2019-2020

Annual Report

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

National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

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National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

Letter of Transmission

Chair
Education Council
PO Box 202
CARLTON SOUTH VIC 3053

Dear Minister

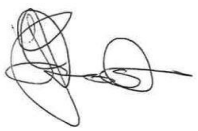
In accordance with Regulations 198, 207 and 221 of the *Education and Care Services National Law Regulations* (the ECS Regulations) I am pleased to present to the Ministerial Education Council the National Education and Care Services Freedom of Information Commissioner, National Education and Care Services Privacy Commissioner, and Education and Care Services Ombudsman (the ECS Commissioners), Annual Report for the period 1 July 2019 to 30 June 2020.

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

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

Regulations 198, 207 and 221 of the ECS Regulations require the Ministerial Council to arrange for the tabling of this Annual Report in the State, Territory and Commonwealth Parliaments.

Yours sincerely



Lesley Foster

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

Overview

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

The two Commissioners' and the Ombudsman's positions are established and operate independently of each other for the purposes of the ECSNL. The Ministerial Education Council is responsible for appointments to the positions and it has resolved to appoint one person to undertake the three roles.

The positions were established in 2012 as part of reforms by the then Council of Australian Governments (COAG) to create a national, uniform regulatory and quality assurance system for early childhood education and care and outside school hours care services across Australia. The system is referred to as the National Quality Framework for Early Childhood Education and Care (the NQF). The NQF applies to most long day care, family day care, outside school hours care, and preschool/kindergarten services in Australia.

To implement the system, the ECSNL established the Australian Children's Education and Care Quality Authority (ACECQA) and early childhood education and care Regulatory Authorities in each of the 8 Australian states and territories (the NQF agencies). ACECQA oversees the implementation of the NQF and works with all governments to provide guidance, resources, and services to improve outcomes for children in education and care services. State and territory Regulatory Authorities are responsible for granting education and care provider and service approvals, undertaking quality assessment and rating of services, and ensuring services meet the requirements of the ECSNL and the ECS Regulations.

Legislation and the role of the ECS Commissioners

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

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

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

Within this context, the purpose of the ECS Commissioners is to ensure that the information access and privacy rights of the community as set out in the *Freedom of Information Act 1982* and the *Privacy Act 1988* are upheld by ACECQA and the regulatory authorities, and, through the *Ombudsman Act 1976*, that the administrative actions of ACECQA are lawful, fair and proportionate.

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

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

Reflections on 2019-2020

As for everyone, the 2019-2020 year was dominated by the COVID-19 pandemic. The second half of the year has brought different work arrangements and challenges for the office and for the NQF agencies we work with. Remote working has become the norm and face to face meetings have been replaced by video- and tele-conferencing. The office received a significant number of enquiries - mostly by telephone - about COVID-19 related matters that were outside the jurisdiction of the ECS Commissioners. These were referred to appropriate bodies for action.

Legislative challenges

The complexity of the interaction of the national applied laws legislation with the Commonwealth legislation is, unsurprisingly, not well understood by individuals and organisations seeking access to information held by ACECQA or the regulatory authorities, or by individuals seeking redress for breaches of privacy, or amendments to their personal information, by these agencies.

This is particularly the case in relation to the regulatory authorities which operate within, or in association with, state or territory government departments where freedom of information requests and privacy matters are more commonly dealt with under the relevant state or territory laws.

One review conducted by the NECS FOI Commissioner during the year highlighted some difficulties that can arise. The Review applicant (an affected third party to a FOI access application) asserted that the *Freedom of Information Act 1982* (Cth) was wrongly applied to the FOI access application by an officer acting under delegation from a regulatory authority and that the freedom of information laws of the jurisdiction should apply. In applying for both internal and NECS FOI Commissioner Reviews the applicant relied on the jurisdiction's legislation to support some of their objections to access being provided to certain documents.

The case highlights the need to ensure that information is available on agency websites and is included in correspondence with parties to an FOI application concerning the jurisdiction of the Commonwealth legislation for the purposes of the National Quality Framework.

Advice on the application of the *Commonwealth Freedom of Information Act 1982* to NQF agencies, designed to support jurisdictions assisting people to exercise their rights under the Commonwealth legislation, is at Attachment 1.

Office capacity

Each of the ECS Commissioners is appointed on a part-time basis. The legislated functions of the Commissioners are set out in the next section of this report. They can broadly be categorised as reactive and proactive functions.

The nature of the reactive functions of the roles – broadly defined as responding to and investigating complaints and undertaking reviews – means that there are inevitable peaks and troughs in the demand for the services of the Commissioners. Consequently, the time to undertake the more proactive functions such as the development of guidance materials and Commissioner own-motion investigations is variable.

The year saw an escalation in requests for NECS FOI Commissioner Reviews of FOI access decisions made by the agencies.

Seven NECS FOI Commissioner Reviews were completed over the period. Such reviews are formal, complex, and protracted and are subject to scrutiny by relevant state and territory administrative appeal bodies.

Each Review was completed within the office performance target of 3 months; this is only achieved by escalating the time fraction worked by the Commissioners. The only relevant agency against which to attempt to benchmark performance in this area is the office of the Australian Information Commissioner (AIC) given she operates under the same Commonwealth legislation as the NECS FOI and Privacy Commissioners. However, such comparison is severely limited. The AIC office, while having access to significantly greater resources, also has jurisdiction over a much greater number of agencies and organisations and consequently handles a significantly greater volume of FOI Review applications. It is noted that in 2018-2019 the AIC reported that the average completion time for FOI Reviews undertaken by her office was 7.8 months.

Provision of guidance materials

Section 93A of the *Freedom of Information Act 1982* (Cth) (as modified by the ECSNL and ECSNL regulations), provides for the NECS FOI Commissioner to issue written guidelines to the NQF agencies in relation to the operations of the FOI Act. Such guidelines are not legislative instruments but section 93A does require agencies to have regard to them when exercising powers or functions under the FOI Act.

Section 28 of the *Privacy Act 1988* (as modified by the ECSNL and ECSNL Regulations) similarly makes provision for the NECS Privacy Commissioner to issue guidelines in relation to the protection of individual privacy and to promote an understanding and acceptance of the Australian Privacy Principles (APPs).

The NECS FOI and Privacy Commissioners have issued guidance and advice to agencies under these powers from time to time as necessary and within resource capacity. However, I have formed the view that the information is not sufficiently comprehensive to support agencies in all aspects of their responsibilities under the two Acts.

The Australian Information Commissioner (AIC) has developed guidelines on the interpretation, operations, and administration of the FOI Act[1] and on the application of the Australian Privacy Principles[2] that reflect accumulated knowledge derived from practice and relevant case law. The NQF agencies have referred to the FOI Guidelines in determining FOI access applications.

The NECS FOI and Privacy Commissioners have now determined to formally adopt relevant sections of these AIC Guidelines, by written instrument, for use by ACECQA and the regulatory authorities when performing their duties or functions under the Commonwealth legislation (as modified). This will ensure consistency in the interpretation and application of the legislation across agencies that are subject to the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) and remove any uncertainty for NQF agencies or the public as to the expectations of the NECS Commissioners in the application of the two Acts.

A copy of the Instrument adopting parts of the AIC Freedom of Information Guidelines is at **Attachment 2.** A similar Instrument adopting the AIC Privacy Principles Guidelines is under development.

[1] Office of the Australian Information Commissioner Freedom of Information Guidelines

[2] Office of the Australian Information Commissioner Australian Privacy Principles Guidelines

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

Priorities for 2020-2021

The priorities for the office for 2020-2021 will be:
(1) Review of the application of the Disclosure Log and Information Publication Scheme provisions of the *Freedom of Information 1982* (Cth) by the NQF agencies following a desktop audit conducted by the ECS Commissioners during 2019/2020.
(2) Review of the application of the Australian Privacy Principles requirements of the *Privacy Act 1988 (Cth)* by the NQF agencies.
(3) The identification of, and reporting to AESOC on, any legislative issues associated with the application of the three Commonwealth Acts under the Education and Care Services National Law and regulations with respect to the functions and powers of the ECS Commissioners.
(4) Ongoing identification and resolution of gaps in policy documents and support material provided by the office.
(5) Subject to budget availability, the development and implementation of design specifications for an upgrade of the NECSOPIC website.

Functions of the ECS Commissioners

Education and Care Services Ombudsman

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

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

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

The ECS Ombudsman does not have powers in relation to how state and territory regulatory authorities exercise their powers or functions under the ECSNL or ECS 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.

National Education and Care Services Freedom of Information Commissioner

The *Freedom of Information Act 1982* (Cth) provides the public with a general right of access to documents in the possession of the NQF

agencies subject to limited exceptions and exemptions.

ACECQA and each state and territory regulatory authority are bound by, and must comply with, the requirements of the FOI Act when dealing with formal requests for access to documents under freedom of information.

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

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

National Education and Care Services Privacy Commissioner

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

ACECQA and each state and territory regulatory authority are bound by, and must comply with, the requirements of the Privacy Act in relation to how they collect, use, store and otherwise handle personal information about individuals.

Complaints and Enquiries

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

There continues to be a pleasingly low level of complaints received by the office in relation to the administrative actions of ACECQA or to privacy breaches by ACECQA or regulatory authorities. During the 2019/20 reporting period 4 complaints were received by the office of the Education and Care Services Ombudsman in relation to ACECQA; Two complaints related to matters associated with rating review panels and two related to the assessment of qualifications. In each instance ACECQA was found to have taken appropriate administrative actions.

One complaint was received by the Privacy Commissioner concerning an alleged breach of privacy by a regulatory authority. However, following preliminary enquiries, when further information was requested to enable the matter to be investigated, the complainant declined to respond.

One complaint was received by the Freedom of Information Commissioner with respect to a regulatory authority's handling of a freedom of information matter. The complainant was advised about the investigative powers of the FOI Commissioner and the complainant's right to seek a review of the FOI Decision made by the regulatory authority. The complainant did not pursue the matter further.

Seven requests for NECS FOI Commissioner Reviews of freedom of information decisions made by agencies were completed during the reporting period. These are discussed in the next section of this report.

For the purposes of reporting here, "enquiries" are defined as matters raised with the Office that fall outside the jurisdiction of the ECS Commissioners. The Office continued to receive a steady stream of such enquiries. About 60 percent were related to childcare fees including debt recovery methods of some services, fee charging during child absences from a service, fee charging under the Government's COVID 19 Education and

Care Relief Package, and the Child Care Subsidy. Other enquiries related to the administrative actions of state or territory regulatory authorities; the health and safety of children in childcare services; the operations of childcare services; family court related matters; and matters unrelated to early childhood education and care. In all cases such complaints were redirected to relevant bodies.

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

Freedom of Information (FOI)

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

ACECQA and each state and territory regulatory authority are required to report to the Commissioner on freedom of information matters relating to their jurisdiction including: the number of FOI requests for access to documents received and their outcomes; the number of applications received for amendment to personal information and their results; the total charges collected during the year; and the number of applications for internal review of FOI decisions and their results.

There was a small overall percentage increase (3.2 percent) in the total number of new FOI applications received by ACECQA and the state and territory regulatory authorities compared to the last reporting period. Data by jurisdiction for the 2019/2020 reporting period is provided in Table 1 of Attachment 4 to this report. In summary, only one jurisdiction - the Northern Territory - reported they received no FOI applications for the period. The remaining 8 agencies received a total of 64 applications and had a further total of 16 applications in hand from the previous reporting year – a total of 80 applications requiring decision during the reporting year.

Seventy-five applications, or 94 percent, were finalised by 30 June 2020. Of those finalised 12 percent were granted access in full, 44 percent were granted partial access, 27 percent were refused access in full, 16 percent of applications were withdrawn by applicants, and 1 percent of applications were dealt with administratively.

Three jurisdictions charged fees and collected a total of $2,473. No applications for amendment to personal information were reported during the period. Three applications were received for internal reviews of FOI decisions.

Collectively, jurisdictions reported that ninety eight percent of FOI decisions were made within the statutory time of 30 days and 2 percent were up to 30 days overdue.

Exemptions and Conditional Exemptions

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

If a requested document meets the criteria of one of the Exemptions provisions an agency can refuse to release it. If a document meets the criteria of a Conditional Exemption provision the decision maker must apply "a public interest test" to determine if giving access to the document would be contrary to the public interest. Access cannot be refused simply because a document falls within a conditional exemption provision. It must also be

contrary to the public interest to release the document, otherwise access must be granted. The FOI Act is weighted towards disclosure of information and redactions may be applied to parts of a document to enable its partial release.

During the reporting period ACECQA and the regulatory authorities applied Exemptions or Conditional Exemptions provisions to FOI requested documents a total of 89 times. Table 2 of Attachment 4 details the Exemptions and Conditional Exemptions provisions that were applied and the frequency of their use. Note that more than one Exemption or 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 containing material obtained in confidence' (12.4 percent of the total). Section 45 of the FOI Act exempts a document from disclosure in circumstances where a person who provided confidential information to an agency would be able to bring an action under the general law for breach of confidence to prevent the disclosure of the information, or seek compensation for loss or damage arising from disclosure.

The second most frequently applied Exemption provisions related equally to "documents affecting law enforcement or the protection of public safety" and "documents disclosing trade secrets or commercially valuable information" (each 2 percent of the total).

Section 37 of the FOI Act applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public safety in any of a number of circumstances that are listed in the section. These include: prejudice the conduct of an investigation of a breach, or possible breach, of the law; prejudice the enforcement, or the proper administration, of the law in a particular instance; endanger the life or physical safety of any person; and prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

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

Section 47 exempts a document from disclosure if its disclosure would disclose trade secrets, or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

Trade secret is not defined in the FOI Act. In brief, in determining if information constitutes a trade secret, consideration is given to whether: the information is used in a trade or business; the owner of the information must limit its dissemination; and the information, if disclosed, would be liable to cause real or significant harm to the owner of the information. In determining whether a document has a commercial value, both the fact of the commercial value and the detrimental consequence of its disclosure must be established under the section 47 exemption provision.

The most frequently applied Conditional Exemption provision related to "personal privacy" (32.6 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" (23.6 percent of the total). Section 47E of the FOI Act conditionally exempts documents from disclosure where such disclosure would, or could reasonably be expected to do any of the following: prejudice the effectiveness of procedures or methods for, or the attainment of the objects of, the conduct of tests, examinations or audits 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.

Volume of FOI applications and outcomes over three years

Table 3 in Attachment 4 provides a snapshot of FOI applications over the three years from 2017/18 to 2019/20. There has been an overall 8 percent increase in the number of applications requiring decision within the reporting periods over the 3 years. ACECQA has recorded a 200 percent increase and NSW has recorded a 29 percent increase, while Queensland has recorded a 53 percent decrease, over the period.

National Education and Care Services Freedom of Information Commissioner Reviews

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

During the reporting period the NECS FOI Commissioner completed seven FOI Commissioner reviews of freedom of information decisions made by the NSW (3 applications), Queensland (3 applications), and ACT (1 application) regulatory authorities.

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

No applications for a review of a NECS FOI Commissioner Review Decision were reported for the period.

The Commissioner Review Decisions are 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* .

Audited Financial Report and Budget

The financial report has been audited by Grant Thornton Audit Pty Ltd and the audit statement is at Attachment 3.

Salary and on costs have increased significantly during the period reflecting the substantial increase in the sitting days and work of the Commissioners. The annual budget for the office has been maintained without increase for the past 5 years of operations and the small surplus built up over the previous years has to date been drawn on to cover its operating costs.

In the past year rates for legal advice provided to the office have increased by ten percent. Specifications to update the office website are being prepared; however, this will not proceed in full without additional funding. An increase to the office budget will be sought for 2021/22.

ATTACHMENTS

Attachment 1: Advice on the application of the Commonwealth *Freedom of Information Act 1982* to FOI requests to ACECQA and state and territory regulatory authorities

Attachment 2: Instrument adopting parts of the Australian Information Commissioner FOI Guidelines

Attachment 3: Audited Financial Report

Attachment 4: ACECQA and Regulatory Authorities' Freedom of Information Data

National Education and Care Services Freedom of Information Commissioner

Advice on the application of the Commonwealth *Freedom of Information Act 1982* to FOI Requests made to ACECQA and State and Territory Regulatory Authorities

Introduction

This document sets out the details of how the *Freedom of Information Act 1982* (Cth)) applies to the freedom of information requests for documents held by the Australian Children's Education and Care Quality Authority (ACECQA) and the state and territory education and care Regulatory Authorities.

The following terms and acronyms are used throughout:

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

Agency/ies means ACECQA and/or the state and territory Regulatory Authorities

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

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

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

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

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

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

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

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

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

ECS Regulations means *Education and Care Services National Regulations*

FOI means Freedom of Information
FOI Act means the Commonwealth *Freedom of Information Act 1982*
NECS means National Education and Care Services
NECS FOI Commissioner means the National Education and Care Services Freedom of Information Commissioner
NQF means the National Quality Framework
Regulatory Authority means the Regulatory Authority of each participating jurisdiction under the Education and Care Services National Law.

Introduction

1. All Australian states and territories have passed legislation adopting the Education and Care Services National Law (***ECSNL).*** Victoria passed the *Education and Care Services National Law Act, 2010* and each state and territory passed legislation applying the ECSNL, or enacted corresponding legislation, with some variations to accommodate local requirements.

2. The ECSNL provides a national system for the regulation, assessment and quality improvement of early childhood education and care and outside school hours care services in Australia. The system is referred to as the National Quality Framework (the NQF).

3. The NQF comprises the ECSNL, the Education and Care Services National Regulations, the National Quality Standard for education and care services, an assessment and quality rating process, and national learning frameworks.

4. The ECSNL establishes a national authority - the Australian Children's Education and Care Quality Authority (**ACECQA**) - and state and territory Regulatory Authorities. The Regulatory Authority of each jurisdiction, except South Australia, is the Secretary (or equivalent) of the Department with responsibility for administering early childhood education and care in the particular jurisdiction; in the case of South Australia, the Regulatory Authority is the Education Standards Board.

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

Application of the *Freedom of Information Act 1982* (Cth)

6. In order to achieve consistency across jurisdictions in handling requests for access to information held by ACECQA and the Regulatory Authorities, section 264 of the ECSNL, modified by the ECS Regulations, applies the *Freedom of Information Act 1982* (Cth) as a law of a participating

jurisdiction for the purposes of the National Quality Framework. ECS Regulation 208 states that the FOI Act only applies to the National Authority (ACECQA) and the Regulatory Authority of each participating jurisdiction. Section 264(2)(b) of the ECSNL modifies the FOI Act to require all references to the Information Commissioner in the FOI Act to be read as referring to the NECS FOI Commissioner.

7. In legislation adopting the ECSNL as a law in their jurisdiction, states and territories have **excluded** their respective jurisdiction's freedom of information/right to information laws from applying to the ECSNL or to any instruments made under the ECSNL.

8. All applications for access to information held by ACECQA or by state or territory regulatory authorities in relation to the national quality framework, which includes information in relation to approved education and care providers and services, are therefore considered under the provisions of the *Freedom of Information Act 1982* (Cth) and applications must be consistent with the requirements of that Act.

9. Applications for access to information held by ACECQA or by state or territory regulatory authorities must meet the formal requirements set out in section 15(2) of the FOI Act. The request must be in writing, state that it is an application for the purposes of the FOI Act, include sufficient details about the information being requested to enable the agency to identify it, and include contact details for the applicant.

10. Similarly, an application for a review of a FOI decision that was made by ACECQA or a state or territory regulatory authority must be made to the NECS FOI Commissioner under section 54N of the FOI Act. It must be in writing and must contain contact details for the review applicant and include a copy of the agency's FOI Decision Notice for which an NECS FOIC review is being sought. The review application should also contain reason why the review applicant disputes the FOI decision.

11. Table 1 identifies the relevant State/Territory ECSNL legislation and details the relevant sections of the legislation that apply the ECSNL as a law of the jurisdiction and exclude the state or territory's information laws from applying to the ECSNL or to instruments made under the ECSNL

Table 1 Relevant sections of state/territory legislation applying ECSNL and excluding the jurisdiction's information laws from applying to the ECSNL or instrument made under it

Jurisdiction	State/Territory ECSNL Application Legislation	Section of Act adopting ECSNL	Section of Act excluding jurisdiction's information laws from applying
ACT	*Education & Care Services National Law (ACT) Act 2011*	Section 6	Section 7(1)
NSW	*Children (Education and Care Services National Law Application) Act 2010*	Section 4	Section 5

NT	*Education and Care Services (National Uniform Legislation) Act 2011*	Section 4	Section 7
QLD	*Education and Care Services National Law (Queensland) Act 2011*	Section 4	Section 6
SA	*Education and Early Childhood Services (Registration and Standards) Act 2011*	Section 10	Section 12
TAS	*Education and Care Services Nation Law Application Act 2011*	Section 4	Section 5
VIC	*Education and Care Services National Law Act 2010*	Section 4	Section 5
WA	*Education and Care Services National Law (WA) Act 2012*	Section 4	Section 5

National Education & Care Services
FOI & Privacy Commissioners & Ombudsman

NECS FOIC Instrument 1/2020

Instrument adopting parts of the Australian Information Commissioner Freedom of Information Guidelines

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The following terms and acronyms are used in this Instrument:

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

AIC FOI Guidelines mean the Guidelines issued by the Australian Information Commissioner under s93A of the *Freedom of Information Act 1982* (Cth).

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

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

> In respect of the Australian Capital Territory - the Schedule to *the Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education & Care Services National Law (ACT) Act 2011.*
>
> In respect of New South Wales - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Children (Education and Care Services National Law Application) Act 2010 (NSW).*
>
> In respect of the Northern Territory - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services (National Uniform Legislation) Act 2011*.
>
> In respect of Queensland - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Queensland) Act 2011.*
>
> In respect of South Australia – Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011*.
>
> In respect of Tasmania - the Schedule to the *Education and Care Services National Law Act 2010* (Vic) as adopted by the *Education and Care Services National Law (Application) Act 2011.*
>
> In respect of Victoria – the Schedule to the *Education and Care Services National Law Act 2010* (Vic).
>
> In respect of Western Australia - the Schedule to the *Education and Care Services National Law (WA) Act 2012.*

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

FOI Act means the Commonwealth *Freedom of Information Act 1982.*

Information Commissioner as defined in the FOI Act and the *Australian Information Commissioner Act 2010 (Cth)* means the Australian Information Commissioner.

Instrument as defined by clause 12 of Schedule 1 of the ECSNL includes a statutory instrument.

NECS FOI Commissioner means the National Education and Care Services Freedom of Information Commissioner.

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

Statutory Instrument as defined by clause 12 of Schedule 1 of the ECSNL means an instrument (including a regulation) made or in force under or for the purposes of this Law, and includes an instrument made or in force under any such instrument.

Preamble

Section 264 of the *Education and Care Services National Law* applies the Commonwealth *Freedom of Information Act 1982* (with modifications) as a law of a participating jurisdiction for the purposes of the National Quality Framework. Section 264(2)(b) of the ECSNL modifies the FOI Act so that a reference to the *Information Commissioner* is to be construed as a reference to the *National Education and Care Services Freedom of Information Commissioner*. Section 264(2)(c) of the ECSNL provides that the FOI Act applies with any other modifications made by the *Education and Care Services National Law Regulations.* Regulation 208 of the ECSNL Regulations provides that the FOI Act only applies to the National Authority (which is the Australian Children's Education and Care Quality Authority) and to the Regulatory Authority of each participating jurisdiction.

In this Instrument, ACECEQA and the Regulatory Authorities are referred to collectively as the ECS Agencies.

Section 93A (1) of the Commonwealth *Freedom of Information Act 1982* (as modified by the ECSNL) enables the NECS FOI Commissioner, by instrument in writing, to issue guidelines for the purposes of the FOI Act. The same section provides that ECS Agencies must have regard to any such guidelines when exercising their functions or powers under the FOI Act.

Clauses 24 (1) & (2) of Schedule 1 of the ECSNL allows a statutory instrument made under that Law to apply, adopt or incorporate (with or without modification) the provisions of another document (whether of the same or a different kind) as in force at a particular time, or as in force from time to time.

The Australian Information Commissioner administers the FOI Act in respect to Commonwealth Government agencies. Under s 93A of the FOI Act the Australian Information Commissioner has issued guidelines that provide information and guidance on the interpretation, operation, and administration of the FOI Act. The AIC FOI Guidelines are often already referenced by the ECS agencies in determining FOI access applications and by the NECS FOI Commissioner when undertaking Commissioner Reviews.

Purposes of this Instrument

The purposes of this Instrument are to:

(i) provide clarification as to the guidelines that apply for the purposes of the ECSNL;

(ii) ensure consistency in the interpretation and application of the Commonwealth *Freedom of Information Act 1982;* and

(iii) remove any uncertainty for agencies or the public as to the expectations of the Office of the NECS FOI Commissioner in the application of the FOI Act.

Adoption of Parts of the Australian Information Commissioner FOI Guidelines

Pursuant to section 93A of the FOI Act (as modified by the ECSNL) I hereby make this Instrument adopting the following Parts of the AIC FOI Guidelines:

Part 3	Processing and deciding on requests for access
Part 4	Charges for providing access
Part 5	Exemptions
Part 6	Conditional exemptions
Part 7	Amendment and annotation of personal records
Part 9	Internal Agency review of decisions
Part 12	Vexatious applicant declarations
Glossary	To the extent of references to terms used in the abovementioned Parts.

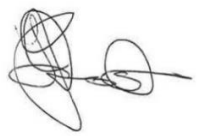
ECS Agencies should note that the above parts of the AIC FOI Guidelines are hereby adopted *as in force from time to time*. This is effected pursuant to clause 24(2) of Schedule 1 of the ECSNL, which provides that if a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates the provisions *as in force from time to time,* unless the statutory instrument otherwise expressly provides.

In adopting the above parts of the AIC FOI Guidelines, references in the Guidelines to the Australian Information Commissioner exercising a power or performing a duty or function generally should be read to mean the NECS FOI Commissioner exercising such power or performing such a duty or function in relation to the ECS Agencies.

In applying the above Guidelines, ECS Agencies will need to be mindful of the modifications made to the FOI Act by the ECSNL Regulations, and in particular regulations 209 and 210. For example, page 43 of Part 3 of the above Guidelines refer to third party applications to the AAT or the Federal Court. The modifications made by the ECSNL regulation 209(d) require the reference to the Federal Court to mean the relevant jurisdiction's Supreme Court, and ECSNL regulation 210 require the reference to the AAT to mean the relevant jurisdiction's administrative tribunal.

ECS Agencies must have regard to the above parts of the AIC FOI Guidelines when exercising their responsibilities under the FOI Act.

This Instrument will be reviewed as required and at the latest every 6 months and may, by instrument in writing, be varied, amended, or revoked.



Lesley Foster
National Education and Care Services Freedom of Information Commissioner

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 2019 - 30 June 2020

		Actual $	Budget $	Variance $
Funding				
	FY19-20 Funding	145,000	145,000	0
		145,000	**145,000**	**0**
Expenditure				
	Domestic Travel account for Projects	0	3,500	3,500
	Investigation Contigency	0	0	0
	Website Development & Hosting Cost	1,284	8,000	6,716
	Retainer	20,000	20,000	0
	Rent - Ombudsman	20,000	20,000	0
	Sundry	3,842	10,000	6,158
	Project Legal fees	25,125	29,000	3,875
	Salary & On Costs	114,757	54,500	(60,257)
		185,008	**145,000**	**- 40,008**
Surplus/(Deficit)		(40,008)		
Prior years unspent funding		114,503		
Total Balance of funds remaining		**74,495**		

For identification purposes only

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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 2020

CURRENT ASSETS	**$**
Cash at bank	74,495
Total Current Assets	74,495
Total Non-Current Assets	0
TOTAL ASSETS	74,495
CURRENT LIABILITIES	
Income received in advance	74,495
Total Current Liabilities	74,495
NON-CURRENT LIABILITIES	
Total Non-Current Liabilities	0
TOTAL LIABILITIES	74,495
NET ASSETS	0

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Note 1: Basis of Preparation

The financial statements for the year ended 30 June 2020 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 2020, 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.

For identification purposes only

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Independent Auditor's Report

To the Members of Education Services Australia Limited

Report on the audit of the financial report

Opinion

We have audited the accompanying financial report, being a special purpose financial report, which comprises the Statement of Financial Position as at 30 June 2020 and Statement of Funding and Expenditure for the year then ended and noted to the financial statements, including a summary of significant accounting policies.

The financial report related 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 (the "Company") for the year ended 30 June 2020 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 Auditor's opinion

We conducted our audit in accordance with Australian Auditing Standards. Our responsibilities under those standards are further described in the Auditor's Responsibilities 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.

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Management's responsibility 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 Australian Accounting Standards.

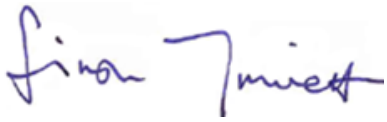
Auditor's responsibility

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.pdf.

This description forms part of our auditor's report.

Grant Thornton Audit Pty Ltd
Chartered Accountants



S C Trivett
Partner - Audit & Assurance

Melbourne, 13 August 2020

Freedom of Information Data - 1 July 2019 to 30 June 2020

Table 1 provides details of Freedom of Information applications 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 2019 - 30 June 2020.

Table 1 FOI ACCESS REQUESTS AND OUTCOMES: 1 July 2019 - 30 June 2020

Jurisdiction	No. in hand from 2018/19	No. received	No. Finalised*	Access granted (full)	Access granted (partial)	Access refused in full	Requests withdrawn by applicant	Request dealt with administratively	Internal Review	Fees Collected $	Amendments to personal records sought
ACECQA	4	8	12	2	2	2	5	1	0	0	0
ACT	0	4	2	0	2	0	0	0	1	0	0
NSW	9	31	38	3	18	13	4	0	2	1,114	0
NT	0	0	0	0	0	0	0	0	0	0	0
QLD	0	8	7	1	0	4	2	0	0	166	0
SA	0	1	1	0	1	0	0	0	0	0	0
TAS	0	1	1	0	1	0	0	0	0	0	0
VIC	3	9	12	1	9	1	1	0	0	1,193	0
WA	0	2	2	2	0	0	0	0	0	0	0
TOTAL	16	64	75	9	33	20	12	1	3	2,473	0

Note: * Number finalised includes those requests that were subsequently withdrawn or dealt with administratively.

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
Exempt documents under Division 2, Part IV of the FOI Act			
S34	Cabinet Documents	1	1.1
S37	Documents affecting law enforcement or protection of public safety	2	2.2
S42	Documents subject to legal professional privilege	1	1.1
S45	Documents containing material obtained in confidence	11	12.4
S47	Documents disclosing trade secrets or commercially valuable information	2	2.2
Conditionally exempt documents under Division 3, Part IV of the FOI Act			
S47B	Commonwealth/State Relations	4	4.5
S47C	Deliberative processes	7	7.9
S47E	Certain operations of agencies	21	23.6
S47F	Personal Privacy	29	32.6
S47G	Business (other than documents to which s47 applies)	11	12.4
TOTAL		89	100

Table 3 Volume of Freedom of Information Applications received by ACECQA and Regulatory Authorities for 3year period by year 2017/18 to 2019/20

Year	ACECQA	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
2017/18									
*Number**	4	9	31	0	17	0	0	11	2
No. finalised	4	9	28	0	15	0	0	9	2
Access granted in full	0	0	5	0	1	0	0	0	0
Partial access granted	2	9	5	0	13	0	0	7	2
Access refused in Full	0	0	4	0	0	0	0	1	0
Requests withdrawn	2	0	14		1	0	0	1	0
2018/19									
*Number**	#7	3	31	0	15	1	0	13	0
No. finalised	0	3	22	0	15	1	0	11	0
Access granted in full	0	0	8	0	2	0	0	0	0
Partial access granted	0	3	7	0	9	1	0	9	0
Access refused in full	0	0	5	0	3	0	0	1	0
Requests withdrawn	2	0	2	0	1	0	0	1	0
2019/20									
*Number**	#12	4	40	0	8	1	1	12	2
No. finalised	12	2	38	0	7	1	1	12	2
Access granted in full	2	0	3	0	1	0	0	1	2
Partial access granted	2	2	18	0	0	1	1	9	0
Access refused in full	2	0	13	0	4	0	0	1	0
Requests withdrawn	5	0	4	0	2	0	0	1	0

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