*Carolyn Adams and Krista Lee-Jones**

WHAT CAN I TELL YOU? SHARING PERSONAL INFORMATION IN THE SCHOOLS SECTOR

Abstract

Those working in the schools sector have a duty of care to ensure the safety and wellbeing of teachers and students. Fulfilling this duty often requires the sharing of sensitive personal information about teachers and students across institutional and jurisdictional boundaries. One of the most pressing reasons to share such information is to help identify, prevent and respond to child sexual abuse. This article examines the complex legal policy frameworks that govern the sharing of personal information — including teacher registration systems and privacy legislation — in the eight Australian states and territories. The focus of the study was to identify legal policy approaches that were likely to promote appropriate and timely sharing of information and any approaches that were likely to impede such sharing. Based on this comparative study, the article suggests a number of general regulatory approaches to improve legal frameworks for sharing information in the schools sector. It also proposes a test for legislators and policy makers to consider in developing such legal frameworks that gives due recognition to the human rights that come into tension in this policy context: the right to privacy and the rights of the child.

I Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013 with the task of examining where law, policy and practice has failed to protect children from abuse in institutional environments,

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including schools.[1] The Royal Commission has investigated a number of case studies documenting allegations of child sexual abuse in primary and secondary schools across Australia.[2] The case studies highlight the failure of the schools concerned to appropriately respond to allegations, including the failure to share information about incidents and allegations with other institutions such as the police, education and child protection agencies and other schools. The Royal Commission has consistently highlighted appropriate and timely information sharing between institutions and across jurisdictions as an important step in ensuring the safety and wellbeing of children and young people.

There is a wealth of research into the personal, professional, organisational and technical barriers to professionals and institutions sharing information in relation to child protection issues.[3] However, there is a limited amount of research that focusses specifically on the legal frameworks that regulate this activity in the schools sector.[4] This is critical because the legal framework is foundational and necessary — although as Richardson and Asthana point out, not sufficient[5] — to establishing a robust information sharing network that correctly balances conflicting rights such as the right to privacy and the rights of the child. In the schools sector, this legal framework includes legislation regulating privacy, child protection, teacher accreditation and registration, and the operation and governance of schools.

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1 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference* (2013) <http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>.

2 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 23: The Response of Knox Grammar School and the Uniting Church in Australia to Allegations of Child Sexual Abuse at Knox Grammar School in Wahroonga, New South Wales* (2016); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 32: The Response of Geelong Grammar School to Allegations of Child Sexual Abuse of Former Students* (2016); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 34: The Response of Brisbane Grammar School and St Paul's School to Allegations of Child Sexual Abuse* (2017).

3 See, eg, Chris Clark and Janice McGhee (eds), *Private and Confidential? Handling Personal Information in Social and Health Services* (Policy Press, 2008); Matthew Keeley et al, *Opportunities for Information Sharing: Case Studies* (Social Policy Research Centre, University of New South Wales, 2015); Susan Richardson and Sheena Asthana, 'Inter-Agency Information Sharing in Health and Social Care Services: The Role of Professional Culture' (2006) 36 *British Journal of Social Work* 657.

4 The Debelle Inquiry in South Australia, which reported in 2013, considered the legal arrangements for sharing information in the schools sector in South Australia: South Australia, Royal Commission 2012–13, *Report of Independent Education Inquiry* (2013).

5 Susan Richardson and Sheena Asthana, 'Policy and Legal Influences on Inter-Organisational Information Sharing in Health and Social Care Services' (2005) 13(3) *Journal of Integrated Care* 3, 9.

In order to address this gap in the literature, the authors undertook a comprehensive study of relevant legislation across all eight Australian states and territories that specifically impacts on sharing information between institutions — that is government agencies and private sector organisations — in the schools sector. The study also included the federal *Privacy Act 1988* (Cth), which regulates the handling of personal information by Commonwealth government agencies and private sector organisations, including most non-government schools.

Equivalent provisions in each jurisdiction were analysed in light of existing research on sharing information in institutional settings and, in particular, the recommendations of a number of national and international inquiries into child protection arrangements — such as the Wood Inquiry in New South Wales,[6] the Munro Review in the United Kingdom,[7] the Debelle Inquiry in South Australia[8] and the Victorian Royal Commission into Family Violence[9] — with the goal of identifying provisions that were likely to support or impede the flow of information. The primary legislation considered as part of the study is set out in Table 1. The research also involved analysis of delegated legislation and policy documents where these had a direct impact on sharing information.

Each legislative provision identified was examined in order to answer the following questions:

(1) What types of information may, must or must not be shared?

(2) Who may, must or must not share information?

(3) With whom may or must information be shared?

(4) Are there any other significant requirements or restrictions that might impact on the sharing of information, including any relating to how information may or must be shared?

A comparative analysis of the resulting data was conducted to identify significant similarities and differences between jurisdictions. The various approaches were considered in light of existing literature on sharing information in institutional contexts and tested against the standards established in international human rights law. In addition, the authors analysed the interactions between provisions within each jurisdiction, for example, teacher registration schemes and privacy legislation, to identify potential issues and impediments.

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6 New South Wales, Special Commission of Inquiry into Child Protection Services in New South Wales, *Report* (2008).

7 Eileen Munro, *The Munro Review of Child Protection — Final Report: A Child-Centred System* (2011).

8 Royal Commission 2012–13, above n 4.

9 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

Table 1: Privacy, child protection and education related legislation and other regulatory instruments considered as part of this study.

Jurisdiction	Privacy	Child Protection	Education
Commonwealth	*Privacy Act 1988* (Cth)	N/A	N/A
Australian Capital Territory	*Information Privacy Act 2014* (ACT) *Health Records (Privacy and Access) Act 1997* (ACT)	*Children and Young People Act 2008* (ACT)	*ACT Teacher Quality Institute Act 2010* (ACT) *Education Act 2004* (ACT)
New South Wales	*Privacy and Personal Information Protection Act 1998* (NSW) *Health Records and Information Privacy Act 2002* (NSW)	*Children and Young Persons (Care and Protection) Act 1998* (NSW)	*Teacher Accreditation Act 2004* (NSW) *Teaching Service Act 1980* (NSW)
Northern Territory	*Information Act* (NT)	*Care and Protection of Children Act* (NT)	*Teacher Registration (Northern Territory) Act* (NT)
Queensland	*Information Privacy Act 2009* (Qld)	*Child Protection Act 1999* (Qld)	*Education (Queensland College of Teachers) Act 2005* (Qld) *Education (General Provisions) Act 2006* (Qld)
South Australia	*Information Privacy Principles Instruction 2013* (SA)	*Children's Protection Act 1993* (SA) *Information Sharing Guidelines for Promoting Safety and Wellbeing 2013* (SA)	*Teachers Registration and Standards Act 2004* (SA) *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA)
Tasmania	*Personal Information Protection Act 2004* (Tas)	*Children, Young Persons and their Families Act 1997* (Tas)	*Education Act 1994* (Tas) *Teachers Registration Act 2000* (Tas)
Victoria	*Privacy and Data Protection Act 2014* (Vic) *Health Records Act 2001* (Vic)	*Children, Youth and Families Act 2005* (Vic)	*Education and Training Reform Act 2006* (Vic) *Education and Care Services National Law Act 2010* (Vic)
Western Australia	N/A	*Children and Community Services Act 2004* (WA)	*School Education Act 1999* (WA) *Teachers Registration Act 2012* (WA)

The research identified a range of potential problems with the existing legal policy framework, in particular, a lack of consistency in teacher registration schemes across jurisdictions — despite efforts to develop a national framework — and unnecessary limits on the detail included, and access to information, in these registers.[10] By way of comparison, the study also considered the legal arrangements in place for sharing information in the early childhood services sector in Australia, which provide a different, and in some respects a more coherent, model for sharing information about service providers and supervisors in that sector, particularly where information needs to be shared across jurisdictional boundaries.[11]

In terms of sharing information about students, both within and across jurisdictions, the key appears to be reform of information privacy law and policy to adopt a shared set of privacy principles regulating the collection, use and disclosure of personal information. This is a particular problem in federations where privacy principles have been developed separately in each jurisdiction based on international standards but differing in detail.[12] It is also necessary to develop information sharing policies that are soundly based on privacy principles and provide clear guidance.

In some cases, the study identified provisions and policies that were likely to unnecessarily impede the exchange of information because they did not draw an appropriate balance between conflicting rights. In these cases, one set of rights — for example, those relating to the handling of personal information — was privileged in law, policy or practice over other rights — such as the rights of children to be protected from physical or mental violence, injury or abuse — or vice versa. This was sometimes because the legislation itself did not draw an appropriate balance or because the balance drawn in legislation was not well understood or was not properly reflected in the policy documents meant to guide those working in the field.

This project did not address those points at which information comes into the school and child protection systems, for example, through mandatory and non-mandatory reporting, inquiries, reports and investigations. Rather, the focus was on the mechanisms in place to allow information to flow between institutions once received into the system to help prevent, identify and respond to issues of child sexual abuse.

A *The Need to Share Information*

There are a number of circumstances in which it is necessary to share sensitive and personal information about teachers and students in order to meet the duty of care imposed on schools to ensure the safety and wellbeing of students. While it is also

10 Carolyn Adams and Krista Lee-Jones, *A Study into the Legislative — and Related Key Policy and Operational — Frameworks for Sharing Information Relating to Child Sexual Abuse in Institutional Contexts: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (2016) 99–109.

11 Ibid 91–98.

12 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 191.

important to ensure the safety and wellbeing of staff, the focus of this study was on child sexual abuse and, therefore, on protecting the student population. It is critical, for example, that information in teacher registers is readily available to those considering applicants for appointments as teachers in schools, including those applicants who move across jurisdictional boundaries. It is also important to share information about students who may pose a risk to other students, particularly when they move schools. Although this article focusses on sharing information about teachers and students, it may also be necessary in some circumstances to share information about other staff — such as administrators, contractors and volunteers — when they move between schools.

Apart from the Royal Commission, a number of other national and international inquiries and reviews have highlighted that failure to share personal information relating to the safety and wellbeing of children can lead to devastating consequences.[13] In the school context, failure to share information can result in adult perpetrators not being brought to account, instead being able to move from one school to another or from one jurisdiction to another. The Royal Commission's report on Knox Grammar School, for example, dealt with allegations against a number of teachers, five of whom were charged and ultimately convicted of child sex offences against students. A number of these teachers continued teaching at Knox Grammar for years despite serious allegations and disciplinary findings against them. Some were able to move to other schools despite substantiated allegations against them.[14] In New Zealand, a Ministerial Inquiry was established in 2012 to investigate how a convicted sex offender was employed as a teacher in a number of schools between 2004 and 2010, partly on the basis of institutional failures to appropriately share information.[15] In 2014, the Australian Broadcasting Commission reported that almost 1000 cases of children abusing other children had been reported by Australian schools in the previous year.[16] The problem of child sexual abuse in schools is, and continues to be, a serious concern.

In 2009, the Council of Australian Governments ('COAG') endorsed the *National Framework for Protecting Australia's Children 2009–2020*.[17] A central principle

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13 See, eg, ibid 158–159; Coroner's Court of Victoria, *Finding into Death with Inquest: Luke Geoffrey Batty* (28 September 2015) 20, 78, 82–4; Lord Laming, *The Victoria Climbié Inquiry Report* (2003) 9, 368.

14 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 2, 5–7.

15 Mel Smith and Judith Aitken, *Ministerial Inquiry into the Employment of a Convicted Sex Offender in the Education Sector: Report to Hon Hekia Parata, Minister of Education* (2012).

16 Lorna Knowles and Alison Branley, 'Data Reveals Allegations of Children Sexually Abusing Peers at School, Experts Call for Action' *ABC News* (online), 31 July 2014 <http://www.abc.net.au/news/2014-06-03/calls-for-action-to-halt-child-on-child-sex-abuse/5497196>.

17 Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (2009).

of the National Framework is that a single agency is not responsible for keeping children safe and well. The National Framework calls for collaboration and a 'shared responsibility' which avoids duplication, coordinates planning and implementation, and involves *better sharing of information*.[18]

B *When is the Legal Framework a Problem?*

Legislation has been identified as one of the potential impediments to creating a robust information sharing network that allows shared responsibility to develop among institutions.[19] A number of reviews have found that complexity in the legislative framework can act as an impediment to effective information sharing as it creates confusion and can lead to risk-averse behaviours by those trying to implement information sharing policies.[20] For example, the Australian Law Reform Commission ('ALRC') noted in its report, *For Your Information: Australian Privacy Law and Practice*, the potential 'reluctance by organisations and agencies to share information' due to the inconsistency and fragmentation in privacy regulation across Australia.[21] One of the key problems identified with such legal frameworks is the often unresolved or misunderstood tension between obligations to protect personal information collected for a specific purpose, and the obligation to share that information to help ensure the safety and wellbeing of children.[22]

This might be characterised as a tension between conflicting human rights: the right to privacy of teachers, families and children; and other rights of the child. The right to privacy is enshrined in article 17 of the *International Covenant on Civil and Political Rights* ('ICCPR').[23] This paper considers a specific aspect of the much broader right to privacy set out in the ICCPR, that is, the protection of personal information. This aspect of the right to privacy concerns who may collect and use an individual's personal information and under what conditions such information may be shared. This aspect of the right to privacy is important for a range of reasons. Where personal information is not appropriately protected this can result in embarrassment or discrimination and may also result in individuals being less inclined to provide relevant information. It is therefore important to both the individual and the community that personal information is regulated and handled appropriately.

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18 Ibid 9 (emphasis added).

19 See, eg, Wood, above n 6, vol 3, [24.89]; Australian Research Alliance for Children & Youth, *Working Together to Prevent Child Abuse and Neglect — A Common Approach for Identifying and Responding Early to Indicators of Need*, (2010) 33.

20 Australian Law Reform Commission, above n 12, 189–232; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 54–5.

21 Australian Law Reform Commission, above n 12, 499.

22 Bob Hudson, 'Information Sharing and Children's Services Reform in England: Can Legislation Change Practice?' (2005) 19 *Journal of Interprofessional Care* 537, 538; Richardson and Asthana, above n 5.

23 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

The rights of the child are enshrined in the *United Nations Convention on the Rights of the Child* ('CRC'). They include the principle that in all actions concerning children, the best interests of the child shall be the primary consideration as well as the right of all children to be protected from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.[24]

Australia, like most other countries of the world, is a party to both these treaties and is therefore bound in international law to implement these rights in law and policy. McBeth, Nolan and Rice note that in dualist systems, such as Australia, international obligations are not automatically incorporated into domestic law and that Australia has adopted a patchwork approach to the protection of human rights

> pieced together from an unplanned and uncoordinated collection of constitutional provisions, common law, legislation, policies and procedures, and institutions, across state, territory and national jurisdictions, with the notable absence of a national human rights law.[25]

This is certainly the case in relation to the right to privacy and the rights of the child in Australia. While McBeth, Nolan and Rice express the view that such an approach may provide adequate protection for human rights,[26] it is sometimes difficult, among the patchwork of law and policy, to determine the extent to which a particular right is protected. Article 17 of the ICCPR, which protects the right to privacy, is one of the few provisions that have been expressly enacted into domestic law. Even then, the protection provided is partial and provided by a patchwork of Commonwealth, state and territory legislation with some gaps in the protective fabric. For example, there is no privacy legislation in Western Australia.

Nevertheless, the international human rights regime does provide a valuable framework for legislators and policy makers to apply in developing law and policy that is consistent with international norms. The international human rights regime establishes that where there are rights holders — for example, school children — there are duty bearers — for example, education agencies — that have responsibility to ensure that relevant rights are respected, protected and fulfilled.[27] Where individual human rights, such as the right to privacy and the best interests of the child principle, come into tension — as they do, for example, when the interests of parents or teachers and the interests of children are not congruent — it is necessary to find an appropriate

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24 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19.

25 Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2nd ed, 2017) 301.

26 Ibid.

27 The United Nations Children's Fund, *The State of the World's Children 2004: Girls, Education and Development* (2004) 92.

legislative and policy balance between them. This is possible because most rights are not absolute.[28]

The United Nations Human Rights Committee ('UNHRC'), which monitors compliance with the ICCPR, recognises, for example, that as 'all persons live in society, the protection of privacy is necessarily relative'.[29] The UNHRC has made clear that it is consistent with international law to impose limits on the right to privacy where those limits are lawful and reasonable in the particular circumstances. This means that a law or policy that interferes with privacy — by, for example, allowing the sharing of sensitive personal information without consent — must meet two criteria: it must have a legitimate aim, for example, the protection of the rights of the child; and it must be a necessary and proportional means to achieve that aim.[30] This approach leaves considerable room to manoeuvre and allows domestic law and policy makers to resolve the tension between conflicting rights in particular contexts. By way of illustration, this test is applied below to some of the provisions considered in our study.

II Sharing Information about Teachers

A *Privacy Regulation Across Australia*

The collection, use and disclosure — and thus the sharing — of personal information by public sector agencies and government and non-government schools in Australia is regulated by privacy legislation at the federal, state and territory level. In general terms, the federal *Privacy Act 1988* (Cth) regulates the handling of personal information by Australian Government agencies and by most non-government schools. There is also privacy legislation in most other states and territories that, broadly speaking, regulates the handling of personal information by state and territory public sector agencies, including government schools. In South Australia the handling of personal information by public sector agencies is regulated by Cabinet administrative instructions issued by the government of South Australia.[31] There is no privacy legislation or similar administrative instruction in Western Australia. Each of these state and territory Acts and the South Australian instructions includes a set of privacy principles regulating the collection, use and disclosure of personal information.

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28 McBeth, Nolan and Rice, above n 25, 112–113.

29 Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Doc HRI/GEN/1/Rev.9 (vol I) (8 April 1988) 2 [7].

30 United Nations Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th session, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) 3 [6].

31 Government of South Australia, *PC012 — Information Privacy Principles (IPPS) Instruction*, Cabinet Administrative Instruction 1/89 (1989; last amended by Cabinet 6 February 2017).

There is also separate health privacy legislation in the Australian Capital Territory, New South Wales and Victoria and separate health privacy principles in Queensland.[32] While the privacy principles set out in the various privacy and health privacy Acts are broadly similar, they are not the same.[33] This level of complexity is mirrored in other federal systems in which privacy policy is developed at both the national and sub-national level, such as Canada and the United States of America.

The complexity of privacy regulation has been regularly identified as an impediment to appropriate and timely information sharing in a range of contexts. This is also an issue for schools, particularly where there is a need to share information across the government/non-government school divide or across jurisdictional boundaries. The need to bring greater consistency to privacy regulation is discussed further below in relation to sharing information about students.

In relation to sharing information about teachers, however, it is possible to rely on a common exception found in privacy principles in every jurisdiction in Australia, and more broadly, that allows personal information to be used and disclosed where the use or disclosure is required or authorised by law. The teacher registration and accreditation systems in all the Australian states and territories are established by legislation and expressly require or authorise the use or disclosure of personal information about teachers, and applicants to teach, in specific circumstances. This mechanism defines a clear relationship between privacy regulation and the teacher accreditation and registration system in each jurisdiction. It is critical, however, that the teacher registration system itself does not set up unnecessary barriers to sharing information between institutions and across jurisdictions.

B *Registration and Accreditation of Teachers*

Significant efforts are made in Australia, as in many other countries, to ensure that individuals teaching in schools are fit and proper people to carry out teaching duties and that they do not pose a risk to students. Currently, all teachers in Australia are required to be accredited under a national teacher accreditation and registration framework. This accreditation and registration system is one of the key mechanisms for sharing information about teachers between institutions within a jurisdiction and across jurisdictional boundaries. While some essential elements of the teacher registration framework are shared across Australia, the scheme is implemented by separate, and often inconsistent, legislation in each state and territory and this can give rise to problems.

The Australian Institute for Teaching and School Leadership ('AITSL') is responsible for developing and maintaining the Australian Professional Standards for Teachers and for implementing the national accreditation system based on these

32 *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic); *Information Privacy Act 2009* (Qld) sch 4.

33 Australian Law Reform Commission, above n 12, 161–88.

standards.[34] Under the national framework, each state and territory has a Registering Authority which is responsible for implementing the national framework. Each Registering Authority has responsibility for granting, refusing, renewing, suspending or cancelling teacher registrations and maintaining an up-to-date register of this information. The arrangements apply to both government and non-government schools.

Common elements of the registration framework include a requirement that applicants be 'suitable' to be a teacher and to work with children, based on an assessment of character and criminal history. This is judged on the basis of a range of information including a national criminal history check and a working with children check. All teachers, and those applying for positions as teachers, must have an up-to-date national criminal history check. Overseas criminal history checks are also required where an applicant or teacher has resided overseas as an adult. In addition, teachers must pass the relevant state or territory working with children check.

The Royal Commission has considered the working with children check schemes across Australia in detail, finding that they are complex, inconsistent and not nationally integrated. As a result there is inadequate information sharing across the states and territories under the schemes.[35] In addition, such schemes are limited by the fact that much abusive behaviour goes unreported and the majority of adult sexual abuse perpetrators detected do not have prior convictions for any form of child maltreatment.[36] Thus, other sources of information about teachers and applicants to teach are critical including information about disciplinary matters such as the giving of cautions and the suspension or cancellation of a teacher's registration.

A range of this kind of information is collected and shared by way of teachers registers maintained by the Registering Authority in each state and territory. The efficacy of this mechanism depends on what information is captured in the register and who may have access to the information. Each register must include personal details of registered teachers and information about the suspension or cancellation of a teacher's registration. However, the level of detail in each register and the extent to which the information is shared differs from jurisdiction to jurisdiction.

In the Australian Capital Territory, for example, the Registering Authority — the Australian Capital Territory Teacher Quality Institute ('TQI') — maintains the register of teachers, which includes details of any suspension or cancellation including the grounds for suspension or cancellation. The TQI must, on request, make the information in the register available to a teacher's employer, or prospective employer. However, the grounds for suspension or cancellation must not be disclosed.[37] By way

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34 Australian Institute for Teaching and School Leadership, *Nationally Consistent Registration for All Teachers* <http://www.aitsl.edu.au/registration/nationally-consistent-registration-of-teachers>.

35 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 20, 3.

36 Clare Tilbury, 'Working with Children Checks — Time to Step Back?' (2014) 49 *Australian Journal of Social Issues* 87, 92.

37 *ACT Teacher Quality Institute Act 2010* (ACT) s 42(6).

of contrast, where the TQI suspends or cancels a person's registration the TQI must inform the Registering Authority in every other state and territory and the notification must include the grounds for suspension or cancellation.[38] In other words, more detail is provided to the Registering Authorities in other states and territories than to a prospective school employer. The TQI may also make a limited range of information about a teachers' registration status available to the public on request but this does not include the grounds for any suspension or cancellation of registration.

The arrangements for teacher accreditation in New South Wales are more complex than in the Australian Capital Territory, with separate teacher accreditation authorities in relation to government and non-government schools. However, these accreditation authorities must notify the central Registering Authority — the Board of Studies, Teaching and Educational Standards NSW ('the Board') — of their decisions to grant, revoke or suspend accreditation.[39] The Board maintains the teachers register, called the roll of teachers, which has two parts: the electoral list and the accreditation list.[40] The electoral list includes basic information about employment and accreditation, but does not include information about suspensions or cancellations. The public may inspect the electoral list section of the register. Where a person has been suspended or had their registration cancelled they must not be enrolled on the electoral list.[41]

The accreditation list must include personal and professional details of each accredited person as well as details of any decision to refuse, revoke or suspend a teacher's accreditation.[42] The Board is authorised to request and receive such information from teacher accreditation authorities and may also provide information to such authorities. Although the Board is also authorised to share the information on the accreditation list with 'any other person or body prescribed by the regulations'[43] no other person or body has been prescribed to date. It appears, therefore, that disciplinary information may not be shared directly with schools. In contrast to the Australian Capital Territory, the Board may, but is not required to, share information about suspensions and cancellations with Registering Authorities in other jurisdictions. In New South Wales, the Secretary of the Department of Education also maintains a list of persons who 'are not to be employed' in the Government Teaching Service.[44] School principals, deputy principals, assistant principals and school administrative managers may access this list.

Within New South Wales, the limits on information sharing evident in the teacher accreditation and registration legislation are addressed to some extent under the child

38 Ibid s 66.

39 *Teacher Accreditation Act 2004* (NSW) s 22(1).

40 Ibid s 16.

41 Ibid s 17(2).

42 Ibid s 18.

43 Ibid s 18(3)(b)(iii).

44 *Teaching Service Act 1980* (NSW) s 7(1)(e).

protection legislation, which allows institutions that have responsibilities relating to the safety, welfare and wellbeing of children, including schools, to share information that promotes the safety, welfare or wellbeing of children.[45] This allows the sharing of information about teachers who might pose a risk to students to be shared directly between education agencies and schools without the need to rely on the teachers register.

In contrast, Victoria takes a more public approach to disciplinary information about teachers in their teacher registration schemes. The Victorian Institute of Teaching ('VIT') maintains the register of teachers and a separate Register of Disciplinary Action which records all disciplinary action — including cautions and reprimands, suspension or cancellation of registration and other information — taken against registered or formerly registered teachers.[46] The VIT is required to make both registers available for inspection by the public.[47] The VIT may exclude information from the Register of Disciplinary Action in certain circumstances, including where it is of the view that it is in the public interest to do so.[48] Although this may be thought necessary, on the basis that the register is public, it does have the potential to give rise to problems if institutions seek to rely on the information in the register. The VIT is also required to publish information about cancellations and suspensions in the Government Gazette and to share the information with Registering Authorities in other states and territories.[49]

Given the different arrangement across the states and territories it is not surprising that the AITSL guide to teacher registration in Australia provides that '[*w*]*here permitted*, jurisdictions will share information with regard to discipline and de-registration of registrants.'[50] The guide recognises that the arrangements for sharing information depend on the legislation in each state and territory and that the information collected and the arrangements for sharing differ across jurisdictions.

In fact, however, all states and territories provide for a level of sharing with the Registering Authorities in other jurisdictions although some Registering Authorities must share information while others are not required to but may share such information. How does a legislator or other policy maker decide whether these provisions should permit or require Registering Authorities to share information? Moving sensitive personal information about teachers across jurisdictional borders does place limits

45 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 16A.

46 *Education and Training Reform Act 2006* (Vic) pt 2.6 div 13A.

47 Ibid ss 2.6.25, 2.6.54B(2). See also Victorian Institute of Teaching, *Register of Disciplinary Action* (25 August 2017) <http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/registry-of-disciplinary-action>.

48 *Education and Training Reform Act 2006* (Vic) s 2.6.54E(2).

49 Ibid s 2.6.51.

50 Australian Institute for Teaching and School Leadership, *Discipline and De-Registration* (2014) <https://www.aitsl.edu.au/teach/start-your-career/registration/nationally-consistent-teacher-registration> (emphasis added).

on teachers' right to privacy but is the limit reasonable and therefore consistent with the test provided by the UNHRC?

The first question to ask is whether the restriction on the right to privacy has a legitimate aim. A strong argument could be made to support the sharing of information across jurisdictional borders, including international borders, with the aim of protecting the safety and welfare of children in schools. The second question is whether the restriction is necessary to achieve that aim. In a federation, such as Australia, with a mobile population the sharing of such information across jurisdictional borders is necessary to achieve the stated aim. Is it, however, necessary to *require* registering authorities to share information with each other about all teachers? An argument could be made either way here but, given the mobility of the Australian population, it could be argued that it is necessary to ensure that Registering Authorities across Australia have nationally consistent information and that every jurisdiction receives information about teachers who pose a risk to children to prevent potential adult perpetrators moving across borders with impunity. Indeed, perhaps a more efficient alternative would be to establish a national register, as has been done in the early childhood services sector, discussed below.

Finally, is requiring Registering Authorities to share disciplinary information with other jurisdictions a proportional means of achieving the legitimate aim of protecting the safety and welfare of children in schools? This will depend to some extent on the way that personal information is collected, used and disclosed in those other jurisdictions. Officers of the Registering Authority in New South Wales, for example, may be concerned about sharing information with Victoria or Queensland if that information is going to be put in the public domain.

The second issue for consideration in this scenario is in relation to who may access the information on the various registers within jurisdictions. On this issue the approach across Australia is diverse and inconsistent.[51] In some jurisdictions school authorities are unable to directly access detailed information about disciplinary matters while in Queensland and Victoria such information is a matter of public record.

As discussed above, in order to find an appropriate balance between a teacher's right to have the privacy of his or her personal information protected and the rights of children, the limits placed on the right to privacy must have a legitimate aim and, in addition, must be reasonable, that is, a necessary and proportionate means of achieving that aim. Choosing suitable people to teach in schools and protecting the welfare and safety of children are certainly legitimate aims. Children have the right to a high standard of education[52] and to be protected from violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.[53] In the authors' view, access to detailed information about disciplinary matters, including cautions and

51 Adams and Lee-Jones, above n 10, 108–109.

52 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13.

53 *CRC* art 19.

reprimands and the grounds for suspension or cancellation of registration, should be made available to school authorities as a matter of course to ensure that their decision making about employing or continuing to employ teachers is fully informed.

It is a matter for debate, however, whether such detailed information about disciplinary matters should be on the public record. The public, including parents, should be able to check, easily and efficiently, that the teachers with responsibility for their children are appropriately qualified and currently registered. This is achieved by providing access to basic information about registration status on teacher registers, as is done in New South Wales by way of the electoral list. The authors question, however, whether it is necessary to place more detailed disciplinary information on the public record. The question from a rights perspective is whether this is necessary to achieve the legitimate aims identified above, and, in the authors' view, it is not. Parents are not responsible for ensuring that teachers are properly accredited and registered or for employing appropriate teachers in schools. This duty lies with administrators and managers in the schools sector.

C *Registration and Accreditation in the Early Childhood Services Sector*

The early childhood services sector in Australia has gone further than the schools sector down the path of establishing a national framework for the regulation of the sector and for collecting and sharing information about early childhood service providers and supervisors. The National Quality Framework currently covers long day care, family day care, preschool/kindergarten, and outside school hours care.[54]

The Education and Care Services National Law ('National Law') and the Education and Care Services National Regulations underpin the National Quality Framework. The National Law was an attempt to introduce consistency into state and territory legislation by developing an agreed model Bill, which was originally passed as a law of Victoria[55] and then adopted by other jurisdictions by way of corresponding legislation. The National Law aims to establish 'a jointly governed, uniform and integrated national approach to the regulation and quality assessment of education and care services'.[56] This contrasts with the implementation of the national teacher accreditation and registration framework, which is implemented by separate and different legislation in each state and territory.

Under the National Quality Framework, a Regulatory Authority is nominated in each jurisdiction to administer the framework. Regulatory Authorities conduct assessments as to whether providers, services and supervisors meet and maintain minimum quality requirements. Regulatory Authorities have the power to authorise, suspend and cancel approvals and certificates required for persons providing and managing

54 Australian Children's Education & Care Quality Authority, *Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011* (2017) 11.

55 *Education and Care Services National Law Act 2010* (Vic).

56 Australian Children's Education & Care Quality Authority, above n 54, 9.

early childhood services. Regulatory Authorities also appoint authorised officers to enter, assess and monitor services and have powers to obtain information, documents and evidence.

Applications for provider and service approvals and supervisor certificates require Regulatory Authorities to consider whether a person or entity is fit and proper to be involved with the provision of early childhood services to children. Individuals must satisfy the Regulatory Authority that they are 'fit and proper persons'[57] to be involved in the provision of early childhood services while an entity must satisfy the Regulatory Authority that each person with management or control of a service to be operated by the applicant is a fit and proper person to be involved in providing such services. As in the schools sector, early childhood services Regulatory Authorities are state and territory based and maintain state and territory registers of approved providers, services and supervisors.

The Australian Children's Education and Care Quality Authority ('ACECQA') is established under the National Law and is responsible for overseeing the implementation of the National Quality Framework. The ACECQA establishes and maintains a system of national registers, which are in addition to the state and territory registers, and this is a point of difference with the national teacher accreditation and registration framework. The national registers are publicly available and provide information about: the individual services granted approval to operate as early childhood services; individuals or entities authorised to operate an approved early childhood service; and certified supervisors who are required at every service. It appears reasonable, necessary and proportionate that this level of detail is included in the national, public register for the information of families and others with an interest.

Part 13 of the National Law — called *Information, Records and Privacy* — deals expressly with the establishment of national, state and territory registers, and the publication and sharing of information. Division 6 of part 13, called *Disclosure of Information*, makes clear that Regulatory Authorities, government departments and other public authorities may disclose information to each other for the purposes of the National Law.[58] Regulatory Authorities may also disclose information to the National Authority.[59] Finally, Regulatory Authorities may publish information about enforcement actions taken under the National Law such as the issue of compliance notices, prosecutions, and suspension or cancellation of service approvals or supervisor certificates.[60] The publication of information about enforcement action against entities providing children's services is likely to be a necessary and proportionate measure to protect the safety and wellbeing of children by keeping families and the community informed about the quality of the services and any history of non-compliance with legislative requirements. Whether or not disciplinary information about individual supervisors should be published is open to debate, but this information should

57 *Education and Care Services National Law Act 2010* (Vic) ss 12, 109.

58 Ibid s 271(1).

59 Ibid s 271(2).

60 Ibid s 270(5).

certainly be shared with the Regulatory Authorities in other jurisdictions. This would most efficiently be done by including it in the national register under provisions that require, rather than simply authorise, this exchange of information.

Perhaps the most interesting difference between the schools sector and the early childhood services sector in relation to the legal framework for sharing information is the approach taken to privacy legislation. The National Law has taken a unique approach to privacy regulation by excluding the operation of state and territory privacy legislation in relation to the operation of the National Quality Framework. Instead, the federal *Privacy Act 1988* (Cth) is amended and applied as a law of each state and territory. This approach to privacy, coupled with the express information sharing arrangements in the National Law and Regulations, establishes a high level of consistency and coherence to these arrangements in the early childhood services sector. This contrasts with the complex and fragmented approach in the schools sector, which relies on inconsistent state and territory legislation and does not have national information sharing arrangements or national registers. This workaround does indicate, however, that privacy regulation in Australia is in need of significant reform and this issue is discussed further below in relation to sharing information about students.

III Sharing Information about Students

While it is critical to share information about teachers and applicants to teach, it is also necessary to share information about students when they transfer, or are transferred, from one school to another including across jurisdictional boundaries. In some cases, this may be because a student poses a potential risk to other students. Schools have a common law duty of care to their staff and their students.[61] This duty of care may require schools to collect certain personal information, including sensitive personal information relating to child sexual abuse, and to use and disclose the information.

The sharing of information about students is generally regulated by privacy, child protection and education legislation.[62] This can give rise to problems because of inconsistency between legislation within particular jurisdictions or across jurisdictional boundaries. Each of these issues will be considered in turn.

A *Within a Jurisdiction*

In most jurisdictions, sharing of information about students is not expressly addressed in the education legislation — although New South Wales, Queensland and Western

61 *New South Wales v Lepore* (2003) 212 CLR 511, 522 (Gleeson CJ). The authors note that the duty of care owed to staff is not the same as the duty of care owed to students. The former is not explored in detail here as the focus of this paper is on child sexual abuse and, therefore, on protecting the student population.

62 See Table 1.

Australia are exceptions to this — and so information is generally shared under child protection and privacy legislation. In Australia, government schools are covered by the relevant state or territory privacy legislation, where such legislation exists, and non-government schools are covered by the federal *Privacy Act 1988* (Cth), except where they fall within the small business exception, that is, where they have an annual turnover of $3 000 000 or less.[63] This immediately gives rise to issues of inconsistency when sharing information between government and non-government schools within a jurisdiction and also between government schools where they need to share information across jurisdictional boundaries.

The complexity and inconsistency of privacy regulation across Australia and confusion concerning the interaction with other legislation, such as child protection legislation, have been identified as impediments to appropriate and timely information sharing.[64] This is a clear indication of the need for reform in the privacy landscape. The ALRC has recommended that all jurisdictions adopt a single set of uniform privacy principles, the core of all privacy legislation.[65] In response to the Commission's report, the Australian Government developed the Australian Privacy Principles and enshrined them in the federal *Privacy Act 1988* (Cth). However, only the Australian Capital Territory has adopted these principles to date. This means that in the ACT, government and most non-government schools are regulated by the same set of privacy principles, even though they are enshrined in two separate pieces of legislation. This is a step in the right direction.

Information about students who might pose a risk to other children, may also be shared to varying degrees under child protection legislation. For example, in the Australian Capital Territory, schools are included in the definition of 'information sharing entity'[66] under the child protection legislation. Under this legislation, information relevant to the safety and wellbeing of a child must be provided to the central child protection agency upon request and the agency may provide such

63 *Privacy Act 1988* (Cth) s 6D. Non-government schools that fall within the definition of a small business may still, however, be covered by the *Privacy Act 1988* (Cth) in some circumstances. These include where a school holds health information and provides a health service, for example, where a school has an infirmary or a registered nurse on staff. Non-government schools may also choose to be covered by the *Privacy Act 1988* (Cth) by registering in writing under s 6EA of the Act. The *Privacy Compliance Manual* (2016), produced by the Independent Schools Council of Australia and the National Catholic Education Commission also suggests, at paragraph 2.6.3, that all schools should consider adopting the Australian Privacy Principles as a matter of good practice even if they fall within the small business exemption in the *Privacy Act 1988* (Cth).

64 Australian Law Reform Commission, above n 20, ch 3; Parenting Research Centre, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) 95–8; Wood, above n 6, ch 24.

65 Australian Law Reform Commission, above n 20, ch 18.

66 *Children and Young People Act 2008* (ACT) dictionary.

information to schools and other information sharing entities.[67] In this model, the child protection agency acts as a hub for information, receiving and distributing information. Whether centralising information in this way is a useful approach to child protection is contested,[68] but it may become a problem if the centralisation and control comes at the expense of lateral sharing between front line service providers, such as schools.[69] In the Australian Capital Territory, it is possible for institutions to share information with each other, but only where the head of the child protection agency has established a 'care team' with a defined membership.[70]

By way of contrast, New South Wales has adopted a decentralised approach under its child protection legislation. Both government and non-government schools are defined as 'prescribed bodies' under the legislation and may share information with other prescribed bodies, including each other, in order to promote the 'safety, welfare or wellbeing of children'.[71] Similarly, the Northern Territory, Queensland, Tasmania and Western Australia allow the direct exchange of information between prescribed bodies, including schools, without needing to rely on or refer to the central child protection agency.

Research conducted by the Social Policy Research Centre of the University of New South Wales found that the more open regulatory arrangements in New South Wales support information sharing between schools when the information concerns the welfare of the child and noted that, generally, information is shared appropriately.[72] The report documented some problems with sharing information in practice but noted that 'where there was trust and/or familiarity between schools and with other agencies, sharing information becomes much more efficient'.[73]

The interaction between privacy and other legislation, such as child protection legislation, can also give rise to confusion and create an environment in which school managers tend to be risk averse and do not share information when necessary. In New South Wales, any potential confusion between privacy legislation and the child protection legislation has been addressed by s 245H of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This section states that provisions in other legislation that restrict the disclosure of information do not operate to prevent the disclosure of information under the child protection legislation. In addition, s 245A(2)(d) of the Act provides that because the safety, welfare and wellbeing of children and young people are paramount, the needs and interests of children and

67 *Children and Young People Act 2008* (ACT) div 25.3.2.

68 Hudson, above n 22; Eileen Munro, 'What Tools do We Need to Improve Identification of Child Abuse?' (2005) 14 *Child Abuse Review* 374.

69 Wood, above n 6, 998.

70 *Children and Young People Act 2008* (ACT) div. 25.3.2.

71 *Children and Young Persons (Care and Protection) Act* (NSW) ch 16A.

72 Keeley et al, above n 3, 4.

73 Ibid 5.

young people, and of their families, take precedence over the protection of confidentiality or of an individual's privacy.[74]

Again, this demonstrates the need for reform in the privacy landscape. While the intention is to make the arrangements as clear as possible in the New South Wales child protection legislation, in the authors' view, it is not necessary to absolutely preference the needs and interests of children over the protection of confidentiality and privacy in this way. Both sets of rights must be given appropriate weight and protection and any limits placed on the rights must be necessary and proportionate.

The school's duty of care to students requires information about a child with harmful sexual behaviours to be shared for the safety and wellbeing of other students. However, how that information is managed, and how the child with the behaviours is 'managed', is critical. It is important to recognise the distinction between a child who exhibits harmful sexual behaviours and an adult with those behaviours and that they are qualitatively different.[75] In a child, those behaviours originate from a different set of factors.[76] It is important that in sharing information about such a child, that child should not be stripped of the opportunity for an education as the educational opportunity and the attachments formed through educative processes are known to be protective factors for wellbeing across the life course.[77]

Privacy legislation is not intended to stymy the flow of personal information, but to establish privacy principles that ensure that information is handled appropriately. It is possible to share information in a way that is consistent with privacy principles, which uniformly allow the use and disclosure of information for the primary purpose of collection and, as discussed above, where authorised or required by law. It is important that parents and students are made aware of these purposes at the time information is collected. The stated purposes of collection should always include fulfilling the school's duty of care to students and expediting transfer of students between schools. The Australian Capital Territory Education and Training Directorate's *Personal Information Digest* (2014) makes clear, for example, that one of the purposes of collecting personal information is to expedite the transfer of students' records between government schools within the territory.[78] This could certainly be broadened to include non-government schools and students moving to another jurisdiction.

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74 See, eg, *BMY v Department of Family and Community Services* [2016] NSWCATAD 24 [121]–[124].

75 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth, Sydney, Case Study 45, Day 215, 20 October 2016, 21653 (Wendy O'Brien).

76 Ibid 21655.

77 Ibid 21669.

78 ACT Government Education and Training Directorate, *Personal Information Digest* (2014) 58.

Privacy principles also allow the use and disclosure of information as required or authorised by law and this provides a point of intersection with child protection legislation and education legislation that includes provisions authorising or requiring that information be shared in certain circumstances. In Queensland, for example, s 385 of the *Education (General Provisions) Act 2006* (Qld) expressly provides for the creation of 'transfer notes', which allow for sharing of information about students between government and non-government schools. Transfer notes aim to help schools ensure continuity of education for students and meet the school's duty of care obligations. The system appears unique in Australia and is another mechanism for helping to ensure consistency with privacy legislation and clarity for administrators and managers.

B *Across Jurisdictions*

When students transfer to a school in another jurisdiction, the situation is even more complex because of the interaction between inconsistent privacy, child protection and education legislation in the states and territories. Because of this, the Australian Government, state and territory education departments, and the independent and Catholic education sectors have developed the Interstate Student Data Transfer Note ('ISDTN') and Protocols under the auspices of COAG.[79] An ISDTN may include information about a student's progress and support needs and any behaviour and management issues. Some of this information may indicate that the child may be a risk to other children. The ISDTN protocols note that the safety of students and staff is paramount.

In relation to non-government schools across Australia, the arrangements under the ISDTN scheme are relatively straightforward because they are all potentially covered by the federal *Privacy Act 1988* (Cth) and are therefore in a position to adopt a nationally consistent approach to information sharing. Non-government schools may share information under the ISDTN scheme if they have in place a standard data collection notice that informs parents and students of the 'purposes of collection', discussed above.[80]

However, where a student is moving to or from a government school across jurisdictional boundaries, the ISDTN requires the new school to gain the consent of parents or guardians as well as students before requesting information from the previous school. This approach may be a response, at least in part, to the complex web of state and territory privacy legislation that applies to government schools. However, the suggested approach is not consistent with good privacy practice and is likely to

79 Council of Australian Governments Education Council, *Interstate Student Transfer Note* <http://educationcouncil.edu.au/archive/Publications/ISDTN.aspx>.

80 Council of Australian Governments Education Council, *Protocol for Use by Non-Government Schools for Students Transferring from other Non-Government Schools* <http://educationcouncil.edu.au/archive/Publications/ISDTN/ISDTN---Non-Gov-Schools.aspx>.

stymy the flow of information between schools necessary to meet the schools' duty of care.

IV Conclusion

Currently, there are significant barriers in the Australian legal framework that are likely to be stymying the flow of information necessary for schools to meet their duty of care to students. These barriers are sometimes the result of actual legal impediments in the sharing arrangements but may also be the result of a tendency to caution caused by the complexity and inconsistency in the legislative framework.

Despite efforts to develop a national framework for teacher registration across Australia, there remain many points of inconsistency and possible confusion. As a result of the National Law, a higher level of consistency and coherence is evident in the legal arrangements for collecting and sharing information in the early childhood services sector. In terms of sharing information about students, both within and across jurisdictions, the key appears to be reform of the privacy landscape to, at the very least, introduce a shared set of privacy principles to regulate the collection, use and disclosure of personal information and to develop a better understanding of how the principles are designed to work with other legislation.

It is possible to develop a legal framework that supports timely and appropriate information sharing in the schools sector that is coherent and consistent and finds the correct balance between conflicting rights. The question that needs to be addressed is whether any law or policy that places limits on the right to privacy — including the privacy of teachers, students and their families — is necessary to achieve a legitimate aim and a proportionate means of doing so. This test, developed in the context of international human rights law is an invaluable tool for legislators, policy makers and those implementing information sharing policy in the schools sector who are most affected by the complex and sometimes incoherent legal arrangements and must advocate for reform.