Submission on Issues Paper 9: Addressing the risk of child sexual abuse in primary and secondary schools

1. Background

1.1 The Ombudsman’s Part 3A reportable conduct scheme

The NSW Ombudsman’s employment-related child protection jurisdiction commenced in May 1999, when a system was established for the Ombudsman to oversee the handling of allegations of a child protection nature against employees of government and certain non-government agencies.\(^2\)

Our jurisdiction involves overseeing the handling of child abuse and neglect allegations that are made against employees\(^3\) of more than 7,000 government and non-government agencies.\(^4\) The scheme was – and remains – a unique and unprecedented jurisdiction, not least because of the oversight it brings to both government and non-government organisations in their handling of child protection concerns and the conduct of their employees (including volunteers).

Part 3A of the *Ombudsman Act 1974* requires and enables the Ombudsman to:

- **Receive and assess notifications** concerning reportable allegations or convictions against an employee
- **Scrutinise agency systems** for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct and convictions
- **Monitor and oversight** agency investigations of reportable conduct
- **Respond to complaints** about inappropriate handling of any reportable allegation or conviction against employees
- **Conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable notification or conviction
- **Conduct systems reviews and education and training** activities to improve the understanding of, and responses to, reportable allegations, and
- **Report on trends** and issues in connection with reportable conduct matters.

All public authorities are subject to the requirements of Part 3A if the reportable conduct arises in the course of a person’s employment. Some public authorities are ‘designated agencies’ and also need to notify reportable allegations if they arise from conduct that takes place outside of employment.\(^5\) Some non-government agencies are also subject to Part 3A requirements and must notify reportable allegations that arise both within and outside of employment.\(^6\) It is worth noting that historical

\(^2\) The scheme was established following recommendations arising from the Wood Royal Commission into the NSW Police Service.
\(^3\) In this context, an ‘employee’ is defined broadly as including: any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).
\(^4\) In August 2013 the NSW Solicitor-General clarified the reach of our jurisdiction, advising us that ‘[O]n its face the notion of “substitute residential care” in the care of children would appear to extend to any arrangement where an organisation has the care and control of children of a kind that would otherwise be provided by parents and caregivers, were a child in his or her place of residence.” This advice has greatly increased the number of agencies and individuals deemed to fall within our employment-related child protection jurisdiction. We are currently working with organisations in the recreational camping and youth sectors, together with religious and other volunteer organisations, which run camps falling within the scope of this advice.
\(^5\) Under s25A of the *Ombudsman Act 1974*, designated government agency means any of the following:
   (a) the Department of Education and Training (including a government school) or the Department of Health,
   (a1) a Division of the Government Service (or a part of a Division of the Government Service) prescribed by the regulations for the purposes of this definition,
   (b) a local health district within the meaning of the *Health Services Act 1997*,
   (c) any other public authority prescribed by the regulations for the purposes of this definition.
\(^6\) Designated non-government agency means any of the following:
   (a) a non-government school within the meaning of the *Education Act 1990*,

3
allegations of child abuse only fall within our employment-related child protection jurisdiction if the involved individual is an “employee” of a relevant agency at the time when the allegation becomes known by the head of agency.

What is notifiable to the Ombudsman?

When an allegation of ‘reportable conduct’ is made against an employee of relevant government and non-government agencies – including non-government schools, approved children’s services and agencies providing substitute residential care – the head of agency is required to notify the Ombudsman of any reportable allegations or convictions involving their employees as soon as practicable and, the ‘notification’ must be made in any event, within 30 days of the head of agency becoming aware of the allegation or conviction.

Section 25C requires the head of agency to ‘make arrangements within the agency to require employees of the agency to notify the head of agency of any such reportable allegation or conviction of which they become aware’. We encourage agencies to notify us at the earliest possible opportunity, whether by way of formal notification or initially through telephone contact, so that we can play an early role in guiding agencies through their initial response.

Section 25A of the Ombudsman Act defines ‘reportable allegation’ as an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct. The same section defines ‘reportable conduct’ as:

(a) Any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or
(b) Any assault, ill-treatment or neglect of a child, or
(c) Any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

The section also specifies that reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
(b) the use of force that, in all circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25C of the Act.

2. Evolution of our oversight and current operational challenges

In February 2015, we provided a statement of information to the Royal Commission in relation to its public hearing into allegations of child sexual abuse at Knox Grammar School. Part 1 of that statement (Annexure 1) provided a comprehensive overview of our employment-related child protection jurisdiction, including our current operational practices. In particular, the statement described our proactive work with key agencies, including the NSW Police Force and Family and Community
Services (FACS), when criminal allegations and serious child protection risks are a feature of the reportable conduct matters we oversight.

We do not propose to duplicate here the information contained in our February statement. However, for the purpose of the discussion which follows, it is important to once again emphasise the significant refinement to our operational practices that has occurred over the past six years.

Many of the changes to our practice were largely brought about by the introduction of Chapter 16A of the *Children and Young Person’s (Care and Protection) Act 1998* – which has facilitated the exchange of information between agencies and closer collaboration between employers and police when there are possible criminal allegations. These changes have also occurred at a time where the WWCC scheme was being overhauled and our office was given a new function which enables us to make Notifications of Concern to the Children’s Guardian. These Notifications are made if we form the view, as a result of concerns arising from the receipt of information by our office in the course of exercising our functions, that ‘on a risk assessment by the Children’s Guardian, the Children’s Guardian may be satisfied that the person poses a risk to the safety of children’7 (see Annexure 1 for further details about this function).

Our oversight of the reportable conduct scheme now has a much greater focus on intervening in serious, high-risk matters and working in partnership with agencies to achieve better child protection and criminal outcomes.

When we first receive an allegation about a person who works with children, we spend time and resources on gathering and analysing relevant risk-related information. Our staff have direct access to key databases held by the NSWPF and FACS, as well as access to the NSW Carers Register – held by the Office of the Children’s Guardian (OCG). Currently, no other agency in NSW has the same breadth of access to external databases – together with our own information holdings. This gives us a unique ‘bird’s eye’ view of information relevant to assessing risks in the critical early stages of a case.

Once we have reviewed relevant information sources, if we need to do so we will release information to other agencies with responsibilities for children or encourage agencies to exchange information with each other – using relevant provisions in the Children and Young People (Care and Protection) Act.

In a significant number of cases, we refer detailed briefings to the NSWPF. These referrals generally result in the commencement or enhancement of police investigations and/or criminal charges. In other cases, we make own motion inquiries in response to notifications from employers. We do this when we become aware of risks to children that may not be addressed through the reportable conduct investigation alone.

Annexure 2 to this submission provides a number of examples of the significant outcomes – including charges and convictions in a number of cases involving schools – which have resulted from this collaborative work.

In the early years of the scheme’s operation, we were managing a high volume8 of notifications (almost double the number we handle today) from a relatively inexperienced and diverse range of agencies that needed significant guidance and support. This meant we had to scrutinise a much greater proportion of less serious matters than is our current practice. As a result, during these early years, our ability to strategically target our resources and undertake significant proactive work very was limited.

Over time, agencies have improved their systems and their general investigative competence. These improvements have enabled us to exempt certain matters from having to be notified to our office under

---

7 *Child Protection (Working with Children) Act 2013*, Schedule 1, Clause 2A. It is also important to note that this clause is not limited to matters arising from the exercise of our functions under Part 3A; if sufficient concerns arise from information which we have received from exercising any of our wide-ranging functions, we can refer the matter to the Children’s Guardian.

8 In 2002-03, we received 2,473 notifications compared with 1,306 notifications for 2014-15.
class or kind determinations⁹, resulting in efficiency gains for both our office and the agencies within our jurisdiction. We now hold over 20 such determinations; 15 of which are with the schools sector. The reduction in the number of notifications received by our office over time can be attributed to these ‘class or kind’ determinations. (We discuss the nature of the agreements we have with the various school sectors in section 4).

In large part due to the effect of our class or kind determinations, matters involving serious criminal allegations now make up a significant proportion of our work; for example, we currently have around 129 open matters concerning individuals who have been charged with criminal offences relating to children. In addition, we have a further 238 open notifications that either are, or have been, the subject of a police investigation but where charges were not, or have not yet, been laid.¹⁰

Since the new WWCC commenced in June 2013, we have made 436 releases of information to the OCG under Chapter 16A and 40 Notifications of Concern. As well, we have responded to 184 requests for information by the OCG under section 31 of the Child Protection (Working with Children) Act 2012; and made 74 Chapter 16A requests for information to the OCG.

The most significant challenge we currently face in relation to our oversight of the reportable conduct scheme is the need to maintain – within existing resources – a high level of scrutiny over the handling of the most high-risk allegations of reportable conduct. This work must occur against the background of a recent expansion to our reportable conduct jurisdiction.

In February 2014, the NSW Solicitor-General provided legal advice which clarified the reach of our jurisdiction in the context of the provision of substitute residential care – the number of agencies now falling within our jurisdiction has expanded considerably. Therefore, an immediate priority for our office is working with organisations in the recreational camping and youth sectors, together with religious and other volunteer organisations, which fall within the scope of this advice, to make them aware of their Part 3A obligations.

As well, a program of transitioning the provision of out-of-home care (OOHC) to non-government agencies is well underway in NSW. The need to build and support the capacity of the NGO OOHC sector to effectively respond to reportable conduct, together with the higher degree of risk inherently posed to children and young people living in OOHC placements, led to a deliberate decision on our part to focus a significant component of our practice development on the OOHC sector – starting with the Aboriginal OOHC sector – which is rapidly expanding.

In light of competing demands on our limited resources, we will be working closely with the schools sector, peak bodies and the Board of Studies Teaching and Educational Standards (BOSTES) to examine ways to enhance promotion of the Part 3A scheme among schools who have notified our office of reportable conduct allegations either rarely or not at all; or where other risks have been identified with individual schools. We discuss notification rates across the schools sector in section 3.

In addition to delivering our comprehensive training program, we are currently planning a large-scale conference for 26 February next year to promote best practice in preventing and responding to reportable conduct. The conference will bring together stakeholders from the education; early childhood, out-of-home care; religious, sporting and recreational sectors, and will examine progress made since the reportable conduct scheme was established 16 years ago. The work of the Royal Commission has repeatedly highlighted the risk to children when reportable allegations are not handled effectively and agencies fail to have good systems in place for preventing and responding to abuse. It is therefore timely for us to join with our stakeholders in taking stock and identifying future directions.

⁹ Pursuant to s25A(c) of the Ombudsman Act.
¹⁰ Current as at 15 September 2015.
3. What the data tells us

In NSW the schools sector is made up of:

- Government (public) schools administered by the Department of Education.
- Catholic systemic schools administered directly by the Catholic Education Offices within each of the 11 Catholic Dioceses.
- Independent schools registered with the Board of Studies, Teaching and Education Standards (BOSTES), including but not limited to schools affiliated with various religions and educational philosophies.

The total number of staff working in NSW schools is 110,636, including 70,257 (64%) in the government sector and 40,379 (36%) in the non-government sector. Teachers make up the majority (83,259) of in-school staff, with 53,904 (65%) teachers working in the government sector and 29,355 (35%) in the non-government sector.\(^\text{11}\)

Table 1: Comparison of notifications received from schools sector with all Part 3A notifications received between 1 July 2010 and 30 June 2015

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Total Notifications</th>
<th>Total from Schools Sector</th>
<th>Notifications from school’s sector as a % of all notifications</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Gov</td>
<td>Non-gov</td>
<td>Total</td>
</tr>
<tr>
<td>2010 - 2011</td>
<td>318</td>
<td>105</td>
<td>423</td>
</tr>
<tr>
<td>2011 - 2012</td>
<td>340</td>
<td>117</td>
<td>457</td>
</tr>
<tr>
<td>2012 - 2013</td>
<td>310</td>
<td>112</td>
<td>422</td>
</tr>
<tr>
<td>2013 - 2014</td>
<td>326</td>
<td>162</td>
<td>488</td>
</tr>
<tr>
<td>2014 - 2015</td>
<td>226</td>
<td>186</td>
<td>412</td>
</tr>
<tr>
<td>Total</td>
<td>1520</td>
<td>682</td>
<td>2202</td>
</tr>
</tbody>
</table>

Table 1 shows that the schools sector has been the source of between 32 – 52% of reportable allegations notified each year over the last five years. The overall number of notifications has remained relatively stable over the past five years; however, the proportion of total notifications has fluctuated by virtue of increases in the notifications received from other industry groups (for example, the out-of-home care sector).

In recent years, there have also been fluctuations in relation to the number of notifications from the Department of Education – for example, there was a decrease of around 30% in 2014/15 from the previous year. The explanation for this drop in reporting is that it is due, in part, to the new guidelines issued by our office in 2013 which narrowed our definition of ill treatment and neglect.\(^\text{12}\)

---


\(^\text{12}\) NSW Ombudsman, *Defining Reportable Conduct* practice update, released in 2013. We note that although there was a drop in reporting of sexual misconduct allegations during the period, there was an increase of reporting in sexual offences.
Table 2: Schools sexual misconduct and sexual offence notifications received between 1 July 2010 and 30 June 2015

<table>
<thead>
<tr>
<th>Sector</th>
<th>Total Notifications</th>
<th>Total Schools in NSW</th>
<th>Total schools that notified</th>
<th>% of Total Schools that notified</th>
<th>Total Sexual Misconduct/Offence notifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government</td>
<td>1520</td>
<td>2211</td>
<td>779</td>
<td>35%</td>
<td>779</td>
</tr>
<tr>
<td>Catholic Systemic</td>
<td>292</td>
<td>545</td>
<td>156</td>
<td>29%</td>
<td>182</td>
</tr>
<tr>
<td>Independents</td>
<td>390</td>
<td>580</td>
<td>197</td>
<td>34%</td>
<td>191</td>
</tr>
<tr>
<td>Total Non-Government</td>
<td>682</td>
<td>1125</td>
<td>353</td>
<td>31%</td>
<td>373</td>
</tr>
<tr>
<td>Total</td>
<td>2202</td>
<td>3336</td>
<td>1132</td>
<td>34%</td>
<td>1152</td>
</tr>
</tbody>
</table>

Due to the class or kind determinations that apply to the majority of schools, the nature of the notifications we receive relating to school employees tend to fall within the category of ‘serious reportable conduct’, and are comprised of a high rate of sexual / misconduct / offence allegations.

Of all sexual misconduct /offence allegations received in the past five years, 61% were notified by schools.

Table 3: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – SUSTAINED FINDINGS as a percentage of total notifications

<table>
<thead>
<tr>
<th>Sustained findings</th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-gov</th>
<th>Total – all schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td>% of open</td>
<td>No.</td>
<td>% of open</td>
<td>No.</td>
<td>% of open</td>
</tr>
<tr>
<td>75</td>
<td>28%</td>
<td>17</td>
<td>26.5%</td>
<td>20</td>
<td>28.5%</td>
</tr>
</tbody>
</table>

Of the sexual misconduct/ offence notifications from schools finalised in the last two years, each sector sustained approximately 28% – compared to an overall sustained rate for sexual misconduct / offence notifications of 24% across all sectors during the same period. The overall sustained rate (for all allegation types) in the schools sector is 20% and 22.5% across all industry groups.

Table 4: Schools sexual misconduct and sexual offence open notifications – CRIMINAL CHARGES

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td>% of open matters</td>
<td>No.</td>
<td>% of all charges</td>
<td>No.</td>
<td>% open sexual charges</td>
<td>No.</td>
<td>% of all schools sexual charges</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As previously noted, the impact of the broad class or kind determinations across the schools sector is, in effect, a concentration of education-related notifications at the ‘pointy end’. Table 4 shows the high proportion of open matters involving school employees that are the subject of related criminal charges.

The schools sector is responsible for 55.5% of all current matters involving related criminal charges and 60.4% of current matters involving related criminal charges of a sexual nature – despite this sector currently accounting for 39.5% of all current open notifications.

By comparison, the OOHC sector is responsible for 27% of all current matters involving related criminal charges and 21% of current matters involving related criminal charges of a sexual nature – despite this sector currently accounting for 44.6% of all current open notifications.

The remainder of the sector is responsible for 17.5% of all current matters involving related criminal charges and 18.9% of current matters involving related criminal charges of a sexual nature – the remainder of the sector currently accounts for 15.9% of all current open notifications.

Table 5: Schools sexual misconduct and sexual offence notifications closed between 1 July 2013 – 30 June 2015 – ALLEGED VICTIM’S AGE GROUP (WHERE KNOWN)

<table>
<thead>
<tr>
<th></th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-gov</th>
<th>Total – all schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td>% of total</td>
<td>No.</td>
<td>% of total</td>
<td>No.</td>
<td>% of total</td>
</tr>
<tr>
<td>&lt; 6 years</td>
<td>14</td>
<td>6.5%</td>
<td>5</td>
<td>4</td>
<td>7%</td>
</tr>
<tr>
<td>7 - 9 years</td>
<td>12</td>
<td>5.5%</td>
<td>5</td>
<td>9</td>
<td>15%</td>
</tr>
<tr>
<td>10 - 12 years</td>
<td>38</td>
<td>17%</td>
<td>11</td>
<td>21%</td>
<td>18.5%</td>
</tr>
<tr>
<td>13 - 15 years</td>
<td>75</td>
<td>33.5%</td>
<td>17</td>
<td>33%</td>
<td>35.5%</td>
</tr>
<tr>
<td>16 - 17 years</td>
<td>85</td>
<td>37.5%</td>
<td>13</td>
<td>25.5%</td>
<td>24%</td>
</tr>
<tr>
<td>Total</td>
<td>225</td>
<td>100%</td>
<td>51</td>
<td>100%</td>
<td>59</td>
</tr>
</tbody>
</table>

The vast majority of the sexual misconduct/ offence allegations against school employees finalised in the last two years involved secondary school employees, with 67% of alleged victims predominantly falling within the 13–15 and 16–17 year age brackets.

Table 6: Schools sexual misconduct and sexual offence notifications closed between 1 July 2013 – 30 June 2015 – LENGTH OF TIME BETWEEN ALLEGED ABUSE AND DISCLOSURE/REPORT

<table>
<thead>
<tr>
<th></th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-gov</th>
<th>Total – all schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td>Total % of sexual</td>
<td>No.</td>
<td>Total % of sexual</td>
<td>No.</td>
<td>Total % of sexual</td>
</tr>
</tbody>
</table>
| 9
Table 6 shows that overall, 18% of the notifications related to historical conduct (defined as having occurred or commenced more than 12 months prior to the disclosure). Of the historical notifications closed in the period, the largest proportion (38%) related to alleged conduct which occurred over 21 years ago; followed by alleged conduct occurring within the previous 1-5 years (36%).

Table 7: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM’S GENDER (where known – total 370)

<table>
<thead>
<tr>
<th></th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-gov</th>
<th>Total – all schools</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>Total % of sexual</td>
<td>No.</td>
<td>Total % of sexual</td>
<td>No.</td>
</tr>
<tr>
<td>Male</td>
<td>31.5%</td>
<td>44%</td>
<td>36</td>
<td>59%</td>
<td>61</td>
</tr>
<tr>
<td>Female</td>
<td>78.5%</td>
<td>56%</td>
<td>25</td>
<td>41%</td>
<td>57</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>61</td>
<td>100%</td>
<td>118</td>
</tr>
</tbody>
</table>

Of the matters closed in the last two years, just over 60% of the alleged victims were female.

Table 8: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM’S GENDER AGAINST WHEN REPORTED

<table>
<thead>
<tr>
<th></th>
<th>Male alleged victim</th>
<th>Female alleged victim</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>% of total male</td>
</tr>
<tr>
<td>Less than 1 year</td>
<td>107</td>
<td>76%</td>
</tr>
<tr>
<td>1 - 5 years</td>
<td>10</td>
<td>7%</td>
</tr>
<tr>
<td>6 – 10 years</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>11 – 15 years</td>
<td>1</td>
<td>0.5%</td>
</tr>
<tr>
<td>16 – 20 years</td>
<td>1</td>
<td>0.5%</td>
</tr>
<tr>
<td>&gt; 21 years</td>
<td>22</td>
<td>16%</td>
</tr>
<tr>
<td>Total historic</td>
<td>34</td>
<td>24%</td>
</tr>
<tr>
<td>Total</td>
<td>141</td>
<td>100%</td>
</tr>
</tbody>
</table>

The notifications involving alleged male victims were more often historical than those involving female victims. Almost a quarter of allegations relating to male victims involved alleged conduct that occurred more than 12 months prior to the disclosure/report, compared with 15% of those involving female alleged victims.
Significantly, 16% of the matters involving alleged male victims related to conduct that was alleged to have occurred more than 21 years prior to the disclosure/report (compared with 2% for females).

Table 9: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – ALLEGED VICTIM’S GENDER AGAINST AGE (where known - 333)

<table>
<thead>
<tr>
<th>Age</th>
<th>Male alleged victim</th>
<th>Female alleged victim</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>% of total for age</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Male</td>
</tr>
<tr>
<td>&lt; 6 years</td>
<td>10</td>
<td>42%</td>
</tr>
<tr>
<td>7 - 9 years</td>
<td>9</td>
<td>36%</td>
</tr>
<tr>
<td>10 - 12 years</td>
<td>24</td>
<td>41%</td>
</tr>
<tr>
<td>13 - 15 years</td>
<td>43</td>
<td>38%</td>
</tr>
<tr>
<td>16 - 18 years</td>
<td>38</td>
<td>34%</td>
</tr>
<tr>
<td>Total of 333 (age &amp; gender known)</td>
<td>124</td>
<td>N/A</td>
</tr>
<tr>
<td>Total of 370 (gender only)</td>
<td>141</td>
<td>N/A</td>
</tr>
</tbody>
</table>

The biggest disparity in the gender of alleged victims was within the 16-17 year age bracket. In matters involving alleged male victims, the subject employee was male in 68% of cases; and female in 32% of matters.

In matters involving alleged female victims, the subject employee was male in 88% of cases and female in 12% of matters.

Table 10: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 – SUBJECT EMPLOYEE’S GENDER

<table>
<thead>
<tr>
<th>Employee Gender</th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-Gov</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>% of total gov sexual</td>
<td>Raw</td>
<td>% of total Catholic sexual</td>
<td>Raw</td>
</tr>
<tr>
<td>Male</td>
<td>220</td>
<td>81%</td>
<td>53</td>
<td>83%</td>
<td>59</td>
</tr>
<tr>
<td>Female</td>
<td>51</td>
<td>19%</td>
<td>11</td>
<td>17%</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>271</td>
<td>100%</td>
<td>64</td>
<td>100%</td>
<td>70</td>
</tr>
</tbody>
</table>

In the sexual misconduct /offence notifications from schools that were finalised in the last two years, 82% involved male employees and 18% female employees.
Table 11: Schools sexual misconduct and sexual offence notifications closed 1 July 2013 – 30 June 2015 –
SUBJECT EMPLOYEE’S JOB TITLE – where known (total 394)

<table>
<thead>
<tr>
<th>Employee Title</th>
<th>Government</th>
<th>Catholic Systemic</th>
<th>Independents</th>
<th>Total Non-Gov</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Raw</td>
<td>% of total gov sexual</td>
<td>Raw</td>
<td>% of total Catholic sexual</td>
<td>Raw</td>
</tr>
<tr>
<td>Teacher</td>
<td>187</td>
<td>70%</td>
<td>35</td>
<td>56%</td>
<td>47</td>
</tr>
<tr>
<td>Teacher aide</td>
<td>19</td>
<td>7%</td>
<td>3</td>
<td>5%</td>
<td>2</td>
</tr>
<tr>
<td>Other employee</td>
<td>17</td>
<td>6.5%</td>
<td>2</td>
<td>3%</td>
<td>2</td>
</tr>
<tr>
<td>Clergy and/or Religious</td>
<td>0</td>
<td>0%</td>
<td>12</td>
<td>19.5%</td>
<td>6</td>
</tr>
<tr>
<td>Executive (Principal, Deputy)</td>
<td>10</td>
<td>4%</td>
<td>6</td>
<td>10%</td>
<td>1</td>
</tr>
<tr>
<td>Support staff</td>
<td>12</td>
<td>4.5%</td>
<td>0</td>
<td>0%</td>
<td>2</td>
</tr>
<tr>
<td>Transport driver</td>
<td>14</td>
<td>5%</td>
<td>0</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>Other school professional</td>
<td>4</td>
<td>1.5%</td>
<td>3</td>
<td>5%</td>
<td>6</td>
</tr>
<tr>
<td>Volunteer</td>
<td>4</td>
<td>1.5%</td>
<td>1</td>
<td>1.5%</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>267</td>
<td>100%</td>
<td>62</td>
<td>100%</td>
<td>66</td>
</tr>
</tbody>
</table>

The vast majority of employees who were the subject of sexual misconduct/offence allegations closed between 1 July 2013 and 30 June 2015 were employed in teaching roles.

The proportion of matters involving teachers in the government sector was 70% and in the independent sector, 71%. In contrast, the proportion of matters involving teachers in the Catholic sector was much lower at 56%.

Notifications relating to clergy and/or religious were the second biggest category (19.5%) in the Catholic sector. Sexual misconduct/offence notifications finalised against clergy and/or religious in the schools sector in the last two years largely related to historical conduct, with 63% relating to conduct that allegedly occurred more than 21 years prior to the disclosure/report.

4. How we work with stakeholders in the schools sector

In addition to working closely with individual schools as part of overseeing reportable conduct matters, at a strategic level we also engage with the schools sector in a variety of ways. We liaise closely with key bodies such as the Department of Education’s Employment Performance and Conduct Directorate (EPAC), the Association of Independent Schools (AIS) and other bodies in the independent sector, including the Christian Schools Association and Christian Education National, and the Catholic Schools/Education Offices (CSOs/CEOs) within the network of Dioceses across NSW.
The sheer size of the schools sector means that we substantially rely on these bodies to act as a conduit for conveying important information to their members; providing the assistance and support their members require to meet their Part 3A obligations; and driving practice improvements across their membership base.

Our engagement with the schools sector has also helped us in identifying a range of practice issues in relation to the reportable conduct scheme and the child protection system more broadly.

For example, several years ago we identified the need to ensure that the reportable conduct scheme gave complainants/victims (and, where relevant, responsible adults) appropriate advice about the progress and outcomes of reportable conduct investigations.

In 2013, we convened a roundtable with representatives from the Department of Education, Catholic education authorities, the AIS, CEN and CSA to examine:

- the practical challenges involved in balancing the rights of individuals the subject of allegations, alleged victims, witnesses and other children; while ensuring that disciplinary or criminal processes are not compromised, and
- opportunities to overcome aspects of privacy legislation that restrict the ability of agencies to keep alleged victims and their parents/carers apprised of the progress and outcome of investigations, including actions taken by the employing agency to manage risks.

As a result of this work, the Child Protection Legislation Amendment Bill 2015 is currently before Parliament. Among other things, it includes proposed amendments to the Ombudsman Act to permit information about investigations into reportable allegations to be provided to the involved child who is the alleged victim, and to certain other persons who are concerned with the welfare of the child. In particular, the proposed amendments permit our office, or the head of designated government or non-government agencies, to disclose information to the alleged victim, parent or authorised carer in relation to:

- information about the progress of the investigation,
- the findings of the investigation, and
- any action taken in response to those findings.

The passage of this legislation will assist us work together with other key stakeholders in seeking to identify best practice in relation to when, how and what information should be shared with victims (and relevant others).

We discuss a range of other systems issues that we have identified through our oversight in section 5.

- **Class or kind determinations**

Within the schools sector, the Ombudsman now has class or kind determinations13 with the Department of Education; the AIS, CSA and CEN (and participating member schools of these organisations respectively); and the CEO/CSO in each of the 11 Catholic Dioceses. These determinations are issued in recognition of our satisfaction with the general competency of the relevant body in relation to appropriately responding to the exempted conduct.

It is important to note that class or kind determinations do not exempt agencies from investigating and taking appropriate action in response to allegations of exempted conduct, or from keeping adequate records of such allegations. Sexual offences and sexual misconduct allegations must be notified to our office and are not included in any of our class or kind determinations.

---

13 Section 25A(c) of the Act enables the Ombudsman to exempt conduct of a class or kind from being reportable conduct.
Reviewing an agency’s systems is one way for the Ombudsman to assess whether an agency is meeting their Part 3A reporting obligations in accordance with class or kind determinations. Under section 25B of the Ombudsman Act we are required to keep under scrutiny the systems agencies have in place for preventing reportable conduct, as well as the systems for handling and responding to reportable allegations.

Our reviews of agency practice could be prompted by a decision to assess compliance with a class or kind determination; concerns about a particular agency’s handling of matters; the vulnerability of particular groups of children and young people; as well as other relevant triggers. Since the reportable conduct scheme commenced we have conducted 184 targeted agency reviews. Of these, almost 60% (108) have involved the schools sector. We also routinely identify and address practice and systems issues as part of our response to individual notifications. This is an effective way of considering whether policies and procedures actually translate into practice.

Our ability to undertake reviews of agency systems is dependent on other competing demands on our resources, such as our office taking an increasingly active role in our oversight of serious reportable conduct matters. Over the last six years we have scaled back our compliance review activities in relation to the school sector in order to allow us to focus our resources towards providing more intensive support in relation to serious individual cases. In part, this shift in focus has been enabled by the maturing of practice by the schools sector in their handling of reportable conduct matters.

Training and education activities

We also deliver a comprehensive employment-related child protection training program which is targeted at agencies that fall within the jurisdiction of the reportable conduct scheme. We currently offer two workshops: Responding to child protection allegations against employees and Handling Serious reportable allegations against employees, peak bodies also regularly deliver training on handling reportable conduct allegations.

As noted at the outset of this submission, we are currently preparing for our reportable conduct conference in February 2016. We have started to consult a range of stakeholders from the schools sector about delivering sessions on how they have sought to improve practice across their membership/sector and priority areas for future reform.

4.1 Key stakeholders

Department of Education (government schools)

As previously noted, the Department of Education has consistently been responsible for the largest number of notifications from within the schools sector.

We first entered into a class or kind determination with the Department of Education in 2001 allowing it to notify certain reportable allegations to us by way of a monthly schedule – providing that there were no prior allegations against the employee and no harm to the child. We reviewed the determination the following year and in 2003, extended it to exempt from notification certain first time allegations of physical assault and neglect. It was further extended in 2005 and again in 2010. As noted earlier, our determination with the Department excludes certain allegations of neglect and ill-treatment from notification, as well as certain types of physical assault.

EPAC has been responsive to suggestions and recommendations we have made in relation to addressing practice issues identified through our oversight of the reportable conduct scheme. For
example, in 2006 we raised concerns with the Department of Education about the quality and
timeliness of its investigations. In response, the Department developed additional resources for
principals and reviewed its categories of findings. Following this, we noted a marked improvement in
its handling of matters. Since then, the handling of reportable conduct matters by EPAC has become
increasingly more sophisticated.

We established a standing liaison meeting with EPAC when the unit was first established. Regular
meetings are used to discuss issues relating to individual cases as well as broader systemic issues. For
example, our liaison has recently led to new arrangements being agreed between EPAC and the
NSWPF in relation to accessing interview records to inform reportable conduct investigations; and
prompting improvements to the recurrent child protection training provided to the Department’s casual
teaching workforce.

The Department’s decision to centralise its handling of reportable conduct allegations under EPAC has
been instrumental in achieving better quality and consistency of responses to reportable conduct across
the public schools sector. The expertise and economies of scale obtained through utilising a single
investigative entity in this very complex area of child protection practice cannot be over-stated.
Overall, our observation is that the Department of Education conducts its investigations to a high
standard, and generally takes a cooperative and constructive approach to meeting its reportable
conduct obligations and working with our office to address broader child protection systems issues.

4.2 Catholic systemic schools

Catholic systemic schools account for the second largest number of primary and high school
enrolments in NSW. There are over 580 Catholic schools in NSW\textsuperscript{14} and the vast majority of these are
systemic. Catholic systemic schools are administered directly by the Catholic Education/Schools
Office (CEO/CSO) within each Diocese.

While the structure of the Catholic Church presents some unique challenges – which we discuss later
in this section – our ongoing liaison with the Church’s network of Dioceses has been essential to
driving practice improvements.

When the reportable conduct scheme began, the Bishops of the 11 Dioceses (and the leaders of
Catholic religious institutes) delegated their ‘head of agency’ function to the Catholic Commission for
Employment Relations (CCER). This arrangement was maintained until 2005, when the head of
agency function was devolved, for most reportable conduct matters, to Bishops and leaders of each
religious institute (or their delegates). Therefore, for the past decade most of our work with the
Catholic schools sector has been with the CEOs/CSOs within the Dioceses.

Since June 2005 we have had identical class or kind determinations with the CEO/CSO of each
Diocese.

The current class or kind determinations with individual Dioceses exempt CEOs/CSOs from notifying:

\begin{quote}
An allegation of a physical assault, or a threat of a physical assault, unless it is alleged that:
\begin{enumerate}
\item[a)] There was contact with any body part of area of a child that was clearly hostile and
forceful, or reckless, and which had the potential to, or resulted in significant harm
or injury to the child; or
\item[b)] A child believed that the threat would result in significant harm or injury with them.\textsuperscript{15}
\end{enumerate}
\end{quote}

\textsuperscript{14} Figure cited by Catholic Education Commission NSW www.cecnsw.catholic.edu.au. Accessed 6 September 2015.
\textsuperscript{15} The determination imposes certain requirements on the type of information that is to be provided to the Ombudsman if
allegations of non-exempted conduct of physical assault are notified. It sets out the actions required by the agency in relation
to exempted conduct, including provision to the Ombudsman of six monthly reports on the number and category breakdown
of allegations exempted from notification.

15
We hold quarterly liaison meetings with the child protection and professional standards officers who handle reportable conduct matters within each Diocese. The meetings have proven to be a very productive way of engaging the Catholic systemic schools sector by providing a forum to regularly discuss discrete and systemic issues that arise in dealing with reportable allegations; as well as identifying and responding to broader child protection issues.

In addition to our quarterly meetings, we also hold ad-hoc meetings with various representatives from the Catholic systemic schools sector to provide assistance and guidance about the direction of individual reportable conduct investigations. Uptake of our employment-related child protection training by the Catholic systemic schools sector has been strong.

During the past decade, the Catholic Dioceses have developed robust systems for handling reportable conduct. Given that in the mid-2000’s we identified significant inadequacies in the CCER’s child protection systems, we supported the Church’s decision in 2005 to devolve responsibility for the ‘head of agency’ function to Bishops and heads of religious institutes. Since then, our ability to engage more directly with each of the Dioceses has resulted in significant practice improvements across the sector.

In addition to the effective relationship that the Dioceses maintain with us through our liaison arrangements, a strength of the sector – and one that is shared by the government school sector and increasingly, the independent schools sector – is that Catholic systemic schools have dedicated staff within each Dioceses who are responsible for dealing with reportable conduct allegations.

However, the unique structure, governance and diversity of the Catholic Church undeniably continues to present particular challenges. While the Church has developed structural arrangements designed to improve the quality and consistency of management decisions in connection with reportable conduct matters – and we continue to support the devolution of responsibility for these matters to the Bishops and heads of religious institutes – we also believe there would be merit in the Church considering additional measures which could be put in place to achieve greater consistency and quality in relation to the decision making of Bishops (and other leaders of religious institutes) in relation to serious reportable conduct matters.

In particular, we believe there is a need for the Church to adopt a system that encourages stronger peer review and where necessary, obtaining independent expert assistance. In this regard, we note that this need is particularly apparent in relation to the Church balancing its pastoral care for priests with managing risks to children. In the past, we have observed a reluctance on the part of the Church to take prompt and decisive risk management action in relation to certain clergy who – by virtue of their status as priests; regardless of whether they continue to work directly with children – constitute a risk to children, young people, vulnerable adults and the reputation of the Church. In some of these cases, the decision by Church leaders not to remove the individual from their role as a priest appears to be at odds with their community obligations. In other cases, the more significant issue is the failure by the Church to adopt sophisticated risk management strategies.

- **Our Part 3A jurisdiction in relation to clergy/religious**

The priest/Church relationship is different from the typical employee/employer relationship that we oversee. Currently, the circumstances in which clergy and religious are subject to the reportable allegations scheme are limited. Allegations against members of the clergy fall within our jurisdiction only if the person is either an employee of a relevant agency (such as a school), or is 'engaged' (by the agency) to provide services to children at the time that the allegation arises.

In a number of matters we have handled, questions have arisen as to the scope of our jurisdiction. In many of these matters, whether we had jurisdiction has been dependent on whether a priest has been deemed to be engaged in 'child-related employment' at a Diocesan school at the time of the allegation.
In several such cases, it has become apparent that the Church has been dealing with concerns relating to a priest for some time (years, in some cases) prior to notifying our office.

4.3 Independent schools

Our relationship with the AIS, and in more recent times, Christian Education National (CEN) and the Christian Schools Association (CSA), has been critical to our ability to effectively oversight and strengthen the handling of reportable conduct across the independent schools sector. Together, these three bodies represent and support more than 400 independent schools across NSW.

Independent schools are registered non-government schools which include, but are not limited to, schools affiliated with a variety of religions and educational philosophies. According to the Association of Independent Schools (AIS), in 2014 there were 465 registered independent schools in NSW, including 49 independent (congregational) Catholic schools operated by the Religious Institutes of brothers, nuns and priests (or by their agents).16

In 2014, the NSW independent schools sector enrolled more than 186,000 students in primary and secondary schools, representing 16.1% of all students in NSW. Independent schools account for almost 10% of all primary school enrolments in NSW and more than 19% of all secondary school enrolments. At the senior secondary level (Years 11 and 12), independent schools account for more than 20% of enrolments. Independent school numbers have increased significantly in NSW over the last 30 years, with the number of students enrolled in independent schools increasing by an average of nearly 4% per year.17

Much of our work with the independent schools sector is carried out through our liaison with the AIS, which represents more than 380 member schools enrolling more than 158,000 students.18 Over a number of years, the AIS has made significant investments to raise practice standards among its membership. For instance, it sought to accredit child protection investigators over a decade ago and has a dedicated Workplace Management unit which provides a range of child protection advice, response management, policy and procedures audits, investigative, and risk management services to members.19 In more recent years, we have also worked with Christian Education National (CEN) which CEN represents 16 schools in NSW and the ACT20 and Christian Schools Australia (CSA) which has 47 member schools in NSW.21 Some members of CSA and CEN are also affiliated with the AIS.

We first entered into a class or kind determination with the AIS and participating member schools in 2004. This took place after we had worked closely with the AIS to develop a training package for the accreditation of certain independent school employees as designated child protection investigators, as well as two key documents, namely the AIS’ Child Protection Policy Framework and Code of Conduct for the Care and Protection of Children. Under the determination, only independent schools with AIS accredited investigators can be exempted from notifying certain matters to our office. In 2010, we worked with the AIS around further strengthening its processes for supporting, training and accrediting member schools. We subsequently expanded the class or kind determination with the AIS and participating member schools in 2012.

The current determination with the AIS exempts notification to us of:

---

16 These schools undertake their own administration, with some support from their local Diocesan CEO/CSO.
19 The unit also provides work health and safety audits and inspections.
First time reports of hitting a child; or inappropriate but minor and transitory restraint of a child; or an incident of inappropriate pushing and pulling a child, provided that
a) the conduct does not involve the use of physical force being applied to any part of the head or neck, or to any other part of the body likely to cause more than short term (or transitory) harm.

In relation to conduct of the class or kind exempted by the determination, heads of agency must abide by certain conditions, including notifying the AIS of the allegation; engaging an AIS accredited investigator; and seeking the support and advice of the AIS at key milestones during the investigation. The determination also requires the AIS to maintain a database of completed class or kind investigation notifications in relation to allegations of reportable conduct.

We entered into class or kind determinations with the CSA and the CEN and their participating members in 2011. CSA had previously approached us in 2007 about issuing a class or kind determination to its member schools; however, we declined to do so primarily because the rate of reportable conduct notifications from CSA’s member schools was very low; and, in this context, we could not be confident about their capacity to meet the required standard of legislative compliance and investigation. Our decision to enter into the determinations with CSA and CEN in 2011 was contingent on both bodies submitting detailed proposals for the establishment of comprehensive systems for the provision of child protection advice, training and support to their members.

The current determinations with CSA and CEN exempt notification to the Ombudsman of the same conduct exempted by our determination with the AIS, but have some additional caveats, including a requirement for schools to outsource to accredited investigators all investigations of allegations of serious reportable conduct, or matters where the investigation would involve a conflict of interest. In addition, for all matters involving clear allegations of criminal conduct, and for other complex matters, the determinations require schools to carefully consider whether they have the competency to properly investigate the allegations (if not, the investigation should be outsourced).

As discussed above, in the early years of the reportable conduct scheme’s operation we provided considerable advice and assistance to the AIS in relation to establishing adequate systems and resources to support its members. In consultation with the AIS, we also undertook a series of compliance reviews of independent schools. Over the last decade, we have also increasingly worked with CSA and CEN, particularly during the process of negotiating the class or kind determination entered into with both organisations in 2011, but also through the provision of training and presentations about responding to reportable conduct allegations.

In 2011, we began working in partnership with the AIS, CSA and CEN to promote a more consistent approach to child protection across the diverse independent schools sector, and to identify new ways to support their member schools fulfilling their child protection responsibilities. As part of this work, in 2013 we commenced a review of certain aspects of the independent school sector’s systems for preventing and responding to child abuse allegations, focusing on compliance with our class or kind determinations. The focus of our review was AIS member schools that had utilised the determination after its reissue in March 2012.

Following discussions with the AIS, we ascertained those eligible member schools that had exempted reportable conduct matters over the period of our review. We surveyed each of these schools to assess their level of understanding about complaint handling and the reportable conduct scheme and we also

---

22 Serious reportable conduct includes alleged child-related sex offences by employees; alleged physical assaults by employees against a child or a young person that involve a) serious injuries to the head and/or body of children including burns; fractures; lacerations; internal injuries or significant bruising b) the violent shaking of a young child; matters where there is evidence of inappropriate or improper conduct of a kind that gives rise to a suspicion, on reasonable grounds, that the involved employee may have committed, or may commit, a sexual offence against a child or young person.

23 The determination also imposes a range of requirements on CEN, particularly in relation to providing adequate support to member schools and monitoring their use of the determination.
reviewed each of their investigations. We attended a number of the schools in our review sample – across a range of geographic locations and school size – and met with principals and other staff to provide feedback on their investigations and child protection policies and procedures. We also provided feedback to the AIS about what we found.

- **Schools with low numbers of notifications or no history of notifications**

An area of potential risk in the independent schools sector concerns the practices of independent schools not affiliated with the AIS, CEN or CSA, and/or schools which are under-represented or entirely absent in the notifications data. The risk is particularly amplified for newer and/or small schools given that, in general, they are less likely to have experience in handling reportable conduct matters.

When non-affiliated schools do make a notification, we invest considerable resources in closely working with them in relation to handling the allegation as case study A (Annexure 2) shows. The benefits of schools being supported through the AIS during the investigative process are well illustrated by case study B (Annexure 2).

In 2012, we delivered a number of training sessions to inspectors employed by BOSTES to inform its responsibility for monitoring the compliance of non-government (independent) schools with the registration and accreditation requirements of the *Education Act 1990*. Registration is a non-government school's licence to operate under the Act. As part of the training, we emphasised to inspectors that when auditing independent schools’ compliance with the Act, they should seek to examine whether schools are meeting their reportable conduct and mandatory reporting obligations.

More recently, prompted by case study A, we have been exploring with BOSTES how our agencies can work more closely to share information about schools where the systems for responding to child protection issues are inadequate. Examining how our office can work more closely with the AIS to engage with independent schools under-represented in the notifications data will also be a priority for our upcoming liaison meeting. In this regard, we recently decided that there would be benefit in bringing the AIS and the Catholic systemic schools sector together in a quarterly forum to discuss specific challenges its members share.

As we noted at the outset of the submission, our capacity to do as much as we would like to in this area is constrained by the sheer number of agencies that come under our jurisdiction and the need to direct a significant component of our limited resources towards scrutinising serious reportable conduct matters and concentrating on other high-risk and newly emerging sectors.

5. **Observations on key systemic issues**

In our previous submissions and statements of information to the Commission, we have shared a number of observations drawn from our 16 years of overseeing the reportable conduct scheme in NSW, as well as monitoring and reviewing the delivery of community services. As we noted earlier, we have emphasised the need for national consistency in key areas of child protection, such as employment-screening and information exchange, and the benefits of implementing consistent reportable conduct schemes in each state and territory.

In the context of the Commission’s current focus on addressing the risk of child sexual abuse in primary and high schools, this section highlights the current strengths and weaknesses in relation to the exchange of child protection information in NSW and across borders given the mobility of the teaching profession; and discusses other systemic issues that have been identified through our oversight of reportable allegations from the schools sector, including:
identifying and responding to sexual misconduct and conduct which crosses professional boundaries,
addressing risks relating to casual teachers, and
managing risks presented by individuals engaged by schools to provide non-teaching services.

5.1 Barriers to sharing information

We note that Issues Paper 9 contains a number of questions (topic F) about information sharing in the context of promoting child protection in the school setting.

The Ombudsman’s office has been at the forefront of advocating for reforms to the area of information exchange for a number of years. In our 2008 submission to the Special Commission of Inquiry into Child Protection Services in NSW, we outlined problems associated with the privacy laws that inhibit the effective exchange of information between agencies about child protection matters. We proposed a specific legislative solution that would enable the ready flow of information between agencies to promote the “safety, welfare and wellbeing of children and young people”. Justice Wood supported our proposal and in his final report, recommended the introduction of new information sharing provisions.

The introduction of Chapter 16A

In October 2009, Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998 came into effect. Chapter 16A allows NSW government and certain non-government agencies (prescribed bodies) to share information that promotes the safety, welfare and wellbeing of a child or young person, and specifically overrides any other legislation (including privacy legislation) that conflicts with this objective. A prescribed body is any organisation specified in section 248(6) of the Act as follows:

(a) the NSW Police Force, a Division of the Government Service or a public authority, or
(b) a government school or a registered non-government school within the meaning of the Education Act 1990, or
(c) a TAFE establishment within the meaning of the Technical and Further Education Commission Act 1990, or
(d) a public health organisation within the meaning of the Health Services Act 1997, or
(e) a private health facility within the meaning of the Private Health Facilities Act 2007, or
(f) any other body or class of bodies (including an unincorporated body or bodies) prescribed by the regulations for the purposes of this section.24

The key principles underpinning Chapter 16A are:

1. agencies that have responsibilities relating to the safety, welfare or well-being of children or young people should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
2. those agencies should work collaboratively in a way that respects each other’s functions and expertise,
3. each such agency should be able to communicate with each other so as to facilitate the provision of services to children and young persons and their families,
4. because the safety, welfare and well-being of children and young persons are paramount:
   1. the need to provide services relating to the care and protection of children and young persons, and
   2. the needs and interests of children and young persons, and of their families, in receiving those services,

24 Clause 7 of the Children and Young Persons (Care and Protection) Regulation 2000 prescribes the relevant bodies regarded “as a prescribed body” for the purpose of section 248(6)(f) of the Act.

20
take precedence over the protection of confidentiality or of an individual’s privacy.

The introduction of Chapter 16A has significantly expanded the scope for relevant agencies to exchange information with each other in a broad range of child protection contexts. The case studies in Appendix 2 clearly illustrate the impact and significance of the provision. The ability of government and non-government agencies to directly request relevant information from each other (and be proactive about providing it) has meant that information from a variety of sources can be easily gathered to better inform assessments of children who may be at risk, and better tailor appropriate responses. As we noted in our 2013 submission about WWCCs and subsequent submissions to the Commission, we believe that other jurisdictions would similarly benefit from a Chapter 16A type provision.

In highlighting the value of Chapter 16A, it is also important to acknowledge some of the challenges which still exist in relation to information exchange.

- **Alerting prospective employers to possible child protection risks**

In our submission to the Commission about WWCCs we outlined the significant strengths of the new WWCC scheme in NSW (introduced in June 2013), which has resulted in a more robust screening process for people who work with children.

Despite this, we have concerns that an employer still cannot be confident that a person who has been cleared to work with children does not have any past known conduct issues which indicate they ‘may pose a risk to the safety of children’. This is because the WWCC scheme is based on issuing either a blanket ‘bar’ or ‘clearance’ to work with children. The legal threshold for issuing a bar means that a person who has had, for example, a finding of sexual misconduct made against them in the past will not necessarily be barred from child-related work.

We have therefore argued that the Children’s Guardian should develop a system for using the information exchange provisions in Chapter 16A to ensure that, in administering the WWCC, they provide the most comprehensive possible responses to employment screening. Case study C in Appendix 2 illustrates the value of risk-related information being provided to prospective employers.

As a result of this and other cases, we recommended that the Children’s Guardian use Chapter 16A to share potentially significant risk-related information with prospective employers, particularly at the point in time when prospective employers are verifying with the Children’s Guardian that a person is cleared to work with children. The Children’s Guardian sought legal advice from the Crown Solicitor in 2014 about whether this was possible. The Crown Solicitor advised that there were no legal impediments to the Children’s Guardian exchanging information in this way.

As a result, in February 2015, the Children’s Guardian facilitated a working group with representatives from five government agencies – Education, FACS, Police, Health and Justice – and the Information and Privacy Commission, to consider the potential operational and resourcing implications. However, we were advised by the Children’s Guardian in August 2015 that the overall view of the attendees was a “reluctance to receive ‘below the bar’ information”. However, we note that this position is at odds with the information made available under the Carers’ Register. We intend to continue exploring this issue with stakeholders.

Finally, we wish to stress that our advocacy on this issue does not mean we believe addressing it will, in and of itself, provide all the necessary safeguards. It is critical that the mechanism we have proposed is complemented by a much more sophisticated understanding across the child-related employment sector in relation to pre-employment screening processes and child safe practices more generally.
• **Interstate exchange of information**

Given the ease with which persons who pose a risk to children can travel across jurisdictions, any weakness in the regime for exchanging information between states and territories can pose significant risks to children. We have previously flagged this issue, and the need for a nationally consistent approach to information sharing provisions, in a number of our submissions to the Commission.25 It is essential that relevant bodies within each state and territory have the power to exchange information, relating to the safety, welfare and wellbeing of children, with like bodies in other Australian jurisdictions.

While there are provisions that apply consistently across the nation in relation to the exchange of criminal information between jurisdictions, these provisions do not encompass other relevant information that can be vital to identifying risks to children, including relevant misconduct findings and child protection notifications.

In NSW, allegations of reportable conduct in relation to current employees of ‘designated’ agencies must be notified to the Ombudsman and investigated by the agency whether they occurred in the recent or distant past; whether they concern conduct at work or outside work; and whether the alleged conduct occurred within NSW or outside. However, where the alleged conduct has occurred outside NSW, many human service agencies have typically been unable to exchange relevant information for various reasons, including where the agency does not have the consent of the involved individual. This has led to inaccurate risk assessments and investigations being concluded on the basis of incomplete information and, as a result, children have been exposed to unacceptable risks – see case studies 1 and 2 below.

Community Services (as the statutory child protection authority) relies upon the *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance* (the Protocol) as its vehicle for obtaining information from other states. Among its purposes, the Protocol is intended to ‘provide for cooperation between jurisdictions to facilitate the care and protection of children and young people’. To this end, the Protocol provides for (among other things), ‘information sharing’ between state child protection authorities. However, the provisions in the Protocol specifically related to ‘information sharing’, only refer to relevant child protection agencies providing to their interstate counterparts information that they ‘hold’ (clause 25).

In our December 2012 report to Parliament about responding to child sexual assault in Aboriginal communities, we highlighted that there are a number of problems with the current arrangements. First, consistent with the Protocol, Community Services has taken the view that it should not make a request to its counterpart in another state unless it is acting pursuant to its own legislative responsibilities (this requires it to first form an opinion that the relevant issue has already met, or may meet, the risk of significant harm threshold). Second, facilitating cross-border exchange of information via statutory child protection authorities may not be effective in cases where the critical information being sought is not actually ‘held’ by the statutory child protection authority in the state where the information is located.

Furthermore, we are aware that particular interstate child protection authorities believe that they do not have the legal authority to even request critical information from a third party agency within their jurisdiction, in circumstances where they themselves do not hold the information being sought and the seeking of such information would not be for the purpose of protecting a child from within their own state. These issues are well illustrated by the following case involving historical allegations of sexual misconduct/offences against a teacher.

---

25 See our submissions on Working with Children Checks; the schedule of systemic issues we provided to the Commission in 2013; and our response to the February 2015 hearing into Knox Grammar School.
Case study 1
In 2012, Community Services requested that one of its interstate counterparts obtain critical information from a school within the counterpart’s jurisdiction about unconfirmed allegations that a teacher had engaged in a sexual relationship with a student when they had taught at that school. (Under the Ombudsman Act, the teacher’s current employer – a NSW school – was under a legal obligation to investigate these historical allegations.) In response to Community Services’ request, its interstate child protection counterpart advised that it did not ‘hold’ any information about the teacher within its own records. Community Services then requested that its counterpart seek relevant information from the relevant school within that state. In response, Community Services’ counterpart advised that it did not have the authority to request the critical information from the school because it did not have the power to seek information in circumstances where it was not acting pursuant to performing its child protection responsibilities in connection with a child from within its own state.

In correspondence between Community Services and its interstate counterpart, the latter noted: ‘A more national approach in this area of information sharing would be useful and valuable but unfortunately we do not have it at present.’

During the course of our audit of Aboriginal child sexual abuse, the NSW Department of Premier and Cabinet advised us that as part of the work plan to implement the National Framework for Protecting Australia’s Children, the Commonwealth, in partnership with the States, was investigating the need for changes to legislation, most likely Commonwealth legislation, to extend the national protocol for sharing information on children at risk’. Our report recommended that DPC highlight the issues raised above as part of progressing legislative reform (and related policy and practice initiatives) to strengthen the existing interstate information exchange regime. We also recommended that the NSW Government actively pursue with the Federal Government and its state and territory counter-parts, the need for legislative and related policy change that address the current weaknesses in the regime for cross-border exchange of child protection-related information.

The case study below illustrates what can be achieved when quality information is exchanged across borders.

Case study 2
Consistent with our employment-related child protection role, an agency in NSW notified us of allegations of sexual misconduct by an employee in 2005 and 2009. The 2009 allegations resulted in a sustained finding of sexual misconduct and the employee was notified to the CCYP. In addition, the NSW Police Force and Community Services had also conducted related inquiries into the employee’s conduct that confirmed he posed a potential risk to children.

In 2011, the former NSW employer received an information request from an interstate employer that was currently employing the person in child-related work and had become aware that there had been serious allegations made in NSW. The NSW employer was unclear as to whether it could legally provide the information requested. Following this case being brought to our office’s attention, we coordinated a review of all relevant holdings in the possession of our office, Community Services and Police, relating to the person and requested Community Services provide a summary of these holdings to its interstate child protection counterpart.

The provision of this information prompted a police investigation. This then led to police promptly laying a number of charges against him in relation to the sexual abuse of children from within that state. He subsequently pleaded guilty.

In June this year, we were advised that the NSW Government:

“is working to improve and enable the sharing of information between governments and non-government agencies across the various jurisdictions for the safety, welfare and wellbeing of children [and that] this has required consideration of state and territories child protection and other legislation… and is currently considering further options to progress this work, including pursuing opportunities arising from the development of the Third Action Plan
Since then, we have received further advice from FACS about a NSW-led research project to identify options for improving inter-jurisdictional information sharing about foster carers. While focusing on one aspect of facilitating better outcomes for children in out-of-home care (OOHC), the project is relevant to the need for national information sharing reform in relation to child protection more broadly.

5.2 Sexual misconduct and crossing professional boundaries

Allegations of sexual misconduct – especially those involving the crossing of professional boundaries – are among the most complex reportable conduct allegations to identify and respond to. Understanding and responding appropriately to early indicators that an employee may be crossing professional boundaries with children is critical to reducing the incidence of the sexual abuse of children in the workplace. Over the 16 years of our employment-related child protection jurisdiction, we have worked to improve agencies’ understanding of the types of sexual misconduct that can precipitate child sexual offences.

- Defining sexual misconduct

We have learnt that the guidelines issued to agencies in relation to what might constitute sexual misconduct – or even an indication of a possible sexual offence – is critical to assisting agencies in identifying conduct of concern, investigating such conduct and, where necessary, making adverse findings.

In this regard, we note that our statement of information to the Commission in February 2015 in relation to Knox Grammar School, discussed sexual misconduct in detail, noting the revised guidelines we issued in 2010 to provide greater clarity for employers in relation to the definition of ‘sexual misconduct’.

From our analysis of cases over the years, we know that a high proportion of sexual offences that occur in employment contexts such as schools are preceded by the employee engaging in conduct with, or towards, a child that is in breach of professional standards. As the conduct does not always involve behaviour of an overtly sexual nature, it is crucial that employers are able to identify early signs of inappropriate conduct of this nature and take adequate action to address it. The revised definition contained in our 2010 guideline makes it clear that ‘crossing of professional boundaries’ with children, particularly if the employee knows or ought to know that their behaviour is unacceptable, can constitute sexual misconduct (regardless of whether or not the conduct involved a manifestly sexual element).

As we advised the Commission in our statement of information in relation to Knox Grammar School earlier this year, the primary weakness of the previous guidelines relating to sexual misconduct concerned the reliance on finding grooming in the context of behaviour by employees towards children which, while not explicitly sexual in nature, crossed professional boundaries. Given that the grooming of children constitutes an offence, and that it involves reaching a conclusion that the employee’s behaviour is a precursor to a sexual relationship with a child, employing bodies were understandably reluctant to reach this conclusion. The difficulty in establishing the elements of ‘grooming’, and the gravity of such a finding, also impacted on the investigative process; for example, investigators would often not rigorously pursue lines of inquiry relating to behaviour which crossed professional boundaries because they had made an assessment that it was unlikely that more rigorous inquiries were ultimately going to support a ‘grooming’ finding.

In turn, this also led to inappropriate behaviour by employees towards children not being fed into the WWCC process because while the behaviour was clearly unacceptable, the evidence was not capable of supporting a conclusion that there was any intention to engage in a sexual relationship with a child. Therefore, against this background, when the current Deputy Ombudsman and Community and Disability Services Commissioner assumed responsibility for our employment-related child protection jurisdiction in 2010, he decided to include a focus on behaviour around the crossing of professional boundaries in relation to:

....behaviour that can reasonably be construed as involving an inappropriate and overly personal or intimate: relationship with; conduct towards; or focus on; a child or young person, or a group of children or young persons.

The revised definition has allowed employers to pursue broader lines of inquiry and examine the nature of inappropriate relationships without the need to establish ‘grooming’. Case study D in Appendix 2 illustrates this.

Notwithstanding the impact of our revised definition of sexual misconduct, it would be misleading to suggest that all agencies, including those within the schools sector, have sophisticated practices in responding to this issue. However, we are confident that many sectors have shown improvements in practice in this area over time.

We also appreciate the hesitance of some agencies in relation to naming conduct which is not overtly sexual as ‘sexual misconduct’. It is important to note that given the significance of labelling behaviour as ‘sexual misconduct’, our guidelines for employers contain a number of caveats which caution employers against being too hasty to label crossing of professional boundaries behaviour as ‘sexual misconduct’.

If there is any flaw in our approach to sexual misconduct, it is a semantic one – the legacy of a scheme established around terminology which, 16 years later, might not precisely describe the types of conduct that the scheme is intended to address.

5.3 Managing risks relating to casual teachers and individuals engaged by schools to provide non-teaching services

In our 2013 submission to the Commission about WWCCs, we outlined the strengths of the new scheme, including the continuous monitoring of any serious relevant offences or disciplinary records against an employee once they are granted a clearance.

A staggered, five-year schedule governs when existing employees in paid, volunteer or self-employed child related work are required to apply for a new WWCC under the enhanced scheme. According to Schedule 1 of the Child Protection (Working with Children) Regulation 2013, the WWCC compliance periods for the Education sector are as follows:

1 April 2016 – 31 March 2017:
- Education - Secondary schools
- Education - Vocational
- Education - Private tuition and coaching

1 April 2017 – 31 March 2018:
- Early education and child care
- Education and care service – approved provider, manager or certified supervisor
- Education – all remaining services
As the Commission has recognised in its recently released report about WWCCs, in the absence of broader child-safe strategies, a robust WWCC scheme will not in and of itself make organisations safe for children. In this regard, we note that even once the new WWCC in NSW is fully phased in, there are a number of systemic risks relating to the screening of people who are engaged by schools which warrant particular consideration.

- **Casual teachers**

In recent months, we have had discussions with various representatives from the education sector and the Children’s Guardian about the engagement of casual teachers.

In circumstances where a reportable allegation is made against a permanent teacher, the employer has the capacity to implement a range of risk management actions while an investigation is being undertaken; for example, a teacher may be placed on alternate duties, or other arrangements may be put in place to ensure that a teacher does not have unsupervised contact with children.

For casual teachers, the fact that a teacher may be working in a large number of different schools for very short periods of time means that risk management options are more limited. For this reason, the Department of Education will often choose to temporarily revoke a teacher’s casual approval while an investigation is being undertaken, and list them on the Department’s centralised ‘not to be employed’ (NTBE) list until such time as the investigation is finalised.

While this approach should ensure that a casual teacher who is the subject of an allegation will not be able to work in any government schools during the investigation period, it is permissible for teachers to be approved as a casual in more than one school sector simultaneously. As a result, there is a risk that an individual who has been simultaneously working as a casual teacher with the Department of Education as well as a Catholic and/or independent school, could continue to work in schools outside of the government sector while an investigation is underway, despite being placed on the government schools NTBE list.

In addition, we note that the other school sectors do not have a centralised list equivalent of the NTBE list. Therefore, by way of example, it is possible for a Catholic school in a particular Diocese to cancel a casual teacher’s casual approval due to an allegation of misconduct, and for other Catholic schools to continue to engage the individual as a casual teacher.

- **Persons engaged by schools to provide non-teaching services**

In a similar vein, a number of matters have also come to our attention that illustrate the challenges associated with managing risks presented by individuals who are engaged to provide various non-teaching services to the school community. Engagement of this type is generally arranged directly by the school – or groups associated with the school, such as Parents & Citizens (P&C) – such that their engagement is not known to any centralised authority.

For example, we were notified by one school of serious allegations against a person who the school had engaged to provide extra-curricular services to children. The allegations were reported to the Department of Education, which reported the matter to Police and placed the person on its NTBE list. However, the Department was unaware that he was also engaged by at least three schools. In each case, he was engaged directly by the school (or P&C). He was able to continue working in the schools for more than a year until he was arrested by police for child sexual abuse offences, after another school reported further allegations to Police. This scenario is analogous to the circumstances outlined above regarding casual teachers.

The potential risks associated with persons engaged to provide services within schools that are not services to children can be even more difficult to manage.
By way of illustration, we were contacted by a school authority after it discovered that a particular individual was being engaged by a number of its schools, and schools in other sectors, to provide services to teaching staff. Prior to the commencement of the Reportable Conduct and WWCC schemes, the school authority had deemed that this man was unsuitable to ever work with children within its schools. As he was providing services to teaching staff rather than directly to students, he was not required to hold a WWCC. There were allegations however that the man was leveraging off his access to the school community to engage with students one-on-one during class break times.

We made a Notification of Concern27 to the Children’s Guardian about this individual, and he was subsequently barred from working with children in NSW. Despite this, the bar does not prevent the man from being engaged in schools to provide services to adults because a WWCC bar does not preclude a person from attending school premises for purposes that do not involve child-related work (See case study E in Annexure 2).

While we emphasise with schools that they should have stringent systems in place to ensure that individuals who attend the school for non-child-related work purposes are not permitted to engage with students, it is important for schools to also take sufficient steps to ensure that these workers do not gain inappropriate access to children. In this matter, we were informed that the school had sound systems in place to ensure visitors were not permitted unsupervised contact with children, but that the school’s executive had been persuaded by the man’s self-proclaimed expertise and reputation, and by the fact that he had been highly recommended by other school executives.

For this reason, school executives should be provided with information on a regular and ongoing basis about the need for vigilance in relation to visitors to school premises and strict observance of systems and procedures designed to keep children safe.

- **The engagement of private tutors**

It is important to note that a range of educational institutions are excluded from the reportable conduct scheme because they do not constitute ‘non-government schools’ as defined by the Education Act 1990.28 As a result, there is a significant difference in the safeguards for children whilst at school, compared to child safety during their before or after-school or weekend tuition at one of the state’s many, tutoring organisations. What is more, the lack of scrutiny applied to tutoring organisations impacts on the overall knowledge base about certain teachers who may pose a risk to students, such that schools may engage a teacher who was the subject of concerns within the tutoring sector, without being privy to the potential risks.

A matter came to our attention last year that illustrates our concerns in this area – see case study F (Annexure 2).

6. **Concluding remarks**

The introduction of the reportable conduct and WWCC schemes in NSW – along with a range of other related initiatives – has improved the safeguards for children in the schools environment. This impact is evidenced by a number of indicators, including more rigorous probity-checking; better awareness of child protection issues; improved systems for preventing and responding to child abuse in schools; and independent scrutiny of these systems. The complementary nature of the schemes, has also

27 Under Schedule 1, Clause 2A of the Child Protection (Working with Children) Act 2012, the Ombudsman can make a Notification of Concern to the Children’s Guardian if, as a result of information received in the course of exercising the Ombudsman’s functions, there are concerns that, on a risk assessment by the Children’s Guardian, the Children’s Guardian may be satisfied that the person poses a risk to children. A Notification of Concern is an assessment requirement trigger under the Act.

28 Pursuant to section 3 of the Act a non-government school means a registered non-government school registered under Part 7 of the Act.
significantly curtailed the ability of persons who pose a risk to children to move around the system undetected.

In making these observations, we believe that it is important to acknowledge that the gains we have made in NSW have been achieved through strong leadership and support from across the government and non-government school sectors for the two schemes and as a result of related initiatives. In addition, oversight agencies and the schools sector alike recognise the need to commit to ongoing practice refinement.

In this regard, it is important that our office continues to refine its own intelligence capacity, particularly as it relates to identifying areas of the sector which need strengthening. An effective intelligence strategy in both the schools and other key sectors must also include obtaining and responding to critical information gleaned from key industry experts. In relation to the schools sector in particular, our office needs to further strengthen our strategic engagement with peak bodies across the sector to jointly determine priority areas that need we need to target.
Part 1: Overview of our child protection role

1 The Ombudsman’s Part 3A reportable conduct scheme

The NSW Ombudsman’s employment-related child protection jurisdiction commenced in May 1999, when a system was established for the Ombudsman to oversee the handling of allegations of a child protection nature against employees of government and certain non-government agencies.1

Our jurisdiction involves overseeing the handling of child abuse and neglect allegations that are made against employees2 of more than 7,000 government and non-government agencies.3 The scheme was – and remains – a unique and unprecedented jurisdiction, not least because of the oversight it brings to both government and non-government organisations in their handling of child protection concerns and the conduct of their employees (including volunteers).

As the Commission is aware, following the 2013 Victorian Parliamentary Inquiry into the handling of child abuse by religious and other organisations, a decision was made to establish a reportable conduct scheme in that state. Our office has been providing ongoing advice to Victorian agencies to support the establishment of the new scheme.

Part 3A of the Ombudsman Act 1974 requires and enables the Ombudsman to:

- **Receive and assess notifications** concerning reportable allegations or convictions against an employee
- **Scrutinise agency systems** for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct and convictions
- **Monitor and oversight** agency investigations of reportable conduct
- **Respond to complaints** about inappropriate handling of any reportable allegation or conviction against employees
- **Conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable notification or conviction
- **Conduct audits and education and training** activities to improve the understanding of, and responses to, reportable allegations, and
- **Report on trends** and issues in connection with reportable conduct matters.

All public authorities are subject to the requirements of Part 3A if the reportable conduct arises in the course of a person’s employment. Some public authorities are ‘designated agencies’ and also need to notify reportable allegations if they arise from conduct that takes

---

1 The scheme was established following recommendations arising from the Wood Royal Commission into the NSW Police Service.

2 In this context, an ‘employee’ is defined broadly as including: any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

3 The NSW Solicitor-General recently clarified the reach of our jurisdiction and advised us that “[O]n its face the notion of “substitute residential care” in the care of children would appear to extend to any arrangement where an organisation has the care and control of children of a kind that would otherwise be provided by parents and caregivers, were a child in his or her place of residence. This advice has greatly increased the number of agencies and individuals deemed to fall within our employment-related child protection jurisdiction. We are currently working with organisations in the recreational camping and youth sectors, together with religious and other volunteer organisations, which run camps falling within the scope of this advice.”
place outside of employment. Some non-government agencies are also subject to Part 3A requirements and must notify reportable allegations that arise both within and outside of employment. It is worth noting that historical allegations of child abuse only fall within our employment-related child protection jurisdiction if the involved individual is an “employee” of a relevant agency at the time when the allegation becomes known by the head of agency.

What is notifiable to the Ombudsman?

In 2003, a government review was initiated into the impact of child protection and employment screening legislation on employers in NSW. The review found that the term ‘child abuse’ raised strong emotions and that:

- there was a reluctance by some agencies to identify certain behaviours by employees towards children as ‘child abuse’, and
- employees were fearful of being labelled a ‘child abuser’ and their future careers being placed in jeopardy when allegations were made against them (regardless of the outcome of any investigation).

The Child Protection Legislation Amendment Act 2003 amended sections of Part 3A of the Ombudsman Act 1974. These amendments removed the terms ‘child abuse’, ‘child abuse allegation’ and ‘child abuse conviction’ and replaced them with ‘reportable conduct’, ‘reportable allegation’ and ‘reportable conviction’. The amendments also clarified the types of matters that are reportable to the Ombudsman. In 2004, we issued revised guidelines for employers – Child Protection in the workplace: responding to allegations against employees – which explained the changes in terminology and included definitions of reportable conduct (see Annexure 3).

When an allegation of ‘reportable conduct’ is made against an employee of relevant government and non-government agencies – including non-government schools, approved children’s services and agencies providing substitute residential care – the head of agency is required to notify the Ombudsman of any reportable allegations or convictions involving their employees as soon as practicable and, the ‘notification’ must be made in any event, within 30 days of the head of agency becoming aware of the allegation or conviction.

Section 25C requires the head of agency to ‘make arrangements within the agency to require employees of the agency to notify the head of agency of any such reportable allegation or conviction of which they become aware. We encourage agencies to notify

---

4 Under s25A of the Ombudsman Act 1974, designated government agency means any of the following:
(a) the Department of Education and Training (including a government school) or the Department of Health,
(al) a Division of the Government Service (or a part of a Division of the Government Service) prescribed by the regulations for the purposes of this definition,
(b) a local health district within the meaning of the Health Services Act 1997,
(c) any other public authority prescribed by the regulations for the purposes of this definition.

5 Designated non-government agency means any of the following:
(a) a non-government school within the meaning of the Education Act 1990,
(b) a designated agency within the meaning of the Children and Young Persons (Care and Protection) Act 1998 (not being a department referred to in paragraph (a) of the definition of designated government agency in this subsection),
(b1) an approved education and care service within the meaning of the Children (Education and Care Services) National Law (NSW) or the Children (Education and Care Services) Supplementary Provisions Act 2011,
(c) an agency providing substitute residential care for children,
(d) any other body prescribed by the regulations for the purposes of this definition.
us at the earliest possible opportunity, whether by way of formal notification or initially through telephone contact, so that we can play an early role in guiding agencies through their initial response.

Section 25A of the Ombudsman Act defines a “reportable allegation” as an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

Section 25A of the Ombudsman Act defines ‘reportable conduct’ as:

(a) Any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or
(b) Any assault, ill-treatment or neglect of a child, or
(c) Any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

The section also specifies that reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
(b) the use of force that, in all circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25C of the Act.

**Our role in keeping agency systems under scrutiny**

We primarily fulfil our section 25B requirements to scrutinise agencies’ systems through our ongoing oversight and monitoring of reportable conduct matters; by conducting direct investigations, as well as our through our intelligence gathering activities. These activities are complemented by our keep under scrutiny function. Our ability to undertake auditing activities is dependent on other competing demands on our resources, such as taking a proactive role in overseeing the handling of the high volume of serious reportable conduct matters involving criminal allegations.

Under section 25B of the Ombudsman Act, the Ombudsman is required to keep under scrutiny the systems that agencies have in place for preventing reportable conduct, as well as the systems for handling and responding to reportable allegations (including allegations which are exempt from notification) and convictions, involving employees of designated government or non-government agencies, or other public authorities. Audits are one way for the Ombudsman to review such systems. Audits of agencies may be conducted independently of the investigation and monitoring role of the Ombudsman.

The purpose of an audit is generally to assist an agency to improve its systems and practices for providing safe environments for children in its care. It is also to identify and promote good practice across agencies. The Ombudsman does this by assessing the policies and practices within an agency, and providing it with advice about the good practice we identify and areas
for improvement. Our audits might also identify the need for training – we discuss this area of our work below.

**Our education and training role**

The Ombudsman employs a range of strategies to raise awareness and knowledge of the reportable conduct scheme among designated agencies, including non-government schools, and to support employers to meet their obligations under the scheme. These strategies include:

- Publishing on our website a range of factsheets and practice updates for employers (see Annexures 4–8).
- Providing direct telephone advice to employers, who are able to contact our Employment-related Child Protection Division at any time.
- Delivering employment-related child protection training to staff of agencies falling within the reportable conduct scheme, including workshops on responding to child protection allegations against employees and handling serious allegations (the latter workshop is frequently delivered by the Deputy Ombudsman and Community Services Commissioner) – see section 2.1.1 for the number of workshops delivered.
- Providing targeted information sessions to build the capacity of specific sectors/agencies, particularly those which are ‘new’ to our jurisdiction.  
- Regularly meeting with agencies to discuss emerging systemic or practice issues, and convening ‘case conferences’ to discuss individual investigations.
- Hosting stakeholder forums and giving presentations at conferences and seminars.
- Providing detailed feedback to the agencies we audit under section 25B of the Ombudsman Act.

Since 2011 we have been working with non-government schools to promote a consistent approach to child protection and to identify new ways to ensure they and their member schools fulfill their child protection responsibilities. In 2013, we commenced an audit of the independent school sector’s systems for preventing and responding to child abuse allegations, focusing on compliance with our ‘class or kind’ determination with the AIS. The audit has provided us with the opportunity to provide targeted feedback both to individual non-government schools and their representative bodies.

---

8 For example, in February this year we provided a workshop to DEC’s Early Childhood Education and Care Directorate as part of our ongoing work in building capacity in the approved children’s services sector. The 20 participants included Regional Managers, staff responsible for approving children’s services providers and staff taking inquiries. We held a similar forum for newly accredited out-of-home care agencies in August 2014. In addition, in 2013 we convened a roundtable discussion with large out of school hours (OOSH) providers, the Department of Education and the OOSH peak body to discuss strategies for improving the child protection knowledge and capability of that sector.

7 For example, to coincide with the ten year anniversary of the introduction of the reportable conduct scheme in 2009, we held a major two-day symposium bringing together expert practitioners to discuss the unique issues arising from the investigation of reportable allegations and convictions. Over 320 delegates attended the symposium. In June 2013, we hosted an employment related child protection forum on the risk management of employees where there is evidence of risk to children but where this evidence is not sufficient for the person to be charged or dismissed. The forum, which was attended by approximately 100 people, had a particular focus on the challenges involved in handling cases of sexual misconduct, where behaviour may constitute a crossing of professional boundaries, but is not found to be grooming or another sexual offence under the law.

5 For example, we addressed attendees at the NSW Family Day Care 2013 professional networking and development forum.
The intersection of our reportable conduct function and the Working With Children Check

The allegation based system which triggers a notification under Part 3A of the Ombudsman Act complements the new Working With Children Check (WWCC) system. In June 2013, we were required to commence a legislative function to support the WWCC.

In determining whether an investigation into a reportable allegation has been properly conducted, and whether appropriate action has been taken in response, we check to see whether, as required under the Child Protection (Working with Children) Act 2013, relevant misconduct findings have been notified to the Children’s Guardian.

In this regard, under section 35 of the Working with Children Act, reporting bodies are required to notify the Children’s Guardian of findings of misconduct in relation to:

1. Sexual misconduct committed against, with or in the presence of a child, including grooming of a child.
2. Any serious physical assault of a child.

In addition, Schedule 1, Clause 2A of the Act, enables the Ombudsman to make a ‘notification of concern’ to the Children’s Guardian if we form the view, as a result of concerns arising from the receipt of information by our office in the course of exercising our functions, that ‘on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children’. It is also important to note that this clause is not limited to matters arising from the exercise of our functions under Part 3A; if sufficient concerns arise from information which we have received from exercising any of our wide-ranging functions, we can refer the matter to the Children’s Guardian.

Both section 35 referrals and Schedule 1, Clause 2A referrals by our office trigger a ‘risk assessment’ by the Children’s Guardian in relation to whether the involved individuals pose a risk to children. Under this function, the information we supply to the Office of the Children’s Guardian (OCG) about individuals who may pose a risk to children triggers formal risks assessments by the OCG of that person’s suitability to work with children. Through this function, we have helped identify individuals of concern whose histories would not have been scrutinised under the WWCC processes if not for the information we have supplied.

Furthermore, under Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998, our office – and other agencies – can also refer information to the Children’s Guardian to assist her in developing profiles of individuals where there is some information indicating possible emerging risk.

We routinely provide information to the OCG under Chapter 16A to inform its administration of the WWCC. (In this regard, it is worth noting that many of our Chapter 16A referrals relate to persons for whom a risk assessment trigger already exists, but we hold additional relevant information that may not be known to the OCG.) This practice recognises that our office does not hold or have access to every piece of

---

9 Child Protection (Working with Children) Act 2013, Schedule 1, Clause 2A
10 These referrals are known as Notifications of Concern.
information about an individual that may be relevant to a WWCC risk assessment. Similarly, the information held or that is otherwise accessible by the OCG about persons applying or being verified for child-related work can be complemented in significant ways by the Ombudsman’s holdings.

Since the commencement of Schedule 1, Clause 2A, our office has provided a significant number of notifications of concern to the OCG, and has exchanged critical risk-related information under Chapter 16A (see section 2.1.1). We discuss our work in referring risk-related information to the OCG in further detail in section 2.

We believe that our office and the OCG are establishing an effective business relationship. A strong and strategic working relationship between our agencies is critical to ensuring that we both carry out our distinct (but related) functions in a complementary and productive manner.

**Our role in monitoring and reviewing the delivery of community services**

It is also important to stress that our reportable conduct jurisdiction is informed, and enhanced by, our broader functions under the **Community Services (Complaints, Reviews and Monitoring) Act 1993** (CS-CRAMA). These functions include (but are not limited to) the following:

- Promoting and assisting the development of standards for delivering community services, and educating service providers, clients, carers and the community generally about those standards.
- Monitoring and reviewing the delivery of community services and related programs, including making recommendations for improvement in the delivery of community services and promoting the rights and best interests of service users.
- Inquiring, on our own initiative, into matters affecting service providers, visitable services and persons receiving or eligible to receive a community service.
- Receiving, assessing, resolving and investigating complaints and working with agencies to improve their complaint handling procedures.
- Reviewing the situation of individual children or groups of children in out-of-home care.
- Reviewing the causes and patterns of child deaths and identifying ways in which these deaths could be prevented or reduced.

Our dual Part 3A and CS-CRAMA oversight functions have been in place for over 12 years (following the merger of the Community Services Commission with the Ombudsman’s office in 2002). Our combined jurisdiction assists us in identifying systemic issues that specifically relate to the out-of-home care system, as well as those which intersect with the broader child protection system.

Following a decision by the Ombudsman in 2010 to integrate our employment-related child protection oversight and our community services monitoring and review role, we have been able to better identify, and seek to address, a range of systems issues impacting on the broader child protection system. Examples of this work are provided in this statement and in a range of earlier documents that we have provided to the Commission. In particular, many of the systemic issues which our office has been involved in progressing over recent years were
summarised in our confidential May 2013 submission to the Commission – *Systemic issues relevant to the handling of sexual abuse/sexual misconduct allegations and related cases.*

We would be happy to provide the Commission with updated advice about our systemic work as part of its ongoing examination of out-of-home care and reportable conduct.

2 Evolution of our operational practice

Much of our earlier work was largely targeted at establishing the framework for the implementation of the reportable conduct scheme across NSW – including an extensive education and support program involving more than 7,000 agencies – which focussed on raising awareness of agencies’ notification obligations; assisting them to establish child protection systems and building their investigative capacity.

Over time, many of the agencies we oversight have increased their competency in handling reportable allegations. As a result, over the past five years we have been able to develop a more streamlined, outcome-focussed approach to the oversight of agencies’ investigations. We have entered into extensive negotiations with a range of sectors in relation to strengthening child protection knowledge and practice, supported by ‘class or kind’ determinations which exempt relevant agencies from having to notify us of less serious forms of alleged reportable conduct. For example, we have entered into 20 class or kind determinations with various government agencies, dioceses, non-government organisations and independent school peak bodies. In March 2012, we entered into a class or kind determination with the Association of Independent Schools, which covers Knox Grammar School.

As a result of this sector development work, we have been better placed over recent years to focus on initiatives aimed at refining and improving our own practices – as well as those of agencies within our jurisdiction – in connection with the handling of reportable conduct involving criminal allegations. In large part due to the effect of our class or kind determinations, matters involving serious criminal allegations now make up a significant proportion of our work; for example, we currently have 112 open matters concerning individuals who have been charged with criminal offences relating to children. In addition, we have a further 169 open notifications that either are, or have been, the subject of a police investigation but where charges were not, or have not yet, been laid.

2.1 Changes to our operational structure and business practices

As part of a broader office restructure, in 2010 the Ombudsman decided to appoint the Community and Disability Services Commissioner and Deputy Ombudsman to lead the Employment-Related Child Protection Division (ERCPD) and merge its operations with the Community Services Division – forming a single Human Services Branch.

After taking up the role, the Deputy Ombudsman introduced a suite of staged reforms which included changes to the ERCPD’s operating structure and business processes. It is important to note that these reforms took place against the background of new information sharing

---

11 Sexual offences and sexual misconduct allegations must be notified to our office and are not included in any of our class or kind determinations.
provisions in October 2009\textsuperscript{12} following recommendations stemming from the Special Commission of Inquiry into Child Protection Services. Chapter 16A has provided significant scope for our office and other prescribed bodies to proactively share risk-related information to promote the safety, welfare and wellbeing of children. \textsuperscript{12}

Another significant change to our business practice involved ERCPD staff gaining direct access to the Community Services' database, KiDS, and the NSW Police Force database, COPS.\textsuperscript{13} Our access to both systems has enabled us to not only gain insights into risks relating to individual children that were previously not apparent to us – and that often went beyond the reportable conduct allegation being oversighted – but to also identify intra and inter agency practice weaknesses, including a failure by agencies to proactively share information. As we outlined in our May 2013 submission to the Commission,\textsuperscript{14} our direct access to these databases has allowed us to identify and address problems with individual cases as well as systems weaknesses in areas such as:

- carer probity screening
- potential gaps in the WWCC relating to police intelligence holdings and
- problems caused by the existence of multiple civilian profiles on the COPS system (known as CNIs).

In establishing systems for preventing and responding to reportable allegations, we were initially managing a high volume of notifications from a relatively inexperienced and diverse range of agencies that needed significant guidance and support. During this period, our ability to strategically target our resources and undertake significant proactive work was very limited.

By substantially reducing the volume of notifications that we receive each year through various class or kind determinations, we have been able to concentrate our efforts on improving our analysis of, and response to, serious reportable conduct matters through:

- Repositioning our strategic focus towards more active monitoring of more serious, higher risk allegations.
- Increasing the proportion of investigators at a senior level in our ERCPD.
- Increasing the level of practical support to agencies responding to allegations of serious reportable conduct.

2.1.1 Particular initiatives to support agencies in responding to allegations of serious reportable conduct

We have implemented a range of policy and practice changes in recent years to ensure that we add value to agency investigations in practical ways, and that we identify and address inhibitors to good practice.

\textsuperscript{12} Chapter 16A of the Children and Young Persons (Care and Protection Act) 1998.
\textsuperscript{13} Access to COPS was provided by the NSWFP to Ombudsman staff initially in 2002 in connection with our policing oversight function. Access to the Policing Oversight Data System (PODS) commenced in 2003. With the advent of our new role in reviewing child deaths in 2002, staff involved in carrying out this function were also given access to COPS in 2003 and PODS in 2005; these staff also had access to the KiDS system from 2002. Additional licenses to allow access to both KiDS and COPS were provided to ERCPD staff somewhat later; a limited number of licenses were issued for KiDS in late 2011 and for COPS in early 2012.
\textsuperscript{14} NSW Ombudsman, Submission to the Royal Commission – Systemic issues relevant to the handling of sexual abuse/sexual misconduct allegations and related cases, May 2013.
Key initiatives that we have undertaken to support agencies in responding to allegations of serious reportable conduct include:

- Taking an increasingly proactive role in relation to serious allegations, including substantially increasing our ‘in-house’ access to Police and Community Services databases in order to obtain a holistic understanding of the prevailing risks in particular matters and to better inform our assessment of any action that may be required. We have also played a role in remedying data integrity issues identified through our direct access to the COPS and KiDS databases.

- Since our new legislative function under the WWCC commenced in June 2013, we have made 449 referrals of information to the OCG, including 28 Notifications of Concern, 284 Chapter 16A referrals and 149 responses to Notices issued under section 31 of the Child Protection (Working With Children) Act 2013.

- Engaging with Police on a frequent basis in relation to significant reportable conduct matters (this approach played an important role in prosecutions involving multiple victims), and having a much greater emphasis on engaging with Police in relation to taskforces. As we discuss in the following sections, particularly when agencies are less experienced in handling reportable conduct and interacting with Police, we play an active role in facilitating police/agency contact and in briefing police on relevant holdings and possible avenues of inquiry. (As noted previously, we are currently handling 112 open matters concerning individuals charged with criminal offences relating to children).

- Reaching an agreement with the Police Commissioner in 2009 regarding Standard Operating Procedures (SOPS) which clearly outline the responsibilities of local police in providing practical support to agencies responding to allegations of reportable conduct under the Part 3A scheme – these SOPS are attached (see Annexure 9).

- Revising our reportable conduct definitions in August 2010, prompted in large part by the difficulties agencies were facing in investigating, and making appropriate findings in relation to alleged sexual misconduct. Our revised definition makes it clear that, in addition to sexually explicit comments or behaviour, sexual misconduct can include boundary breaching behaviour, such as an inappropriate and overly personal or intimate relationship with, or conduct towards, a child or young person. The revised guidelines have allowed employers to be able to pursue broader lines of inquiry and examine the nature of inappropriate relationships without the need to establish ‘grooming’.

- Reviewing the range of findings available to agencies and allowing agencies, in appropriate circumstances, to find that an allegation is ‘not sustained – [due to] a lack of evidence of weight’, rather than ‘false’. The finding of ‘false’ is now reserved for cases where there is compelling evidence to demonstrate that an allegation is untrue, rather than simply a lack of evidence of weight.

- Promoting and strengthening the mechanisms for greater interagency collaboration and information exchange, including actively promoting and utilising Chapter 16A in relation to reportable conduct matters.

- Developing two new training packages to help agencies improve their responses to allegations made against their employees. Since establishing a cross-office community education and training unit in late 2009, we have delivered 73 child protection
workshops to more than 1,400 stakeholders – 33 of these workshops were delivered by the Deputy Ombudsman to almost 700 participants.\textsuperscript{15}

A number of these initiatives are discussed in further detail later in this statement.

\subsection*{2.1.2 The work of the Serious Reportable Conduct Team}

The Commission has requested that we set out how our Serious Reportable Conduct Team and its Intelligence Group operate.

The ERCPD’s Serious Reportable Conduct Team (SRCT) is headed by the Director, Employment-Related Child Protection, and is comprised of a team of senior investigators who work collaboratively with investigation and support staff to ensure timely responses to high risk notifications and enquiries. The SRCT was established 18 months ago and, since that time, it has developed and refined its processes for ensuring that information relating to serious reportable allegations – or children otherwise identified as being at-risk – are responded to quickly and as comprehensively as possible.

Our most experienced investigators regularly liaise with senior police from local area commands and the Child Abuse Squad in relation to investigating serious reportable allegations.

We routinely refer detailed briefings to police which has resulted in the commencement and/or enhancement of police investigations and the preferment of criminal charges. Generally, referrals of information to police are in the form of briefing documents and are usually released in accordance with Chapter 16A of the Care and Protection Act.\textsuperscript{16}

A Director from the Ombudsman’s executive management team is the central contact point for our office and police, and in many cases, she liaises directly with the relevant Commander in the first instance to facilitate the necessary exchange of information. A copy of our protocol for liaison with Police is attached at Annexure 10.

We also work closely with Community Services, the OCG and employers to ensure that critical child protection information is appropriately shared and managed to mitigate risks to children. Increasingly, we fulfill this important role at an early stage in our oversight of matters. We have quarterly liaison meetings with both agencies to track the progress of systemic issues identified through our oversight.

To facilitate the efficient and consistent identification of (and responses to) risk, the SRCT established an Intelligence Group. The establishment of the Intelligence Group was driven by a number of factors, including:

- The unique position our office is in to contribute to identifying child protection risks through our direct access to the policing and child protection databases combined with our own reportable conduct holdings – this access provides us with a ‘helicopter’ view

\textsuperscript{15} Our introductory workshop, Responding to child protection allegations against employees, provides an overview of employer obligations under the Ombudsman Act, and covers the steps involved in the investigation process, risk assessment and risk management. Our advanced training course, Handling serious child protection allegations against employees, is designed for senior management and investigators and focuses on how to handle allegations that may involve criminal conduct, equipping participants with specialist and practical knowledge to help them deal with some of the more complex challenges associated with more serious allegations.

\textsuperscript{16} Children and Young Persons (Care and Protection Act) 1998.
of critical information which is not readily accessible to other agencies (see Annexure 2).

- The recognition that our notification of concern function under the WWCC would need to be supported by strong internal intelligence systems to help us gather and analyse evidence to effectively identify individuals who may pose a risk to children at the earliest opportunity.

All new serious reportable conduct notifications and enquiries relating to children potentially being at-risk, flow through the Intelligence Group to ensure that our oversight is informed by all available relevant information. The Intelligence Group conducts a range of information checks drawing upon publicly accessible information sources, secure sources such as the KIDS and COPS databases, as well as our own holdings. When necessary, we also request information held on the OCG’s WWCC database, and from other police data sources.

As the Intelligence Group is still in its infancy, it will be critical that we reassess and refine our processes over time.

**Triage and assessment**

New matters flowing through the Intelligence Group are assessed and triaged under the guidance of the Director, who ensures that all accesses to secure databases are properly authorised and are in accordance with procedures aimed at protecting personal information. 17

At the initial intake stage, limited checks are conducted to enable the Director to ‘triage’ the matter, including determining whether or not more thorough intelligence checks are warranted. Where a more in-depth intelligence check is required, the Director refers the matter to an Intelligence Group officer who creates a profile outlining relevant information holdings and the nature of any immediate risks which need to be addressed, together with recommended action.

The initial response to a new notification will assess the adequacy of the agency’s response to known risks, including whether it has undertaken an appropriate assessment of, and response to, identified risks. Where we identify that the agency has understated the level of risk, or taken inadequate action to properly manage identified risks, we prioritise telephone contact with the agency to explain our concerns and canvass potential options for strengthening the agency’s risk management response. While we have no authority to direct or require an agency to take certain action to manage risks, agencies are very responsive to our suggestions. However, in circumstances when an agency inadequately responds, we will usually escalate our involvement by making more formal inquiries and requiring the agency to provide information supporting its actions and decisions around assessing and managing risks.

As part of our intelligence checks, we also aim to identify any alternative child-related work (including as a volunteer) that the person who is the subject of the reportable allegation may be involved in. Where we identify other work of this kind, we ascertain whether there are associated risks with that work and, if so, whether they are being addressed. Where any such risks are not being addressed, we take action in an attempt to ameliorate risks. For example, if police are involved in investigating the matter, we will alert police to the person’s alternative employment, so that they can raise identified concerns directly with the ‘other employer’. If

---

17 This information is stored in accordance with NSW Government and our own internal information security requirements. The Ombudsman’s Information and Intelligence Manager conducts audits of our staff access to internal and external databases to confirm compliance with established procedures.
there is no police involvement, we might facilitate the lawful provision of relevant information to the ‘other employer’.

If the other employer also happens to be within our Part 3A jurisdiction – we will engage directly with them about making a notification, managing risks and coordinating its response with all other involved agencies. In cases where we identify another employer but they are not within our employment-related child protection jurisdiction, and/or they are not a prescribed body for the purposes of Chapter 16A, we consider what other action can be taken such as referring relevant information to the OCG.

Facilitating information exchange

In many circumstances, the intelligence profile will recommend the need for a referral of information to appropriate authorities, including the Police, Community Services and the OCG. In these cases, we contact those agencies as quickly as possible and alert them to the type of information identified. Where those agencies confirm they do not have (or have not identified) the information and that it is relevant to their investigation or inquiry, we then facilitate the provision of that information through the ‘owning’ agency.

Approval by a senior officer is required for all external releases of information. Releases of information under Chapter 16A require approval at Director-level or above. In the case of information released under s34 of the Ombudsman Act 1974, approval must be obtained from a statutory officer. The requirement to obtain approval at such a senior level reflects the serious potential consequences of any inappropriate release of information.

In relation to Part 3A cases where the employing agency and/or other relevant agencies are aware of all relevant information, and the documentation that we receive indicates they are taking appropriate action, we will generally have a limited direct role – for example, providing general guidance under our usual oversight practices – until the reportable conduct investigation is finalised. However, where we have identified that the reportable allegations have been, or should have been, reported to Police and/or Community Services, we make it a priority to obtain up-to-date information about the status of the matter, including obtaining information directly from COPS and KiDS. This is a priority so that we can ensure that the employer agency is not taking action that may compromise the Police/Community Services response, and that Police and Community Services are responding appropriately.

Once we have established that appropriate reports have been made and the employer agency is aware of what action it should and should not be taking while a criminal or child protection response is underway, our investigators will consider all relevant available information and identify any gaps in information being used to inform any criminal or child protection response.

Our office is often the only agency with access to all relevant information about a particular matter, and in these circumstances, we will take a more active role to ensure information is shared with appropriate parties and acted on accordingly. We are regularly in a situation where we are required to liaise with relevant parties immediately to facilitate information exchange, requiring us to continually reassess other operational priorities. We discuss referrals of information to Police further in section 2.2.
Identifying and addressing data integrity issues

We take action to remedy data integrity issues whenever they come to our attention. For example, we have developed a ‘multiple CNI register’ to log and refer to police examples of persons with multiple civilian profiles (CNIs) in cases where a failure to link the CNIs would potentially result in critical information relevant to employment screening not being identified and/or a pattern of potentially high risk behaviour not being identified by police investigations.¹⁸

By way of illustration, after receipt of a Part 3A notification where, following our own intelligence checks and subsequent police liaison, an historical investigation was reopened and led to charges being laid against an alleged paedophile: [REDACTED]. Critically, we identified that the subject employee had two separate police CNIs, under completely different names that were unlinked in the database, one of which contained information about credible historical sexual assault allegations, while the other CNI (under the person’s ‘professional’ name) did not.

We also on occasion identify police events or cases that have linked the wrong person as the person of interest (POI), whether through human error or because of identity confusion. In these cases, we have taken steps to ensure the incorrect POI is removed from the record and the correct POI is linked.

Similarly, we are frequently in the position of identifying holdings within the KiDS system where Community Services either did not identify (or would not have identified) the involved person when conducting a check on the subject person, because the person had not been linked to the relevant child’s record. In these cases, we have raised our concerns with Community Services and have requested that it take steps to ensure the relevant records are linked.

While these case-by-case data remediation efforts are resource-intensive, this work is given priority given the potential significant impact data discrepancies can have on identifying and responding to child protection risks. (More broadly, we have highlighted the need for Community Services to address this issue from a systems perspective.)

2.2 Referring matters to Police

On receipt of information about reportable allegations, our immediate priority is to assess whether the information meets the threshold for a report to Community Services and/or Police and, if so, establishing whether or not this has already occurred. The timely reporting of criminal allegations to Police – and where appropriate, the reporting of risk of significant harm (ROSH) concerns to Community Services – are critical to ensuring that any criminal and/or child-protection response, are not compromised.

¹⁸ It should be noted that this process preceded our function in connection with the current WWCC.
Our new operating environment has allowed us to further strengthen our already constructive relationship with the NSW Police Force, and our shared commitment to ensuring child sex offenders are identified and prosecuted.

We also work closely with employers who have not recognised their responsibility to refer matters to the police, guiding them through this process and ensuring that their workplace response to matters does not compromise any police investigation. Increasingly, we fulfil this critical role at an early stage of our oversight of matters — because of the imperative to act promptly when children are at risk.

Since 2009, we have raised concerns about matters where Community Services had not reported criminal child abuse allegations to police. In response to an investigation that we conducted last year concerning Community Services’ response to a report about a teacher alleged to have sent a sexually explicit text message to a child, Community Services has acknowledged that their policies for reporting such criminal allegations to police are inadequate. They have told us they are developing improved policies and procedures to guide frontline staff on when and how to refer matters to police. We are pleased that Community Services has made this commitment but believe it is essential practice in this critical area improves as soon as possible.

Where we identify that reporting obligations have not been met, we triage the matter for urgent/priority action. This will generally involve making telephone contact with the relevant agency to: provide advice about the need to make reports to Community Services and/or Police; provide guidance on the type of information it should include in such reports; and to emphasise to the agency that it may need to suspend any response to the reportable allegation pending clearance from those agencies.

We closely monitor the agency’s compliance with our advice until we are satisfied that the relevant authorities are aware of the matter and that the agency understands how it should proceed. In addition to maintaining contact with the agency about its compliance, we confirm via the Police or Community Services database that the reports have been made and that an appropriate level of information was included in the reports to enable those agencies to assess what, if any, action they should take.

When we identify through the Police or Community Services database that one or both of these agencies intends to take action on a matter, we will often maintain ongoing dialogue with the employing agency, to ensure it does not hinder or inadvertently compromise the child-protection or criminal response.

We also identify matters where it appears that Police or Community Services have determined not to take any action in response to an employer’s report, in circumstances where we have reason to believe that action is warranted. This can often be a result of the report failing to clearly articulate the criminal conduct. In such cases, we might guide the employer to provide further information to Police and/or Community Services; we may initiate direct dialogue with Police or Community Services; or we might coordinate and facilitate an interagency meeting to promote a thorough exploration of the relevant evidence and investigative options.

Finally, it is generally the role of the employing agency to report criminal allegations to Police and ROSSH matters to Community Services. The Ombudsman’s involvement generally
revolves around identifying reporting failures; liaising with relevant parties to remedy problems with the response to matters; and monitoring compliance with required actions. However, we will frequently make reports directly to Police and/or Community Services. This includes in cases that involve technical legal and/or evidentiary issues; where there is no other agency currently involved in the particular matter [REDACTED]; or where the matter requires urgent action [REDACTED].