OmbudsmanSA

REPORT

DEPARTMENT FOR EDUCATION AND CHILD DEVELOPMENT

September 2013

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Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ms Danyse Soester
Agency	Department for Education and Child Development (the department)
Ombudsman reference	2012/04207
Agency reference	CE 2012/0243
Date complaint received	4 June 2012
Issues	1. Whether the principal properly handled an allegation of sexual assault of a child by an employee of a metropolitan school's Out of School Hours Care service 2. Whether the department provided wrong advice to the metropolitan school's governing council about restrictions on the publication of the employee's identity 3. Whether the department provided poor advice to the metropolitan school's governing council about advising relevant parents of the sexual assault 4. Whether the governing council should have informed parents of the conviction of the employee for a child sex offence 5. Whether the department should have informed parents of the conviction of one of its employees for a child sex offence.

Jurisdiction and preliminary matters

The complainant complained to my office by email on 4 June 2012 about the actions of a metropolitan school and its governing council (**the metropolitan school; the governing council**). Following receipt of her email, my assessment officer discussed the matter with her, and on 5 June 2012 sought information from the department. On 14 June 2012 my assessment officer referred the complaint for investigation by an investigating officer.

In a letter to the department dated 22 June 2012 I summarised the complaint as alleging:

- that the department provided misinformation to the governing council in relation to the existence of a suppression order, which resulted in the governing council voting 12-2 not to inform parents of the [metropolitan school] Out of School Hours Care (**OSHC**) about the conviction and sentence of [an OHSC employee] for a child sex offence
- that once the department discovered the error, it correctly informed the governing council that there was no suppression order in place, yet still advised it not to inform the parents of the OSHC because it is 'counter-productive to the safety of the community'
- that the [metropolitan school] principal incorrectly determined not to inform parents of the school of the circumstances of the conviction.

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

I note the following preliminary matters.

Title of the department

At the date of the sexual assault referred to below, the department was titled the Department for Childrens Services, but in this report I have referred to the department by its current name of the Department for Education and Child Development (**the department, DECD**).

Governing council within jurisdiction

The complaint relates to the actions of the department, and to those of the governing council. Because the governing council is a body corporate and is established for a public purpose by the *Education Act 1972*,[1] it is also an agency to which the Ombudsman Act applies.

The Independent Education Inquiry

On 1 November 2012, the Minister for Education and Child Development announced the appointment of Mr Bruce Debelle AO, QC to conduct an Independent Education Inquiry into various matters.[2] Whilst its terms of reference include some of the matters which are the subject of this complaint, the Independent Education Inquiry extended to matters which were not the subject of this complaint. These include the advice provided by the department to the then Minister for Education and Children's Services about the sexual assault which gave rise to the complaint.

Soon after his appointment I spoke to Mr Debelle about the conduct of the investigation. At the time the Independent Education Inquiry was announced I had prepared a draft provisional report which outlined my views on the matters which were the subject of this complaint.

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1 See the Ombudsman Act definition of 'agency to which this Act applies'.

2 Ministerial statement to Parliament, 1 November 2012, Hansard, House of Assembly pp3582-3. The Letters Patent for the IEI inquiry appointed Mr Bruce Debelle AO, QC to inquire into and report on the following matter:

1. *The events and circumstances surrounding the non-disclosure to the metropolitan school community of allegations of sexual assault committed by [a staff member] in the Out of School Hours Care service at [the metropolitan school] against a child in his care in 2010.*
   The review should consider the actions of all relevant agencies, and make recommendations relating to the actions of the parties involved and the procedures and processes that should be in place in these circumstances.

In view of the broader ambit of the Independent Education Inquiry, I decided to suspend my investigation pending its completion. I provided the Independent Education Inquiry with information which I had obtained during the course of my investigation.

I re-commenced my investigation after the Independent Education Inquiry reported on 27 June 2013.

I have limited my investigation to the matters which formed the subject of the complaint to me. I have not investigated the other matters subsequently included in the terms of reference for the Independent Education Inquiry.

Throughout this report, I have adopted the factual findings made by the Independent Education Inquiry. I have considered the Independent Education Inquiry's findings in finalising my views on the matters which were the subject of this complaint.

Concurrent FOI applications

In early 2013, several applicants requested FOI access to documents about incidents of sexual abuse against a child or children at the metropolitan school, from the Department for Education and Child Development, the Minister for Education and Child Development, and the Premier. The agencies determined to refuse access to the documents, and I subsequently received requests to review 21 determinations in accordance with my responsibility as a review authority under the *Freedom of Information Act 1991* (**the FOI Act**).

The FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with the Act. It provides that upon receipt of an application for access to documents, an agency is able to make a determination to refuse access where the documents are 'exempt'.

Exemption: disclosure an offence against the Children's Protection Act 1993

One example is where disclosure of the documents would be an offence under another Act, such as the *Children's Protection Act 1993*. Subject to certain exceptions, that Act makes it an offence for any person to 'divulge' personal information relating to abuse or neglect of a child, which has been obtained while engaged in the administration of the Act.

My reviews considered the Children's Protection Act, and what the word 'divulge' meant. I determined that it would not be a 'divulgence' (and thus an offence under the Children's Protection Act) to release information that has previously been officially and legitimately disclosed and is in the public domain. Examples are where the information is reported in *Hansard*, the Government Gazette, or where the information has been previously disclosed by the agency, provided that that disclosure was not in itself a breach of the Act.

I noted the release of certain identifying information in the Government Gazette dated 10 December 2012; and in my reviews, I proceeded on the basis that the disclosure of this information was not in itself an offence under the Children's Protection Act.

I determined that the release of any information in the documents that had already been published in the Gazette would not be an offence against the Children's Protection Act.

Exemption: unreasonable disclosure of information about a child

Another example of an exempt document under the FOI Act is where disclosure of information about a child would be unreasonable, having regard to the need to protect the child's welfare. In some of my reviews, I determined that any information in the documents that would tend to identify a child would also be exempt, having regard to the need to protect a child's welfare.

Neither admitting nor denying the existence of documents

The FOI Act also provides that an agency is not required to include in a notice of determination any information if its inclusion in the notice would result in the notice being an 'exempt' document. Some of my reviews considered this issue, and I determined that even admitting the existence of documents could result in the agency's notice being an exempt document, and therefore the agency would be in breach of the Children's Protection Act. In other reviews, I determined that the agency should confirm the existence of documents, as this would not be in breach of the Act.

Identifying information in this report

In this report I have followed the same process as I adopted in carrying out the FOI determinations, in order to avoid publishing information that would breach section 58 of the Children's Protection Act, or any other legal obligation.

Consequently I have withheld information which may tend to identify certain individuals. This includes information which might identify the suburb, the school or the child connected with the assault for which the offender was convicted, in order to protect the identity of the child and her family.

I note that this approach is consistent with the approach adopted by the sentencing judge at the trial of the offender. In his sentencing remarks, His Honour Judge Griffin said:

> I do not intend to name the suburb, the school, or the child in order to protect the identity of the child and her family. I will refer to her throughout these remarks as 'the child', or 'the victim' for this reason and I trust that my reference to her in this way is not thought to be impersonal.[3]

I have therefore not identified by name any persons associated with the school, but I have identified DECD officers whose responsibilities extend across more than one metropolitan school in Adelaide.

In the report of the Independent Education Inquiry, the perpetrator of the sexual assault is called 'X', and the school is called 'the metropolitan school'. I have adopted the same terminology.

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3 District Court of South Australia, per His Honour Griffin, 9 February 2012 [further citation withheld].

Investigation

My investigation involved:

- assessing the information provided by the complainant
- seeking a response from the department
- clarifying the response with department
- seeking more particulars from the complainant
- considering:
  - section 66 of the *Child Sex Offenders Registration Act 2006*
  - sections 83 and 84 of the *Education Act 1972*
  - sections 68, 69 and 71A of the *Evidence Act 1929*
  - the *Administrative Instructions and Guidelines (Schooling Sector)*, Section 5: School Councils, Affiliated Committees and Related Matters published by the Minister under section 96(1) of the Education Act (**the administrative instructions**)
  - the department's *Practice Guide: Extra-Familial Notifications*[4]
  - the department's *Structured Decision Making® Screening Criteria & Definitions* (C3MS Grounds)[5]
- considering the sentencing remarks made by the judge at the trial of X
- interviewing the principal of the metropolitan school (**the principal**)
- considering the report of the Independent Education Inquiry (**the IEI report**)[6]
- providing the department, the governing council and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.[7] It is best summed up in the decision as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved … .[8]

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4 Families SA: *Practice Guide: Extra-Familial Notifications*, endorsed by Executive 30 July 2010.
5 Families SA: *Structured Decision Making® Screening Criteria & Definitions* (C3MS Grounds), version 0.4, 17 February 2012.
6 *South Australia Royal Commission 2012-2013, Edited Report of Independent Education Inquiry*, 21 June 2013.
7 This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.
8 *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Responses to provisional report

The department

The department advised me by letter dated 30 July 2013 that it accepted and agreed with my provisional findings. It noted the recommendations which I had foreshadowed, and proposed that it should report to me by 31 December 2013 on the steps which it had undertaken to give effect to them.

The department noted that a number of the IEI Report's recommendations had been implemented, in particular those relating to departmental practices (recommendations 8 to 21). It stated that 'all DCED critical incident and investigation units are now operating under one division ensuring a coordinated approach to managing these matters as well as one file and an appointed case manager for each case'.

The department noted also that improved information sharing processes between SA Police and the education sectors have been agreed to and are being incorporated in amendments to the Interagency Code of Practice.

The governing council

I received no response to the provisional report from the governing council as a whole. I was advised by the chairperson on 3 September 2013 that it did not intend to make any comment.

I received one response from an individual member of the governing council, who joined the council in 2012. She noted that when the vote on 4 June 2012 took place, the council 'had been led to believe that further investigations of the offender were underway and that the … members could be personally held legally liable for any negative consequences to releasing the information to the rest of the school community'.

The complainant

The complainant responded by email dated 23 August 2013. She made the following points:

- she disagreed with my provisional finding that further investigation of the principal's role was unnecessary or unjustifiable
- she stated that the department's error in its advice to the governing council was only discovered after she 'demanded to have the information in writing from DECD Legal'. She considers that 'a lawyer should manage the DECD legal department'
- she considers that the description of 'acting unreasonably' understates the department's actions. I note that my use of this phrase is dictated by the terminology of administrative errors under the Ombudsman Act
- she criticises the response she received from a senior officer through the Parent Help Line, and queries how the culture in the department will change when the same leaders remain responsible
- she questions whether it was 'illegal for the legal representative for DECD to hand out his own opinions as "legal advice"', and considers that the officer was negligent in his actions
- she considers that the legal representative for DECD should have sought legal advice from the department's outposted Crown Solicitor, highlighting the ease with which he could have done so. She considers this omission to be negligence
- she highlights the inconsistency in the 'advice' received from the DECD legal representative (which on the one hand states that the governing council is legally allowed to inform parents, but then counsels the governing council against doing so).

She is of the view that the DECD officers involved should be 'removed from their positions'

- she considers the description of DECD's behaviour as 'unreasonable' in relation to the advice that it provided the governing council 'a most passive term of reference'
- she agrees that the governing council was poorly advised
- she considers that parent volunteers on governing councils need to be trained so that they understand their governance role and 'all that it encompasses'. She emphasises that 'this needs to be a mandated independent training by SAASSO (South Australian Association of State School Organisations Inc) so that councillors know their rights and obligations'
- she asserts that parent volunteers need an independent Education Ombudsman
- she considers that the DECD policy 'Protective Practices for Staff in their Interactions with Children and Young People' should be amended so that the site leader and then all mandated employees should be confidentially informed about a disclosure of 'inappropriate behaviour'
- she is concerned that all the recommendations should be implemented in a timely manner and reviewed for efficacy. She asks who has the power to enforce the recommendations as well as oversee the process of implementation and review.
- she considers that the principal officer of the department should regularly meet with and report to me on a monthly basis with a 'clear update of the situation' until all the recommendations have been implemented

I have considered these comments and taken account of them as I consider appropriate in finalising my views on the complaint.

Background

1. The complainant is a parent whose children were former students at the metropolitan school. At the relevant time she was also the secretary of the metropolitan school's governing council, and a member of the South Australian Association of State School Organisations Inc. (**SAASSO**). The governing council operates an Out of School Hours Care service (**the OSHC service**) on the school's grounds, where out of school hours care is offered before and after school to children aged between 5 and 12 years old who attend the metropolitan school. In addition, full day vacation care is provided to children from the metropolitan school and other schools in the area. It is estimated that in 2010, there were between 150 and 200 children who used the OSHC service.

2. On 1 December 2010, during the last week of school term before the holidays, a seven year old girl was sexually assaulted whilst she was being cared for at the OSHC service (**the sexual assault**). The next day, X was charged with unlawful sexual intercourse with a person under 14. X had been employed at the OSHC since 11 December 2006.

3. The child's mother first contacted police on the evening of 1 December 2010, after the child had reported the assault to her. Police attended at the child's home later that night, and because the child was sleeping, agreed not to take a statement from her until the next day. However, based on the child's disclosure, the police suspected that a sexual assault had occurred, and later that night notified the school principal and the Child Abuse Report Line (**CARL**) about the matter.

4. The subsequent events are described in detail in the IEI report,[9] and I adopt its findings as to the facts.

[9] IEI report, Chapter 6, paragraphs 239-365.

Relevant legislative provisions

Reporting of proceedings

5. Section 71A of the *Evidence Act 1929* (SA) deals with the restriction on reporting proceedings relating to sexual offences:

> (2) A person shall not, before the relevant date, publish any statement or representation -
>
> > (a) by which the identity of a person who has been, or is about to be, charged with a sexual offence is revealed; or
> >
> > (b) from which the identity of a person who has been, or is about to be, charged with a sexual offence, might reasonable be inferred,
>
> unless the accused person consents to the publication.
>
> Maximum penalty:
> (a) in the case of a natural person - $10,000
> (b) in the case of a body corporate - $120,000
>
> (4) A person shall not publish any statement or representation -
>
> > (a) by which the identity of a person alleged in any legal proceedings to be the victim of a sexual offence is revealed; or
> >
> > (b) from which the identity of a person alleged in any legal proceedings to be the victim of a sexual offence might reasonably be inferred,
>
> unless the judge authorises, or the alleged victim consents to, the publication (but no such authorisation or consent can be given where the alleged victim is a child).
>
> Maximum penalty:
> (a) in the case of a natural person - $10,000
> (b) in the case of a body corporate - $120,000
>
> (5) In this section -
>
> *relevant date* means -
>
> > (a) in relation to a charge of a major indictable offence or a charge of a minor indictable offence for which the accused person has elected to be tried by a superior court - the date on which the accused person is committed for trial or sentence; or
> >
> > (b) …
> >
> > (c) in any case - the date on which the charge is dismissed or the proceedings lapse by reason of the death of the accused person, for want of prosecution, or for any other reason.

6. For the purposes of section 71A, the term 'publish' is defined in Section 68 of the Evidence Act as follows:

> ***publish*** means publish by newspaper, radio or television, or on the internet, or by other similar means of communication to the public

7. In my view, it is significant to note that section 71A is directed towards preventing the identity of the person who is about to be, or who has been, charged with a sexual offence from being revealed. It is not directed towards restricting publication of the fact that an offence has occurred.

8. X was committed for trial on 15 June 2011. The restriction on reporting proceedings under section 71A therefore applied from 1 December 2010 (when the police formed an intention to charge X) to 15 June 2011.

9. In addition to the restriction on reporting proceedings, a suppression order can be made by a court pursuant to section 69 of the Evidence Act. In relation to the prosecution of X, at no time was there a court ordered suppression order in place.

X's obligation to advise his employers

10. Section 66 of the *Child Sex Offenders Registration Act 2006* states:

> **66- Offence to fail to disclose charges**
>
> (1) A person engaged in child-related work (including work under a contract for services) who is charged with a class1 or class 2 offence must disclose the charge to his or her employer within 7 days after becoming aware of the filing of the charge or, in the case of a charge that is pending immediately before the commencement of this subsection, within 7 days after that commencement.
>
> Maximum penalty: $5,000.

11. Schedule 1, Part 2 of the Child Sex Offenders Registration Act lists Class 1 offences.

> 2 - Class 1 offences
> The following are class 1 offences:
>
> …
> (e) an offence against section 49 of the *Criminal Law Consolidation Act 1935* (unlawful sexual intercourse) other than an offence that occurred in prescribed circumstances:

12. The governing council operated the OSHC service, and it was therefore the employer of X in his capacity as an employee of the OSHC service. After the relevant date under section 71A of the Evidence Act had passed (i.e. after 15 June 2011), it then became a matter for the governing council as to whether parents of the children who used the OSHC service were informed of the fact that X had been committed for trial on the charge of unlawful sexual intercourse with a person under 14, arising from his employment at the OSHC service.

13. However, X was also an employee of the department, in the role of School Services Officer (**SSO**) working approximately ten hours per week on a contract. As X's contract was due to expire on 12 December 2010, he was placed on special leave with pay from 2 to 10 December 2010, with no further contracts to be offered until resolution of the matter.[10] When the section 71A restriction expired, informing parents of children who attended the metropolitan school about X's committal for trial was therefore a separate matter for the department to determine.

Notification to the Child Abuse Report Line

14. Section 11 of the Children's Protection Act deals with notification of abuse or neglect of children. Reference to 'the department' in this Act is to the Department of Families and Communities.[11] Section 11(1) provides:

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[10] Letter from Acting Chief Executive, Mr Gino DeGennaro to X, undated (mid-December 2010).

[11] Regulation 5 of the *Children's Protection Regulations 2010* prescribes the Department of Families and Communities as 'the Department' for the purposes of section 6 of the Childrens Protection Act. However, I note that DECD now administers the Childrens Protection Act.

(1) If–

(a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected; and

(b) the suspicion is formed in the course of the person's work (whether paid or voluntary) or of carrying out official duties,

the person must notify the Department of that suspicion as soon as practicable after he or she forms the suspicion.

Maximum penalty: $10 000.

(2) This section applies to the following persons:

…

(e) a police officer;

…

(h) a teacher in an educational institution (including a kindergarten);

…

(j) any other person who is an employee of, or volunteer in, a government or non-government organisation that provides health, welfare, education, sporting or recreational, child care or residential services wholly or partly for children, being a person who -

(i) is engaged in the actual delivery of those services to children; or
(ii) holds a management position in the relevant organisation the duties of which include direct responsibility for, or direct supervision of, the provision of those services to children.

Constitution of the governing council

15. A governing council is defined in the Education Act as follows:

governing council means a school council that is, under its constitution, jointly responsible with the head teacher of the school for the governance of the school.

16. Governing councils are established under Part 8 of the Education Act. Section 83 provides as follows:

83–School councils

(1) Each Government school providing courses of instruction in primary or secondary education is to have a school council.

(2) The same body may be the school council for two or more Government schools.

(3) A school council–

(a) is a body corporate with perpetual succession and a common seal; and

(b) is to operate under a constitution approved by the Minister; and

(c) is to consist of members as prescribed by its constitution; and

(d) has the functions prescribed by or under this Act or its constitution; and

(e) has, subject to this Act and its constitution, all the powers of a natural person that are capable of being exercised by a body corporate; and

(f) is not an agency or instrumentality of the Crown.

17. Accordingly, a governing council is a body corporate which answers directly to the Minister, rather than to the department. Section 96 of the Education Act permits the Minister to issue administrative instructions. It states as follows:

> **96- Administrative Instructions**
>
> (1) The Minister may, from time to time, issue administrative instructions to school councils or affiliated committees.
>
> (2) An administrative instruction may be varied or revoked by further administrative instruction.
>
> (3) An administrative instruction -
>
> (a) may be of general application or limited application;
>
> (b) may vary in its terms according to whether or not the school council is a governing council or any other factor.
>
> **(4) School councils and affiliated committees are bound by administrative instructions.** (my emphasis)

18. The department refers to the administrative instructions as 'administrative instructions and guidelines'. Section 5 (School Councils, Affiliated Committees and Related Matters) of the administrative instructions define the powers and functions of governing councils in Part 2: Operational Matters:

> A council has all of the powers of a natural person that are capable of being exercised by a body corporate, including contractual ability. However these powers are subject to the Act, the council's constitution and administrative instructions.[12]

19. The governing council's constitution states[13] the functions of the council includes the provision of 'facilities and services to enhance the education, development, care, safety, health or welfare of children and students'.

20. As stated above, governing councils are bound by the administrative instructions. I am not aware of any specific administrative instruction that was issued by the Minister to the governing council in this case.

21. SAASSO summarises the legal position of governing councils on its website as follows:

> Governing Councils must adhere to the Education Act/ Children's Services Act, a constitution, code of practice and the DECS Administrative Instructions & Guidelines. In addition, there are rules for the school budget, OSHC, canteen and responsibilities as an employer.[14]

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[12] Administrative Instructions and Guidelines, page 14. Reference to 'the Act' here is the Education Act.
[13] Paragraph 5.3.1
[14] http://www.saasso.asn.au/services

Whether the principal properly handled an allegation of sexual assault of a child by an employee of a metropolitan school's Out of School Hours Care service

22. As outlined above, under section 11 of the Children's Protection Act, the principal had an obligation to notify the Department of Families and Communities about the suspected abuse of the child.

23. The department has information available on its website on how to document notifications, including the appropriate paperwork. The department's Legislation and Legal Services Unit publishes a guide in relation to child protection mandatory reporting. It states:

> If an allegation of child abuse is made against another staff member the matter must be reported to the Director/ Principal, Families SA Child Abuse Report Line and the DECS Special Investigations Unit on telephone 8226 0135.[15]

24. It appears from the department's 'Investigation Diary' which it provided to me, that there were initially concerns by police that the principal had not notified the Child Abuse Report Line (**CARL**). Mr Petherick rang the principal to clarify this on 8 December 2010. The IEI report[16] finds that the principal notified CARL on 7 December 2010, although she had earlier stated that she had attempted to notify on 3 December 2010 but had hung up, after waiting for a long time without being answered.

25. In considering the events following the child's disclosure of the crime, I have accepted the outline of the facts contained in the IEI report. [17] At paragraph 283 of that report the following statement appears:

> Although it is possible to criticise [the principal] for failing to notify CARL earlier than 7 December, her failure to do so must be put in context. Her only knowledge of the allegations against X was what she had been told by police. There was, therefore, nothing new that she could tell CARL. In addition, the purpose of notifying CARL is so that police can be contacted to investigate the allegations. Police were already investigating the allegations. Thus, no purpose was to be served by Ms Gale giving notice to CARL. Her failure to notify CARL earlier than 7 December could not have impeded the police investigation in any way. Although she failed to notify CARL promptly, her conduct can be excused. In Chapter 15 of this report, I recommend that a teacher should be relieved of the obligation to notify CARL if that teacher is aware that police have already done so.

26. It is my understanding that the purpose of notification to CARL is to ensure that the relevant department[18] is advised that a child is or may be being abused or neglected, so that appropriate action may be taken to protect the child. Where it appears that the abuse is or was being perpetrated by a person who is not a member of the child's family (as in this case), notification to police occurs. The following extract from the department's Practice Guide: Extra-Familial Notifications outlines its policy in such situations:

> **5.5 Referral to SAPOL**
>
> Referral to police alone can, in certain circumstances, constitute an appropriate response to an *extra familial notification* as an alternative to a child protection investigation. Such circumstances include that it is assessed that there are **NO** concerns regarding willingness or ability of parents to protect and provide appropriate support; **AND** the notification includes

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15 Ancillary Staff and the Law', DECD, '8 Child Protection Mandatory Reporting', page 19 of 29.
16 The IEI report, at paragraph 282.
17 The IEI report, Chapter 6, paragraphs 231-283.
18 As noted above, Regulation 5 of the *Children's Protection Regulations 2010* prescribes the Department of Families and Communities as 'the Department' for the purposes of section 6 of the Children's Protection Act. However, I note that DECD now administers the Childrens Protection Act.

allegations of offending that is likely to impact significantly on the health or welfare of the child or young person concerned.

If there is any doubt about whether a matter should be referred to police, consult with police, as it is their role to interpret and apply the *Criminal Law Consolidation Act 1935*. Such matters should only be referred to police following consultation to determine whether this is appropriate. This approach is a foundation for collaborative practice and interagency partnership. In the metropolitan area, contact the Family Violence Unit in your SAPOL Local Service Area, and in the country contact your local police station or the officer with designated responsibility for child protection matters.

27. In view of the IEI report findings and recommendations, and the departmental policy outlined above, I consider that further investigation of the principal's handling of the sexual assault is not warranted at this time.

Opinion

In light of the above, my final view is that further investigation of the principal's handling of an allegation of sexual assault of a child by the employee of the school's Out of School Hours Care service is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Whether the department provided wrong advice to the metropolitan school's governing council about restrictions on the publication of the employee's identity

28. The IEI report makes it clear that there was considerable confusion within the department and the governing council in relation to the existence of a suppression order, and the terminology used by the department was often not clear.

29. The true position is that because the offences were of a sexual nature there was a restriction on the reporting of the offence allegedly committed by X so that his identity could not be revealed (except with his permission). This restriction, pursuant to section 71A(2) of the Evidence Act, was in place from the time when the police formed an intention to charge X (i.e. the evening of the 1 December 2010, or the morning of the 2 December 2010 at the latest) until the date he was committed for trial (15 June 2011). This restriction did not prevent the publication of general information about the commission of an offence, provided it did not identify X.

30. Further, there was never any court-ordered suppression order in place under section 69 of the Evidence Act. The sentencing judge simply chose not to name the suburb, the school or the child, in order to protect the identity of the child and her family.[19]

31. After X's committal on 15 June 2011 both the school and the governing council could have chosen to inform parents of X's identity and the events without breaching any restriction on reporting, or any suppression order. They would, of course, have needed to protect the identity of the victim.

32. I note also that it is possible, in my view, that the school and the governing council could have informed parents of children using the OSHC service of X's identity **prior** to his committal date without infringing section 71A. Given the relationship between the parents, the school and the elected governing council, it is my view that publication of the information to the parents would not constitute publication to 'the public', as required by the definition of 'publish' in section 68 of the Evidence Act.

33. The departmental confusion continued following X's conviction. For example, a departmental officer incorrectly informed the governing council at its meeting on 7 May 2012 that the judge in sentencing had imposed a suppression order; and on that basis it would be illegal for anyone in the department or the governing council to inform the community about the particulars of the offence. This error was not discovered until the complainant complained to the manager of the departmental Legal Unit. The manager subsequently advised the chairperson of the governing council of the true situation in a minute dated 4 June 2012 (**the 4 June minute**).[20]

34. It therefore appears to me from the evidence presented in the IEI report that the governing council was misinformed by departmental officers about the existence of a suppression order at its meeting held on 9 December 2010;[21] at its meeting on 21 March 2011;[22] at its meeting on 19 March 2012;[23] and at its meeting held on 7 May 2012.[24]

35. I accept that when the governing council voted at its meeting on 7 May 2012 not to inform the school community, it was acting in reliance on the mistaken advice that a

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19 District Court of South Australia, per His Honour Judge Griffin, 9 February 2012, paragraph 2.
20 This minute is set out in full in the IEI report, paragraph 340.
21 IEI report, paragraphs 292-294.
22 IEI report, paragraph 305.
23 IEI report, paragraphs 319-322.
24 IEI report, paragraph 328.

suppression order existed. In my view, this misinformation may have influenced the vote taken by the governing council at that meeting.

36. In my view, it is clear that the department made serious and continuing administrative errors in its advice to the governing council, by informing it of the existence of a suppression order when there was none. In my view it is clear that in making its decisions, the governing council relied on the mistaken departmental advice. The department's error was only corrected after considerable delay, once the true situation was discovered.

Opinion

In light of the above, my final view is that the department acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act, by providing wrong advice to the governing council that there was a suppression order in place, when there was not.

Whether the department provided poor advice to the metropolitan school's governing council about advising relevant parents of the sexual assault

37. The IEI report outlines[25] the steps which the complainant took to raise her concerns with the governing council and the department. She had been informed by the department that, as a governing council member, she needed to follow the administrative instructions.[26]

38. I note that in pursuing her concerns, the complainant had followed the code of practice for the governing council by making her dissent known amongst members, generating informal discussion to allow time for further consideration, and tabling a letter of dissent and asking that it be minuted.[27] She then followed the department's grievance policy and escalated it firstly to the principal, regional director and then to the department's Parents Complaint Unit, where she received in response the 4 June 2012 minute from the manager of the Legal Unit to the chairperson of the governing council.

39. The 4 June 2012 minute correctly states that it is a matter for the governing council to make the decision whether to inform the parents of the OSHC service, but then counsels them not to do so. In my view, the minute states in effect that the governing council would be made liable for any adverse consequences of providing this information to the rest of the school community. The minute includes the following:

> Response: The Council has no role to play in informing the community of such matters. The roles and functions of Council are set out in its governing documents and its obligations and responsibilities under law. The closest these come to such is the Council's obligations to assess the school community's views on education.
>
> I advised [the complainant] that as the operator of the OSHC service the Council could if it was necessary or felt it appropriate to do so, contact those persons who had placed their child/ children in the care of the Council (through its operation of the OSHC) but it would have to have strong grounds to do so. I strongly counselled that in my view there were no grounds I could see that would make it necessary to take such action either at a user of service level or a community level to either protect the council's legal position or ensure the safety of those who have used the service.
>
> The comments by [the complainant] that the community have "a legal & ethical right to this information" are clearly her private views, not the views of this office. In fact as indicated above the counter view was put to [the complainant] in the strongest manner I could. In my experience the "unrestricted and broadcasting" of such information is counter productive to the safety of the community.

40. I disagree with the approach suggested in the 4 June 2012 minute. I consider that the governing council had a responsibility to enhance the wellbeing of the children who utilised the OSHC service. Indeed it is a constitutional function of a governing council to do so. In the absence of advice about the sexual assault, if children had been acting out of character or unusually during the time of X's employment, parents would be unaware of possible causes for their child's behaviour, or what behaviour to look out for.

41. The National Framework for Protecting Australia's Children (**the national framework**)[28] sets out supporting outcomes to be achieved by all Australian governments and non-government organisations to protect children. The national framework encourages businesses and the broader community to educate and engage the community to influence attitudes and beliefs about abuse and neglect. It encourages early

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25 IEI report, paragraphs 319-344.
26 Minutes of governing council meeting 19 March 2012, 'All governing council members must follow DECD 'directive'.
27 Code of Practice for the governing council, 'Professional Integrity: For all Councillors', page 5.
28 Protecting Children is Everyone's Business' National Framework for Protecting Australia's Children 2009-2020, 30 April 2009.

intervention to meet the needs of vulnerable families as a more cost-effective solution than responding to crises or treating the impacts of abuse and neglect. Relevantly, the national framework seeks to raise awareness and knowledge in children and the broader community about risks because it increases detection of abuse and fosters protective behaviours. It states 'The importance of educating young people about healthy relationships is increasingly being recognised.'[29] It is clear the strategy employed by the national framework is to promote collaboration and responsibility amongst parents, communities, governments and businesses. This is what is considered essential to protect children.

42. I note that the 4 June 2012 minute does not refer to the national framework, nor to any of the DECD policies to which I refer below.

43. I acknowledge that the governing council as an independent body was required to come to its own decision on the matter. Nonetheless, it appears to me that the council was heavily reliant on advice provided to it by the department. In my view, it was unreasonable for the department to counsel the governing council in the way contemplated by the 4 June 2012 minute. As there was no suppression order in place, the details of the charge against X could have been published by any party after 15 June 2011, and the governing council could have published non-identifying information prior to this date. In my view, the governing council should have been provided with accurate factual information by the department, and then left to make its decision.

44. In my view, the department made an administrative error in providing incomplete advice to the governing council through the 4 June 2012 minute.

Opinion

In light of the above, my final view is that the department acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act, by suggesting to the governing council that the parents of children attending the OSHC service should not be informed about the sexual assault.

[29] Ibid, page 31.

Whether the governing council should have informed parents of the conviction of the employee for a child sex offence

45. As I have outlined above, under the Education Act a governing council is a body corporate with joint responsibility with the head teacher of a school for the governance of a school. In this case, the governing council was the employer of X, and the sexual assault on the child occurred during the performance of a service for which it was directly responsible.

46. It appears to me that the governing council was heavily reliant on advice provided by the department, and I accept that the members of the governing council at the time were inexperienced in dealing with such matters. In particular, when the governing council voted at its meeting on 7 May 2012 not to inform the school community, it was acting in reliance on the mistaken advice that a suppression order existed. In my view, this misinformation influenced the vote taken by the governing council at that meeting.

47. The governing council reconsidered the issue at its 4 June 2012 meeting. Again, it relied on departmental advice, and in my view its members were again poorly advised. Further, the IEI report details 3 instances prior to the 4 June 2012 meeting in which departmental officers wrongly suggested to the governing council that its members might incur some kind of personal legal liability if it chose not to follow the department's advice.[30] The IEI report notes that while it is not possible to conclude that the 4 June 2012 minute contained threats, it could readily be understood as a threat; and in fact the complainant understood it to be so.[31]

48. Nonetheless, the governing council has an independent responsibility under the Education Act, and should determine its own actions. Further, the governing council took its decision at its 4 June 20102 meeting notwithstanding the complainant's questioning of the proposed course of action.[32] At that meeting, a clear majority of the council was hesitant about informing the community, notwithstanding that the council was aware then that no restriction on reporting or suppression order was in existence. The governing council apparently decided that, as the events were now over two and half years old, the school should move forward and not re-open the issue of the sexual assault.[33]

49. For the same reasons as I have outlined in the section above, I consider that this decision amounts to an administrative error by the governing council. I consider that in reaching its decision, the council either failed to take into account a number of relevant considerations, or failed to give sufficient weight to them. In my view it was acting under a mistake of law or fact.

Opinion

In light of the above, my final view is that in deciding not to inform the users of the OSHC service of the sexual assault committed on a child in its care by X, the governing council acted in a manner that was based wholly or in part on a mistake of law or fact within the meaning of section 25(1)(f) of the Ombudsman Act.

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30 IEI report, paragraphs 449-457.
31 IEI report, paragraph 456
32 IEI report, paragraph 328.
33 IEI report, paragraph 341.

Whether the department should have informed relevant parents of the conviction of one of its employees for a child sex offence

50. The metropolitan school is a government school established under the Education Act. The principal has an authority to make decisions about the school, but this authority is subject to the powers of the Director General of Education, which are delegated to the regional director.[34]

51. In this case, as well as his employment on the OSHC staff, X was employed as a SSO working approximately 10 hours per week at the metropolitan school. The department was aware from 2 December 2010 that one of its employees had been charged with a child sex offence, but chose not to advise parents of children who attended the school.

52. The department has advised me that there are two policies that relate to the communication of incidents to the broader metropolitan school community, and the most sensitive way to communicate with parents without infringing section 71A of the Evidence Act (provided there are no suppression orders put in place by the courts).

53. First, the policy 'Protective Practices for Staff in their Interactions with Children and Young People' states in relation to inappropriate behaviour:

> All staff must take action if children and young people disclose information about inappropriate behaviours of other adults on the site. It is not acceptable to minimise, ignore or delay responding to such information. For the wellbeing of all members of the education or care community, the site leader must be informed as a matter of urgency and a report made to the Child Abuse Report Line, if appropriate. (page 14)

54. Second, the policy 'Responding to Problem Sexual Behaviour in Children and Young People: Guidelines for staff in education and care settings', sets out guidelines which provide advice on the matter of communication with other members of the school community. Although this policy deals with sexualised behaviour in children, I consider it appropriate in these circumstances as it specifically deals with informing the community and matters of privacy. The guidelines state:

> ***How should the site decide what information to share with parents?***
>
> Every situation is different. In most cases, the site should consult with its sector office (and with the police and/or Families SA if they are involved) about the content of the communication with parents. It is important not to delay this task or to give it a lower order of importance. Delays in communication allow the spread of misinformation and invite the community to believe that the site is doing nothing. Reluctance to communicate with the community can create new and more difficult problems for the site to deal with and this can take the site away from its central responsibility to support the specific children/ young people and their families involved in the incident.
> Most importantly, delays in communication may mean that children/ young people who have been harmed are not identified and are therefore not given the support they need.
> …
>
> The three most important factors to consider are whether the site believes that:
> - Other children/ young people may have been affected by the behaviour, currently or in the past
> - Other children/ young people witnessed the incident
> - Accounts of the incident will be circulating amongst the site community
>
> If the site believes that any one of these three circumstances is likely then it needs to plan communication with the relevant groups with whom communication must be considered and planned.

[34] Section 12 of the Education Act.

Parents who need to be informed of the site's management of a critical incident

This situation is just like any other communiqué about, for example, a serious accident or intruder.

The aims of this kind of communication are to:

- Prevent misinformation
- Allay fears
- Direct parents to the site for more information
- Alert parents to dangers
- Advise parents to be particularly attentive to their children's wellbeing
- Give parents suggested responses to the children's questions
- Give parents confidence that the site is managing a situation appropriately.

This kind of communication can be in writing and should refer to the incident in general ways that do not identify individuals.

Parents whose children may have been harmed through the problem sexual behaviour of others

Sites need to consider the possibility that other children/ young people may have been harmed no matter what the age group. Communication about this will be particularly appropriate with parents of toddlers and preschool age children, children/ young people with intellectual or communication disabilities, and children/ young people whose capacity to recognise harmful behaviour or to report it is limited. The ideal method of communicating with these parents is in person so that confidentiality and sensitivity issues can be properly addressed and explained.

The aims of these meetings are to:

- Advise parents of the incident that has raised concerns for other children/ young people
- Explain what changes in behaviour to look out for
- Advise parents about what to report to the site and under what circumstances.

These conversations are not about alarming parents or sensationalising an incident. They are part of the basic duty of care staff members have to advise parents about risks to children/ young people's safety or wellbeing.

55. I note that of the three risk factors which are listed as being indicators for informing the community (paragraph three of the above quoted policy), two were present in this case. In my view, this should have alerted the school to the need to communicate the information about X to parents of the OSHC service.

56. The policy goes on to deal with the circumstances in which information can be shared with parents and others without breaching privacy principles:

How can information be shared with parents, other site leaders and professionals without breaching privacy principles?

South Australia adopted formal guidelines in October 2008 that are specifically designed to assist people in sharing information to help prevent serious threats to safety and wellbeing. The document Information Sharing: Guidelines for promoting the safety and wellbeing of children, young people and their families (GSA 2008), and generally referred to as 'ISG', outlines the main principles and decision-making steps that people should follow when they anticipate a serious threat to safety or wellbeing and want to act to prevent the threat occurring. Following the advice in the ISG means staff members can be confident they are acting in accordance with South Australian Government directions and are not in breach of privacy principles.

…

> Site responses to problem sexual behaviour will often require information sharing with other professionals who have a duty of care for the child/ young person or with the parents of children/ young people who are suspected of having been harmed.
>
> Sharing information is not complex if you have consent to do so and this is the recommended approach under the ISG. However, the ISG also recognise that:
> - It will not always be safe to seek consent
> - People won't necessarily give consent when asked.
>
> In situations involving problem sexual behaviour, both above possibilities can arise. For some parents, the idea of sharing information about their son/daughter's sexual behaviour is extremely uncomfortable and may contradict their views about 'fairness'. Sites must also be sensitive to these responses but they must also act to protect against risks to the safety and wellbeing of others.

57. Whilst the department has informed me in its letter of 21 September 2012 of the child's parents' request not to publicise any information about the offence, the above policy highlights the need to act in the interests of other children who may have been affected. The department could have shared the information with parents whilst protecting the identity of the child, as the policy suggests.

58. In my view, in **all** cases a school should consult with its sector office about what communication should be had with parents, not 'most' as the policy states. The policy needs to make clear it is the department's responsibility to pass on any knowledge it may have in this regard to parents, even if information is communicated in a general sense, without specific details. This is what is required to discharge its duty of care to all children who may have been affected.

59. In this case, it appears to me that the department's failure to advise parents was based on a misunderstanding of the operation of section 71A of the Evidence Act, under which the prohibition on identifying the offender (without consent) was confused with a prohibition on disclosing that an event had occurred.

60. As the policies outlined above suggest, I consider that it is essential that relevant parents and others are advised of such events. Notification would assist parents and others to deal with the needs of other children, and in identifying any other possible offences. I am aware that this approach has been followed by the department in relation to other situations.[35] It is not clear to me why the departmental officers considered that a different approach should have prevailed in X's case.

61. Following the publicity which resulted in the establishment of the Independent Education Inquiry, on 2 November 2012 a letter was sent to all parents advising them of X's conviction. Prior to that time neither the parents of the children attending the metropolitan school, nor the parents of the children who used the OSHC service, had been directly informed by the department or the governing council of the conviction.[36]

62. I consider that it is unacceptable that the affected community was not informed by the department about this sexual assault, particularly as there is a policy in place for informing the parents whose children used the OSHC service when the risk factors are present, as they were in this case. It would have been possible to inform them without infringing the privacy of the child, as set out in the policy and information sharing guidelines.

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[35] I have seen a circular sent to parents at another Adelaide metropolitan school which seems to me to provide appropriate information whilst respecting the operation of the relevant legal provisions.

[36] However, it appeared in the online media ABC News on 10 February 2012, naming the offender but not the metropolitan school.

Opinion

In light of the above, my final view is that the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by not following its policy in respect of informing the broader community when risk factors are present, and not following the Information Sharing Guidelines.

Recommendations

In my provisional report, I foreshadowed making recommendations in the same terms as those relating to the department made by the Independent Education Inquiry.[37] Specifically, this encompasses the recommendations listed under the following headings:

- Informing a School Community (Recommendations 1-6)
- Informing the Minister (Recommendation 7)
- Improving Departmental Practices (Recommendations 8-21)
- Governing Councils (Recommendations 22-25)
- Amending Interagency Practices and Documents (Recommendations 31-36)

I note that Recommendations 31 and 34 of the Independent Education Inquiry concern the Information Sharing Guidelines. As these are now within my administrative responsibility, I do not consider it necessary to make any recommendation in the same terms.[38]

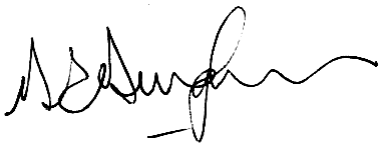
Further, it is beyond my jurisdiction in the context of this investigation[39] to make recommendations in respect of SA Police (Recommendation 30);[40] the State Records Office (which administers the Information Privacy Principles – Recommendation 33); the Department for Communities and Social Inclusion (Recommendation 37); or the Teachers Registration Board (Recommendation 38).[41]

Recommendations 40-43 appearing under the heading 'General' concern publication of the IEI report and do not relate to the department.

Accordingly, I now endorse the remaining IEI recommendations, and make them under section 25(2) of the Ombudsman Act.

Request for response to recommendations

In accordance with section 25(4) of the Ombudsman Act, I request the principal officer of the department to report to me, by 31 December 2013, on 'what steps have been taken to give effect to the recommendations, and if no such steps have been taken, the reason for the inaction'.



Richard Bingham
SA OMBUDSMAN

September 2013

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37 IEI report, Chapter 16.

38 In March 2013 the South Australian Cabinet directed that the scope of the *Information Sharing Guidelines for Promoting Safety and Wellbeing* should be broadened to include information sharing for all adults irrespective of their status as parents or caregivers and relocated responsibility for the ISG to Ombudsman SA.

39 This investigation concerns only the Department for Education and Child Development and the metropolitan school governing council.

40 The Ombudsman Act does not apply to matters which may be the subject of complaint under the *Police (Complaints and Disciplinary Proceedings) Act 1985* (see section 5(2) of the Ombudsman Act). Hence the South Australian police are not within my jurisdiction.

41 Whilst the Department for Communities and Social Inclusion, the Department of Premier and Cabinet (State Records Office) and the Teachers Registration Board are agencies to which the Ombudsman Act applies, in this investigation I have not made any findings of administrative error in relation to those agencies. Hence under section 25(2) of the Ombudsman Act I have no power to make recommendations relating to them.