractor does not do an act, or engage in a practice, that would breach an Australian Privacy Principle if done or engaged in by the agency. (s95B Privacy Act)

21. **Disclosure of certain provisions of contracts under which goods or services are to be or were to be provided to ACECQA or a Regulatory Authority.** If a person asks ACECQA or a Regulatory Authority for information about any provision of its contracts for goods or services provided to the agency, that are inconsistent with a registered APP code binding on it or with an Australian Privacy Principle, the agency must inform the person in writing of that content. (s95C Privacy Act)

National Education and Care Services Privacy Commissioner

NECS Privacy Information Sheet 1

February 2018

Notifiable Data Breaches Scheme - Advice to Regulatory Authorities and ACECQA

Section 263 of the Education and Care Services National Law applies the Commonwealth Privacy Act 1988, as in force from time to time, as a law of a participating jurisdiction for the purposes of the National Quality Framework. Regulation 199 of the Education and Care Services National Regulations modifies the Privacy Act to apply specifically to agencies, those agencies being the National Authority (ACECQA) and each State and Territory Regulatory Authority of a participating jurisdiction. Regulation 196 of the Education and Care Services National Regulations modifies the Privacy Act 1988 to mean that a reference to the Australian Information Commissioner is a reference to the National Education and Care Services Privacy Commissioner.

The Privacy Amendment (Notifiable Data Breaches) Act 2017 establishes the Notifiable Data Breaches (NDB) Scheme under Part IIIC of the Privacy Act. The NDB scheme applies from 22 February 2018 to all agencies and organisations with existing personal information security obligations under the Privacy Act. These include ACECQA and each of the State and Territory Regulatory Authorities (referred to as the agencies throughout this Information Sheet).

Relevant sections of the Privacy Act are referred to throughout this Information Sheet.

What is the NDB Scheme?

The Notifiable Data Breaches (NDB) scheme establishes requirements for entities in responding to data breaches. Entities have data breach notification obligations when a data breach is likely to result in serious harm to any individual whose personal information is involved in the breach.

The NDB scheme places an obligation on ACECQA and State and Territory Regulatory Authorities to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm. The NECS Privacy Commissioner must also be notified.

What data breaches require notification?

The NDB scheme only applies to data breaches involving personal information that are likely to result in serious harm to any of the individuals to whom the information relates. These are referred to as 'eligible data breaches'.

An eligible data breach arises when the following three criteria are satisfied:

- there is **unauthorised access** to or **unauthorised disclosure** of personal information, or a **loss** of personal information, that an agency holds, and

- a reasonable person would conclude that this is likely to result in **serious harm** to one or more individuals to whom the information relates, and

- the agency has not been able to prevent the likely risk of serious harm with **remedial action**.

Assessing for unauthorised access, disclosure or loss.

Agencies must be prepared to conduct a quick assessment of a suspected data breach to determine whether it is likely to result in serious harm to any individual and as a result require notification. S26WH(2)(b) of the Privacy Act requires agencies to take all reasonable steps to ensure the assessment is completed within 30 days of the agency becoming aware there may have been an eligible data breach.

Unauthorised access of personal information occurs when personal information that an agency holds is accessed by someone who is not permitted to have access. This includes unauthorised access by an employee of the entity, or an independent contractor, as well as unauthorised access by an external third party (such as by hacking).

Unauthorised disclosure occurs when an agency, whether intentionally or unintentionally, makes personal information accessible or visible to others outside the agency, and releases that information from its effective control in a way that is not permitted by the Privacy Act. This includes an unauthorised disclosure by an employee of the agency.

Loss refers to the accidental or inadvertent loss of personal information held by an entity, in circumstances where is it is likely to result in unauthorised access or disclosure.

Assessing for the nature and likelihood of "serious harm"

The second step in deciding whether an eligible data breach has occurred involves deciding whether, from the perspective of a **reasonable person**, the data breach would be **likely to result** in **serious harm** to an individual whose personal information was part of the data breach.

"Reasonable person" is not defined in the Privacy Act. For the purposes of the NDB scheme it is taken means a person in the agency's position (rather than the position of an individual whose personal information was part of the data breach or any other person), who is properly informed, based on information immediately available, or following reasonable inquiries or an assessment of the data breach.

The phrase 'likely to result' means the risk of serious harm to an individual is more probable than not (rather than possible).

"Serious harm" is also not defined in the Privacy Act. In the context of a data breach, serious harm to an individual may include serious physical, psychological, emotional, financial, or reputational harm. Examples may include:
- identity theft
- significant financial loss by the individual
- threats to an individual's physical safety
- loss of business or employment opportunities
- humiliation, damage to reputation or relationships
- workplace or social bullying or marginalisation.

The NDB scheme includes a non-exhaustive list of 'relevant matters' that may assist agencies to assess the likelihood of serious harm. These are set out in s26WG of the Privacy Act as follows (paraphrased):
- the kind of information;
- the sensitivity of the information;
- whether the information is protected by any security measures;
- if the information is protected by security measures and the likelihood that any of those security measures could be overcome;
- the persons, or the kinds of persons, who have obtained, or who could obtain, the information;
- if a security measure (eg encryption) was used in relation to the information, and was designed to make the information unintelligible or meaningless to persons unauthorised to obtain the information, the likelihood that anyone obtaining the information with the intention of causing harm would have access to information or knowledge required to circumvent the security measures;
- the nature of the harm;
- any other relevant matters.

Remedial Action

The NDB scheme provides agencies with the opportunity to take positive steps to address a data breach in a timely manner and avoid the need to notify. If an agency takes remedial action such that the data breach would not be likely to result in serious

harm, then the breach is not an eligible data breach for that agency or for any other agency. For breaches where information is lost, the remedial action is adequate if it prevents unauthorised access to, or disclosure of personal information.

If the remedial action prevents the likelihood of serious harm to some individuals within a larger group of individuals whose information was compromised in a data breach, notification to those individuals for whom harm has been prevented is not required.

Requirement to Prepare and Provide a Statement about an Eligible Data Breach

If, following assessment, an agency has reasonable grounds to believe that there has been an eligible data breach the agency **must prepare a statement and provide a copy to the NECS Privacy Commissioner.** S26WK(3) of the Privacy Act requires the Statement to include:

(a) the identity and contact details of the agency;

(b) a description of the eligible data breach that the agency believes has happened;

(c) the kind or kinds of information concerned; and

(d) recommendations about the steps that individuals should take in response to the breach.

If the agency has reasonable grounds to believe that the eligible data breach also constitutes an eligible data breach of one or more other agencies the statement may also set out the identity and contact details of those agencies.

Requirement to Notify Individuals

S26WL of the Privacy Act requires an agency that has prepared a Statement about an eligible data breach to:

(a) take reasonable steps to notify the contents of the Statement to each of the individuals to whom the relevant information relates; or

(b) take reasonable steps to notify the content of the Statement to each of the individuals who are at risk from the eligible data breach, or

(c) if it is not practicable for (a) or (b) to occur, publish a copy of the Statement on the agency's website and take reasonable steps to publicise the contents of the Statement.

Agencies can also provide further information in their notification such as an apology and an explanation about what they are doing about the breach.

Action to prevent Future Breaches

Following a data breach, agencies should review the incident and take action to prevent future breaches. This may include:
- fully investigating the cause of the breach;
- developing a prevention plan;
- conducting regular audits to ensure the plan is implemented and maintained;
- updating security;
- changes to policies and procedures;
- staff training.

Role of the NECS Privacy Commissioner under the NDB Scheme

The NECS Privacy Commissioner has a number of roles under the NDB scheme. These include:

- receiving notifications from ACECQA and State and Territory Regulatory Authorities of eligible data breaches;

- making enquiries or offering advice and guidance in response to notifications;

- encouraging compliance with the scheme, including by handling complaints, conducting investigations, and taking other regulatory action in response to instances of non-compliance;

- offering advice and guidance to ACECQA and Regulatory Authorities and providing information to the community about the operation of the scheme.

The NECS Privacy Commissioner has a range of enforcement powers to ensure that agencies meet their obligations under the scheme. A failure by an agency to meet any of the following requirements of the scheme is an interference with the privacy of an individual under s13(4A) of the Privacy Act:
- conduct a reasonable and expeditious assessment of a suspected eligible data breach (s 26WH(2)), taking all reasonable steps to ensure that this assessment is completed within 30 days of becoming aware (s 26WH(2)(b))

- prepare a statement about the data breach, and give a copy to the Commissioner, as soon as practicable (s 26WK(2))
- notify the contents of the statement to individuals at risk of serious harm (or, in certain circumstances, publish the statement) as soon as practicable (s 26WL(3))
- comply with a direction from the Commissioner to prepare a statement and notify as soon as practicable (s 26WR(10)).

The preferred approach of the NECS Privacy Commissioner is always to work with agencies to encourage and facilitate voluntary compliance with the agencies' obligations under the Privacy Act before taking any enforcement action.

Should they become necessary, enforcement powers available to the NECS Privacy Commissioner in response to an interference with privacy include powers to:
- accept an enforceable undertaking (s 33E) and bring proceedings to enforce an enforceable undertaking (s33F)
- make a determination (s52) and bring proceedings to enforce a determination (ss55A and 62)
- seek an injunction to prevent ongoing activity or a recurrence (s98)
- apply to court for a civil penalty order for a breach of a civil penalty provision (s80W), which includes a serious or repeated interference with privacy (s13G).

The NECS Privacy Commissioner can also direct an agency to notify individuals at risk of serious harm, as well as the Commissioner, about an eligible data breach in certain circumstances (s26WR). This might happen if a data breach comes to the attention of the Commissioner but has not come to the attention of the agency, or if the Commissioner does not agree with the agency's initial view about whether a data breach triggers an obligation to notify.

If the Commissioner and the agency cannot agree about whether notification should occur, the Commissioner will give the agency an opportunity to make a formal submission about why notification is not required, or if notification is required, on what terms. The Commissioner will consider the submission and any other relevant information before deciding whether to direct the entity to notify under s26WR.

Before directing an agency to notify, the Commissioner will usually ask the agency to agree to notify.

The NECS Privacy Commissioner may also declare that notification of a particular data breach is not required (s26WQ(1)(c)) if satisfied it is reasonable in the circumstances to do so, and the Commissioner may also modify the period in which notification needs to occur (s26WQ(1)(d)).

Resources

The *Privacy Amendment (Notifiable Data Breaches) Act 2017* is available at: www.legislation.gov.au/Details/C2017A00012

The Australian Information Commissioner website at www.oaic.gov.au contains further explanatory information and resources about the NDB Scheme which will be used, and adapted where necessary, by the NECS Privacy Commissioner in oversighting the application of the NDB Scheme by ACECQA and the State and Territory Regulatory Authorities.

Acknowledgement

The information provided in this Information Sheet is drawn from the *Privacy Amendment (Notifiable Data Breaches) Act 2017* and material developed by the Commonwealth Office of the Australian Information Commissioner, modified to reflect the specific jurisdiction and circumstances of the NECS Privacy Commissioner.

The information is of a general nature. It is not a substitute for legal advice.

Attachment 4

Freedom of Information Statistical Data 1 July 2017 to 30 June 2018

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 2017 - 30 June 2018

ACT Children's Policy and Regulatory Unit Education and Training Directorate
NSW Early Childhood Education and Care Services
NT Early Childhood Policy and Regulations
QLD Department of Education and Training
SA Education and Early Childhood Services Registration and Standards Board
TAS Department of Education
VIC Department of Education and Training
WA Department of Communities
ACECQA Australian Children's Education and Care Quality Authority

Table 1 FOI ACCESS REQUESTS AND OUTCOMES: 1 July 2017 - 30 June 2018

Jurisdiction	No. in hand from 2016/17	No. received	No. Finalised*	Access granted (full)	Access granted (partial)	Access refused in full	Requests withdrawn	Internal Review	Fees Collected $	Amendments to personal records sought
ACECQA	0	4	4	0	2	0	2	0	330	0
ACT	5	4	9	0	9	0	0	0	0	0
NSW	3	28	28	5	5	4	14	0	0	0
NT	0	0	0	0	0	0	0	0	0	0
QLD	2	15	15	1	13	0	1	1	3,193	0
SA	0	0	0	0	0	0	0	0	0	0
TAS	0	0	0	0	0	0	0	0	0	0
VIC	1	10	9	0	7	1	1	0	47.50	0
WA	0	2	2	0	2	0	0	0	0	0
TOTAL	11	63	67	6	38	5	18	1	3,570.00	0

Note: * Number finalised includes those requests that were subsequently withdrawn.

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

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 claims (*=rounded)
	Exempt documents under Division 2, Part IV of the FOI Act		
S34	Cabinet Documents	1	1.09
S37	Documents affecting law enforcement or protection of public safety	10	*11.00
S42	Legal professional privilege	5	5.49
S45	Material obtained in confidence	8	*8.80
S47	Documents disclosing trade secrets or commercially valuable information	3	3.29
	Conditionally exempt documents under Division 3, Part IV of the FOI Act		
S47B	Commonwealth/State Relations	1	1.09
S47C	Deliberative processes	5	5.49
S47E	Certain operations of agencies	16	*17.60
S47F	Personal Privacy	33	36.25
S47G	Business (other than documents to which s47 applies)	9	*9.90
TOTAL		91	100.00

Education Services Australia

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

Statement of Funding and Expenditure for the period 1 July 2017 - 30 June 2018

		Actual $	Budget $	Variance $
Funding				
	FY17-18 Funding	145,000	145,000	0
		145,000	**145,000**	**0**
Expenditure				
	Domestic Travel account for Projects	910	1,500	590
	Investigation Contigency	0	6,000	6,000
	Website Development & Hosting Cost	5,530	8,000	2,470
	Retainer	20,000	20,000	0
	Rent - Ombudsman	20,000	20,000	0
	Sundry	12,068	10,000	(2,068)
	Project Legal fees	26,128	25,000	(1,128)
	Salary & On Costs	64,352	54,500	(9,852)
		148,987	**145,000**	**(3,987)**
Surplus/(Deficit)		(3,987)		
Prior years unspent funding		104,442		
Total Balance of funds remaining		**100,455**		

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Education Services Australia

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

Statement of Financial Position as at 30 June 2018

CURRENT ASSETS	**$**
Cash at bank	100,455
Total Current Assets	100,455
Total Non-Current Assets	0
TOTAL ASSETS	100,455
CURRENT LIABILITIES	
Income received in advance	100,455
Total Current Liabilities	100,455
NON-CURRENT LIABILITIES	
Total Non-Current Liabilities	0
TOTAL LIABILITIES	100,455
NET ASSETS	0

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Notes to the annual financial statements for the year 1 July 2017 to 30 June 2018

Note 1: Basis of Preparation

The financial statements for the year ended 30 June 2018 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 2018, 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, Employment and Workplace Relations.

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Independent Auditor's Report to the Members of Education Services Australia Limited

Opinion

We have audited the accompanying special purpose financial report, which comprises the statement of financial position as at 30 June 2018, the statement of funding and expenditure for the year then and notes to the financial statements, including a summary of significant accounting policies.

The financial report relates to activities detailed in the Education and Care Services National Law and Education and Care Services National Regulations (collectively the "National Law") 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.

In our opinion the attached financial report of Education Services Australia Limited for the year ended 30 June 2018 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 is presented 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

We conducted our audit in accordance with Australian Auditing Standards. Our responsibilities under those standards are further described in the Auditor's Responsibilities for the Audit of the Financial Report section of our report. We are independent of the Company 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 financial report in Australia. We have also 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 audit opinion.

Grant Thornton Audit Pty Ltd ACN 130 913 594
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Responsibilities of the Management for the Financial Report

The management of Education Services Australia Limited are responsible for the preparation of the financial report. This responsibility includes establishing and maintaining internal control relevant to the preparation and fair presentation of the financial report in accordance with the National Law and the Australian Accounting Standards.

Auditor's Responsibilities for the Audit of the Financial Report

Our objectives are to obtain reasonable assurance about whether the financial report 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 the 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 this financial report.

A further description of our responsibilities for the audit of the financial report is located at the Auditing and Assurance Standards Board website at: http://www.auasb.gov.au/auditors_responsibilities/ar4.pdfn. This description forms part of our auditor's report.

Grant Thornton Audit Pty Ltd
Chartered Accountants

Melbourne, 8 August 2018