



2021-2022

# Annual Report

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

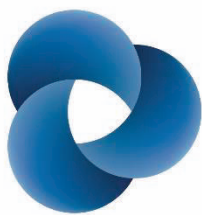


National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman



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

### Letter of Transmittal

Hon Jason Clare MP  
Minister for Education  
Chair  
Education Ministers' Meeting

Dear Minister

In accordance with Regulations 198, 207 and 221 of the *Education and Care Services National Law Regulations* (the ECS Regulations) I am pleased to present to the Education Ministers' Meeting 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 2021 to 30 June 2022.

The Annual Report is the eleventh 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 requirements set for the office and that comply with the ECS Regulations applying to the office.

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

I am retiring from the positions of ECS Commissioners in January 2023. I would like to thank Ministers for the opportunity to serve in the positions. I have found the work to be both fulfilling and challenging.

Yours sincerely

**Lesley Foster**

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

## Overview

### The ECS Commissioners

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

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

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

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

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

### Legislative Framework

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

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

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

The National Law established ACECQA and early childhood education and care Regulatory Authorities in each of the eight Australian states and territories (collectively - **the NQF agencies**) to implement and manage the national system.

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

services, and ensuring services meet their obligations under the ECSNL and associated Regulations.

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

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

Together with ACECQA, state and territory Regulatory Authorities regulate and support a total of 16,986 approved education and care services and 7,270 approved providers across Australia under the National Quality Framework<sup>1</sup>.

The vast majority - 97% - of these services are centre based services. They include most long day care, preschool and outside school hours care services that are delivered at a centre. Tasmanian preschools/kindergartens and most preschools/kindergartens in Western Australia that are outside the scope of the NQF, as well as other services that aren't regulated under the National Law, are not included in the data.

Three percent of the services are family day care service delivered through a network of educators operating from residences and other approved venues. They are sometimes known as family day care schemes and they are administered and supported by central coordination units.

## Vision and Purpose of the ECS Commissioners

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

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

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

## Reflections on 2021-2022

### *COVID-19 impacts*

The coronavirus pandemic continued to impact the ECS Commissioners' office and the NQF agencies we work with. A mix of remote and in office work is established as the norm for the present and virtual meetings have largely replaced in person meetings.

During the reporting period the office continued to receive enquiries - mostly by telephone - about COVID-19 related matters in relation to the operations of education and care services, in particular in relation to the Child Care Subsidy, fee-charging, and debt recovery practices of services. These were outside the jurisdiction of the Commissioners and were referred to other relevant bodies.

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<sup>1</sup> ACECQA NQF Snapshot Q2 2022. August 2022

## Operational Issues

During the reporting period the ECS Commissioners experienced a significant increase in complex Freedom of Information and Privacy complaints and requests for reviews and investigations.

These have tested the resources of the office and highlighted for the ECS Commissioners the need for some new thinking about how best to organise, support and resource the work of the Commissioners going forward.

Work will be undertaken in conjunction with the Australian Education Senior Officials Committee (AESOC) with a view to advising the Education Ministers' Meeting on options for the future operational arrangements for the ECS Commissioners.

## Progress in the Commonwealth Attorney General's Review of the Privacy Act 1988

In November 2019 the Australian Government committed to a review of the *Privacy Act 1988*. The Review is part of the Commonwealth government's response to the report of the Australian Competition and Consumer Affairs Commission's *Digital Platform Inquiry*. It is being led by the Commonwealth Attorney General's office.

As was foreshadowed in last year's Annual Report, the Government released a Discussion Paper in October 2021 with a call for submissions by January 2022. The Discussion Paper sets out proposals and options for reform of the Privacy Act based on feedback received in response to its earlier Issues Paper. The Discussion Paper covers a broad range of topics, including:

- the scope and application of the Act including considerations to clarify and broaden the definition of personal information to capture technical

information such as IP addresses and other online identifiers;

- the protections contained in the Australian Privacy Principles including discussion on the collection, use and disclosure of personal information; and
- how the Act is regulated and enforced, including consideration of introducing a direct right to action for individuals whose privacy has been breached.

Copies of the Discussion Paper and submissions in relation to it are on the Attorney General's Government's consultations [website](#).

The NECS Privacy Commissioner will continue to monitor the review and will advise Ministers and NQF agencies in due course about its outcomes and implications, if any, for the NQF agencies.

## Compliance requirements for NQF agencies under Commonwealth legislation

Matters before the ECS Commissioners this year have highlighted the challenges faced at times by the NQF agencies in having to apply the Commonwealth Privacy and Freedom of Information legislation to aspects of their operations. Most of the NQF agencies are part of large state or territory government departments and rely on the services of departmental privacy and freedom of information officers who have commensurate responsibilities under their own jurisdiction's legislation.

Whilst those challenges may sometimes cause difficulties, the Commonwealth legislation provides a consistent framework in which the same privacy and freedom of information principles and legislation apply to the different jurisdictions when operating in the context of the Education and Care Services National Laws.

The ECS FOI and Privacy Commissioners will continue to gradually build a suite of resources for

the NQF agencies to support them in carrying out their responsibilities under the respective Acts.

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

Although the FOI Guidelines are not legally binding, NQF agencies must have regard to them in carrying out their responsibilities under the FOI Act.

During the reporting period the Australian Information Commissioner issued an updated set of the Guidelines<sup>2</sup>. The NQF agencies must be alert to the content of the updated guidelines in undertaking their responsibilities under the FOI Act.

NQF agencies must also be aware that ECS Regulation 211 applies the [Freedom of Information \(Charges\) Regulations 2019](#) to the NQF agencies in handling FOI requests under the FOI Act (Cth). Part 4 of the FOI Guidelines discusses the application of the Charges Regulations by agencies.

The ECS Privacy Commissioner has similarly adopted by written instrument the Australian Privacy Principles Guidelines<sup>3</sup> for use by the NQF agencies in carrying out their responsibilities under the *Privacy Act 1988*.

The APPs are legally binding principles which are the cornerstone of the privacy protection framework in the Commonwealth Privacy Act. The APPs set out standards, rights and obligations in relation to handling, holding, accessing and correcting personal information.

There are 13 APPs. The Privacy Act applies the APPs to APP entities; an APP entity is defined in s6 of the Act as an *agency* or organisation. National Education and Care Services regulation 199 states that the Privacy Act only applies to *agencies* - that is the NQF agencies, ACECQA and the state and territory regulatory authorities. APPs 1 to 6, 8, and 10 to 13 apply to agencies. The Privacy Act states that APPs 7 and 9 only apply to organisations and hence they do not apply to the NQF agencies.

The NQF agencies must ensure that their handling of personal information is in accordance with the requirements of the APPs, including having an Australian Privacy Principles Policy in place as required by APPs 1.3 and 1.4.

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

A copy of each of the updated adopting instruments is at **Attachments 2 and 3** of this Report.

### *Office re-location*

For the past 12 months the ECS Commissioners have leased office space and services from the Education Ministers' company, Education Services Australia (ESA).

The Commissioners would like to acknowledge the support and assistance provided to them by Education Services Australia staff. In the latter

<sup>2</sup> FOI Guidelines. OAIC Combined version February 2022

<sup>3</sup> Australian Privacy Principle Guidelines. OAIC July 2019



part of 2022, ESA will relocate their premises. The ECS Commissioners will continue to co-locate with ESA at the new premises at Level 22, 180 Lonsdale Street, Melbourne for the foreseeable future.

## Priorities for 2022-2023

The Strategic Plan for 2021-2024 for the ECS Commissioners is at **Attachment 4**. The Strategic Plan covers the period July 2021–July 2024. It presents a three-year outlook and identifies key challenges and proposed for the period.

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

In addition to carrying out their legislated complaint handling, review and investigation responsibilities, the key priority for the ECS Commissioners for 2022-2023 will be to work with the Australian Education Senior Officials Committee (AESOC) to ensure the working arrangements for the office support the business continuity of the ECS Commissioners' roles.

## 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 their recommendations nor change the law. However, having concluded an investigation and reported on findings and recommendations, the Ombudsman may forward the report to the nominated member of the Education Ministers' Meeting responsible for overseeing the National Law. In addition, if appropriate action is not taken by ACECQA in response to an investigation, the Ombudsman may also formally report to the Parliaments of the Commonwealth and the states and territories.

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

As reported previously, this continues to prove a source of confusion for complainants approaching the Education and Care Services Ombudsman for services. Advice included on the Office website aims to mitigate this confusion.

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

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

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

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

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

## National Education and Care Services Privacy Commissioner

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

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

## Complaints and Enquiries

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

During the 2021/22 reporting period, no formal complaints were received by the office of the ECS Ombudsman in relation to the administrative actions of ACECQA.

Two complaints were received by the NECS Privacy Commissioner, both in relation to one

NQF agency carrying out its responsibilities under the Privacy Act. These matters proved to be complex and are ongoing. The final Decisions in relation to them will be published on the NECSOPIC website once they are finalised and all avenues of appeal have been exhausted.

One complaint was received by the NECS Freedom of Information Commissioner with respect to an NQF agency carrying out its responsibilities under the FOI Act.

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

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

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

The ECS Commissioners have added links on their website to information about childcare fees and the Child Care Subsidy in an attempt to direct parents to both relevant material and the avenues open to them for handling any complaint.

Other enquiries received by the office included matters related to the health and safety of

children in childcare services; the operations of childcare services; and closure of childcare services. Matters raised that were unrelated to early childhood education and care included disputes with schools; family court matters; and public liability insurance. In all cases such complaints were redirected to relevant bodies. General enquiries were also made to the office about its operations.

## Freedom of Information (FOI)

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

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

There was a 51.6 percent increase in the total number of *new* FOI requests received by the NQF agencies in 2021/22 compared to the last reporting period. Data by jurisdiction for the 2021/2022 reporting period is provided in Table 1 of **Attachment 6** to this report. In summary the nine NQF agencies collectively received 87 FOI requests and had a further 14 requests in hand from the previous reporting year – a total of 101 requests requiring decision during 2021/22.

Eighty-three requests, or 82 percent, were finalised by 30 June 2022. Of those finalised, 10.8 percent were granted access in full, 53 percent

were granted partial access, 19.3 percent were refused access in full, 16.9 percent of requests were withdrawn, one request of which was subsequently dealt with administratively.

An NQF agency has discretion as to whether or not to impose a charge for access to a document under the *Freedom of Information (Charges) Regulations 1982*. A charge can be imposed for the staff time (over and above the first five hours which are free) and resources expended in processing a FOI request and for costs such as postage, photocopying, or reducing information to a written document. No fees can be charged for making a FOI request or requesting an amendment to personal records, or for seeking an internal review or review by the NECS FOI Commissioner. The Regulations set out the maximum charges rates that apply and no agency may exceed those levels - although they may impose a lower charge (consistent with the 'lowest reasonable cost' objective of the FOI Act).

Two jurisdictions reported they imposed charges, and collected a total of \$626 for the reporting period.

No applications for amendment to personal information were reported for the period. Two agencies received one application each for an internal review of an FOI decision. In one case the original decision was affirmed and in the other greater access was provided.

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

### Exemptions and Conditional Exemptions

Section 11A of the FOI Act requires access to be given to a document unless the document at the time of the request is an exempt document. An exempt document includes documents that meet the criteria for an exemption provision under Part

IV of the FOI Act. Divisions 2 and 3 of the Act set out the Exemptions and Conditional Exemptions provisions which can be applied by a decision maker when considering a freedom of information request. The Act sets out ten Exemptions provisions and eight Conditional Exemptions provisions.

If a requested document meets the criteria of one of the Exemptions provisions an agency can refuse to release it. If a document meets the criteria of a Conditional Exemption provision the decision maker must apply “a public interest test” to determine if giving access to the document would be contrary to the public interest. Access cannot be refused simply because a document falls within a conditional exemption provision. It must also be contrary to the public interest to release the document, otherwise access must be granted. The FOI Act is weighted towards disclosure of information and redactions may be applied to parts of a document to enable its partial release.

During the reporting period the NQF agencies applied Exemptions or Conditional Exemptions provisions to FOI requested documents a total of 100 times. Table 2 of **Attachment 5** details the Exemptions and Conditional Exemptions provisions that were applied and the frequency of their use. It is important to note that more than one Exemption or Conditional Exemption provision may be applied to a document.

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

Of these, the most frequently applied Exemption provision related to “legal professional privilege” (3 percent of the total). Section 42 of the FOI Act exempts documents from disclosure if they are of such a nature that they would be privileged from production in legal proceedings on the grounds of legal professional privilege. The protection provided by legal professional privilege does not apply to all communications between legal

advisers and clients. It is the purpose of the communication, between a lawyer and their client, not the information itself, that is determinative. The document must have been made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

The second most frequently applied Exemption provisions related to “documents affecting law enforcement or the protection of public safety” (2.0 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.

The most frequently applied Conditional Exemption provision related to “personal privacy” (44 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 provisions related to each of “the business affairs of an individual or organisation” and “certain operations of agencies” (each at 24 percent of the total).

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

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 5** provides a snapshot of FOI applications over the three reporting years from 2019/20 to 2021/22. There has been an overall 22.5 percent *increase* in the number of applications *requiring decision* over the three-year

period (that is requests in hand from a previous reporting year plus new requests received during the reporting year). There was a 45 percent increase in the total number of *new* FOI requests received by the agencies during the 2021/22 reporting period over the previous year (2020/21). This compares to a 6.25% *decrease* in the total number of new FOI requests received between the two previous reporting years (2019/20 and 2020/21). The variation between the 2020/21 to 2021/22 years is significant.

ACECQA, South Australia and Tasmania have recorded significant percentage decreases in the number of FOI requests requiring decision over the three-year period - at 50, 100 and 100 percent respectively. NSW, Queensland, and Western Australia have recorded significant percentage increases in such requests - at 27.5, 100, and 350 percent respectively. The ACT, the Northern Territory and Victoria have recorded no change.

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

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

Four requests for NECS FOI Commissioner Reviews of decisions made by NQF agencies under the FOI Act were received during the reporting period. One request was subsequently withdrawn by the applicant while the Review was underway on the basis that the applicant had been provided with access to the requested documents outside the FOI process. Of the remaining three requests, the Commissioner affirmed one decision, varied a



second, and set aside a practical refusal decision and required the agency to process the request. Copies of these decisions will be published on the ECS Commissioners website at [necsopic.edu.au](https://necsopic.edu.au) when all appeal rights have been exhausted.

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

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

## Audited Financial Report and Budget

The annual budget for the ECS office is \$200,000. The financial report for 2021-2022 has been prepared by auditors PKF Melbourne and the audit statement is at **Attachment 5**. PKF are also the auditors for Education Services Australia.

The office has continued to operate within a tight annual budget over the past 6 years and has maintained a small but diminishing surplus over that time.

Salary and on costs, legal fees, and website maintenance remain the bulk of the office costs. Legal costs in particular have escalated during the reporting period due to an increase in the need for external legal advice in relation to matters before the Commissioners. The office does not have internal legal support. Increases in salary costs reflect an increase in the hours worked by the Commissioners.

## ATTACHMENTS

Attachment 1: State and Territory Regulatory Authorities and administrative units

Attachment 2: Updated Instrument adopting the Australian Privacy Principles Guidelines

Attachment 3: Updated Instrument adopting the Freedom of Information Guidelines

Attachment 4: Strategic Plan 2021-2024

Attachment 5: Audited Financial Report 2021-2022

Attachment 6: ACECQA and Regulatory Authorities' Freedom of Information Data Summary

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

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

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





## NECS Privacy Commissioner Guideline 1 - Reviewed June 2022

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

#### Terms

The following terms and acronyms are used in this Guideline:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**NECS Privacy Guideline** mean this Guideline.

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

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

## Preamble

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

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

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

The Australian Privacy Principles (APPs) set out in Schedule 1 of the Privacy Act are legally binding principles which are the cornerstone of the privacy protection framework in the Act. The APPs set out standards, rights and obligations in relation to handling, holding, accessing and correcting personal information.

[There are 13 APPs.](#) The Privacy Act applies the APPs to APP entities; an APP entity is defined in s6 of the Act as an *agency* or organisation. National Education and Care Services regulation 199 states that the Privacy Act only applies to *agencies* - that is the NQF agencies, ACECQA and the state and territory regulatory authorities. [APPs 1 to 6, 8, and 10 to 13 apply to agencies. The Privacy Act states that APPs 7 and 9 only apply to organisations and hence they do not apply to the NQF agencies.](#)

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

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

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

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

## Purpose of this NECS Privacy Commissioner Guideline

The purpose of this NECS Privacy Commissioner Guideline is to:

- i. provide clarification as to the guidelines on the implementation of the Australian Privacy Principles that apply for the purposes of the ECSNL;
- ii. ensure consistency in the interpretation and application of the Privacy Act; and
- iii. remove any uncertainty for agencies or the public as to the expectations of the Office of the NECS Privacy Commissioner in the application of the Privacy Act for the purposes of the ECSNL.

## Adoption of Parts of the APP Guidelines

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

General matters Chapters A, B and C

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

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

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

6. ECSNL Regulations 196(d) and 201(o) exclude the following matters from the functions of the NECS Privacy Commissioner. Accordingly, the APP Guidelines on those matters are excluded from this NECS Privacy Guideline. The excluded matters comprise the following:

- (a) ECSNL regulation 196(d) excludes matters relating to tax file numbers (set out in s17 and s18 of the Privacy Act);
- (b) ECSNL regulation 196(d) excludes matters relating to credit reporting (set out in s19 to s21W of the Privacy Act);
- (c) ECSNL Regulation 201(o) excludes matters relating to emergencies and disasters (set out in s80F to s80T of the Privacy Act).

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

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

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

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

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

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

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

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

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

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

### Further modifications made by the ECSNL Regulations

16. In applying the APP Guidelines, ECS Agencies will need to be mindful of all the modifications made to the Privacy Act by the ECSNL Regulations, and in particular the following.
- (a) As required by ECSNL Regulation 201(i), a reference to a contracted service provider is to be applied as if it were a reference to a person who provides goods or services under a contract with the National Authority or a Regulatory Authority (of a participating jurisdiction), or a subcontract for that contract.
  - (b) As required by ECSNL Regulation 201(j), a reference to a Commonwealth contract, a government contract or a State contract, is to be applied as if it were a reference to a contract under which goods or services are to be, or were to be, provided to the National Authority or a Regulatory Authority (of a participating jurisdiction).
  - (c) As required by ECSNL Regulation 201(h), a reference to the Ombudsman is to be applied as if it were a reference to the ECS Ombudsman.
  - (d) As required by ECSNL Regulation 201(p), the provisions relating to transferring complaints to the Ombudsman do not apply to complaints made about a Regulatory Authority of a participating jurisdiction.
  - (e) As required by ECSNL Regulation 201(e), a reference to the Administrative Appeals Tribunal is to be applied as if it were a reference to a *relevant administrative tribunal*. (Note: ECS Regulation 202 lists the relevant administrative tribunal of the participating jurisdictions).
  - (f) As required by ECSNL Regulation 201(f), a reference to the Federal Court is to be applied as if it were a reference to the Supreme Court of a participating jurisdiction.
  - (g) As required by ECSNL Regulation 201(g), a reference to the Federal Magistrates Court is to be applied as if it were a reference to the Magistrates Court or Local Court of a participating jurisdiction. (Note: Federal Magistrates Courts have been renamed Federal Circuit Courts.)

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

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

**Lesley Foster**

**National Education and Care Services Privacy Commissioner**

### Document Currency

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

This Version	Reviewed June 2022
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## NECS FOI Commissioner Instrument 01/V2 June 2022

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

#### Terms

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 state and territory 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 state or territory 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 education and care 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. A copy of the Guidelines is at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>. The AIC FOI Guidelines have traditionally been 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 in relation to ECS Agencies exercising their functions under the Commonwealth *Freedom of Information Act 1982* in respect of freedom of information requests received by the Agencies;
- (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 Commonwealth *Freedom of Information Act 1982*.

## 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 1	Introduction
Part 2	Scope of application of the FOI Act
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 10	Review by Information Commissioner
Part 11	Complaints and Investigations
Part 12	Vexatious applicant declarations
Part 14	Disclosure Log
Part 15	Reporting to the extent that agencies are required to provide an annual FOI statistical return
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 requires 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.

**Lesley Foster**  
**National Education and Care Services Freedom of Information Commissioner**

### **Document History**

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

This version	Reviewed and updated June 2022
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National Education & Care Services  
FOI & Privacy Commissioners & Ombudsman

## Strategic Plan 2021-2024

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

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

### Setting

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

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

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

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

### Legislative Framework

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

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

## Vision

To support public confidence in the accountability and fairness of the administration of the national regulatory and quality assurance system for early childhood education and care in Australia.

## Purpose

To provide independent, fair and accessible complaint-handling, review, investigation and advisory services in relation to the protection of privacy and information access rights, and to work with the NQF agencies to support their decision making and practices.

## Guiding Principles

### Fairness and Impartiality

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

### Integrity and Respect

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

### Accessibility and Responsiveness

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

### Proportionality and Value-adding

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

## Key challenges for the period

Key challenges facing the office during the period are:

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

## Objectives\*

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

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

We are successful when we:

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

## Accountability

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

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

We aim to keep individuals and agencies within our jurisdiction informed about actions and outcomes through appropriate communication

### Strategic Plan Review

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

Updated: October 2022.





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

**Statement of Funding and Expenditure for the period 1 July 2021 - 30 June 2022**

	Actual	Budget	Variance
	\$	\$	\$
<b>Funding</b>			
FY21-22 Funding	200,000	200,000	0
	<u>200,000</u>	<u>200,000</u>	<u>0</u>
<b>Expenditure</b>			
Domestic Travel account for Projects	0	4,000	4,000
Investigation Contingency	0	91,904	91,904
Website Development & Hosting Cost	4,042	36,000	31,958
Retainer	20,000	20,000	0
Rent - Ombudsman	15,000	15,000	0
Sundry	1,871	12,000	10,129
Audit Fees	5,250	3,000	(2,250)
Project Legal fees	47,960	25,000	(22,960)
Salary & On Costs	123,517	85,000	(38,517)
	<u>217,639</u>	<u>291,904</u>	<u>74,265</u>
<b>Surplus/(Deficit)</b>	<u>(17,639)</u>		
<b>Prior years unspent funding</b>	<u>91,655</u>		
<b>Total Balance of funds remaining</b>	<u><b>74,016</b></u>		

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

## Opinion

We have audited the accompanying financial statements, being a special purpose financial report of the Education and Care Services Ombudsman, the National Education and Care Services Privacy Commissioner and the National Education and Care Services Freedom of Information Commissioner, which comprises the statement of financial position as at 30 June 2022, the statement of funding and expenditure for the year then ended 30 June 2022 and noted to the financial statements, including a summary of significant accounting policies. In our opinion, the Profit and Loss Statement represented by a deficit of \$17,639 presents fairly, in all material respects, in accordance with the National Law and Australian Accounting Standards and the funding was expended in accordance with the National Law.

## ***Basis for Opinion***

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

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

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

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

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

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

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

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

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

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

**Independence**

In conducting our audit we have met the independence requirements of the Australian professional accounting bodies.

**PKF****Melbourne, 31 August 2022****Kenneth Weldin****Partner**PKF Melbourne Audit & Assurance Pty Ltd ABN 75 600 749 184Level 12, 440 Collins Street, Melbourne, Victoria 3000T: +61 3 9679 2222 F: +61 3 9679 2288 [www.pkf.com.au](http://www.pkf.com.au)Liability limited by a scheme approved under Professional Standards LegislationPKF Melbourne Audit & Assurance Pty Ltd is a member firm of the PKF International Limited family of separately owned firms and does not accept any responsibility or liability for the actions or inactions of any individual member or correspondent firm or firms.

## Freedom of Information Statistical Data 1 July 2021 to 30 June 2022

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 2021 - 30 June 2022.

**Table 1 FOI ACCESS REQUESTS AND OUTCOMES: 1 July 2021 - 30 June 2022**

Jurisdiction	No. in hand from 2020/2021	No. received	No. Finalised*	Access granted (full)	Access granted (partial)	Access refused in full	Requests withdrawn by applicant	Request dealt with administratively	Internal Review	Fees Collected \$	Amendments to personal records sought
ACECQA	0	6	6	0	0	1	0	5	0	0	0
ACT	1	3	3	1	1	1	0	1	0	0	0
NSW	7	44	47	5	30	7	5	0	1	552	0
NT	0	0	0	0	0	0	0	0	0	0	0
QLD	1	15	10	3	5	0	2	0	0	74	0
SA	0	0	0	0	0	0	0	0	0	0	0
TAS	0	0	0	0	0	0	0	0	0	0	0
VIC	0	12	9	0	7	1	1	0	0	0	0
WA	2	7	8	0	0	8	0	0	1	0	0
<b>TOTAL</b>	14	87	83	9	44	16	14	0	2	626	0

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

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

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

Section of the FOI Act	Exemption/Conditional Exemption Claimed	Number of FOI requests to which the exemption/conditional exemption was applied	Percent of total applied
<b>Exempt documents under Division 2, Part IV of the FOI Act</b>			
S37	Documents affecting law enforcement or protection of public safety	2	2.0
S42	Documents subject to legal professional privilege	3	3.0
S45	Documents containing material obtained in confidence	1	1.0
<b>Conditionally exempt documents under Division 3, Part IV of the FOI Act</b>			
S47C	Deliberative processes	2	2.0
S47E	Certain operations of agencies	24	24.0
S47F	Personal Privacy	44	44.0
S47G	Business (other than documents to which s47 applies)	24	24.0
<b>TOTAL</b>		100	100

**Table 3 Volume of Freedom of Information requests received by ACECQA and Regulatory Authorities for 3year period by year 2019/20 to 2021/22**

Year	ACECQA	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>2019/20</b>									
<i>Number*</i>	12	4	40	0	8	1	1	12	2
<i>No. finalised</i>	12	2	38	0	7	1	1	12	2
<i>Access granted in full</i>	2	0	3	0	1	0	0	1	2
<i>Partial access granted</i>	2	2	18	0	0	1	1	9	0
<i>Access refused in full</i>	2	0	13	0	4	0	0	1	0
<i>Requests withdrawn</i>	5	0	4	0	2	0	0	1	0
<b>2020/21</b>									
<i>Number*</i>	4	7	27	1	6	3	1	10	#6
<i>No. finalised</i>	4	6	20	1	5	3	1	10	4
<i>Access granted in full</i>	0	0	3	0	0	0	1	0	0
<i>Partial access granted</i>	0	4	11	1	2	3	0	6	4
<i>Access refused in full</i>	0	1	4	0	1	0	0	3	0
<i>Requests withdrawn</i>	4	1	2	0	2	0	0	1	0
<b>2021/22</b>									
<i>Number*</i>	6	4	51	0	16	0	0	12	9
<i>No. finalised</i>	6	3	47	0	#10	0	0	9	8
<i>Access granted in full</i>	0	i	5	0	3	0	0	0	0
<i>Partial access granted</i>	1	1	30	0	5	0	0	7	0
<i>Access refused in full</i>	0	0	7	0	0	0	0	1	8
<i>Requests withdrawn</i>	5	1	5	0	2	0	0	1	0

**Notes** \*Number = requests not finalised from the previous reporting year **plus** requests received during the reporting year. # QLD 1 request deemed refusal; #WA number of requests revised from 7 to 6 on advice from WA in August 2022 that an invalid request had been inadvertently counted in the WA 2020/21 Statistical Return.



