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**Government
of South Australia**

**Independent
Education
Inquiry**

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21 June 2013

His Excellency Rear Admiral Kevin Scarce AC CSC RANR
Governor for South Australia
Government House
Adelaide SA 5000

Your Excellency

On 10 December 2012 you invested me with the powers of a Royal Commissioner in respect of an Inquiry I was then in the course of undertaking for the Hon. Grace Portolesi MP, then Minister for Education and Child Development.

I have the honour to present my report. It is contained in the whole of the succeeding pages bound in this volume.

There are legal reasons why, for the time being, this report must remain confidential and cannot be made available to the public. The legal reasons why the report must remain confidential cannot be disclosed. If they were, it would entirely defeat the purpose of making the report confidential.

The need for confidentiality applies only to the name and identity of the offender and the school at which that person offended. I have therefore, prepared an edited version of the report that can be made available to the public and I recommend that it should. Very little has been excused from the report. What has been excised does not in any respect affect either the sense of what remains or the substance of the recommendations contained in the report.

I have ordered that the report should remain confidential until the Attorney-General announces that it can be released to the public.

Yours faithfully

A handwritten signature in black ink, reading "Bruce M Debelle".

Bruce M Debelle

Encl.

Report of the Independent Education Inquiry 2012 - 2013

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SOUTH AUSTRALIA



ROYAL COMMISSION

2012 – 2013

REPORT

of

INDEPENDENT

EDUCATION INQUIRY

TABLE OF CONTENTS

INTRODUCTION	1
The Terms of Reference	1
The Meaning of the Terms of Reference	1
Not a General Inquiry	2
The Relevant Agencies	3
Law Reform	3
Terms Used in this Report	3
Legislation	5
Premises and Staff	6
The Conduct of the Inquiry	6
Limited Powers	7
Appointment as Royal Commissioner	8
An Issues Paper is Published	9
The Hearings	9
Notice to the School	10
Roundtable Discussions	10
Other Reviews	12
The Scheme of this Report	13
 CHAPTER 1 - THE SAFETY AND WELFARE OF CHILDREN	 15
Common Law Duty	15
Statutory Duties	15
The Protection of Victims	18
 CHAPTER 2 – THE LEGAL FRAMEWORK	 20
Part 1 - Restrictions On Publication	20
The Evidence Act	20
What is Meant by Publication?	23
Young Offenders Act	29
Suppression Orders	31
Different Duration	33
Part 2 - The Law Of Defamation	33
Avoid a Defamatory Meaning	33
Qualified Privilege	34
 CHAPTER 3 – CRIMINAL PROSECUTIONS AND DISCIPLINARY PROCEEDINGS	 37
The Courts	37
Two Classes of Offences	37
Trials of Summary and Minor Indictable Offences	38
Trials of Major Indictable Offences	38
Police Investigation and Arrest	38
Bail	39

The Process of Committal	39
The Arraignment	40
Directions Hearings	41
The Trial	41
Appeals	42
Discontinuance of a Prosecution	43
Sexual Offences	43
Major Indictable Offences	43
Minor Indictable Offences	44
Summary Offences	45
Disciplinary Proceedings	46
Education Act	46
The Power to Suspend	46
Teachers Registration Board	47
Informing the Board	49
CHAPTER 4 – SHARING INFORMATION	51
The Need to Share Information	51
Interagency Code of Practice	51
Information Sharing Guidelines	51
The Privacy Act	52
Information Privacy Principles Instruction	53
Any Sanction to Ensure Compliance?	53
Drafting Information Sharing Guidelines	54
The Test is Reviewed	55
Privacy Act is Amended	56
A New Test Recommended	57
Should the Department Disclose Names?	57
Governing Councils	59
Section 14 of the Interagency Code of Practice	59
Memorandum of Administrative Arrangement	60
Sharing Information Between Sectors	60
CHAPTER 5 – SOME FACTS ABOUT THE DEPARTMENT	62
A Large Department	62
Management in December 2010	62
Operating Divisions and Units	62
Several Units Involved in Harvey Matter	63
Regions	64
Principals	65
Critical Incidents	65
Suspending an Alleged Offender	66
Directions to the Alleged Offender	67
Notice of Allegations	69

CHAPTER 6 – A FAILURE TO INFORM PARENTS	71
Imperfect Recollections	71
Largs Bay Primary School	71
The Checks on Harvey’s Suitability	71
An Appalling Crime	72
The Crime is Reported	72
The Morning of 2 December	73
Did Harvey Work on 2 December?	75
Harvey is Arrested	75
Ms Gale Reports the Arrest	76
An Important Email	76
A Telephone Conference	77
A Draft Letter	78
Harvey Contacts Ms Gale	78
The Morning of 3 December	79
Limited Information to Staff	79
Police Call Mr Thredgold	79
Police Send Email to Mr Thredgold	80
Two Letters Sent	82
The Events of 6 December	84
Police Make Further Inquiries	85
Ms Gale Notifies CARL	86
Ms Gale Obtains Further Advice	86
The Events of 9 December	88
The Governing Council Meets	88
Harvey Resigns	89
The Events of January 2011	90
Ms Oshinsky Becomes Principal	91
Three letters in February 2011	91
Governing Council Meeting in March 2011	92
Harvey is Sentenced	92
News Reports of the Sentence	93
The Department’s Response to the Sentencing of Harvey	93
Channel 7 Requests Information	95
Parents Request Information	96
Governing Council Meets on 19 March 2012	100
A Dispute About Minutes	100
Ms Soester Makes Inquiries	102
Actions of Mr Semmens Before Next Governing Council Meeting	104
Governing Council Meets on 7 May 2012	104
Ms Soester Seeks Further Information	105
The Department Prepares its Response	107
Mr Mackie’s Minute of 4 June 2012	111
Governing Council Meets on 4 June 2012	114
Ombudsman Begins an Inquiry	115
Parents Continue to Seek Information	116
A Question in the Parliament	117
SA Police Publishes a Reply	118

The Department Seeks Legal Advice	119
Department Sends a Letter to Parents	119
Anger at the School	120
Premier's Unfortunate Remarks	121
The Department Sends a Second Letter	122
The Premier and the Minister Respond	123
Some Consequences	124
CHAPTER 7 – WAS THE MINISTER INFORMED?	125
Some Relevant Principles	125
Operational Matters	126
Informing the Minister	128
Responsible Government	129
Ministerial Advisers	131
An Email is Discovered	132
No Memory of the Email	135
Computers Searched	135
No One Informed the Minister	137
Should the Minister Have Been Informed?	138
A Subsequent Briefing Was Necessary	141
CHAPTER 8 –DEPARTMENTAL FAILINGS	142
A Failure to Inform Parents	142
An Inadequate Letter to Parents	143
The Inadequate Letter Compounded	144
A Failure to Obtain Legal Advice	144
A Failure to Reconsider	145
The Flaws in Mr Mackie's Minute	147
Did the Department Make Threats?	149
Court Proceedings Not Monitored	151
Inadequate Management	152
Emails Not Correctly Targeted	153
No Central File	154
Some Errors in the Letter to the Ombudsman	155
Lack of Accuracy	156
Did a Failure to Send a Letter Impede the Police Investigation?	157
A Policy to Inform Parents?	158
Did a Policy to Inform the Minister Exist?	158
Briefing Minister on Appointment	160
Departmental Reforms	161
CHAPTER 9 – SEXUAL OFFENDING IN SCHOOLS	163
Place of Offending	164
The Nature of the Offending	164
Some Statistics	166
Matters When Conviction Recorded	167
A Postscript	168

CHAPTER 10 – TWO ARRESTS IN 2013	170
A Case Manager is Arrested	170
An Undue Delay?	172
A Defective Screening	173
Should A Have Been Cleared?	176
Should A Have Been Named?	177
A Breach of the Information Privacy Principles?	177
A Primary School Teacher is Arrested	177
CHAPTER 11 – RESPONSIBLE DISCLOSURE TO PARENTS	180
Factors Relevant To Disclosure	181
The Evidence Act	181
Law of Defamation	182
Consult Police	182
Alleged Offender Removed	182
Protecting the Victim	182
Safeguarding Other Children	183
Presumption of Innocence	183
Other Hardship	184
A Stigma that Cannot be Removed	184
Possible Retribution	185
Correcting Misinformation	186
Maintaining Confidence in the School	186
The Length of the Investigation	187
Three Occasions To Consider Disclosure	187
After Committal - Inform Whole of School Community	188
Informing Parents	188
After Teacher Has Been Charged	188
Mere Allegations	189
Informing Staff	190
After Teacher Has Been Charged	190
Mere Allegations	190
Informing Governing Council	192
After Teacher Has Been Charged	192
Mere Allegations	192
Informing The Minister	192
Risk Assessment	193
The State of Mind	194
Some Factors for Consideration	194
Police Assistance	195

Where Police Do Not Charge Alleged Offender	196
CHAPTER 12 – PROVIDING BETTER INFORMATION TO PARENTS	197
Two Courses of Action	197
Meetings of Parents	197
Counselling for Parents	200
The Purpose And Content Of A Letter	200
Consult with SA Police	200
The Purpose of a Letter	200
A Statement of the Alleged Offending	201
Assurance of Safety	201
Contact Information	202
Request for Confidentiality	202
Concluding the Letter	203
Should the Teacher be Named When No Suspicion?	203
Should the Teacher be Named Where Suspicion of Other Victims?	205
Letters to be Translated	208
Timing of the Letter	209
How Should the Letter Be Sent?	209
Letters to Previous Students	210
Two Prohibitions	210
Keeping Parents Informed	211
CHAPTER 13 – OTHER ISSUES	212
The Role of a Governing Council	212
The Powers of a Governing Council	213
The Functions of a Governing Council	214
The Functions of the Principal	215
Limits on the Powers and Functions	215
The Question of Joint Responsibility	217
Other Limits on Power	217
Power to Send a Letter?	218
Resolution of Disputes	220
Obtaining Legal Advice	220
Recommendations	221
Conclusion	221
Reviewing Mandatory Notification	222
Student On Student Behaviour	227
Third Parties Using DECD Sites	228
Informing Teachers And Principals	229
Recruiting Investigators	230
Counselling For Victims And Victim's Parents	230
Increasing the Resources of the Screening Unit	231
Note taking	231
Managing Critical Incidents	232

Child Sex Offenders Registration Act	233
Liaison With Police	234
Information On Prosecutions	236
 CHAPTER 14 – GUIDELINES PROPOSED	 237
The Need for Guidelines	237
Application to All Schools	238
Purpose of Guidelines	239
What the Guidelines Will Cover	239
 CHAPTER 15 – GUIDELINES	 241
 CHAPTER 16 – RECOMMENDATIONS	 277
 APPENDICES	 287

INTRODUCTION

The Terms of Reference

1. On 1 November 2012, the Hon. Grace Portolesi MP, then Minister for Education and Child Development, appointed me to conduct an independent review into the events and circumstances surrounding the arrest and later conviction of the Director of the OSHC service at the Largs Bay Primary School on charges of sexual assault committed against a child in his care. The Terms of Reference of the Inquiry are:

To undertake an independent review in relation to the events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at Largs Bay Primary 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.

When the Minister announced the Inquiry in the House of Assembly, she did not name the Largs Bay Primary School. She referred to it as “this Adelaide metropolitan school”. Neither she nor those who asked her questions in the House of Assembly on subsequent occasions named the school. I infer that the purpose of the Minister and those who questioned her in not naming the school was that nothing would be said that might identify the victim.

2. When it was necessary to quote the Terms of Reference in correspondence or in any other document published by the Inquiry, I have referred to the school as “a school in metropolitan Adelaide”. My purpose in doing so was to ensure that nothing would be said that might identify the victim. In the course of the Inquiry, I interviewed the parents of the victim. They told me that the victim has left Largs Bay Primary School and attends another school. Other evidence given to the Inquiry established that a relatively large number of students had left the school in 2011 and 2012 and now attend other schools. At this point in time, there is little risk that the victim will be identified by naming the school. As the victim has changed schools, it is appropriate to name the school in this report.

3. There is a further practical reason for naming the school. When making my findings as to the events that occurred following the arrest of the Director of the OSHC service, it has been necessary to name individuals who were involved at different stages. The report would have conveyed little useful information if I did not do so. A number of those individuals occupied and some still occupy positions at the school. The fact that those persons are named would, in any event, have identified the school.

The Meaning of the Terms of Reference

4. Broadly speaking, the Terms of Reference require two tasks to be undertaken. The first is essentially an enquiry to ascertain facts. It is to investigate the events and circumstances surrounding the arrest and later conviction of Mr Mark Harvey, who was the Director of the OSHC service at Largs Bay Primary School, and the failure to inform the

parents of that school in a timely manner that he had been convicted. The second part requires recommendations of procedures that should be in place to deal with future occasions when allegations of sexual misconduct are made in schools.

5. In my view, the proper discharge of the first task requires an examination of how the events following the arrest of Mark Harvey were managed both by the school and by the Department for Education and Child Development on the one hand and by the South Australia Police on the other. The appropriate time to commence that examination is the time when the allegations were first made against Harvey. When I was first appointed, it was not clear what the end point of this part of the Inquiry should be as events continued to unfold throughout November and December 2012. I had to deal with facts that were continuing to unfold and with fresh incidents occurring, at times, almost on a daily basis. In the result, it became clear that a convenient end to that part of the Inquiry dealing with events at the Largs Bay Primary School is the end of the school year on 14 December 2012.

6. The continued unfolding of events and new incidents has caused the Inquiry to occupy a longer time than Minister Portolesi initially believed to be necessary. In addition, the Inquiry has had to examine issues that were not contemplated by Minister Portolesi when she established the Inquiry. The importance of the subject matter also required an opportunity to be given to the public and, in particular, parents of the Largs Bay Primary School to make submissions. The Inquiry has, therefore, taken a longer time than the Minister believed to be necessary. It has certainly taken a longer time than I had anticipated.

7. The direction in the second paragraph of the Terms of Reference requires an examination of current processes so that recommendations can be made as to how the Department for Education and Child Development and other relevant agencies should manage allegations of sexual misconduct by a member of the staff at the school or by a person employed by a governing council of a school. Given that this Inquiry resulted from the failure to make proper disclosure of allegations of sexual misconduct to parents at the Largs Bay Primary School, it will be necessary to give particular attention to the question whether disclosure should be made to parents and, if so, when and how that disclosure should be made.

Not a General Inquiry

8. It must be emphasised that this Inquiry is not a general inquiry into sexual misconduct in schools nor into the manner in which the Department for Education and Child Development has managed all allegations of sexual misconduct made in respect of staff at schools in South Australia. The Terms of Reference limit the inquiry to the events at Largs Bay Primary School. However, for the reasons given in Chapter 9 of this report, I decided to survey allegations of sexual misconduct in Government schools made in the four year period from 2009 to 2012 in order to gain an understanding of the kind of sexual misconduct that has been alleged against teachers and other members of staff at those schools. That survey was necessary for the purpose of making recommendations as to the processes that should be implemented by the Department for Education and Child Development. The study of the two arrests mentioned in Chapter 10 was made for the same reasons.

The Relevant Agencies

9. At first, it appeared that the only relevant agencies were the Department for Education and Child Development and the South Australia Police. However, in February 2013, it was disclosed that the Screening Unit of the Department for Communities and Social Inclusion had given to a person, who had been convicted of indecent behaviour, a clearance to work with teenage students. That fact required an examination of the adequacies of the screening process by the Department for Communities and Social Inclusion. It will be necessary also to consider what, if any, role a governing council might have in the process of disclosing information to parents. While a governing council is not an agency of Government, it is an important part of the administration of a school.

Law Reform

10. The Terms of Reference do not require me to consider matters of law reform. Instead, they require recommendations as to the procedures that might be adopted when a school must manage allegations of sexual misconduct. However, in the course of the Inquiry, five matters where law reform is desirable have been identified. They are noted in the recommendations.

11. Early in this Inquiry, it became very apparent that this report would have to include an examination of the legal principles regulating the disclosure of allegations of sexual misconduct. This was necessary both to provide the legal context for any recommendations and to inform teachers, principals and officers in the central office of the Department for Education and Child Development of the legal principles that regulate the disclosure of information concerning allegations of sexual misconduct. One important piece of legislation is section 71A of the *Evidence Act*. Furthermore, misunderstandings by officers of the Department for Education and Child Development as to what constituted a suppression order and their lack of knowledge of the relevant provisions in the *Evidence Act* were two reasons why, in the case of the Largs Bay Primary School, there was a failure to make proper disclosure. In addition, a complete appreciation of the operation of the *Evidence Act* will be assisted by an understanding of the course of a criminal prosecution. That in turn will provide a better understanding of the stages at which information could be disclosed to parents at schools. For that reason, a brief description of the course of a criminal prosecution has also been included in this report.

12. Another reason for the educative nature of sections of this report is the public interest in this Inquiry. Given that public interest, it is likely that this report will be read by members of the public who might not have a detailed understanding of such matters as the relevant legislation, the course of a criminal prosecution, the operations of the Department for Education and Child Development, the processes implemented by the Department when allegations of misconduct, be it sexual or other offending, are made against teachers, or the processes of disciplining teachers. An understanding of those matters is essential for a proper understanding of the reasons for the recommendations made in this report.

Terms Used in this Report

13. In this report, a number of abbreviations and acronyms will be used for convenience. The following is a key to the shorthand expressions used in this report.

“Association of Independent Schools” means “Association of Independent Schools of SA Inc”.

“CARL” means “Child Abuse Report Line”. It is the agency which must be notified by police and teachers, among others, who have a reasonable suspicion that a child has been or is being abused or neglected.

“OSHC” means “Out of School Hours Care”. It is an acronym in such common use that it is desirable to use it.

“SA Police” means South Australia Police.

“The Department” or **“the Department for Education”** means the Department for Education and Children’s Services until 21 October 2011 when the name of the Department was changed. Thereafter, it means the Department for Education and Child Development.

“The Minister” means the Minister for Education and Children’s Services until 21 October 2011 when the name of the portfolio was changed. Thereafter “the Minister” means the Minister for Education and Child Development.

I have for convenience used the single word **“parent”** to refer to all those who might have a child or children under their care or protection. The Inquiry is especially aware of the fact that schoolchildren are cared for by a range of persons. In addition to natural parents, there are stepfathers and stepmothers, foster parents, guardians, grandparents, other relations and other carers. It would make the reading of this report unmanageable if, on every occasion when reference is made to those who might be caring for a child, reference had to be made to all those who might be the carer of a child. Even the expression “parent or carer” can become unwieldy. For that reason, the word “parent” will be used in this report and will signify and include natural parents as well as step-parents, foster parents, guardians, grandparents and any other relative or other person caring for a child. No disrespect is intended by using the word “parent” in this way.

The pronoun **“he”** is used frequently. It is used with the provisions of section 26 of the *Acts Interpretation Act* firmly in mind and without any disrespect to women. Therefore, unless the context indicates a contrary intention, the pronoun “he” should be construed as including the feminine gender. That usage allows for a more readable document.

I will refer to Mr Mark Harvey as either “Mark Harvey” or “Harvey”. In doing so, I mean no disrespect. I do so for the purpose of distinguishing him from Mr Jadyne Harvey, a ministerial adviser at different times to the Hon. J Weatherill MP and the Hon. G Portolesi MP.

As the events that led to this Inquiry occurred at a school and the recommendations will apply in schools, it has been convenient for the discussion of principles and recommendations to refer to schools. Nevertheless, the recommendations in this report apply with equal force (but with appropriate alteration) to non-government schools and to all places where children’s services operate.

Legislation

14. It will be necessary in this report to refer to a number of Acts of both the Parliament of South Australia and the Commonwealth Parliament. Those Acts are:

South Australia

Acts Interpretation Act 1915
 Adoption Act 1988
 Child Sex Offenders Registration Act 2006
 Children's Protection Act 1993 and Children's Protection Regulations 2010
 Constitution Act 1934
 Criminal Law Consolidation Act 1935
 Criminal Law (Sentencing) Act 1988
 Defamation Act 2005
 Education Act 1972 and Education Regulations 2012
 Education and Early Childhood (Registration and Standards) Act 2011
 Equal Opportunity Act 1984
 Evidence Act 1929
 Freedom of Information Act 1991
 Magistrates Court Act 1991
 Ombudsman Act 1972
 Public Sector Act 2009
 Public Sector Management Act 1995
 Statutes Amendment (Courts Efficiency Reforms) Act 2012
 Summary Offences Act 1953
 Teachers Registration and Standards Act 2004
 Victims of Crime Act 2001
 Whistleblowers Protection Act 1993
 Young Offenders Act 1993

Commonwealth

Criminal Code Act 1995
 Privacy Act 1988
 Privacy Amendment (Enhancing Privacy Protection) Act 2012
 Public Service Act 1999
 Sex Discrimination Act 1984

As a general rule, those Acts will be named in this report without the date of their enactment. For example, the *Education Act 1972* will be called the "*Education Act*".

15. When preparing this report, I have had regard to the law in operation as at 31 May 2013.

From time to time it has been necessary in this report to examine and discuss the intended operation or meaning of provisions in different Acts of Parliament. While it is necessary to examine legislation for the purpose of ascertaining the intended operation of relevant provisions, it is entirely inappropriate in a report of this kind to express a concluded opinion upon the meaning and effect of a provision in an Act of Parliament. The views expressed in

this report as to the meaning and operation of any provision in an Act of Parliament are neither intended to be nor are they legal advice. It will be necessary for a school or the Department to obtain legal advice on the operation of any legislative provision in any particular set of circumstances.

Premises and Staff

16. I commenced the Inquiry on 6 November 2012. The Department for Education offered rooms in the central office of the Department in the Education Building at 31 Flinders Street, Adelaide for the purpose of the Inquiry. In order to secure and maintain the independence of the Inquiry, I asked to be accommodated at a place other than the Education Building. The Attorney-General provided accommodation for me and my staff on the 10th floor of the building at 45 Pirie Street, Adelaide.

17. Initially, I was assisted by only one legal officer, Ms Amanda Pienaar. Ms Pienaar is a senior solicitor in the Crown Solicitor's Office. Ms Pienaar has provided extensive assistance as she has had considerable experience as a solicitor in conducting prosecutions of persons charged with sexual offending in schools and in other places. She also has a wide experience of conducting proceedings for the protection of children under the *Children's Protection Act*. Before coming to Australia, Ms Pienaar had been a prosecutor in the office of the Director of Public Prosecutions in South Africa and later a magistrate in that country. Ms Pienaar's assistance has been especially valuable. I was later assisted by Ms Claire Davidson, a legal officer in the Legislative Services Section of the Attorney-General's Department, and by Mr Brad McCloud, a senior solicitor in the office of the Crown Solicitor. On two brief occasions, I was ably assisted by Ms Kathy Rozaklis, a senior legal officer in the Legislative Services Section of the Attorney-General's Department, but, unfortunately, her valuable assistance was short-lived as she was required for other duties. My gratitude to each of my legal officers is unbounded. I am extremely grateful to them all for their tireless and considerable assistance. I am grateful also to Ms Kerry Martin, Ms Sue Burton, Ms Lina Perilli and Ms Fiona Blackmore who at different times have assisted in the typing of this report. They have endured my poor handwriting and repeated corrections of the manuscript with patience and good humour.

The Conduct of the Inquiry

18. From the outset of this Inquiry, I have received the complete co-operation of the Department for Education and SA Police and the officers of those two agencies. Immediately upon my appointment, Mr Gino DeGennaro, the Deputy Chief Executive of the Department, sent an email to all relevant officers in the Department asking that they arrange for all relevant documents to be supplied to me. In addition, two officers of the Department were appointed to pursue any inquiries made by me for documents and other information required for the Inquiry. That co-operation has continued throughout the Inquiry. At an early stage in the Inquiry, I had a meeting with the Commissioner of Police who assured me that I would have the full co-operation of the police force. I have had every assistance from the SA Police. I express my appreciation and gratitude to both the Department and SA Police for their assistance.

19. The Department supplied the Inquiry with an enormous volume of documents, in many cases with multiple copies of the same document. It was a substantial and time-consuming task to peruse all documents and to sort and classify them.

20. The nature of the Inquiry did not make it necessary to conduct public hearings. The events and circumstances associated with the arrest and later conviction of Mark Harvey were capable of being ascertained by interviewing police officers and employees of the Department as well as other individuals, such as members of the Governing Council of the Largs Bay Primary School. That was a task that I could undertake with the assistance of Ms Pienaar. It was not a task that required a full-scale commission of inquiry with legal representation of different parties. It was simply necessary to examine documents and to interview witnesses and then make findings of fact. In addition, the limited powers available to me at the commencement of the Inquiry meant that I had no alternative but to conduct the Inquiry in that way. I will note those limited powers in a moment.

21. Furthermore, the process of consultation required for the second paragraph of the Terms of Reference of the Inquiry did not require public hearings. It was necessary only to identify those persons who were in a position to provide useful information and to consult them.

22. I, therefore, proceeded to conduct the Inquiry and obtain information from such persons and in such manner as I thought fit.

Limited Powers

23. At a very early stage in the Inquiry, I became concerned at the lack of powers available to me. The fact that the Minister for Education had appointed me to conduct an Inquiry did not give me any powers to gather evidence. I did not even have the powers of a police officer. In every respect, I was in no different position from any other citizen. I had no power to summon witnesses, no power to compel the production of documents, and no power to require witnesses to swear an oath or make an affirmation to tell the truth. I was able to take evidence and inspect documents only if a witness was co-operative and agreed to give evidence and produce documents. In addition, witnesses who appeared before me would not have any of the protections available to witnesses who appear before a Royal Commission. The scope of the Inquiry I had been asked to undertake was larger than that of an inquiry by the Ombudsman but I did not even have the powers of the Ombudsman.¹ I expressed these concerns to the Minister for Education at a meeting on the afternoon of 8 November and to the Attorney-General at a meeting on the morning of 9 November 2012. On both occasions, I asked that I be granted the powers of a Royal Commissioner, stating that I had no desire to make the Inquiry larger than it needed to be. I expressed concern that the absence of the powers of a Royal Commissioner might inhibit the conduct of the Inquiry. Both Ministers declined my request on the ground that the grant of the powers of a Royal Commissioner might create an expectation that the Inquiry was of a larger scale than it needed to be.

¹ The Ombudsman has the powers of a Royal Commissioner: see section 19 of the *Ombudsman Act*.

24. The Crown Solicitor, Mr Greg Parker, also attended the meeting with the Attorney-General on 9 November. He suggested a means of avoiding my lack of powers. I will explain the procedure he suggested in a moment. It was agreed that I would proceed on the basis suggested by Mr Parker but, if I discovered that I needed further powers, I should again ask the Attorney-General.

25. With the assistance of Mr Parker and with the co-operation of Mr Keith Bartley, the Chief Executive of the Department for Education, the following arrangements were put in place to ensure that I could call officers from the Department to give evidence and provide documents. Mr Bartley sent a letter to each of the teachers and other employees of the Department that I wished to interview. The letter directed the intended witness to attend at the appointed time and stated that the intended witness could bring a friend or relative, a union official or a lawyer with him. The letter then explained how the interview was to be conducted. The letter also informed the intended witness that, as he will be acting in the performance of his duties in answering questions, he will be immune from civil liability under section 74 of the *Public Sector Act*, provided that he had acted in good faith in answering questions. A copy of that letter is Appendix A. The witness was also directed to make a statutory declaration stating that the evidence was true to the best of the knowledge, information and belief of the witness.

26. The Commissioner of Police instructed those police officers who I wished to interview to appear before me. Those officers later read the transcript of their evidence and made a statutory declaration that their evidence was true.

Appointment as Royal Commissioner

27. As events unfolded, it became apparent that it would be necessary to examine witnesses who were not employees of either the Department for Education or of SA Police. I was concerned that some would not be willing to be interviewed. I had no power to compel such witnesses to attend to give evidence nor any means of placing them under any obligation to tell the truth. I was also concerned that those witnesses should have the same protection as a witness who appeared before a Royal Commission. One group from whom I wished to hear evidence were the parents of the victim and parents of potential victims. In order to protect the identity of the victim and of other children who I thought might also be victims, I wished to have the power to make the evidence of those parents confidential. Confidentiality was also necessary because some of the potential victims were likely to be witnesses in criminal proceedings yet to be brought against Harvey. There were serious questions whether I had the power to order any part of the evidence given to me to be confidential, whereas it was clear that a Royal Commissioner does have power to order that evidence be confidential.

28. These concerns caused me to write on 4 December 2012 to both the Minister for Education and to the Attorney-General asking that I be granted the powers of a Royal Commissioner. My letters to the Minister and the Attorney-General are both attached as Appendix B and Appendix C to this report. By Letters Patent dated 10 December 2012, His Excellency the Governor invested me with the powers of a Royal Commissioner. A copy of the Letters Patent is Appendix D.

An Issues Paper is Published

29. In order to have the benefit of submissions of interested parties, especially on the questions of the procedures that might be recommended, I prepared an Issues Paper that set out some of the issues for consideration. On 27 and 28 November 2012, copies of the Issues Paper were sent to fifty persons and organisations. They were persons and organisations involved in education, in child protection, in law enforcement, in the criminal justice system, and other persons. A list of the persons and organisations to whom the Issues Paper was sent is Appendix E.

30. On 28 and 29 November 2012, I caused the Terms of Reference to be published in both *The Advertiser* and *The Australian* newspapers. The notice publishing the Terms of Reference also stated that the Issues Paper had been prepared and invited those interested to obtain a copy of the Issues Paper from the Inquiry. A copy of the notice published in both newspapers is Appendix F. Only 22 requests were made for the Issues Paper.

31. The Commission received submissions from 23 persons and organisations. They are listed in Appendix G.

The Hearings

32. The hearing of witnesses began on 20 November 2012. At times, there were breaks between witnesses. The hearings ceased on 10 April 2013. At no stage in the Inquiry did a witness refuse to give evidence or decline to answer a question.

33. The Inquiry conducted most of its hearings in a conference room on the 10th floor of the building at 45 Pirie Street, Adelaide. On some occasions, when that conference room was required for other purposes, the hearings were conducted in a conference room on the 4th floor of that building.

34. I asked witnesses questions and documents were tendered by them or proved through them. The hearings were recorded and a transcript was made of the recorded proceedings. Each witness who gave his evidence before I was invested with the powers of a Royal Commissioner was asked to read the transcript of his evidence, make any corrections, and then make a statutory declaration that the evidence was true to the best of his knowledge, information and belief. Once I had been invested with the powers of a Royal Commissioner, each witness either swore an oath or made an affirmation to tell the truth. It was, therefore, unnecessary to ask those witnesses to read the transcript and make a statutory declaration that the evidence was true and correct.

35. Before I was invested with the powers of a Royal Commission, some members of the Governing Council of the school consented to be interviewed. They read the transcript of their evidence and made a statutory declaration that it was true.

36. Ninety-eight persons gave evidence. The names of all witnesses are listed in Appendix H except for the names of confidential witnesses. Their names are confidential in order to protect children. There are more than 560 exhibits, many of which are confidential.

37. I recommend that, when the unedited version of this report can be released to the public, the transcript of evidence be available to the public except those parts that are confidential.

Notice to the School

38. I was concerned that parents of the Largs Bay Primary School should be aware that they could give evidence or make submissions. On 16 November 2012, I wrote to Ms Jacqui Larkin, the chairperson of the Largs Bay Primary School inviting her and other members of the Governing Council to make submissions. I also asked her to inform parents that they may make submissions. A copy of my letter to Ms Larkin is Appendix I. Later, after Ms Larkin and other members of the Governing Council had given evidence, I again enlisted her assistance. She kindly arranged for the following notice to be placed in the school newsletter published on 12 December 2012.

Governing Council News

The Hon. B M Debelle AO, QC has been appointed to inquire into the events and circumstances surrounding the arrest and later conviction of Mr Mark Harvey for sexual assault committed on a child at Largs Bay Primary School on 1 December 2010.

His terms of reference are:

To undertake an independent review in relation to the events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at the school in metropolitan Adelaide against a child 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.

Mr Debelle has informed me that he is willing to hear evidence and submissions from parents. If you wish to make a submission please call **(08) 8207 1953** or email:

independenteducationinquiry@agd.sa.gov.au

An Issues Paper has been prepared. It deals with the issues in the second paragraph of the Terms of Reference. Mr Debelle is calling for submissions on the issues raised in that paper and other issues relevant to the terms of reference. You may make either a written or oral submission.

Please address written submissions to:

independenteducationinquiry@agd.sa.gov.au

Submissions must be made before 30 January 2013. The Issues Paper is available by calling **(08) 8207 1953** or emailing **independenteducationinquiry@agd.sa.gov.au**.

Several parents responded to that invitation.

Roundtable Discussions

39. It is very easy to make recommendations. It is far more difficult to make recommendations that will both be useful and be capable of being put into effect. In an attempt to make recommendations that would be useful and capable of being put into effect, I held meetings with representatives of organisations involved in education as well as with representatives of the SA Police.

40. The following are the organisations who participated in those discussions, the dates on which the separate discussions were held and the persons who attended those meetings.

Department for Education and Child Development - Monday, 4 and 6 February 2013

Mr Gino DeGennaro, Deputy Chief Executive.
 Mr Garry Costello, Head of Schools.
 Mr Benjamin Temperly, Head of Policy and Communications.
 Ms Anne Kibble, Director Regional Operations Programs.
 Ms Gaye Brimacombe, Interagency Child Protection Policy Adviser.

Australian Education Union (SA Branch) - Wednesday, 20 February 2013

Ms Anne Walker, Legal and Information Officer.
 Mr James Hignett, Co-ordinator of the Organisers Group.
 Mr Geoffrey Black, Solicitor at Wallmans Lawyers.

South Australia Police - Friday, 22 February 2013

Assistant Commissioner Paul Dickson.
 Superintendent Noel Bamford.
 Superintendent Damien Powell.
 Detective Senior Sergeant Ian Gibbons.

Catholic Education SA and Association of Independent Schools - Wednesday, 27 February 2013

Mr Roger Anderson, Deputy Chief Executive Officer, Association of Independent Schools.
 Dr Paul Sharkey, Director, Catholic Education SA.
 Ms Jocelyn Milne, Legal Counsel, Catholic Education SA.

South Australian Primary Principals Association and South Australian Secondary Principals Association - Thursday, 28 February 2013

Mr Stephen Portlock, President of South Australian Primary Principals Association.
 Ms Janet Paterson, President of the Secondary Principals Association.

South Australian Association of School Parent Clubs - Friday, 8 March 2013

Ms Jenice Zerna, President.
 Ms Gwen Secomb, Project Officer.

The South Australian Association of State School Organisations Inc was invited to participate in these discussions. It declined to do so stating that it was unable to do so because notice was too short. It had at least the same notice as the other organisations that did participate. The whole of the discussion with Catholic Education SA and the Association of Independent Schools is confidential. The order for confidentiality was necessary in order to allow for past incidents of sexual misconduct in schools to be freely discussed.

41. Although the meetings were held mainly for the purpose of discussion of issues relevant to proposed recommendations, it was likely that, in the course of the discussion, those persons might give evidence of facts. For that reason, each person present at each of these meetings either swore an oath or made an affirmation to tell the truth. The discussion in

each of those meetings was recorded and a transcript was later produced. The transcripts of each of those meetings and discussions are part of the proceedings of the Inquiry. In those instances where evidence was given about facts that were confidential, I made an order that that part of the transcript be a confidential transcript. Most of those instances where I ordered that the transcript be confidential related to evidence concerning allegations of sexual misconduct and the order as to confidentiality was made either to protect the victim or because the proceedings had not been brought to a conclusion.

Other Reviews

42. This Inquiry is neither the first nor the only inquiry into or review of the events at the Largs Bay Primary School or of matters relating to disclosure of sexual offending by persons employed at schools.

43. The first inquiry was initiated by the Ombudsman. As will be seen in the narrative in Chapter 6 of this report, the Ombudsman began his inquiry in June 2012. He was responding to a complaint made by a member of the Governing Council of the Largs Bay Primary School.

44. On 5 November 2012, the Commissioner of Police initiated a review of the policies and procedures relevant to notification and release of information in the investigation of serious sexual offences involving children. That review has been completed.

45. The Commissioner of Police also initiated an examination of police records to identify the employment history of Mark Harvey and to ascertain whether similar incidents had occurred of which school communities had not been advised. That review has been completed.

46. At about the same time as the Minister for Education announced this Inquiry, the Department for Education began reviewing its own procedures. One of those reviews concerned the management of critical incidents and its management of allegations of sexual misconduct by members of staff at schools. That review resulted in a report entitled *Critical Incident Review Report* published by the Department in January 2013. Another review has resulted in an interim report published in April 2013. It is called *Interim Guidelines for Disclosing Information: Responding to Critical Incidents of a Sexual Nature Involving a Child or Young Person*. The Department's internal processes of review continue.

47. On 13 November 2012, the Premier announced that the Chief Executive of the Department of Premier and Cabinet had convened a Government Task Force. That Task Force is called the "Interagency Task Force on Disclosure of Sexual Offences". The initial members of the Task Force were the Chief Executive of the Department of Premier and Cabinet, the Commissioner of Police, the Chief Executive of the Department for Education, the Crown Solicitor and the Executive Director of SA Health. In December 2012, Ms Vanessa Swan, Director of the Office for Women, and Ms Katrina Dee, the Manager of the Yarrow Place Rape and Sexual Assault Service were also appointed to the Task Force. On 21 March 2013, Mr David Waterford was appointed Deputy Chief Executive, Child Safety in the Department for Education. Shortly after, he was appointed to the Task Force. The Terms of Reference of the Task Force are as follows:

The Interagency Task Force on Disclosure of Sexual Offences will:

1. Coordinate a crisis management response to the impact of the conviction of Mark Christopher Harvey for a child sex offence on communities and organisations, including:
 - (a) disclosure of criminal activities to organisation or people connected with the past or present employment and volunteer arrangements of the offender, consistent with legislation
 - (b) the delivery of support services to people and organisations affected by the criminal activity.
2. Ensure the application of current government policies and practices relating to the disclosure of sexual offences by people working with children, including disclosing information retrospectively to relevant people or organisations who, by policy or practice, were not informed of the criminal activity at the time of the offending.
3. Provide input into the implementation of any recommendations arising from the Independent Education Inquiry.
4. Provide advice to the Department for Education and Child Development on the notification to parents in any other allegations of sexual assault before the Independent Education Inquiry reports to government.

The work of the Task Force continues. It meets as often as necessary providing advice to Cabinet as required.

The Scheme of this Report

48. As already mentioned, there are two essential aspects of this Inquiry. The first is to ascertain the facts concerning the failure of the Department for Education to inform parents at the Largs Bay Primary School of the conviction and sentencing of Mark Harvey. The second is to recommend appropriate procedures for the management of allegations of sexual misconduct in schools. Central to both aspects of the Inquiry is the safety and welfare of children at schools. The first chapter in this report will, therefore, note the legal obligations of schools to ensure the safety, health and well-being of children in their care.

49. When making recommendations, it is necessary to have regard, among other things, to legislation that restricts the publication of the name of a person accused of a sexual offence and the name of a person said to be the victim. Chapter 2 of the report will, therefore, consider the provisions of relevant legislation and legal principles.

50. Decisions as to what action should be taken in the course of managing allegations of sexual misconduct in schools will be assisted by an understanding of the course of a criminal prosecution from the time a person is arrested until trial. A knowledge of the relevant legislation and an understanding of the steps in a criminal prosecution will also provide a clearer insight into what will be identified as shortcomings in the Department for Education when dealing with the events following the arrest of Mark Harvey. For those reasons, Chapter 3 of this report will include a discussion of the steps in a criminal prosecution. It will also include a note on the disciplinary processes to which teachers are subject.

51. The process of child protection will be improved and enhanced if those agencies or organisations involved in protecting and working with children share information. The

sharing of information should also reduce the need to interview children. The existing processes by which information is shared are noted in Chapter 4.

52. Chapter 5 will note some relevant facts about the Department.

53. Chapter 6 will narrate the events that occurred at the Largs Bay Primary School from the arrest of Harvey until the end of the school year in 2012. It will also examine the conduct of both the Department and the office of the Minister for Education in relation to events following the arrest of Mark Harvey and the conduct of the Department in failing to disclose the fact of his conviction to parents at the Largs Bay Primary School.

54. Chapter 7 will examine the question whether in December 2010, Mr Weatherill, who was then Minister for Education, was informed of the arrest of Harvey.

55. Chapter 8 will examine some of the failures of the Department that were associated with its mismanagement of events following Harvey's arrest.

56. Chapter 9 notes the results of a survey by this Inquiry of sexual allegations made against teachers and others employed at schools in the four year period 2009 to 2012. In order to be properly equipped to make recommendations for the management of allegations of sexual misconduct, it was necessary to examine the kinds of allegations that had been made in the Department's schools in past years.

57. Chapter 10 examines the events associated with the arrest of a teacher and a case manager in 2013. Those events illustrate particular issues that need to be addressed.

58. Chapter 11 examines the factors that must be considered when deciding whether to inform parents, members of staff at a school, and members of the governing council of a school of allegations of sexual misconduct. It also examines when and how that information should be provided.

59. Chapter 12 examines how parents are best informed of allegations of sexual misconduct at schools. This chapter also examines whether the Department should do more than simply write a letter to parents.

60. Chapter 13 will examine several relevant but unrelated issues.

61. Chapter 14 will propose that Guidelines be established to assist the management of allegations of sexual misconduct in schools. Chapter 15 will contain those Guidelines.

62. Chapter 16 will list the recommendations contained in this report.

CHAPTER 1 - THE SAFETY AND WELFARE OF CHILDREN

63. Although the catalyst for this report was the failure of the Department for Education to give appropriate information in a timely manner to parents of children at the Largs Bay Primary School, the rationale that will guide the recommendations in this report will be the safety, health and well-being of children at schools. The protection and advancement of the interests of children have been addressed in the substantial report by Ms Robyn Layton QC, *Our Best Investment - A State Plan to Protect and Advance the Interests of Children*, hereinafter called the “Layton Report”. This chapter directs its attention to both the duty at common law and the statutory duties on teachers and school administrators to act so as to ensure the safety and welfare of children in their care. It will also note the legislation protecting victims of crime.

Common Law Duty

64. Teachers¹ and school administrators² owe to the children in their care a duty to take reasonable care to protect them from a reasonably foreseeable risk of injury. The duty exists at common law.³ That duty is not necessarily confined to events on school premises or during school hours.⁴ The same duty of care applies in both government and non-government schools. In addition to the duty at common law, teachers and school administrators must comply with a number of statutory duties or obligations.

Statutory Duties

65. Section 4 of the *Children’s Protection Act* states that it is a fundamental principle that every child has a right to be safe from harm. The Act then gives effect to that fundamental principle in section 11 by establishing a mandatory duty for teachers, among others, to give notice to the Child Abuse Report Line⁵ where the teacher suspects on reasonable grounds that a child has been or is being abused or neglected. Abuse in this context includes sexual abuse.

66. The *Children’s Protection Act* reflects the principles and philosophy of the United Nations Convention on the Rights of the Child which declares that child protection is a

¹ *Geyer v Downs* (1977) 138 CLR 91; *Richards v State of Victoria* [1969] VR 136. See generally RP Balkin and JLR Davis, *Law of Torts* (Butterworths, 4th ed, 2009) para. 7.21.

² *Commonwealth v Introvigne* (1982) 150 CLR 258; *Watson v Haines* (1987) Aust. Tort Reports 80-094.

³ *Warren v Haines* (1986) Aust. Tort Reports 80-014, 67,633.

⁴ *Geyer v Downs* (1977) 138 CLR 91; *Trustees of Roman Catholic Church, Dioceses of Bathurst v Koffman* (1996) Aust. Tort Reports 81-399.

⁵ The terms of Section 11 require that notice be given to “the Department”. The Department is defined in the *Children’s Protection Regulations* as the Department for Families and Communities (now called the Department for Communities and Social Inclusion following the machinery of Government changes on 21 October 2011). The *Children’s Protection Act* was assigned to the Minister for Education and Child Development during the same machinery of Government changes. Administrative arrangements have been made to allow the functions under the *Children’s Protection Act* to be carried out by the Department for Education and Child Development. The Child Abuse Report Line is administered by Families SA, which is a unit of the Department.

primary consideration. Article 3 of that Convention spells out in clear terms the goal of protecting children. Article 3 states:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

It will have been noticed that the Convention states that the obligation to protect children applies at all levels of government and to all social institutions in both the public and private sector. That obligation, therefore, is intended to apply in both government and non-government schools.

67. The *Education Act* does not in express terms spell out any obligation to protect children. However, such an obligation is to be found in the *Education and Early Childhood Services (Registration and Standards) Act*. That Act is part of uniform legislation that applies in each of the States and Territories of the Commonwealth of Australia. Although it is not expressly stated, the Act applies to all schools. It, therefore, applies to both government and non-government schools.⁶

68. Section 9 of the Act states the objects and principles of the Act. Section 9(1) is in these terms:

- (1) The objects of this Act include providing for the regulation of the provision of education and early childhood services in a manner that maintains high standards of competence and conduct by providers and—
 - (a) recognises that all children should have access to high quality education and early childhood facilities and services that—
 - (i) address their developmental needs; and
 - (ii) maximise their learning and development potential through an appropriate curriculum; and
 - (iii) support their educational achievement; and
 - (iv) promote enthusiasm for learning; and
 - (v) support, promote and contribute to their health, safety and well-being; and
 - (b) provides for a diverse range of services; and

⁶ The definition of “school” in section 5 of the National Law includes government and non-government schools. The National Law is established by section 10 of the *Education and Early Childhood Services (Registration and Standards) Act* and is Schedule 1 of that Act.

- (c) recognises the rights of parents to access a diverse range of education and early childhood services providers; and
- (d) enhances public confidence in the operation of education and early childhood services providers.

Section 9(1)(a)(ii), therefore, recognises that schools should promote and contribute to the health, safety and well-being of children. In section 9(2) the Act states the principles that should be taken into account in the administration of the Act. It is in these terms:

- (2) The following principles should be taken into account in the administration of this Act:
 - (a) parents and guardians should have the right to choose the best services for their family;
 - (b) parents and guardians, and members of school communities, should have access to relevant information concerning the regulation of their child's school;
 - (c) the welfare and best interests of children is the primary consideration in the performance of the Board's functions;
 - (d) any person who works with children is obliged to protect them, respect their dignity and privacy and safeguard and promote their well-being;
 - (e) cooperation between the Minister, the Board and the school education sectors contributes to achieving the effective provision of education and early childhood services;
 - (f) successful learning is built on a foundation of rich, engaging environments and meaningful interactions in which children's voices are listened to and acted on.

For present purposes, paragraphs (b), (c) and (d) are of particular relevance. It is clear, therefore, that there is an obligation on all schools to provide a healthy and safe environment for children.

69. Section 10 of the *Education and Early Childhood Services (Registration and Standards) Act* adopts the Education and Care Services National Law and makes it apply as a law of the State of South Australia. The purpose of the National Law is to establish a national education and care services framework for the delivery of education and care services to children.⁷ It is a uniform law that applies to all schools in all States and Territories of the Commonwealth.⁸ Its provisions include a statement in section 3 of the obligations and guiding principles of the National Law. It is in these terms:

- (2) The objectives of the national education and care services quality framework are—
 - (a) to ensure the safety, health and wellbeing of children attending education and care services;
 - (b) to improve the educational and developmental outcomes for children attending education and care services;
 - (c) to promote continuous improvement in the provision of quality education and care services;

⁷ Section 3 of the Education and Care Services National Law.

⁸ See definition of "school" in section 5 of the Education and Care Services National Law.

- (d) to establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the national education and care services quality framework;
 - (e) to improve public knowledge, and access to information, about the quality of education and care services;
 - (f) to reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.
- (3) The guiding principles of the national education and care services quality framework are as follows—
- (a) that the rights and best interests of the child are paramount;
 - (b) that children are successful, competent and capable learners;
 - (c) that the principles of equity, inclusion and diversity underlie this Law;
 - (d) that Australia's Aboriginal and Torres Strait Islander cultures are valued;
 - (e) that the role of parents and families is respected and supported;
 - (f) that best practice is expected in the provision of education and care services.

Sections 3(2)(a) and 3(3)(a) of the National Law are an unequivocal Parliamentary expression of the principle that the rights and best interests of children are paramount and that the safety, health and well-being of children attending schools are to be assured.

70. The protection of children is a national concern. The Council of Australian Governments at a meeting on 30 April 2009 endorsed a document called *Protecting Children is Everyone's Business*. It is the National Framework for Protecting Australia's Children 2009 to 2020. All Australian Governments are committed to implementing the initial actions it contains. It is a long term, national approach to help protect all Australian children.

The Protection of Victims

71. The protection of children also involves the protection of those children who are victims of crime and, in the context of this report, those children who are victims of sexual crimes. It is, therefore, necessary to note the public policy that requires that due regard be given to the interest of victims. That policy is exemplified in a number of ways. It finds statutory expression in the provisions of the *Victims of Crime Act*. One of the objects of that Act is to give statutory recognition to victims of crime and the harm they suffer from criminal offending.⁹ The Act declares the principles that should govern the way victims are dealt with by public agencies and officials.¹⁰ While the principles of the Act do not give rise to legal obligations, public agencies and officials are required to have regard to and to give effect to them so far as it is practical to do so.¹¹ The Act expressly states that the need for the declaration arises out of national and international concern about the position of victims of crime in the criminal justice system.¹² One instance of that international concern is the

⁹ Section 3 of *Victims of Crime Act*.

¹⁰ Part 2 of *Victims of Crime Act*.

¹¹ Section 5(4) of *Victims of Crime Act*.

¹² Section 5(2) of *Victims of Crime Act*.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations in 1985. Article 4 of the Declaration states that victims of crime should be treated with compassion and respect for their dignity. The *Victims of Crime Act* also establishes the Office of the Commissioner for Victims' Rights whose powers include the power to further the interests of victims.¹³

72. Statutory effect is given to the principles expressed in the *Victims of Crime Act* by the *Criminal Law (Sentencing) Act* ("the *Sentencing Act*"). Section 10(1)(d) of the *Sentencing Act* requires courts to have regard to the interests of victims when sentencing offenders for serious crimes that involve a victim. In the case of serious offences, the victim may read to the court a victim impact statement.¹⁴ Section 10(2)(c) of the *Sentencing Act* also seeks to protect children by directing judges when determining the sentence for an offence involving the sexual exploitation of a child to have regard to the protection of children by ensuring that paramount consideration is given to the need for deterrence, both general deterrence to the public and personal deterrence to the offender.

73. Section 71A(4) of the *Evidence Act* is another statutory provision intended to protect and safeguard the interests of victims of sexual offences. It protects the victim by prohibiting disclosure of anything that might identify the victim.¹⁵ While in certain circumstances the identity of an adult victim can be disclosed, the identity of a victim who is a child can never be disclosed. Other restrictions on publishing the name of the victim are contained in the *Young Offenders Act*.¹⁶ Those provisions and other provisions dealing with publication of the name of an alleged offender will be considered in the next chapter. For the moment, it is sufficient to note that there is a clear statutory policy of recognising the rights of victims of crime including the rights of victims of sexual crimes.

¹³ Section 16 of *Victims of Crime Act*.

¹⁴ Section 7A of *Criminal Law (Sentencing) Act*.

¹⁵ Section 71A(4) of *Evidence Act*.

¹⁶ Section 13 of *Young Offender's Act*.

CHAPTER 2 – THE LEGAL FRAMEWORK

74. This chapter comprises two parts. The first is an examination of legislation that regulates the publication of the names or identity of both the person accused of committing a sexual offence and of the alleged victim of the offence. The second part will examine those aspects of the law of defamation that must be considered when determining whether to inform a school community of allegations of sexual misconduct.

PART 1 - RESTRICTIONS ON PUBLICATION

75. The law restricts the disclosure of information relating to allegations of sexual misconduct. Those restrictions relate to disclosure of the name of the person accused of committing a sexual offence and the name of a person said to be the victim of the offending. The restrictions on publication are contained in the *Evidence Act* and the *Young Offenders Act*. Both in different ways restrict the publication of the name of a person accused of committing a sexual offence and the name of the alleged victim of that offence. It is necessary also to consider suppression orders.

The Evidence Act

76. Section 71A of the *Evidence Act* restricts publication of certain information when a person has been charged with a sexual offence¹. These statutory constraints are intended to protect the interests of both the alleged victim and of the accused person pending the trial of that accused person. Section 71A(4) protects the interests of the victim. It is in these terms:

- (4) A person must 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).

It is readily apparent from the manner in which sub-section (4) is expressed that it prohibits any publication of any statement or representation that might reveal the identity of the alleged victim or from which the identity of the alleged victim might be inferred. If the alleged victim is a child, publication cannot be authorised, even by a judge. This is clear and unequivocal direction not to publish anything that might identify a child.

77. Section 71A(2) prohibits the publication of a statement or representation that might identify the person accused of a sexual offence. It states:

- (2) Subject to this section, a person must not, before the relevant date, publish any statement or representation -

¹ A sexual offence is defined in section 4 of the *Evidence Act*. The implications of that definition are examined in para 549 of Chapter 11.

- (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 reasonably be inferred,
- unless the accused person consents to the publication.

When introducing the Bill in the Parliament, the Treasurer, the Hon. S J Baker MP, stated that the purpose of section 71A(2) was to protect the interests of the accused person. He said:²

The rationale is that a person should not be publicly associated with sexual offences until it has been determined that there is sufficient evidence for the accused to have a case to answer.

He later added that section 71A(2):³

will ensure that the accused is not publicly linked to a sexual offence until it is certain the accused has a case to answer.

Section 71A(2) is a provision that is designed to protect the reputation of the accused person until it is certain that the accused person has a case to answer. It is founded on the presumption of innocence.

78. The expression “the relevant date” in subsection (2) is defined in subsection (5) of Section 71A. The occasion for the relevant date depends on the kind of offence with which the accused person has been charged. Section 71A(5) is in these terms:

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) in relation to a charge of any other minor indictable offence or a charge of a summary offence - the date on which a plea of guilty is entered by the accused person or the date on which the accused person is found guilty following a trial; or
- (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.

The expressions “major indictable offence”, “minor indictable offence” and “summary offence” are explained in paragraphs 120 to 127 of Chapter 3. Another way of stating the relevant date could be as follows:

1. If the accused person has been charged with 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, it is the date on which the accused person is committed for trial or, if the accused person has pleaded guilty, the date on which that person is committed for sentence.

² South Australia, *Parliamentary Debates (Hansard)* House of Assembly, 9 July 1997, 1831 (S J Baker, Treasurer).

³ Ibid.

2. If the accused person has been charged with a minor indictable offence or a summary offence, it is the date on which a plea of guilty is entered by the accused person or the date on which the accused person is found guilty following a trial. These will usually be proceedings in a Magistrates Court.
3. When the charge, whatever its nature, is dismissed or the proceedings lapse by reason of the death of the accused person, or for want of prosecution or for any other reason.

In this report, I shall, for convenience, refer to each of the first two occasions in paragraphs numbered 1 and 2 as “the date for committal” or “the date when the alleged offender is committed for trial or sentence” or a similar phrase.

79. Late in 2012, Parliament enacted the *Statutes Amendment (Courts Efficiency Reforms) Act*. The Act makes provision for a defendant who has pleaded guilty to a major indictable offence to be sentenced by a magistrate.⁴ Major indictable offences include many of the sexual offences. This provision will apply only if three conditions are satisfied. They are

1. the defendant has pleaded guilty before the preliminary examination;⁵
2. the Director of Public Prosecutions and the defendant consent,⁶ and
3. if the Magistrate is not of the opinion that the defendant should be sentenced in a superior court.⁷

This new legislation has failed to have regard to the terms of the definition of “relevant date” in section 71A(5) and, in particular, to the occasions when it is lawful to publish the name of an accused person. On a strict construction of section 71A(5), despite the fact that the defendant has pleaded guilty, the consequence is that there will be no committal on the major indictable offence and so no date when the identity of the defendant can be published. As already mentioned, the intent of section 71A(2) is to prevent a person from being publicly associated with a sexual offence until the time when it is certain that he has a case to answer. A plea of guilty is an admission of the offending. When a plea of guilty has been entered, there is no justification for prohibiting publication. It might be argued that, on a liberal construction of section 71A and having regard to its intent, it would be lawful to publish the name of an accused person once that person has pleaded guilty before a preliminary examination. It is unnecessary, however, to speculate on that question since the Attorney-General is considering legislation to correct the oversight. Given that the *Statutes Amendment (Courts Efficiency Reforms) Act* does not commence until 1 July 2013 and that a Bill to amend that Act was introduced into the House of Assembly on 5 June 2013, it is likely that any difficulties consequent on the oversight might not exist or will be of short duration only. To all intents and purposes, this particular consequence of the *Statutes Amendment (Courts Efficiency Reforms) Act* can be put to one side. It does not substantially affect the discussion in this chapter of the terms of section 71A.

⁴ The relevant provisions of the amending Act are sections 25, 26, 37, 38 and 39.

⁵ See paragraph 131 in Chapter 3 for an explanation of a preliminary examination.

⁶ Section 108(1) of *Magistrates Court Act*.

⁷ *Ibid.*

80. In September 2012, Parliament reconsidered the restrictions in section 71A(2) that prohibit publication of the name of the accused person. The Attorney-General had in 2011 commissioned a review and report upon the operation of section 71A(2) from the Hon. Brian Martin AO, QC.⁸ In that report, Mr Martin recommended, among other things, that section 71A(2) should be repealed. When making that recommendation, he acknowledged “There is no ‘right’ answer”.⁹ He, therefore, recommended that if section 71A(2) should not be repealed, a court should be given power to permit publication if, in the opinion of the court, publication is required for the protection of the public or in the interests of the administration of justice or for the purposes of any investigation.¹⁰ Parliament was not prepared to repeal section 71A(2) but instead amended section 71A to include the power of a court to permit publication in the circumstances recommended in the Martin Report. In that respect, the Parliament re-affirmed the position that an accused person should not be publicly linked to a sexual offence until it is certain that the accused has a case to answer.

81. In the course of his second reading speech introducing the bill to amend section 71A, the Attorney-General explained the Government’s reasons for taking a conservative approach to reform of that section. He said:¹¹

The Government is well aware that the breadth, speed and accessibility of reporting now available by electronic media make it necessary to review the whole issue of suppression laws, and this is currently being undertaken at a national level. Given that those discussions are taking place, and that submissions to the review were generally supportive of retaining section 71A in some form, it is reasonable at this time to take a conservative approach to reform. The amendments will provide some flexibility to the existing law.

The review at the national level is currently being undertaken on behalf of the Standing Council on Law and Justice. The discussion of the operation of section 71A that follows might have to be reviewed should section 71A later be amended.

What is meant by Publication?

82. Although section 71A(2) prohibits publication of the name of the accused person until the occurrence of one of the relevant dates noted above, it might not prevent a school from disclosing both the name of the accused person and the nature of the offending to those who have a legitimate interest in receiving that information. The question whether a school can lawfully disclose that information might depend on the size of the school. The reasons for that conclusion follow.

83. Section 71A(2) prohibits a person from publishing any statement or representation that might identify the accused person or from which that person’s identity might reasonably be inferred. It is necessary to note the definition of the word “publish”. It is defined in section 68 of the *Evidence Act* in these terms:

⁸ The Hon. Brian Martin AO, QC is a former Justice of the Supreme Court of South Australia and later Chief Justice of the Northern Territory.

⁹ The Martin Report at para. 94.

¹⁰ Ibid at para. 116.

¹¹ South Australia, *Parliamentary Debates (Hansard)* House of Assembly, 5 September 2012, 2789 (J R Rau, Attorney-General).

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

The manner in which the definition is expressed makes it clear that the Act is concerned to prohibit publication by means of documents or processes that are disseminated widely or to which access can be readily gained by any member of the public. It, therefore, includes the media in all its forms as well as the internet which also enables widespread dissemination of information. Section 71A(2) is clearly intended to apply to widespread communication to the public. In that respect, it differs from the meaning of “publish” in the law of defamation where a communication of defamatory material to one person or a small group of persons will constitute a publication. The expression “other similar means of communication to the public” in the last part of the definition is clearly a dragnet provision. That expression also serves to indicate that the Act is concerned to prevent communication to the public as distinct from private communications.

84. To summarise, the fact that the definition refers both to the media in all its forms and to the internet coupled with a reference to “other similar means of communication to the public” indicates that section 71A(2) is intended to prevent widespread publication. It is a prohibition forbidding the dissemination of information widely to the public. There is nothing in section 71A(2) that prevents private communications.

85. In addition, there are practical reasons that suggest that section 71A(2) is not intended to prohibit private communications. If a person has been charged with a sexual offence, it might be necessary for an employer to take some form of action in relation to the accused person. If that person is a teacher at a school, it might be necessary to suspend the teacher until there has been a resolution of the charges. If that person is employed to care for children in a pre-school, it might be necessary to suspend the accused person. The principal at the school or the person in authority at the pre-school will need to speak at least to other members of staff about replacing the suspended person and making such other arrangements as are necessary to enable the school or pre-school to continue to operate efficiently and effectively. It might be necessary also to inform some parents, for example, parents of children who have had regular and frequent contact with the accused person. In each of those instances, it might be necessary to inform the particular person that the teacher has been charged with a sexual offence. It would not be the intention of the Act to prohibit a private communication of that kind.

86. The question as to what was meant by “publication” in this context was considered in the Supreme Court of South Australia in *Roget v Flavel*,¹² a decision of Justice Cox. In that case, Justice Cox was required to determine what was meant by “publication” in section 69A of the *Evidence Act*. Section 69A is the statutory provision that authorises courts to make a suppression order. In 1987, section 69A authorised a court to make an order forbidding the publication of specified evidence or of any account or report of specified evidence. In 1987, the *Evidence Act* did not define either “publish” or “publication”. It was submitted to Justice Cox that the meaning of “publication” was the same as in the law of defamation. Justice Cox

¹² (1987) 47 SASR 402.

rejected that submission. He held that publication does not refer to what is essentially a private communication. He said:¹³

The first of the definitions of ‘publication’ in the *Shorter Oxford Dictionary* are:

“The action of publishing or that which is published. 1. The action of making publicly known; public notification or announcement; promulgation. b. spec. in Law. Notification or communication to those concerned, or to a limited number regarded as representing the public”

In my opinion, this gives the general sense of what ‘publication’ means in s 69a. It does not refer to a substantially private communication, from one person to another, whether by way of preparation for an impending trial, or as information to someone with an obvious commercial or personal or other interest in the matter, or merely by way of unedifying gossip. The typical publication prohibited by s 69a will be publication by means of a newspaper or a television or wireless broadcast. However, there are other ways in which the communication of information may be made with the necessary public element – an announcement at a public meeting, for instance, or a statement uttered to the world at large on a street corner. Perhaps there could be cases in which, in accordance with the dictionary definition, notification to a relatively small group of people could be regarded, by reason of their random, or in some circumstances their representative, character, as a publication under s 69a. Obviously there will be borderline cases. There is no need to explore the matter exhaustively now.

In my opinion, that interpretation of s 69a will cope with the problem that, as I see it, the section is attempting to solve – the more or less wholesale communication of the suppressed material to all and sundry, including those with only an idle interest in the matter. I do not think that Parliament was attempting to stop and make unlawful – and it would obviously be very difficult to stop it, anyway – a communication between individuals, for one reason or another, with no public aspect about it.

It is reasonable to infer that the definition of “publish” inserted in the *Evidence Act* in 1999 has been adapted from the reasons of Justice Cox with the addition of publication on the internet, a process that has in the 12 years since 1987 rapidly become more frequently used as a means of disseminating information widely.

87. As Justice Cox noted earlier in his reasons, the meaning of “publication” in section 69A must depend “upon the context in which it is used, the mischief that the legislation is designed to overcome, and the need to construe the scheme created by section 69A in a way that will make it workable”.¹⁴ The same can be said of section 71A(2).

88. As mentioned in paragraph 77, the purpose of section 71A(2) is that a person should not be publicly associated with sexual offences until it has been decided that there is sufficient evidence for the accused person to have a case to answer. The accused person has a case to answer when he or she has been committed for trial. Section 71A permits disclosure of the identity of the alleged offender after the committal for trial. The mischief that section 71A(2) seeks to remedy is widespread dissemination of what might ultimately be found to be unsubstantiated allegations or even wholly unjustified allegations. In *Roget v Flavel*, Cox J also noted that the meaning of publication will in part depend on the need to construe the scheme in a way that will make it workable. He identified particular circumstances that

¹³ Ibid 406.

¹⁴ Ibid 405.

indicated why section 69A did not apply to private communications. The same reasoning demonstrates why section 71A does not apply to a private communication made by a school to members of its staff and to parents. If a school is informed of an allegation of sexual misconduct by a member of its staff against a student at the school, its duty of care to its students and its statutory obligation to ensure the safety, health and well-being of its students require it to act so as to protect its students. At an appropriate time, it might be necessary to inform parents lest there be other children at the school who might also be victims. In addition, it might be necessary to remove the alleged offender and make arrangements with other staff to replace the alleged offender. All of these will require communication between the school and its staff and the parents of children at the school. The nature of those communications and when they should be made will be discussed later in this report. For present purposes it is sufficient to note that, at different times, there will be a need for such communications and, because they are private communications, those communications will not be the kind of communications that section 71A(2) intends to prohibit.

89. When an allegation of sexual misconduct by a member of staff at a school has been made, there will be three groups who will have a legitimate interest in knowing the fact of the allegation and the identity of the person against whom the allegation has been made. They are the staff, the parents of children at the school, and the governing body of the school, that is to say, the governing council in the case of government schools and the school council or like body in the case of non-government schools. In the case of staff, the communication will be made in order to enable the orderly operations of the school to continue. The number of staff, even in a large school, will not be so great as to prevent any communications to staff being a private communication. That communication will probably be best effected by a meeting of staff addressed by the principal. Similarly, in the case of the governing body of a school, the numbers who comprise the governing body will be small and, as the governing body of the school, its members have a legitimate interest in being aware of important issues affecting the staff of the school. In the case of parents, the issues are not so simple. If the school has a small number of children, a letter to parents might not infringe section 71A. However, the position might be different in the case of a large school because any letter sent by the school will be sent to a large number of parents. I turn to examine that question.

90. Many schools, both government and non-government, have 500 or more students. Some have as many as 1,500 or more. The question, therefore, arises whether a letter sent to parents of a school of 500 or more students would be a letter published in breach of section 71A(2). It is necessary to refer again to the definition of “publish”. Section 68 of the *Evidence Act* defines it to mean:

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

If the letter is sent to parents, it is not a newspaper nor is it a communication by radio or television or on the internet. The question is whether the letter is a similar means of communication to the public, that is to say, whether it is similar to widespread dissemination by newspaper or the other listed forms of publishing information. On the face of it, it is not a communication to the public. Instead, it is a letter sent to parents at a particular school. There is an obvious connexion between the school and the parents of children at the school. That connexion is reinforced by the fact that the letter is doing no more than communicating to parents of the school an item of information relevant to the safety and welfare of the

children at the school. That reasoning would suggest that such a letter would not be a communication of the kind prohibited by section 71A(2).

91. That conclusion is reinforced by decisions concerning companies legislation that contain restrictions on making invitations to invest in shares or other securities to the public or to a section of the public. It is clear that the size of the group to whom an invitation is made is not necessarily the criterion by which to determine whether the invitation has been communicated to the public.¹⁵ An invitation to the public is an invitation communicated to the general public, that is to say, to the public at large, to all and sundry.¹⁶ An invitation communicated to persons between whom there exists a sufficiently subsisting connection between the person making the offer and the person to whom the offer is made is not an invitation to the public.¹⁷

92. The High Court reached a similar conclusion in *Corporate Affairs Commission (South Australia) v Australian Central Credit Union*¹⁸ (“the Credit Union Case”). In that case the court had to decide whether an offer made by a credit union to some 23,000 members of that credit union to invest in a unit trust constituted an offer to a section of the public, a narrower requirement than an offer to the public. The High Court held that it did not. The Court held that a distinction had to be made between an offer made by a stranger to the members of the credit union and an offer made by the credit union to its members. The former was an offer to a section of the public in breach of the then companies legislation but the latter was not because of the relationship between the credit union and its members. Four members of the Court expressed their reasons in these terms:¹⁹

For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public. In a case where an offer is made by a stranger and there is no rational connexion between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If, however, there is some subsisting special relationship between offeror and members of a group or some rational connexion between the common characteristic of members of a group and the offer made to them, the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connexion between that characteristic and the offer. (Citations omitted)

The Court held that, if the offer had been made by a stranger to the members of the credit union, there was no rational connection between the members of the credit union and the

¹⁵ *Lee v Evans* (1964) 112 CLR 276, 287 (Kitto J.).

¹⁶ *Ibid* 292 (Windeyer J.).

¹⁷ *Ibid* 292 (Windeyer J.).

¹⁸ (1985) 157 CLR 201.

¹⁹ *Ibid* 208 (Mason ACJ, Wilson, Deane and Dawson JJ.).

offer. However, as the offer had been made by the credit union to its members, there was a rational connection. As Justice Brennan said:²⁰

But when an antecedent relationship exists between an offeror and a group of offerees and, by reason of that relationship, the offerees have a special interest in the subject-matter of the offer, there is a ground for distinguishing the group from the public.

The reasoning as to what constitutes an offer to the public reinforces the conclusion that section 71A(2) is not intended to prohibit private communications made by a school to persons who have a special interest in the information that is being communicated. There is a subsisting relationship between the school, its staff, its governing council and the parents of children at the school. Not only do those persons have a special interest in the subject matter of any communication concerning allegations of sexual misconduct at the school but they have a real and legitimate interest in being informed of a matter that affects the safety, health and well-being of children at the school.

93. While the reasoning in the *Credit Union Case* reinforces the conclusion that section 71A(2) is not intended to apply to a private communication and suggests that a communication to a relatively large group who have a subsisting relationship or other rational connexion might not be a communication to the public, the purpose of the companies legislation is different from the purpose of section 71A(2). The purpose of section 71A(2) is to prevent widespread dissemination of what might ultimately be unsubstantiated or unfounded allegations. It is, nevertheless, arguable that there are sound reasons why the same principles should apply to section 71A(2). That argument is grounded on the proposition that there is a subsisting relationship between the school, its staff and its parents as well as the fact that the purpose of the communication stems from that subsisting relationship for the purpose of protecting children at the school and of alerting the parents of those children. That suggests that a communication to the staff and the parents might not infringe section 71A(2).

94. However, regard must be had to the internet and the ability to use Facebook and other services that enable widespread dissemination of information to the public. A letter sent by a school to parents can readily be scanned and posted on Facebook and thereby be made available to the public. The evidence in this Inquiry has demonstrated that there are members of the public who, out of a misguided sense of justice or for other reasons, will not heed a request from the school to keep the content of a letter confidential and not to publish the letter in any way. In one case, a letter sent to parents was within 24 hours posted on Facebook despite a request not to do so. The implications of the internet will be considered later.

95. If the reasoning in the *Credit Union Case* can be applied, a letter to a large number of parents will not infringe section 71A(2). It might also be argued that a letter is not a communication to the public within the meaning of section 68 of the *Evidence Act*. It is entirely inappropriate for me to express a concluded view. Should a school with a large number of students be intending to send a letter to parents, it would be prudent for that school to take advice on the question whether such a letter would infringe section 71A(2). It must be mentioned that section 71A(2) does not prohibit a school from saying that a member of its staff has been arrested and charged with an offence, naming the offence but not the accused

²⁰ Ibid 213.

person. Section 71A(2) prohibits only publication of a statement from which the identity of the accused person may be inferred. A large school might, therefore, decide as a matter of prudence to do no more than inform parents that a member of its staff has been arrested without naming that person. If it is suspected on reasonable grounds that there is a smaller body of students who might be victims of the accused person, it might be possible to send a letter to that group without infringing section 71A(2). These issues are addressed in more detail in Chapter 12 of this report.

96. One other aspect of the question of communication must be emphasised. Some schools communicate with parents by means of a newsletter published on the internet. In those cases, there is nothing to prevent any member of the public from reading the newsletter. Section 68 of the *Evidence Act* defines “publish” to mean, among other things, to publish by means of a newspaper or a publication on the internet. Given that a school newsletter published on the internet is readily available to members of the public, there is a very real likelihood that a court would find that such a school newsletter published on the internet is a communication to the public. It is relevant to note also that section 68 also defines a newspaper so it means “a newspaper, journal, magazine or other publication that is published at periodic intervals”. That definition might also catch a school newsletter of any kind. For these reasons, although it is lawful to publish a school newsletter on the internet, any communication by a school to parents concerning allegations of sexual misconduct should **not** be made by a newsletter published on the internet or otherwise. The appropriate form by which a school should communicate information concerning allegations of sexual misconduct will be addressed in Chapter 12 of this report.

Young Offenders Act

97. The preceding discussion has addressed the question of communication by a school to staff and parents when an allegation has been made of sexual misconduct by a member of staff against a student. On occasions, sexual misconduct might occur at a school between students. Generally speaking, the students will be under the age of 18 years. Where the students are over the age of 10 years and under the age of 18 years, the *Young Offenders Act* applies.²¹ Regard must be had to its provisions when schools are required to manage this kind of offending.

98. The objects of the *Young Offenders Act* include the rehabilitation of young offenders. Section 3(1) spells out that objective in these terms:

The object of this Act is to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into responsible and useful members of the community and the proper realisation of their potential.

Regard must be had to that objective when considering whether and, if so, how schools might communicate with staff and parents.

²¹ The *Young Offenders Act* does not apply to children under the age of 10 years because children under the age of 10 years are deemed to be incapable of committing an offence: see section 5 of the *Young Offenders Act*.

99. One means by which effect is given to the goal of rehabilitating young offenders is section 13(1) of the *Young Offenders Act* which prohibits the publication of information concerning young offenders. It provides:

- (1) A person must not publish, by radio, television, newspaper or in any other way, a report of any action or proceeding taken against a youth by a police officer or family conference under this Part if the report—
 - (a) identifies the youth or contains information tending to identify the youth; or
 - (b) reveals the name, address or school, or includes any particulars, picture or film that may lead to the identification, of any youth who is in any way concerned in the action or proceeding; or
 - (c) identifies the victim or any other person involved in the action or proceeding (other than a person involved in an official capacity) without the consent of that person.

A further restriction on publication is provided by section 63C of the *Young Offenders Act*. It restricts reports of proceedings in the Youth Court. It is in these terms:

- (1) A person must not publish, by radio, television, newspaper or in any other way, a report of proceedings in which a child or youth is alleged to have committed an offence, if—
 - (a) the court before which the proceedings are heard prohibits publication of any report of the proceedings; or
 - (b) the report—
 - (i) identifies the child or youth or contains information tending to identify the child or youth; or
 - (ii) reveals the name, address or school, or includes any particulars, picture or film that may lead to the identification, of any child or youth who is concerned in those proceedings, either as a party or a witness.
- (2) The court before which the proceedings are heard may, on such conditions as it thinks fit, permit the publication of particulars, pictures or films that would otherwise be suppressed from publication under subsection (1)(b).

The penalty for a breach of either provision is a maximum fine of \$10,000.

100. It will be noticed that both provisions prohibit publication “by radio, television, newspaper or in any other way”. The expression “or in any other way” is to be contrasted with the definition of “publish” in the *Evidence Act* which prohibits widespread communication to the public by all forms of the media and “similar means of communication to the public”. The word “publish” is not defined in the *Young Offenders Act*. The use of the expression “or in any other way” in both section 13(1) and section 63 suggests that the Act is concerned not only with widespread communication by the media in all its forms but it also is concerned with any communication that might identify the offender and the victim. It is reasonable to conclude, therefore, that the purpose and intention of the Act might be even more restrictive than the restrictions on publication in the *Evidence Act*.

101. At the same time, it does not appear to be the purpose and intent of the Act to prohibit private communication for the purpose of managing the situation where young offenders are involved. As in the case of an allegation against a member of the staff of a school, the school will need to take steps to manage the situation. Staff will need to be informed so that they are in a position to deal appropriately with those involved in the alleged offending. Any communication between the principal of a school and members of staff will be a private

communication for the purpose of managing the matter in an appropriate way. These are matters necessary for the proper administration of the school. It is reasonable to conclude that the Act does not intend to prohibit communications of that kind. It would be prudent, nevertheless, for the principal to ask members of staff to keep the names of the offender and the victim confidential.

102. It is necessary to note what section 13(1) actually prohibits. It prohibits any publication of a report of any action or proceeding against a youth if the report identifies the youth, the school of that youth, and the victim. It might be lawful, therefore, to publish a report of an incident between young offenders provided it does not identify either the offender, the victim, or the school or anything that might identify the young persons.

103. Depending on the nature of the offending, it might be necessary for the school in the discharge of its duty of care to all students to inform parents of other students at the school of offending involving students. It is not clear whether section 13(1) prohibits such a letter. Schools will have to take advice on that question. If the alleged offending is between two students only, there might not be any need to inform other parents. If a statement is required, the alleged offending should be described in a general way without naming the students or stating anything that might identify them. If more than two students are involved and the offending is of the kind of which parents and the broader school community should be informed, then the matter should also be described in a general way without naming any student or stating anything that might identify a student.

104. It must be stressed that at no time is it lawful to publish the name of a young offender or anything that might identify that offender. Although there are occasions when the name of an adult accused person may be lawfully published, the name of an accused youth cannot be published at any time.

Suppression Orders

105. Any discussion of the legislation restricting publication of names must also consider section 69A of the *Evidence Act*. Section 69A authorises a court to make a suppression order. A suppression order is defined by section 68 of the *Evidence Act* as follows:

suppression order means an order —

- (a) forbidding the publication of specified evidence or of any account or report of specified evidence; or
- (b) forbidding the publication of the name of —
 - (i) a party or witness; or
 - (ii) a person alluded to in the course of proceedings before the court,
 and of any other material tending to identify any such person.

Suppression orders may be made in any of the courts in South Australia. They may be made by a Magistrates Court, the District Court of South Australia and the Supreme Court of South Australia. The circumstances in which a suppression order might be made are set out in section 69A of the *Evidence Act*. It is unnecessary in this report to examine in what circumstances an order might be made. It is relevant only to examine what constitutes a suppression order.

106. A suppression order is an order made by a court stating that it forbids the publication of whatever is the subject matter of the order. An order of the court is to be contrasted with a statement made by a judge when sentencing an offender that he does not propose to name a person or to state anything that might identify that person. Statements to that effect are quite frequently made by a judge when sentencing a person guilty of a sexual offence in order to protect the victim. However, such a statement is not a suppression order. A misunderstanding as to what constituted a suppression order was one of the factors that caused the Department for Education to take the view (for some months at least) that a suppression order had been made when Harvey had been sentenced. At a very early stage in his sentencing remarks, the judge had 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.

As is apparent from those remarks, the only reason why the judge did not name the suburb, the school or the child was to protect the identity of the child and her family. It was not in any sense a suppression order. It was simply a means adopted by the judge to ensure that nothing was said in his remarks that might identify the victim.

107. Should any question exist as to whether a sentencing judge has made a suppression order, that question can be answered by examining the orders made by the judge. In the case of Harvey, it was clear that the judge had not made a suppression order. He did no more than sentence Harvey. If questions remain after examining the order of the court, an inquiry should be made to the Registrar of the relevant court as to whether a suppression order exists and legal advice obtained as to the effect of the order.

108. The penalties for acting in breach of a suppression order are severe. A person who disobeys a suppression order is liable to be punished for contempt or to be found guilty of an offence.²² Punishment for contempt might be as severe as a term of imprisonment. If a person disobeying the suppression order is punished for an offence, the maximum penalty for a natural person is a fine of \$10,000 or imprisonment for 2 years. If the offender is a body corporate, the fine is \$120,000. It is desirable, therefore, to obtain legal advice as to the terms of the order and as to whether the terms of that order forbid the kind of letter under consideration.

109. Because of the restrictions on publication expressed in section 71A of the *Evidence Act*, it is not usual for a suppression order to be made when a person has been charged with a sexual offence. However, the existence of such an order cannot be ruled out, especially after the accused person has been committed for trial. It is prudent, therefore, to check with the court whether a suppression order has been made.

110. The power to prohibit publication of the name of a party or witness is wide enough to include the power to prohibit publication in documents or by means other than newspapers, television, radio or the internet. It is wide enough to include the power to prohibit some

²² Section 70 of the *Evidence Act*.

private forms of communication. If a suppression order has been made and the school is considering sending a letter to parents, it will be prudent, therefore, to ascertain whether the order prohibits a letter of the kind under consideration and, if there is any uncertainty about what is prohibited, to obtain legal advice. In addition, the court has power to vary or revoke a suppression order. It is, therefore, necessary to check with the court to ensure that the order being read is, in fact, the most recent form of the order.

Different Duration

111. The restrictions on publications contained in section 71A(2) and section 71A(4) of the *Evidence Act* are similar to suppression orders in that they are all prohibitions on publication. They are all intended to prohibit widespread dissemination of particular facts. However, at the risk of repetition, the restrictions on publication in section 71A are not suppression orders. Furthermore, the duration for each restriction will remain in force varies.

- A suppression order operates for as long as the court has ordered. That is why it is necessary to continue to enquire whether the order is still in force.
- The restrictions on the publication on anything that might identify the alleged victim of a sexual offence as prescribed by section 71A(4) operate permanently in the case of a child. In the case of an adult it operates until a judge authorises publication or the alleged victim consents to publication.
- The restriction on the publication of anything that might identify the accused person as prescribed by section 71A(2) operates only until the accused person is committed for trial or sentence if he is charged with a major indictable offence. If he is charged with a minor indictable offence or a summary offence, it operates until the date when he pleads guilty or is found to be guilty. In the case of all classes of offence, it is the date when the charge is dismissed or the proceedings lapse or are withdrawn.

It is important, therefore, to distinguish between suppression orders and the restrictions on publication contained in section 71A of the *Evidence Act*.

PART 2 - THE LAW OF DEFAMATION

Avoid a Defamatory Meaning

112. Should a school send a letter to parents concerning allegations of sexual misconduct against a member of the staff of the school, it must ensure that the letter is not defamatory. If the letter does no more than state, for example, that a teacher (who is named) has been arrested and charged with a sexual offence, the letter is not defamatory. The reason for that stems from the presumption of innocence. It was explained in these terms by Justice Mason of the High Court of Australia in *Mirror Newspapers Ltd v Harrison*²³ in these terms:²⁴

²³ (1982) 149 CLR 293.

²⁴ *Ibid* 300-301.

The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted.

However, if the letter includes any statement that implies or carries the innuendo that the teacher has been properly charged or that he had in fact offended, the letter would be defamatory. If any letter is sent to parents, it is, therefore, essential to ensure that it does no more than state the fact that the teacher has been arrested and charged.

113. Different considerations will apply if a school should send a letter stating allegations of sexual misconduct have been made against a teacher. There is a real likelihood that the letter will be defamatory as the ordinary reasonable reader of the letter might infer that the teacher is guilty of that offence: *John Fairfax Publications Pty Ltd v Obeid*.²⁵ See also *Channel 7 Adelaide Pty Ltd v S*.²⁶ Schools should always obtain legal advice before sending such a letter.

Qualified Privilege

114. In certain limited circumstances, a defamatory statement may be made about a person's reputation but the person making the statement will be able to rely on the defence of qualified privilege. One occasion of qualified privilege is where the person making the communication has an interest or a legal, social or moral duty to make the communication to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it.²⁷ It is arguable that one occasion on which a school has at least a social or moral duty to inform parents is when a member of the staff of the school has been arrested and charged with a sexual offence. The position will be even stronger if it is suspected that other children in addition to the alleged victim have also been abused or assaulted. The letters would be sent to parents so that they may be alerted to behaviour in their children that indicates that their children might be victims and the parents can provide appropriate support to the child. It is arguable, therefore, that there is a community of interest between the school in informing parents and the parents in receiving that information. The issues are more complex in the case of mere allegations and it will be desirable for a school to obtain legal advice before sending a letter to parents.

115. It is arguable also that a letter to parents informing them that a member of the staff of the school has been arrested and charged with a sexual offence would be an occasion of qualified privilege by reason of section 28 of the *Defamation Act*. Section 28 provides:

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that —
 - (a) the recipient has an interest or apparent interest in having information on some subject; and

²⁵ (2005) 64 NSWLR 485.

²⁶ (2006) 94 SASR 296.

²⁷ *Adam v Ward* [1917] AC 309, 334 (Lord Atkinson).

- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) ...
- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account-
 - (a) the extent to which the matter published is of public interest; and
 - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
 - (c) the seriousness of any defamatory imputation carried by the matter published; and
 - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
 - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
 - (f) the nature of the business environment in which the defendant operates; and
 - (g) the sources of the information in the matter published and the integrity of those sources; and
 - (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
 - (i) any other steps taken to verify the information in the matter published; and
 - (j) any other circumstances that the court considers relevant.
- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

There are grounds for contending that, as parents have an interest in knowing that a member of the staff of the school has been arrested and charged with a sexual offence and as the school publishes the letter in the course of giving parents information on that subject, that the conduct of the school in publishing the letter is reasonable in the circumstances so that the letter is sent on an occasion of qualified privilege. Section 28(3)(j) of the *Defamation Act* makes it clear that the criteria for determining reasonableness that are listed in section 28(3) are not exhaustive. A court may have regard to other relevant factors.

116. Care must always be taken to ensure that any communication to parents is made in a fair and balanced manner. The defence of qualified privilege will not be available if it can be established that the person making the communication did so for a malicious or improper purpose or made the communication knowing that the statement was false or with reckless

disregard whether the statement was true or false. The latter will apply when the maker of the statement repeats comments or rumours without seeking any substantiation for them.²⁸

117. These remarks are intended only to draw attention to the issues relating to qualified privilege. It is inappropriate in a report of this kind to express a firm legal opinion. It is appropriate, nevertheless, to say that, as a general rule, a school is able to inform parents and staff that a member of its staff has been arrested and charged with a sexual offence. If a school wishes to inform parents or staff of allegations, it should seek legal advice before doing so.

²⁸ These questions are examined by Messrs Balkin and Davis in *Law of Torts* (Butterworths, 4th ed, 2009) at paras. 19.50 to 19.54.

CHAPTER 3 – CRIMINAL PROSECUTIONS AND DISCIPLINARY PROCEEDINGS

118. This chapter begins with a brief overview of the steps involved in prosecuting a person accused of a criminal offence. In this discussion, that person will be called “the defendant”. The discussion will also note the courts that hear trials of persons charged with criminal offences. This part has been included because many lay persons are, for understandable reasons, not familiar with the course of a criminal prosecution. It is desirable, therefore, to describe that process briefly so that principals and other teachers will have a better appreciation of the steps that will be followed after a person has been charged with a sexual offence. In addition, a number of witnesses expressed the desire to have a better understanding of the course of a prosecution for an offence against the criminal law so that they are better informed when called upon to manage allegations of sexual misconduct. It is appropriate to discuss the course of a prosecution using a sexual offence as an example. This chapter also includes a list of sexual offences and an examination of the disciplinary processes to which teachers might be subject.

The Courts

119. The courts that try offences against the criminal law are the Supreme Court of South Australia (“the Supreme Court”), the District Court of South Australia (“the District Court”), and the Magistrates Court of South Australia (“the Magistrates Court”). Trials for murder and treason and other serious crimes are heard in the Supreme Court. Trials for other serious crimes are heard in the District Court and trials of summary offences are heard in the Magistrates Court. The Supreme Court also hears appeals from decisions made in the Magistrates Court. Three judges of the Supreme Court constitute what is called the “Court of Criminal Appeal” which is the court which hears appeals from convictions in both the District Court and in the Supreme Court.

Two Classes of Offences

120. Criminal conduct is divided into two classes, summary offences and indictable offences. Summary offences are the less serious kinds of criminal offending. Summary offences include parking and traffic offences, offensive or indecent behaviour, minor assaults against the person, shoplifting and minor offences against property.

121. A person is charged with a summary offence by a document called a “complaint”. A complaint states the offence with which the person is charged. The complaint will also include a summons requiring the person charged to attend a named Magistrates Court on a specified date. A summary offence is an offence that is not punishable by imprisonment or, if punishable by imprisonment, the imprisonment is two years or less.

122. Indictable offences are the more serious kinds of offences. They include all forms of assaults against the person, ranging from minor assaults to murder; almost all forms of sexual assaults ranging from indecent assault to rape; home invasion; burglary; robbery; fraud and other serious financial crimes; and other crimes against property such as arson. Indictable offences are divided into minor indictable offences and major indictable offences.

123. Proceedings in respect of indictable offences are more complex than is the case for summary offences. Major indictable offences are heard in the District Court or the Supreme Court. Most sexual offences are major indictable offences and are usually heard in the District Court and, on rare occasions, are heard in the Supreme Court. A person is charged with an indictable offence by a document called an “information”.

124. Minor indictable offences are heard in the Magistrates Court unless the defendant chooses to have the matter heard by a judge and jury in the District Court. Minor indictable offences which are jointly charged with major indictable offences are heard in the District Court or Supreme Court.

Trials of Summary and Minor Indictable Offences

125. Trials of summary and minor indictable offences are conducted in the Magistrates Court. When the matter is called on, the defendant may either plead guilty or not guilty. If he pleads guilty, the magistrate will then determine the appropriate penalty.

126. If the defendant pleads not guilty, the matter will be adjourned for a trial on another date. If the case is complex or there is some difficulty either with witnesses or for some other reason, it may be necessary for the court to grant such adjournments as are necessary. The matter will be tried by a magistrate sitting alone. The magistrate will decide whether the defendant is guilty or not guilty. If the magistrate finds the defendant guilty, the magistrate will then determine the appropriate penalty.

Trials of Major Indictable Offences

127. It is convenient to describe the process of a prosecution for a major indictable offence from the time police begin an investigation until the trial and appeal. That will enable the best understanding of the process. The following description of the process of police investigation, arrest and bail also applies to some of the more serious kinds of summary offences. It must be emphasised that the summary that follows mentions only each step in the course of a criminal prosecution. Each of those steps might involve one or more hearings.

Police Investigation and Arrest

128. In the ordinary course, police will be informed of allegations that a person has committed, for example, a sexual offence. Police will then investigate those allegations. That investigation will disclose whether there is evidence sufficient to arrest and charge the defendant. In some cases, the investigation will be quite short. That usually occurs when the victim of the sexual offence or someone on behalf of the victim is able to make allegations of specific conduct and there is other evidence that corroborates the allegations. In other cases, the investigation might be quite long. That usually occurs when the allegations are more vague and there is little by way of other evidence to corroborate the allegations. If, at the conclusion of the investigation, police believe there is sufficient evidence upon which to convict the defendant, they will arrest and charge the defendant. If they are not satisfied there is sufficient evidence, the matter will proceed no further or might be filed in case further evidence should come to light.

129. After the defendant has been arrested and charged, police might wish to conduct further investigations to ascertain whether there is further evidence to prove the case against the defendant. If those investigations establish other offending, the defendant will be charged with those offences.

Bail

130. In the case of most sexual offences, once police have charged the defendant, they will release the defendant on bail. When a defendant is released on bail, it will be a condition of the bail that he is required to attend at a Magistrates Court for the purpose of indicating whether he will plead guilty or not guilty. A date is fixed for that court hearing. It is likely that additional conditions of bail will be imposed. They will contain restrictions upon the movements of the defendant. If the defendant is a member of the staff of a school, one of the conditions will usually be to the effect that the defendant not go on to the school grounds. Other bail conditions may include that the defendant not contact the victim or not have any unsupervised contact with any child of or under the age of 17 years. If the police decide not to release the defendant on bail, the defendant must be taken to a Magistrates Court as soon as possible and, on that occasion, the defendant may apply for bail. Generally speaking, bail will be granted but with conditions restricting the movements of the defendant. Those conditions would be similar to the kind of conditions on which the police would have released the defendant on bail.

The Process of Committal

131. Although trials for major indictable offences are heard in either the District Court or the Supreme Court, the first step in the prosecution of a person charged with a major indictable offence is the preliminary examination which is conducted in the Magistrates Court. The preliminary examination is often called a “committal hearing”. The purpose of a preliminary examination or committal hearing is to determine whether there is sufficient evidence to put the defendant on trial for a major indictable offence.

132. After the defendant has been charged on information, a period of between six to ten weeks will elapse before the defendant is required to appear in the Magistrates Court. On that occasion, the magistrate will fix a date, usually ten weeks later, for the prosecution to file in court and serve on the defendant the statements of all the witnesses on whom the prosecution relies to establish the guilt of the defendant. Those statements are called “declarations”. The date is referred to as the “declarations date”. Four weeks after the declarations date, the magistrate will set a date for the defendant to answer the charges. That date is referred to as the “answer charge date”.

133. Before the declarations date, the police will deliver the evidence and the results of their investigations to the office of the Director of Public Prosecutions. The Director of Public Prosecutions, or one of the lawyers in his office, will then consider whether there is sufficient evidence to convict the defendant. In other words, the Director of Public Prosecutions will consider the evidence and decide whether there is a reasonable prospect of a conviction. If the Director of Public Prosecutions comes to the conclusion that there is insufficient evidence on which to convict the defendant, the prosecution will not proceed.

134. On the answer charge date, the defendant will be asked if he pleads guilty or not guilty. If he pleads guilty, he will be committed for sentence in the District Court or the Supreme Court.¹

135. If the defendant pleads not guilty, the prosecution has the task of satisfying the magistrate that it has sufficient evidence to put the defendant on trial for the offence named in the information. The evidence will be sufficient to put the defendant on trial if, in the opinion of the magistrate, the evidence, if accepted, would prove every element of the offence. In other words, the magistrate must consider the evidence that the prosecution intends to lead and, assuming that it will be accepted, then decide whether it is sufficient to prove the offence. If the magistrate reaches that conclusion, the defendant will be committed for trial. Between late 2006 and September 2011, there were only two matters recorded on the database of the office of the Director of Public Prosecutions in which a defendant charged with a sexual offence was not committed for trial.²

136. If the magistrate is not satisfied that the evidence is sufficient to put the defendant on trial, he will reject the information and discharge the defendant. If the defendant is in custody, the magistrate will release the defendant. That will usually be the end of the case. However, the Director of Public Prosecutions has the power to file an *ex officio* information. That enables the Director of Public Prosecutions to continue with the matter even though the magistrate has found that the defendant has no case to answer. The Director of Public Prosecutions will not make such a decision lightly. It will be made if the Director of Public Prosecutions believes that the magistrate erred in declining to commit or if fresh evidence has since become available and that evidence would have led to the defendant being committed for trial if that evidence had been before the magistrate.

137. To put the position briefly, at the preliminary hearing, the defendant is either committed for sentence, committed for trial or the information is rejected. The committal for sentence or the committal for trial will be either to the District Court or to the Supreme Court. Generally speaking, if a person is committed for trial for a sexual offence, the trial will be in the District Court.

The Arraignment

138. A defendant who has been committed for trial or sentence is remanded, either in custody or on bail, to appear before the District Court or the Supreme Court to be arraigned, that is to say, to be formally charged with that offence. The arraignment day will be fixed four weeks after the committal. The defendant must attend to be arraigned in person. The charge stated on the information is read out and the defendant is asked to plead guilty or not guilty. If the defendant pleads guilty, the matter will usually be adjourned to a later date for submissions to be made as to the sentence to be ordered against the defendant. If the matter is

¹ A defendant who pleads guilty before the preliminary hearing will be sentenced in the Magistrates Court if the conditions of section 108 of the *Magistrates Court Act* are satisfied.

² See the Martin Report at para. 98.

adjourned, the defendant will be remanded either in custody or on bail until the date of the adjourned hearing.

139. Defendants who plead not guilty are remanded for trial, either in custody or on bail. They will be required to attend at a directions hearing which is held four to six weeks after the date of the arraignment.

Directions Hearings

140. Directions hearings are held for the purpose of resolving all the procedural matters that must be attended to before the trial begins. Directions hearings also give the judge the opportunity to explore with the prosecution and the defendant whether the matter can be resolved without having to go to trial. If not, a trial date will be set. The judge will also hear any preliminary applications, for example, an application by the defendant to be tried by a judge alone. It is not uncommon for a number of directions hearings to take place prior to the actual trial.

The Trial

141. The next step is the actual trial. The trial will usually take place before a judge and jury. However, in certain circumstances, the defendant may apply to be tried by a judge sitting alone without a jury.

142. Before the trial begins, the defendant is again asked whether he pleads guilty or not guilty. Although the defendant was asked whether he pleaded guilty or not guilty at the arraignment, he is again asked that question because the defendant may in the interim have decided to change his plea. If the defendant pleads guilty, the judge will proceed to sentence him.

143. If the defendant pleads not guilty, a jury is empanelled and the trial begins. The prosecution presents its case first. The prosecutor will open the case by giving a brief outline of the prosecution case. The witnesses are then called. They are asked questions by the prosecution and then by the defendant. That process is called examination and cross-examination of the witnesses. After each witness has been examined and cross-examined, the prosecution may ask questions to clarify matters that arise in cross-examination, a process called re-examination. After the prosecution has called its evidence, it closes its case. The defendant may then open his case and call evidence or decide not to do so. That is entirely for the defendant to decide. The defendant has the right to remain silent and does not have to give evidence. If the defendant calls evidence, each defence witness, including the defendant, will be examined and cross-examined and perhaps re-examined. Once the defendant has called all his witnesses, he closes his case. In strictly limited circumstances, the prosecution might be permitted to call witnesses in reply. After all the evidence has been presented to the court, counsel for the prosecution addresses the jury summing up the case for the prosecution. The defendant's legal representative will then follow with his address to the jury. Those addresses will be followed in turn by the judge's summing up in which the judge instructs the jury as to the principles of law that apply to the case in question. The jury then retires to consider its verdict. If the jury returns a verdict of not guilty, the defendant is acquitted and released. If the verdict is guilty, the judge will proceed to sentence the defendant. If the jury

cannot agree on its verdict, the judge will discharge the jury and direct a new trial of the defendant.

144. As a general rule, a trial is open to the public. Open justice is one of the most fundamental rules of our legal system.³ Justice Gibbs of the High Court of Australia expressed the principle in these terms:⁴

It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted “publicly and in open view”. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for “publicity is the authentic hall-mark of judicial as distinct from administrative procedure”. (Citations omitted)

On rare occasions the court might be closed to the public. The court might make an order excluding the public from the court if the court considers it desirable in the interests of the administration of justice or in order to prevent hardship or embarrassment to any person. The only persons then permitted to be in the courtroom will be the judge and necessary officers of the court, the jury, the prosecution and the defendant and his legal advisers and the witness. There is one occasion when the court must make an order clearing the courtroom. That occasion is when a child who is the alleged victim of a sexual offence is about to give evidence.⁵ The judge will then make an order clearing the court while the child is giving evidence. The court will then be cleared of all persons except the judge and necessary officers of the court, the jury, the prosecution and the defendant and his legal advisers and the witness. In addition, a person may be present at the request of or with the consent of a child to provide emotional support for the child as well as any other person who, in the opinion of the court, should be allowed to be present. Thus, the child could have one or both parents present in the courtroom while giving evidence.

Appeals

145. A defendant who has been convicted may apply for permission to appeal against the conviction. A Supreme Court judge will decide whether permission should be granted and, if it is, the appeal will be heard by the Court of Criminal Appeal. The Court of Criminal Appeal comprises three judges of the Supreme Court. A convicted defendant may also apply for permission to appeal against the severity of the sentence. If permission is granted, the appeal will also be heard by the Court of Criminal Appeal. In limited circumstances, the Director of Public Prosecutions may apply for permission to appeal if he believes the sentence is too lenient. If permission is granted, that appeal will also be heard by the Court of Criminal Appeal. The Director of Public Prosecutions may in certain circumstances apply for permission to appeal against the decision of a judge acquitting a defendant. The Director cannot appeal against an acquittal after a trial by jury.

³ J J Spigelman CJ, *Seen To Be Done: The Principle of Open Justice – Part 1* (2000) 74 ALJ 290, 292.

⁴ *Russell v Russell* (1976) 134 CLR 495, 520.

⁵ Section 69(1) of the *Evidence Act*.

Discontinuance of a Prosecution

146. The Director of Public Prosecutions might decide to withdraw a prosecution. There could be a number of reasons for that decision. They include the fact that the victim does not wish the matter to proceed because the victim does not wish to give evidence or for some other reason. Alternatively, other evidence might have been obtained which weakens the prosecution case. If the decision not to proceed is made after committal but before arraignment, the Director of Public Prosecutions will then file what is called a white paper in the District Court and the defendant will then be discharged. If that decision is made after arraignment, the Director of Public Prosecutions will inform the court that he does not wish to prosecute the case any further by announcing a *nolle prosequi*, a Latin expression meaning “unwilling to prosecute”. The defendant will then be discharged. In other cases, where there might be difficulty with some witnesses or other difficulties in a prosecution case, the Director of Public Prosecutions might be willing to accept a plea of guilty to a lesser charge than that stated on the information.

SEXUAL OFFENCES

147. The following is a list of sexual offences that are likely to involve children. They are listed according to whether they are indictable offences or summary offences. It is not a list of every offence that might be committed against children. Instead, it is a list of the kinds of sexual offending most likely to occur in schools or is offending that is incompatible with being a teacher or having a position that involves having contact or dealings with children.

Major Indictable Offences

148. The following are sexual offences that are classified as major indictable offences:

1. Rape⁶ – a person will be found guilty of rape if he or she has sexual intercourse with another person without the consent of that person, either knowing that there is no consent or is recklessly indifferent as to whether that person is consenting or not.
2. Unlawful sexual intercourse⁷ – a person will be found guilty of unlawful sexual intercourse if that person has sexual intercourse with a person under the age of 17 years. Unlawful sexual intercourse may also occur when a person who is in a position of authority in relation to a person under the age of 18 years has sexual intercourse with that person. A person in authority includes a teacher.

It is a defence to a charge of unlawful sexual intercourse with a person over the age of 14 years and under the age of 17 years if the person with whom the defendant is alleged to have had sexual intercourse was of or over the age of 16 years and the defendant was under the age of 17 years on the date of the offence

⁶ Section 48 of *Criminal Law Consolidation Act*.

⁷ Section 49 of *Criminal Law Consolidation Act*.

or believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or over the age of 17 years.

3. Persistent sexual exploitation⁸ – a person will be found guilty of this offence if, over a period of not less than three days, he commits more than one act of sexual exploitation of the same child under the age of 17 years or, if that person is in a position of authority in relation to the child, the child is under the age of 18 years.
4. Indecent assault⁹ – an indecent assault is not defined in legislation but it is an assault accompanied by circumstances of indecency. Examples are unwelcome kissing and touching a person in the area of that person's breasts, buttocks or genitals. If the victim was at the time of the offence under the age of 14 years, the offence is classified as an aggravated offence. The basic offence of indecent assault is a minor indictable offence.
5. Producing or disseminating child pornography¹⁰ – a person who produces or takes any step in the production of child pornography or disseminates or takes any step in the dissemination of child pornography knowing of its pornographic nature is guilty of this offence.
6. Being in possession of child pornography¹¹ – a person who is in possession of child pornography knowing of its pornographic nature or a person who intends to obtain access to child pornography or obtains access to child pornography is guilty of this offence. The offence is a major indictable offence if it is a subsequent offence or an aggravated offence. If it is a first offence of a basic nature, it is a minor indictable offence.
7. Procuring a child to commit an indecent act¹² – it is an offence for a person to encourage or procure a child to commit an indecent act. This includes causing or persuading a child to expose any part of his or her body to make a photographic, electronic or other record from which the image of that child may be reproduced.

Minor Indictable Offences

149. Minor indictable offences include:

1. Indecent filming¹³ – it is an offence to film another person in a state of undress in circumstances in which a reasonable person would have an expectation of privacy, or that other person is engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy, or filming another person's genitals in circumstances in which a reasonable person would

⁸ Section 50 of *Criminal Law Consolidation Act*.

⁹ Section 56 of *Criminal Law Consolidation Act*.

¹⁰ Section 63 of *Criminal Law Consolidation Act*.

¹¹ Section 63A of *Criminal Law Consolidation Act*.

¹² Section 63B of *Criminal Law Consolidation Act*.

¹³ Section 23AA of *Summary Offences Act*.

not expect to be filmed. If the person filmed is 18 years or older, the offence is a summary offence. If that person is under the age of 18 years, it is a minor indictable offence. It is also an offence to distribute a picture obtained by indecent filming.

2. Stalking¹⁴ – it is an offence unlawfully to stalk another person. Stalking includes following another person, loitering outside a person's place of residence or some other place that person frequents, and a range of other behaviour that might reasonably be expected to create apprehension or fear in that other person.
3. Gross Indecency¹⁵ – any person who, in public or in private commits any act of gross indecency with, or in the presence of, another person under the age of 16 years is guilty of this offence. The offence is also committed if the act of gross indecency is committed by or with any other person in the presence of the victim.

Summary Offences

150. Summary offences include:

1. Indecent behaviour¹⁶ – it is an offence for a person to behave in an indecent manner in a public place or in any other place so as to offend or insult a person.
2. Gross indecency¹⁷ – it is an offence if a person in a public place or while visible from a public place wilfully does a grossly indecent act either alone or with another person.
3. Producing indecent or offensive material¹⁸ – a person who produces or takes any step in the production of indecent or offensive material for the purpose of sale or who sells indecent or offensive material or exhibits indecent material or commits other offences in relation to indecent or offensive material is guilty of an offence.

151. All of the above kinds of offending are offences either against the *Criminal Law Consolidation Act* or offences against the *Summary Offences Act* of South Australia. Other legislation, both State and Federal, also creates offences involving sexual misconduct with children. One such offence is sexual harassment. Sexual harassment is made unlawful by both section 28F of the *Sex Discrimination Act* of the Commonwealth and by section 87 of the *Equal Opportunity Act* of South Australia.

152. In addition, Commonwealth legislation prescribes offences relating to the use of postal or like services for child pornography material or child abuse material. The offences are prescribed by Subdivision B and C of the *Criminal Code Act* of the Commonwealth.

¹⁴ Section 19AA of *Criminal Law Consolidation Act*.

¹⁵ Section 58 of *Criminal Law Consolidation Act*.

¹⁶ Section 23 of *Summary Offences Act*.

¹⁷ Section 23 of *Summary Offences Act*.

¹⁸ Section 33 of *Summary Offences Act*.

DISCIPLINARY PROCEEDINGS

153. Teachers are subject to other disciplinary proceedings in addition to being punishable by the criminal law. They are liable to disciplinary proceedings under both the *Education Act* and the *Teachers Registration and Standards Act*. The standard of proof in disciplinary proceedings is proof on the balance of probabilities, that is to say, that it is more probable than not that the teacher has offended. That is a lower standard of proof than proof beyond reasonable doubt which applies in criminal proceedings.

Education Act

154. Section 26 of the *Education Act* states that a teacher will be liable to disciplinary action if the teacher

- (a) contravenes or fails to comply with any provision of the *Education Act*;
- (b) contravenes or fails to comply with any lawful direction given to him under the *Education Act*;
- (c) is negligent, inefficient or incompetent in the discharge of his duties;
- (d) is absent from duty without proper cause; or
- (e) is guilty of any disgraceful or improper conduct.

If the Chief Executive of the Department finds there is sufficient cause for disciplinary action, he may impose a range of penalties. Those penalties range from reprimanding the teacher through fining or reducing the remuneration of the teacher to suspending the teacher without any remuneration or recommending the dismissal of the teacher. The *Education Act* provides teachers with rights of appeal to the Appeal Board against a decision to dismiss him. The Appeal Board may vary or revoke the decision to dismiss a teacher.

The Power to Suspend

155. In addition to those powers, section 27 of the *Education Act* invests the Chief Executive of the Department with power to suspend a teacher where, in his opinion, the nature or circumstances of any matter alleged against that teacher are such that the teacher should not continue in the performance of his duties. The Chief Executive may suspend a teacher whether or not the teacher has been charged with an offence. The power to suspend a teacher might be exercised in a number of circumstances. One instance is when allegations have been made against a teacher of unlawful conduct of any kind. The unlawful conduct alleged might be theft or sexual misconduct or some other kind of offending.

156. Subsections (3) and (4) of section 27 deal with the question of payment of salary to a suspended teacher. They are in these terms:

- (3) Unless the employing authority otherwise determines, a person suspended under this section shall be entitled to his salary in respect of the period of suspension.
- (4) Where a direction has been given under subsection (3) and the guilt of the suspended officer of the matter alleged against him is not established by due process of law, he shall be entitled to receive the salary to which he would have been entitled if there had been no direction under subsection (3).

The employing authority in section 27 means the Director-General of Education who is, in fact and in law, the Chief Executive of the Department. The manner in which section 27(3) is expressed indicates that the general rule is that a suspended officer is entitled to be paid his salary. The meaning of section 27(3) is that the salary will be paid unless the Chief Executive determines that it should not be paid. Section 27(3) should also be considered with section 27(4). If the Chief Executive decides that the suspended officer is not entitled to be paid and the guilt of the suspended officer is not established, the Chief Executive must pay that officer's salary in full. The general rule as expressed in subsection (3) that the teacher is suspended on full pay has regard to the presumption of innocence.

157. In the course of this Inquiry, it was publicly asserted that it is inappropriate for a teacher to continue to be paid his salary while the teacher is suspended. Remarks to that effect overlook or do not give due weight to the terms of section 27(3) or to the presumption of innocence.

158. It is likely that the Chief Executive would approach with great caution the question not to pay a suspended teacher while allegations are being investigated or prosecuted. The Chief Executive must have regard to the presumption of innocence. Certainly, it would be a bold act to decide not to pay the teacher's salary while investigations are proceeding. The evidence of this Inquiry shows that, in a large number of instances, when a teacher has been suspended while allegations of sexual misconduct are being investigated, the result of the investigation is that there is not sufficient evidence to warrant charging the alleged offender. A decision to withhold the payment of salary could cause a teacher considerable financial hardship, a hardship that might not be remedied later by payment of the full salary when the allegations have not been substantiated and the teacher resumes duties. There might be a stronger case for withholding payment of salary where the alleged offender has been arrested and charged but, even then, the Chief Executive would need to approach the question of withholding payment of salary with great care. The varied nature of sexual offending together with the variation in the weight and substance of allegations means that there cannot be any rule of universal application. The Chief Executive would be conscious also of the fact that the teacher might be acquitted of the alleged offending. As will be demonstrated later, in the case of almost half of the cases where a teacher has been tried for sexual offences, the case has been withdrawn or the teacher has been acquitted. As with so many decisions in this difficult and complex area, each case will have to be considered on its own facts.

Teachers Registration Board

159. Teachers are also subject to the *Teachers Registration and Standards Act*. That Act established a regime for both the registration of teachers and the disciplining of teachers. It also established the Teachers Registration Board.¹⁹ The functions of the Board include the registration and discipline of teachers as well as the promotion of the teaching profession and of professional standards for teachers.²⁰ It is necessary to examine only the provisions of the Act relating to discipline.

¹⁹ See Part 3 of *Teachers Registration and Standards Act*.

²⁰ Section 6 of *Teachers Registration and Standards Act*.

160. The provisions of the *Teachers Registration and Standards Act* apply to all teachers in South Australia, that is to say, they apply to teachers in both government and non-government schools.

161. The circumstances in which a teacher will be liable for disciplinary action by the Teachers Registration Board include

- (a) where the teacher has been guilty of unprofessional conduct, or
- (b) if the teacher is not a fit and proper person to be registered as a teacher.²¹

The expression “unprofessional conduct” is defined in section 3 of the *Teachers Registration and Standards Act*. It includes incompetence and disgraceful or improper conduct. The Supreme Court of South Australia has held that the words “disgraceful” and “improper” are to be read disjunctively so that a teacher can be guilty of unprofessional conduct if the conduct is either disgraceful or improper.²² The question whether a teacher is a fit and proper person to be registered as a teacher involves an examination of three things, honesty, knowledge and ability.²³

162. The Board may hold an inquiry to determine whether the conduct of a teacher warrants disciplinary action.²⁴ The Board may hold an inquiry if a complaint has been made by the Registrar of the Teachers Registration Board or if the Board itself decides to hold the inquiry. If the Board finds that the teacher has been guilty of unprofessional conduct or is not a fit and proper person to be registered as a teacher, the Board may impose a range of penalties. The Board may either:

- (a) reprimand the teacher;
- (b) order the teacher to pay a fine not exceeding \$5,000;
- (c) impose conditions on the teacher’s registration;
- (d) suspend the teacher’s registration for a specified period or until the fulfilment of the specified condition or until further order;
- (e) cancel the teacher’s registration with immediate effect or to take effect at a future specified date;
- (f) disqualify the teacher from being registered as a teacher permanently or for a specified period or until the fulfilment of specified conditions or until further order.

A teacher has a right to appeal against a decision of the Board to exercise disciplinary action. That appeal lies to the Administrative and Disciplinary Division of the District Court.²⁵

²¹ Section 33 of *Teachers Registration and Standards Act*.

²² *Reg v Teachers Appeal Board; Ex parte Bilney* (1984) 35 SASR 492.

²³ *Hughes and Vale Pty Ltd v New South Wales* (No. 2) (1955) 93 CLR 127, 156.

²⁴ Section 35 of *Teachers Registration and Standards Act*.

²⁵ Section 49 of *Teachers Registration and Standards Act*.

Informing the Board

163. The *Teachers Registration and Standards Act* establishes mechanisms by which the Board can be informed of conduct that might require disciplinary action by the Board. They are

1. Employers of teachers have a statutory duty prescribed by section 37 of the Act to report to the Board
 - (i) if the employer has dismissed a practising teacher in response to allegations of unprofessional conduct, or
 - (ii) if the employer has accepted the resignation of the teacher following allegations of unprofessional misconduct.

In either case, the employer must within seven days submit a written report to the Board describing the circumstances of the dismissal or resignation and providing other prescribed information.

2. The Director of Public Prosecutions and the Commissioner of Police both have a statutory duty imposed by section 51 of the Act to make arrangements for reporting to the Board any offence that
 - (i) has been committed or is alleged to have been committed by a person who is a registered teacher or is believed to be a registered teacher, and
 - (ii) raises serious concerns about that person's fitness to be or continue to be a registered teacher.

The Director of Public Prosecutions and the Commissioner of Police have established administrative arrangements to report those matters to the Teachers Registration Board.

The arrangements with the Director of Public Prosecutions and the Commissioner of Police provide a means by which the Board is informed of any criminal proceedings against a teacher once the teacher has been charged with an offence that raises serious concerns in respect of the teacher's fitness to be a teacher. It also enables the Board to learn the outcome of the proceedings.

164. The *Teachers Registration and Standards Act* imposes obligations on the Registrar of the Board to give notice of any disciplinary or criminal proceedings against a teacher. Section 40 of the Act requires the Registrar to give notice of the commencement of an inquiry to determine whether the conduct of a practising teacher gives proper cause for disciplinary action and to notify the outcome of that inquiry. That notice must be given to

- (a) the employer of that person if the person is a practising teacher;
- (b) the chief executives of the Department for Education, the Catholic Education Office and the Association of Independent Schools of South Australia Incorporated;
- (c) the Director of Children's Services; and
- (d) the other teacher regulatory authorities in Australia and New Zealand.

If the Registrar of the Board becomes aware that a person who is or has been a registered teacher has been charged with or convicted of a criminal offence that, in the opinion of the Registrar, raises serious concerns about that person's fitness to be or to continue to be registered as a teacher, section 52 of the *Teachers Registration and Standards Act* requires the Registrar to give details of the matter to

- (a) the employer of that person if the person is a practising teacher;
- (b) the chief executives of the Department for Education, the Catholic Education Office and the Association of Independent Schools of South Australia Incorporated; and
- (c) the Director of Children's Services.

The Registrar must also notify those same persons if the charge is subsequently withdrawn or the teacher is acquitted.²⁶ In this way, school administrators both in South Australia and throughout the Commonwealth are informed of concerns as to a person's fitness to be a teacher.

165. If a criminal charge against a teacher is withdrawn or the teacher is acquitted of the offence for which he has been charged, that does not necessarily mean that the teacher can return to employment as a teacher. As already mentioned, a criminal charge must be proved beyond reasonable doubt. The Teachers Registration Board or the teacher's employer, be it the Department or in the case of non-government schools the school council or other like body, is able to take disciplinary action against the teacher and may do so if satisfied on the balance of probabilities that disciplinary action is required. For example, the Teachers Registration Board may charge the teacher with unprofessional conduct and may discipline the teacher if it is satisfied on the balance of probabilities that the teacher has been guilty of unprofessional conduct. Similarly, the Chief Executive of the Department may charge the teacher with disgraceful or improper conduct and may discipline the teacher if satisfied on the balance of probabilities that the charge has been proved.

²⁶ Section 52(2) of the *Teachers Registration and Standards Act*.

CHAPTER 4 – SHARING INFORMATION

The Need to Share Information

166. Early intervention is one means of enhancing the protection of children from abuse or neglect. That process will in turn be assisted if there are mechanisms or processes by which information can be shared between those individuals, agencies and organisations who are involved, in one capacity or another, in the care, welfare and support of children.

167. Two documents have been prepared by agencies of the South Australian Government for the purpose of establishing procedures for the exchange of information that will assist in the promotion of the safety and welfare of children and young people. The first is the *Interagency Code of Practice: Investigation of Suspected Child Abuse or Neglect*. It is commonly called the “Interagency Code of Practice”. The second is called *Information Sharing: Guidelines for Promoting the Safety and Well-being of Children, Young People and their Families*. The latter is commonly called the “Information Sharing Guidelines”. Both documents were prepared by committees comprising representatives of relevant government agencies.

Interagency Code of Practice

168. The Interagency Code of Practice was first published in 2001. A revised version was published in June 2009. The Interagency Code of Practice is a handbook stating the agencies and organisations, both government and non-government, which may be involved in notifying and investigating child abuse or neglect. Its intention is to guide those agencies and organisations in the investigation of child abuse or neglect. Its aims include

- to minimise any trauma for children and their caregivers from their involvement in the interagency process; and
- to minimise the number of interviews with a child.

The sharing of information is an essential tool in minimising the trauma for the child, a goal that is especially achieved if the number of interviews with the child is minimised. In section 6.1.2, the Code expressly refers to the Information Sharing Guidelines. Section 14 of the Code identifies issues specific to the education system. I will return to section 14 of the Code in paragraphs 191 to 193 below.

Information Sharing Guidelines

169. The Information Sharing Guidelines were published in 2008. They apply to all public sector agencies and to non-government organisations that have entered into contracts with government and have agreed to share information about risks to children and young people. They provide a set of overarching principles and practices for sharing information between agencies of Government. The aim of the Guidelines is to remove barriers to the exchange of

information so as to achieve a better integration between the agencies and organisations involved in child protection.¹

170. When considering processes for sharing information, it is necessary to respect an individual's right to privacy. The only aspect of the Information Sharing Guidelines that needs to be reviewed in this report concerns the disclosure of personal information when it is believed that a threat to a child exists. That might require the disclosure of personal information about the child without the consent of the child or the parents of the child or the disclosure of personal information about another person. That question must be considered by reference to any legislation and any binding principles regulating to the disclosure of personal information.

171. The use and disclosure of information concerning individuals have been addressed both by Commonwealth legislation and a Cabinet Instruction of the Government of South Australia. The following discussion examines the historical development of principles relating to the disclosure of personal information. It begins with the enactment by the Commonwealth Parliament in 1988 of the *Privacy Act*. It then notes how the Government of South Australia adopted one of the tests in the *Privacy Act* for the disclosure of personal information. It then examines how that test has been reviewed first by the Commonwealth Parliament and later by the Government of South Australia.

The Privacy Act

172. The question of the use and disclosure of personal information concerning an individual was first addressed by the *Privacy Act* of the Commonwealth. The *Privacy Act* enacted what are called "Information Privacy Principles" in section 14 of the Act and "National Privacy Principles" in Schedule 3 of the Act. The Information Privacy Principles apply to agencies of the Commonwealth Government. The National Privacy Principles apply to organisations as defined in the Act. State Government agencies (which include the Department for Education) are not bound by the *Privacy Act*.

173. Both the Information Privacy Principles and National Privacy Principles state the circumstances in which an organisation might disclose personal information about an individual. One of the circumstances in which the *Privacy Act* permitted disclosure of personal information about an individual was where the organisation "reasonably believes that the use or disclosure is necessary to lessen or prevent a serious and imminent threat to an individual's life, health or safety".² As will be noted in a moment, the Commonwealth Parliament has recently amended the *Privacy Act* to alter that test.

¹ The Guidelines are in the process of being amended. One proposed amendment is to extend them to include adults.

² See section 14 Principle 10 and Clause 2.1(e) of Schedule 3 of the *Privacy Act*.

Information Privacy Principles Instruction

174. There is no privacy legislation in South Australia.³ However, in 1989, the Government of South Australia published an instruction to all public sector agencies called “Information Privacy Principles Instruction”. The Instruction was reissued in 1992, 2009 and 2013. The Instruction applies to public sector agencies as defined by section 3 of the *Public Sector Management Act*. That Act has been replaced by the *Public Sector Act*. Public sector agencies are agencies and instrumentalities of the Government. Clause 4 of the Instruction requires the principal officer of each public sector agency to ensure that the principles are implemented and maintained and observed for and in respect of all personal information for which the agency is responsible. The effect of clause 4 is that all employees of public sector agencies are bound to observe the principles.

175. Before 2013, paragraph (10) of clause 4 of the Instruction stated the circumstances in which public sector agencies might disclose personal information about an individual to a third person in these terms:

- (10) An agency should not disclose personal information about some other person to a third person unless:
 - (a) the record-subject has expressly or impliedly consented to the disclosure;
 - (b) the person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the record-subject or of some other person;
 - (c) the disclosure is required or authorised by or under law; or
 - (d) the disclosure is reasonably necessary for the enforcement of the criminal law, or of a law imposing a pecuniary penalty or for the protection of the public revenue or for the protection of the interests of the government, statutory authority or statutory office-holder as an employer.

It is readily apparent that sub-paragraph (b) was based on the Information Privacy Principles in section 14 of the *Privacy Act* of the Commonwealth. On 4 February 2013, Cabinet amended the Information Privacy Principles Instruction to add an additional paragraph (e) to paragraph (10) of clause 4. I will refer to that amendment shortly.

Any Sanction to Ensure Compliance?

176. The Information Privacy Principles do not provide any penalty for a failure to comply with any of the principles. Paragraph 8 in Part III of the Instruction provides for the appointment of a person to investigate the extent of compliance by an agency. Paragraph 9 invests the Privacy Committee with power to require a report by the principal officer of an agency as to the extent of the agency’s compliance with the Instruction. However, no penalty is prescribed for a failure to comply with the Instruction.

177. Public sector employees are bound by the Code of Ethics for the South Australia Public Sector (“the Public Sector Code of Conduct”). The Public Sector Code of Conduct is published by the Commissioner for Public Sector Employment pursuant to section 15 of the

³ The South Australian Government is in the process of developing a bill.

Public Sector Act. A breach of a disciplinary provision of the Public Sector Code of Conduct constitutes misconduct as defined by section 3 of the *Public Sector Act*. The Code sets out what it calls “professional conduct standards” to be complied with by public sector employees. Those conduct standards include the observance of lawful and reasonable directions, policies and procedures and other instruments which define what is expected or required of public sector employees. The Information Privacy Principles Instruction is an instrument that defines what is expected or required of public sector employees. The Public Sector Code of Conduct also states that a public sector employee who fails to comply with the conduct standards may be liable to disciplinary action. A failure to comply with the Information Privacy Principles would, therefore, be a breach or disciplinary provision of the Public Sector Code of Conduct and as such constitute misconduct as defined by section 3 of the *Public Sector Act*. In this way, public sector employees are bound to comply with the Information Privacy Principles.

178. However, it is difficult to envisage what sanction would apply if an agency or department failed to comply with the Information Privacy Principles Instruction. The chief executive of a department is bound by the Information Privacy Principles. The Instruction does not contain any sanction for a breach of the Instruction. Unless the breach was very serious or systemic and there were no extenuating circumstances, it is unlikely that the chief executive of a large Government agency or department would be accountable for the failure to observe the Instruction.

179. The Privacy Committee of South Australia is the agency that administers the Information Privacy Principles. It provides advice to Government on issues relating to the protection of personal privacy and oversees the implementation of the Privacy Principles in the agencies of the South Australian Government. If a complaint is made to the Privacy Committee that a department or agency has breached the Privacy Principles, the Privacy Committee will seek a response from that department or agency. It can also assist in the examination of the procedures of that department or agency in order to ensure further compliance with the Privacy Principles and recommend changes to the procedures of the department or agency. Another function of the Privacy Committee is to make an annual report to the Minister on its activities in the previous financial year. The report is tabled in the Parliament. If the annual report stated that a particular agency or department of Government had been the subject of a number of complaints, the tabling of the report in the Parliament might be a form of sanction. Apart from any public disapproval that might follow the tabling of an adverse report in the Parliament, it seems that, to all intents and purposes, **there is no effective sanction to ensure compliance with the Information Privacy Principles.**

Drafting Information Sharing Guidelines

180. Chapter 3 of the Information Sharing Guidelines states the circumstances in which information can be shared. Part 6 of Chapter 3 discusses the circumstances in which information concerning a child may be legitimately shared without consent. When the Information Sharing Guidelines were being drafted, the Privacy Committee of the Government of South Australia granted agencies and organisations using the Guidelines an exemption from compliance with paragraph 10(b) of clause 4 of the Information Privacy Principles. It permitted the words “and imminent” to be removed from paragraph 10(b). Had the draftsman of the Guidelines adopted that exemption, the Guidelines would have permitted disclosure of personal information about a child if the person disclosing the information

believed on reasonable grounds that a disclosure is necessary to prevent or lessen a serious threat to the life or health of that child. However, when the draftsman came to state the circumstances in which information could be shared without consent, he expressed the test in these terms:

Generally speaking, sufficient reason will exist if the provider believes that a child or young person or a group of children or young people is “at risk” in facing an immediate or anticipated serious threat to wellbeing and/or safety.

It will be readily noticed that, although the draftsman has not used the words “and imminent”, he has effectively restored those words by adding to the test the words “an immediate or anticipated”. There is, in fact, very little difference between an imminent or serious threat and an immediate or anticipated serious threat, especially if the words “immediate or anticipated” are intended to be read together. It is not clear whether the words “immediate or anticipated” are intended to be read conjunctively or disjunctively. They have the capacity to lead to confusion as to the circumstances in which information can be shared. That would be particularly so if the person seeking the information reads the words disjunctively but the person who is in a position to supply the information reads the words conjunctively. The drafting was most unfortunate. It frustrated the effect of the exemption.

The Test is Reviewed

181. The question of the appropriate test to apply where there is a serious threat to a person’s health, welfare or safety has been reviewed by the Australian Law Reform Commission. In 2006, the Commission received a reference from the Attorney-General of the Commonwealth to review the extent to which the *Privacy Act* continued to provide an effective framework for the protection of privacy in Australia. In May 2008, the Commission published a substantial report entitled *For Your Information - Australian Privacy Law and Practice*. Among the matters examined in the report were the criteria for the disclosure of personal information. That examination included a review of the “serious and imminent threat” test. The Commission received a number of submissions to the effect that it was necessary to have a lower threshold than the requirement that the threat be both serious and imminent before personal information could be used or disclosed. After reviewing the submissions, the Australian Law Reform Commission recommended that the Privacy Principles in the *Privacy Act* should be amended to permit the use or disclosure of an individual’s personal information if the agency or organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to an individual’s life, health or safety. The Commission’s report contains a summary of the submissions received and its analysis of those submissions. It is unnecessary to repeat the summary of the submissions. It is sufficient to refer to the Commission’s analysis and conclusions:

25.82 Agencies and organisations should be permitted to use and disclose personal information for a purpose other than the primary purpose of collection if they reasonably believe that the use or disclosure is necessary to lessen or prevent a serious threat to an individual’s life, health or safety; or public health or safety.

25.83 The current requirement that the requisite threats to an individual be imminent as well as serious sets a disproportionately high bar to the use and disclosure of personal information. This is problematic in circumstances in which there may be compelling policy reasons for the information to be used or disclosed but it is impracticable to seek consent. Agencies and organisations should be able to take preventative action to stop a threat from escalating to the point of materialisation. In order to do so, they may need to sue or disclose personal information.

25.84 The requirement that the requisite threats to an individual be imminent, therefore, should be removed. Any analysis of whether a threat is ‘serious’ must involve consideration of the gravity of the potential outcome as well as the relative likelihood. If a threat carries a potentially grave outcome but is highly unlikely to occur, it cannot be considered ‘serious’ in any meaningful sense. The word ‘serious’ cannot be considered in isolation. It must be considered in the context of a ‘serious threat’. The second listed definition of ‘threat’ in the Macquarie Dictionary is ‘an indication of *probable* evil to come’. This indicates that an assessment of likelihood of harm is implied.

25.85 While the removal of the imminence requirement will not impact on the need to assess whether a threat is likely to eventuate, it will render unnecessary an assessment of when a threat is likely to take place. This is borne out by the definition of ‘imminent’, which focuses on the immediacy of a threat. The Macquarie Dictionary defines ‘imminent’ as ‘likely to occur at any moment; impending’. It defines ‘impending’ as ‘about to happen; imminent’.

25.86 It should be emphasised that there are important safeguards contained in the formulation of the exception recommended by the ALRC. In each case, an agency or organisation will need to form a reasonable belief that the use or disclosure is necessary to lessen or prevent the requisite threat. An agency or organisation, therefore, will need to have reasonable grounds for its belief that the proposed use or disclosure is essential, and not merely helpful, desirable, or convenient.

25.87 There is a strong public interest in averting threats to life, health and safety. To remove the categories of threat relating to an individual’s safety or public safety, as suggested by one stakeholder, would leave a gap in the operation of the principles, and potentially lead to ambiguity in their application. For example, if an individual is facing a serious risk of injury or danger, in the absence of an exception allowing use and disclosure to prevent serious threats to safety, an agency or organisation may take an overly-conservative view that such risks do not constitute either a threat to life or health, and therefore refrain from acting. (Citations omitted)

182. I respectfully agree with the substance of the Commission’s reasons. They apply with equal force to the test of “an imminent or anticipated threat to well-being and/or safety” of a child in both the Information Privacy Principles and the Information Sharing Guidelines. There will be occasions when one person has knowledge about another person working with children that causes the first person to believe that there is a risk that at some future time the second person might harm any one of the children in his care. Although, the threat is anticipated on reasonable grounds, it might not be possible to state when the threat might materialise. For those reasons, I will in a moment recommend that the Information Privacy Principles be amended to reflect the Commission’s recommendation.

Privacy Act is Amended

183. The Commonwealth Parliament has adopted the recommendations of the Australian Law Reform Commission that relate to the “serious and imminent threat” test. In 2012, it enacted the *Privacy Amendment (Enabling Privacy Protection) Act*. Among other things, that Act has removed the “serious and imminent threat” test and permits disclosure where it is unreasonable or impractical to obtain the individual’s consent and the entity who has the personal information reasonably believes that disclosure is necessary to lessen or prevent a

serious threat to the life, health or safety of any individual.⁴ Those provisions will not come into force until 2014.⁵ Nevertheless, they are a useful model.

A New Test Recommended

184. Although there is no legislation in relation to privacy in South Australia, public sector agencies and their employees in this State are bound by the Information Privacy Principles and those principles are reflected in the Information Sharing Guidelines. It is desirable that the test in both documents for sharing information in respect of children who are at risk of abuse or neglect should not have to meet the high threshold of “an immediate or anticipated serious threat” to their well-being or safety. That test should be replaced by a test that reflects the test recommended by the Australian Law Reform Commission and adopted by the Commonwealth Parliament. I therefore recommend that clause 4(10) of the Information Privacy Principles should be amended by deleting paragraph (b) and substituting in its place the following:

- (b) The person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of the record-subject or of some other person.

In addition, I recommend that Part 6 of Chapter 3 of the Information Sharing Guidelines be amended by deleting the words:

Generally speaking, sufficient reason will exist if the provider believes that a child or young person or group of young people is “at risk” in facing an immediate or anticipated serious threat to wellbeing and/or safety.

and that those words be replaced by the following:

Generally speaking, sufficient reason will exist if the person disclosing the information (“the provider”) believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of any person or group of persons or that the provider reasonably believes that a child or young person or a group of children or young people are at risk.

The expression “at risk” is explained in the Guidelines.⁶ The suggested amendment reflects the proposal to amend the Information Sharing Guidelines to include adults. The sharing of information to protect children is provided for in both limbs of the amendment.

Should the Department Disclose Names?

185. The Department for Education is a public sector agency. It is, therefore, bound by and must comply with the Information Privacy Principles. The expression “personal information” is defined in clause 3 of the Principles in these terms:

“personal information” means information or an opinion, whether true or not, relating to a natural person or the affairs of a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

⁴ See section 16A and Schedule 1 of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

⁵ See section 2 of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

⁶ See section 5, Explanation of Terms.

It is the practice of SA Police to inform the Department that criminal charges have been made against a teacher. Personal information will include the fact that a teacher has been charged with an offence. In that sense, the Department collects personal information and is bound by the Information Privacy Principles in relation to that personal information. It is permitted to disclose that personal information only in the circumstances referred to in clause 4(10).

186. As will be noted later in this report, when an allegation of sexual misconduct is made against a teacher or other member of the staff of a school, the Department immediately conducts a risk assessment to determine whether allowing that employee to remain at the school while the allegations are investigated poses a risk to the safety of children at the school. Generally speaking, the result of that risk assessment is that the employee is suspended pending the investigation of the allegations. If police arrest and charge the employee, the suspension of that employee continues until the trial of the employee has concluded.

187. One question that must be considered when examining the question whether a letter should be sent to parents informing them, say, that a teacher has been arrested and charged with a sexual offence is whether the teacher should be named in the letter. Sub-paragraphs (a) and (d) of clause 4(10) would not permit the naming of the teacher. Any threat that the teacher might pose has been reduced by the fact that he has been suspended and cannot attend the school. It is readily apparent that those sub-paragraphs of clause 4(10) of the Information Privacy Principles do not permit the Department to name the teacher in any letter sent to parents. However, there might be cases where the offending is of a kind that there are grounds for suspecting that children other than the victim have been involved and might themselves be victims. In those circumstances, the Department ought to be able to inform parents so that parents might be alert to behaviour in their child that might indicate some form of abuse. As noted in Chapter 2, although section 71A(2) of the *Evidence Act* prohibits public communication of the name of a person accused of a sexual offence before that person is committed for trial or sentence, it does not prohibit a private communication of that fact. However, it is arguable that sub-paragraphs (a) and (d) of clause 4(10) of the Information Privacy Principles would not permit the Department to name the teacher in any letter to parents. The position would be no different even if the Information Privacy Principles and the Information Sharing Guidelines were amended as recommended in paragraph 184 above.

188. There is much to be said for the view that the proper protection of children should prevail over the presumption of innocence in the case of an alleged offender. In this context, the protection of children means safeguarding the health and welfare of children who might be victims. For that reason, it is desirable that the Department should be able to disclose the name of the alleged offender to parents whose children might have been at risk of being offended against by the teacher who has been charged. For these reasons, I had intended recommending a second amendment to the Information Privacy Principles to permit the naming of a teacher who had been charged with a sexual offence. However, it is unnecessary to make such a recommendation because on 4 February 2013, Cabinet amended the Information Privacy Principles Instruction by adding an additional paragraph at the end of paragraph (10) of clause 4. The new paragraph reads:

- (e) The agency has reason to suspect that unlawful activity has been, is being or may be engaged in, and discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.

That paragraph would permit both the naming of the teacher and a statement as to the nature of the offending to be made in a letter to parents. The question when it is appropriate to name the teacher in a letter to parents is discussed in Chapter 12 of this report.

189. The Information Privacy Principles do not apply once a person has been committed for trial or sentence. As noted in Chapter 2, section 71A(2) of the *Evidence Act* permits the name of a person charged with a sexual offence to be published once that person has been committed for trial or sentence. Section 71A(2) overrides the Information Privacy Principles since it is an Act of Parliament whereas the Information Privacy Principles are no more than a Cabinet instruction to public sector agencies. It is a fundamental principle of law stemming from the separation of powers that an Act of Parliament prevails over an act of the Executive Government such as a Cabinet instruction. The Parliament has supremacy over the Executive. It is lawful, therefore, for a school to inform parents of the result of the committal hearing unless a suppression order has been made.

Governing Councils

190. Governing councils of schools are not bound by the Information Privacy Principles. The principles apply only to public sector agencies as defined by section 3 of the *Public Sector Act*. The definition states that a public sector agency does not include “a person or body declared under an Act not to be part of the Crown or not to be an agency or instrumentality of the Crown”. Governing councils are one form of school council established as bodies corporate pursuant to section 83 and section 85 of the *Education Act*. Section 83(3)(f) provides that a school council is not an agency or instrumentality of the Crown. Governing councils are, therefore, not an agency or instrumentality of the Crown and, for that reason, are not public sector agencies and are not bound by the Information Privacy Principles. It is recommended that this anomaly be addressed by amending the Code of Practice of Governing Councils to include an obligation to comply with the Information Privacy Principles or, alternatively, by an administrative instruction to that effect made by the Minister pursuant to section 96 of the *Education Act*.

Section 14 of the Interagency Code of Practice

191. Section 14 of the Interagency Code of Practice deals with issues specific to the education system and, in particular, with several issues that relate specifically to the Department and SA Police. In section 14.2, the Code refers to two matters relating to interviewing children. The two paragraphs read as follows:

Should an interview need to be conducted with a child at a DECS site and the allegation is against a staff member, it is inappropriate for other staff members to be the child’s support person or to be present at the interview.

SAPOL has a responsibility to notify parents or guardians that they are interviewing their child (children), preferably before the interview.

It is desirable that the Code be amended to state at the end of the first of those paragraphs that police should ensure that a support person is available for the child and that the support person be a parent (unless the parent is the alleged offender), a relative or friend chosen by or acceptable to the child.

192. It is desirable also that the word “responsibility” in the second paragraph of the two paragraphs as quoted above is deleted and replaced by the word “duty”.

193. The Code also requires amendment to bring it up to date with changes in the name of some agencies. This report will focus on the changes to section 14. The following amendments are required:

1. As the name of the Department has changed, the Department should be called the “Department for Education and Child Development”. In addition, where the abbreviation DECS is used to refer to the Department by its former name, the abbreviation should be changed to “DECD”.
2. The expression “Special Investigations Unit” when used in the Code should be changed to “Investigations Unit”. That reflects a change of name of that unit by the Department in January 2012.

Memorandum of Administrative Arrangement

194. In November 2011, the Department and SA Police executed a Memorandum of Administrative Arrangement. The purpose of the Memorandum is to enable the two agencies to collaborate on a number of issues including:

- the investigation or other action in relation to an assault on any student or member of staff at a school;
- the investigation or other action in relation to other crimes at a school; and
- crime prevention at schools.

The expression “assault” would include a sexual assault. The Memorandum is expressed in broad terms and enables the two agencies to develop policies and procedures that specifically address particular issues.

Sharing Information Between Sectors

195. In 2005, the Department entered into a Memorandum of Understanding with both Catholic Education SA and the Association of Independent Schools by which each party is agreed to disclose to the other, on a confidential basis, information as to whether an individual poses an unacceptable risk for working with children

196. The Memorandum of Understanding has been replaced by a protocol executed in February 2013 which is to the same effect as the Memorandum of Understanding. It is called the *Intersectorial Information Sharing Protocol*. It states that the three parties are committed to the following principles:

- the safety of children and young people is of paramount concern;
- individuals must be suitable to work or volunteer with children and young people at all times;
- a determination about an individual’s suitability to work or volunteer with children and young people must be based on relevant information;

- employers or oversighting bodies need to know sufficient relevant information about individuals working or volunteering with children and young people to be able to safeguard them from harm;
- known and potential risks to children and young people must be responded to in a timely way and cannot be ignored;
- personal and sensitive information about a person's history must not be misused.

The protocol imposes an obligation on each party to judge whether it is appropriate to share, on a confidential basis with the other two parties, relevant information as to whether a person is an unacceptable risk when working with children in any capacity. When making that decision it is necessary for the party to have regard to the principles that underline the protocol. The protocol provides that it will be reviewed on an annual basis. Plainly, this is a commendable initiative in the endeavour to avoid employing persons unfit to work with children.

197. The Department has failed on at least one occasion to comply in a timely manner with the Memorandum of Understanding made in 2005. Not until 7 November 2012, did it notify Catholic Education SA and the Association of Independent Schools of the fact that Harvey had been arrested and charged or that he had been convicted. It is beyond the Terms of Reference of this Inquiry to examine whether the Department has consistently complied with the Memorandum of Understanding. The Department has reviewed its practices and has on several occasions in 2013 complied. It hardly needs to be stated that understandings or protocols of this kind are almost worthless unless all parties comply with them.

CHAPTER 5 – SOME FACTS ABOUT THE DEPARTMENT

198. This chapter will note some brief facts about the Department and describe the units at the central office of the Department that were involved in the events at the Largs Bay Primary School. It will also describe the Department's process for managing critical incidents and the process of suspension of teachers accused of sexual misconduct.

A Large Department

199. The Department for Education and Child Development is one of the largest departments in the Government of South Australia. It employs some 28,400 employees (or 22,670 full-time equivalents). It administers more than 1,200 sites including 555 schools. Those sites also include pre-schools and child care centres. It is not only responsible for the provision of education under the *Education Act* but is also responsible for the oversight of early childhood care centres under the *Children's Services Act*. It is also responsible for child protection under the *Children's Protection Act* and adoption under the *Adoption Act*. Families SA is part of the Department. The work of Families SA includes protecting children from abuse and harm, supporting families to reduce risk to children, working with young people who break the law, caring for refugee children at risk, and delivering services to address poverty. This list of the Department's responsibilities is not exhaustive. It has wide-ranging responsibilities for children and young people.

Management in December 2010

200. The Department is headed by a Chief Executive and a Deputy Chief Executive. They are respectively Mr Keith Bartley and Mr Gino DeGennaro. In December 2010, there was no Chief Executive. The services of the previous Chief Executive, Mr Robinson, had been terminated in mid-2010 and his replacement, Mr Keith Bartley, did not commence duty until 2 May 2011. In December 2010, the Acting Chief Executive was Mr Gino DeGennaro and the Deputy Chief Executive was Ms Jan Andrews. Before Mr Robinson had left the Department, Mr DeGennaro and Ms Andrews had both been Deputy Chief Executives, each having different operating divisions of the central office reporting to them.

Operating Divisions and Units

201. The Department is administered from a central office at 31 Flinders Street, Adelaide. The Department is divided into a number of operating divisions, each headed by an executive director. Those operating divisions comprise a number of units. The head of each unit is responsible to the executive director of the operating division who in turn is ultimately responsible to either the Deputy Chief Executive or the Chief Executive of the Department. The structure of the operating divisions in December 2010 was different from the present structure. It is not necessary to describe the administrative structure in any detail. A copy of the organisational charts of the Department for 2011 and 2012 are attached as Appendix J and Appendix K.

Several Units Involved in Harvey Matter

202. In December 2010, a number of units of the Department were involved in different aspects of the events following the arrest of Mark Harvey and, after he had been convicted and sentenced in 2012, in dealing with the requests by parents and some members of the Governing Council of the Largs Bay Primary School for information to be given to parents. Those units were:

- the School Care Unit;
- the Special Investigations Unit (which is now called the Investigations Unit);
- the Licensing and Standards Unit;
- the Human Resources Unit;
- the Legislation and Legal Services Unit; and
- the Media Unit.

I will briefly describe the function of each unit.

203. The School Care Unit is part of the operating division called “Office for Schools”. Its functions include providing support and assistance to schools and school principals. If a critical incident occurs at a school, it will provide advice and support for the principal and the regional office. That advice includes directing the principal to relevant units in the central office. In December 2010, Mr Wuttke was the manager of the School Care Unit. Since August 2011, Mr Gary Costello has been Head of Schools, that is to say, he is the senior executive in charge of the Office for Schools. Another officer in that division is Ms Anne Kibble. She was actively involved in the steps taken by the Department following the conviction of Mark Harvey on 9 February 2012.

204. The functions of the Special Investigations Unit include investigating incidents at schools and misconduct by employees of the Department. On 16 January 2012, its name was changed to the Investigations Unit. One important aspect of its functions is that it is the unit that liaises with SA Police in respect of criminal offending by employees of the Department. It is the unit that SA Police contacts for the purposes of informing the Department that an employee has been arrested and charged with a criminal offence. In December 2010, Mr Andrew Thredgold liaised with SA Police on matters concerning the arrest of Harvey. Another officer in the Special Investigations Unit in December 2010 who was briefly involved in matters relating to Harvey was Ms Oggi Stojanovich. The manager of the Special Investigations Unit in December 2010 was Mr Kelsey.

205. In December 2010, the oversight of the OSHC services was the responsibility of Mr Ian Lamb. It is still his responsibility. Mr Lamb is a Senior Policy Officer in the operating division called the Office for Early Childhood Development, Strategy and Programs. In December 2010, the functions of the Licensing and Standards Unit included investigating incidents that had occurred in OSHC services. In that sense, it was yet another investigating unit in the Department. Its investigative functions have since been taken over by the Investigations Unit. Because police were already investigating Harvey’s offending, the Licensing and Standards Unit did not conduct any investigation in respect of that offending. Nevertheless, Mr Lamb consulted Ms Janne Todd who was in December 2010 the manager of that unit.

206. In December 2010, Ms Mardi Barry was the Manager, Employee Relations and Conduct within the Employee Relations and Conduct Unit. That unit was part of the operating division called Human Resources and Workforce Development, which is often referred to as the “Human Resources Unit”. It will be called the “Human Resources Unit” in this report. Ms Barry’s duties included advising the principal of the Largs Bay Primary School on the termination of Harvey’s services as Director of the OSHC service.

207. The Department obtains legal advice and other legal services from the Crown Solicitor. In order that the Department might receive timely advice, the Crown Solicitor has deployed lawyers from his office to work in the central office of the Department. They are referred to as “outposted solicitors”. There are three solicitors outposted to the Department.

208. Although the Department obtains legal advice and other legal services from the Crown Solicitor, it has a unit called the “Legislation and Legal Services Unit”. For convenience, it will be called “the Legal Unit”. It has a number of functions. They include the oversight of legislation that affects the Department. It provides legal advice to the Department on matters that do not require advice from the Crown Solicitor or where the matter has been the subject of advice on an earlier occasion. It manages personal injury and public liability claims. It advises and assists schools in respect of a wide variety of legal issues. Its manager is Mr Donald Mackie. He is not a qualified lawyer. Two members of the Legal Unit involved soon after the arrest of Harvey were Ms Kim Reynolds and Ms Marylen Bechara. They are both qualified lawyers but they have not had extensive legal experience.

209. As its name implies, the Media Unit is responsible for the Department’s dealings with the media. Officers in the Media Unit prepared press releases in relation to the events and circumstances following the conviction and sentencing of Mark Harvey.

210. In December 2010, some of the units described above reported ultimately to Mr DeGennaro and others to Ms Andrews. The units that reported to Mr DeGennaro were the Special Investigations Unit, the Legal Unit and the Human Resources Unit. The School Care Unit and the Licensing and Standards Unit reported to Ms Andrews. In addition, school principals were responsible to regional directors who in turn were responsible to Ms Andrews. This administrative structure has the potential to result in a lack of co-ordination and a failure to communicate information between those units who ought to be informed of particular events. At times, in the course of the management of the events following the arrest and charging of Harvey, there was an unfortunate lack of co-ordination and communication between units and senior executives of the Department.

Regions

211. For the purpose of administering schools, the Department has divided the State into 12 regions. Five are in the metropolitan areas of Adelaide and there are seven country regions. The Largs Bay Primary School is in the Western Adelaide Region. Each region has a Director and at least one Assistant Director. At all relevant times, Mr Brendyn Semmens and Mr Gregory Petherick were respectively the Director and Assistant Director for the Western Adelaide Region. The role of the Regional Directors and Assistant Regional Directors, as explained by Mr Semmens, is broadly speaking, threefold. One is risk and crisis management that essentially involves assisting principals of schools within the region in managing incidents at schools. The Regional Directors also provide a link between the principal and the

central office. Regional Directors are often the first port of call for principals seeking assistance. Principals are also assisted by the School Care Unit through the system for managing critical incidents that will be described in a moment. The second aspect of the role of Regional Directors is ensuring that schools are correctly implementing Departmental policies. The third is the improvement in the quality of schools. In December 2010, Regional Directors were responsible to Ms Andrews.

Principals

212. In December 2010, the principal of Largs Bay Primary School was Ms Julie Gale. Her appointment was to end in January 2011. She was succeeded as principal by Ms Tania Oshinsky.

Critical Incidents

213. As might be expected, different kinds of incidents occur at schools each day during the school term. In 1995, the Department instituted a manual documentary process for the reporting and management of critical incidents at schools. In August 2009, the Department replaced that process with an electronic web-based system. The system is called the Information and Response Management System. It is commonly referred to as “IRMS”. IRMS is intended to facilitate timely and efficient reporting and investigation of incidents affecting health and safety, injuries to students or staff, and incidents affecting the security of the site. IRMS enables electronic reporting of critical incidents at pre-schools, schools and children’s centres.

214. In August 2010, the Department published guidelines for the reporting of critical incidents. It is one of a number of documents published under the heading “Making Our Sites Safer” and is called *Critical Incident Reporting*. That document defined critical incidents in these terms:

- Parent issues
- A major disruption to the school/centre’s routine
- Intervention or action by police or other agencies
- Intruders
- Weapons at your school, preschool or children’s centre
- Disaster eg. fire/flood
- Drug incidents
- Death or serious injury to a student or staff member.

School principals were required by the guidelines to use IRMS to report incidents as soon as practicable after any critical incidents. The report was to be made electronically on a form called “Critical Incident Report”. If the incident was urgent, the principal was encouraged to make a telephone call to the Regional Director and the Manager of the School Care Unit.

215. It is apparent from the guidelines for the reporting of critical incidents that operated in December 2010 that the School Care Unit was the unit responsible for the management of critical incidents. However, as will be apparent from the narrative in Chapter 6, there was no central management of the issues concerning Mark Harvey either by the School Care Unit or by any other unit. In December 2010, different units in the Department gave advice to Ms Gale, who was then the principal of Largs Bay Primary School, but that advice was given on

what appears to be an ad hoc basis with no single person co-ordinating the management of the matter. In the result, anything to do with Harvey seems to have dropped out of the corporate memory of the Department in early 2011 until he was sentenced on 9 February 2012.

Suspending an Alleged Offender

216. In this section, it is assumed that the person against whom allegations have been made is a teacher. The discussion will apply with equal force to other members of the staff of a school who are employed by the Department. At the conclusion of this section, the position of an employee in the OSHC service will be examined.

217. Reference has already been made in Chapter 3 to the power of the Chief Executive of the Department to suspend a teacher.¹ The procedure by which the suspension is effected is as follows. When allegations of misconduct are made against a teacher, be it sexual misconduct or any other form of misconduct, the teacher is immediately stood down and placed on leave with pay.² During that period of leave, the Department sends a letter to the teacher informing him of the allegations and stating that it is the intention of the Department to suspend the teacher from duty on full pay until further notice. The letter offers the teacher the opportunity to make submissions to the Department why he should not be suspended. The Department correctly takes the view that it is not its task to investigate the allegations unless police decide not to investigate. Unless there is any obvious reason why the allegations should be dismissed, the teacher is suspended on full pay until further notice. A similar practice occurs in non-government schools.

218. The process of suspension raises the question whether the interests of the alleged victim and other children at a school should prevail over the interests of the alleged offender. Reference has already been made to the fact that schools have both a statutory duty and a common law duty to protect the children in their care. That duty points to the conclusion that the alleged offender should be removed in order to safeguard and protect the alleged victim and other children. On the other hand, consideration must be given to the presumption of innocence. The allegation might be frivolous or unfounded or both. This is a difficult question, especially as the likelihood is that the career of the alleged offender will be severely jeopardised even if the allegations are not substantiated. After carefully weighing the arguments, the resolution of this question seems to be that it is necessary to remove the alleged offender from the school. The removal of the alleged offender reduces the risk of re-offending with either the alleged victim or other students. It also protects the alleged victim from any fear of the alleged offender and from any threat, coercion or intimidation by the alleged offender. If the alleged offender is not removed and does, in fact, offend again, the school will have failed in its duty to protect either the alleged victim or other children in the school or both. It is appropriate to add that all interested parties who appeared before the Inquiry agreed with this conclusion.

¹ See paragraphs 155 to 158 of Chapter 3. The power is invested in the Chief Executive of the Department by section 27 of the *Education Act*.

² Regulation 22 of the *Education Regulations* authorises the Chief Executive of the Department to place a teacher on special leave for 15 days.

219. Suspending the alleged offender on full pay maintains a reasonable balance between the protection of children and the presumption of innocence. Suspension reduces the risk of reoffending at the school while the fact that the alleged offender continues to be paid has regard to the presumption of innocence. It is an indication that no judgment has been made as to the guilt or innocence of the alleged offender. It is a neutral position. In addition, suspension on pay does not signify any particular kind of offending. The offending might be a theft or other offending against property. It might be sexual misconduct or a physical assault or some other kind of offending. The offending might range from the relatively minor through to conduct of a grave and serious kind.

220. A similar process should be adopted when allegations of sexual misconduct have been made against an employee of the governing council of a school. The governing council should stand down the employee and send him a letter informing him of the allegations, stating that it is the intention of the governing council to suspend the employee on full pay until further notice and offering the employee the opportunity to make submissions why he should not be suspended. There appears to be no reason why the employee should not be suspended while the allegations are being investigated. The Inquiry has not heard evidence on the question whether an employee of OSHC should be suspended on full pay. The governing council might not have sufficient funding to do so. Another issue is whether it is the Department or the governing council that is in fact the employer of staff in the OSHC services. This is a matter for governing councils and the Department to resolve. The position might vary from school to school. The governing council of one school has provided the Inquiry with a legal opinion to the effect that the employer of staff in the OSHC service at that school is the Department not the governing council.

221. There are two other situations where it will be necessary either to suspend or to terminate the services of the alleged offender. The first is where the alleged offender has contracted to provide services to the Department in relation to children. In that case, the Department will need to obtain legal advice whether it can suspend the services of the contractor or any employees of the contractor or terminate the contract. In this respect, it would be desirable for the Department to obtain legal advice from the Crown Solicitor on the question of including, in any contract for services of a person who will be working with children, a clause or clauses that would require the contractor to suspend the services or state that the contract be terminated in the event that allegations of sexual misconduct are made against the contractor. Such clauses would avoid difficulties that might arise should there be no provision in the contract of that kind. The other situation concerns a person who is working as a volunteer at a school. The need to protect children at the school requires that, if allegations of sexual misconduct are made against a volunteer, the services of the volunteer should be terminated.

Directions to the Alleged Offender

222. When the Department suspends an alleged offender who is a teacher pending the investigation of allegations of sexual misconduct, it usually gives the suspended teacher certain directions. One such direction is not to attend or come near the site. Another is not to communicate with the person said to be the victim. A third that is sometimes given requires the teacher not to communicate with other members of the staff of the school. The first two conditions are entirely appropriate. They are necessary in order to ensure that the safety and welfare of the victim and of other children at the school are adequately protected. However,

for the reasons that follow, the third direction might not be reasonable and, therefore, might be unlawful. The Department may wish to consider whether it is necessary.

223. An employee has a duty at common law to obey the lawful and reasonable commands or directions of his employer.³ The standard by which to determine whether a direction is lawful and reasonable was expressed by Justice Dixon in *ex parte Halliday* in these terms:⁴

If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.

Public servants have an additional obligation, that is to say, they are subject to public service legislation that is designed not only to serve the purposes of the relationship of employer and employee but also, for reasons of governmental and public interest, has the object of securing values proper to be required of a public service in our system of Government and, in particular, the maintenance of public confidence in the integrity of the public service and of public servants.⁵ As Justice Finn noted in *McManus v Scott-Charlton*:⁶

For this reason public service Acts and regulations have in some respects gone considerably beyond what would be countenanced by the implied contractual duty of an ordinary employee to serve his or her employer with good faith and fidelity - at least in so far as the regulation of an employee's private activities are concerned.

The effect of the decision in *McManus v Scott-Charlton* is that the public service employment relationship might enlarge the scope of directions that might be given to those employed in the public sector. These principles apply to teachers as employees in the public sector.

224. Notwithstanding that the scope of reasonable directions to a teacher may be wider than in the case of the ordinary relationship of employer and employee, real questions exist as to the validity of a direction not to communicate with other members of the staff of the school. Such a direction does nothing towards the protection of children at the school. It does not seem to have any real connection with the teacher's employment at the school or the reason for his suspension from employment at the school. The direction would prohibit the teacher from communicating with those members of the staff of the school who are his friends. In that respect, it interferes with the teacher's right to freedom of association. There can be no justification for forbidding the teacher from communicating with colleagues at places other than the school. The Australian Education Union stated that teachers often suffer psychological harm on being suspended. A direction that prevents a teacher from speaking to colleagues who are friends is likely to add to any risk of psychological harm.

225. Other consequences of the direction must also be considered. Assume, for example, the teacher against whom the allegations have been made is, in fact, innocent. That teacher might wish to communicate with one or more other teachers at the school who are in a position to give evidence to assist him. The direction not to communicate with other teachers

³ *R v Darling Island Stevedoring and Lighterage Co Ltd; ex parte Halliday* (1938) 60 CLR 601; *McManus v Scott-Charlton* (1996) 70 FCR 16, 21.

⁴ *R v Darling Island Stevedoring and Lighterage Co Ltd; ex parte Halliday*, 621-622.

⁵ *McManus v Scott-Charlton* (1996) 70 FCR 16, 25.

⁶ *Ibid.* 25.

of the school would forbid any such communication. Even if the teacher against whom the allegations have been made is not innocent, there does not appear to be any reason why that teacher should not be able to communicate with other teachers at the school. It is the prerogative of the teacher who is being approached to decide whether he wishes to speak to the suspended teacher. It is difficult to find any reasonable justification for the direction. The concept of proportionality is not inappropriate to use as a test to determine the propriety of a direction.⁷ There are questions whether the direction to communicate to the other members of staff is disproportionate in all the circumstances. If the intention is to prevent the teacher from speaking to colleagues who are witnesses, a direction might be reasonable if it does no more than require the teacher not to speak to witnesses and name those persons.

226. I do not intend to express a firm opinion on this important question. It is inappropriate that I should. However, the Chief Executive of the Department might wish to consider the necessity for or take advice upon the lawfulness of a direction to a teacher not to communicate with other members of the staff of the school.

Notice of Allegations

227. When the Department writes to a teacher asking him to show cause to why he should not be suspended, the letter gives a very generalised statement of the nature of the allegations made against the teacher. The Australian Education Union submitted that the Department should give notice to the teacher of the allegations and, in those cases where there is an alleged victim, the name of that person. The effect of that submission was that procedural fairness required the name of the alleged victim to be given to the teacher so that the teacher was in a position to identify the occasion of the alleged incident. The union added that, while police might interview the teacher as early as 24 hours after he has been stood down, in other cases the teacher has not been interviewed for a period as long as seven weeks. It was asserted that this was unfair to the teacher.

228. Essentially, this is a matter of significance for the teacher who is in fact innocent of the allegations made against him. If the person is innocent, he will not know the circumstances of the offending and will need some particulars so that he can recall events and gather the evidence to assist his defence. If the allegation is made soon after the alleged offending, the person who has in fact offended would only be too well aware of the circumstances of the offending.

229. While the union's submissions have some force, there are sound reasons why it is not appropriate for the Department to disclose the name of the alleged victim to the teacher. First, it is the practice of police to give priority to investigating allegations of sexual misconduct against children. As a general rule, police will, therefore, be interviewing the teacher against whom the allegations have been made soon after the investigation has begun. In the course of interviewing the teacher, police will ask the teacher questions that will disclose the content of the allegations. In all likelihood, the teacher will in that way obtain sufficient notice of the allegations. Secondly, if the alleged victim is named, there might be a risk that the teacher

⁷ Ibid. 30.

might attempt to persuade the alleged victim to withdraw or modify the allegations. The attempt to persuade might be accompanied by a threat or some other form of inducement. The protection of the alleged victim must prevail over informing the teacher of the name of the alleged victim.

230. This is only a matter for concern in those cases where the allegations have first been made to a teacher or to a principal at the school. In those cases, where the teacher has been arrested and charged before the school or the Department has learned of any allegations against that teacher, the teacher will have learned the allegations when interviewed by police and will only be too well aware of them. In those instances, it will be sufficient for the Department when sending the letter asking the teacher to make submissions as to why he should not be suspended from duty simply to name the offence with which the teacher has been charged.

CHAPTER 6 – A FAILURE TO INFORM PARENTS

231. This chapter recounts the events surrounding the arrest of Mark Harvey, his conviction and the failure of the Department to inform parents of that conviction. I have deliberately recounted the events in some detail. There are at least three reasons for doing so. First, the parents of children of the Largs Bay Primary School and the teachers at that school are entitled to know what occurred and how the Department mismanaged the matter. Secondly, a detailed account demonstrates a lack of co-ordinated management of the matter on the part of the Department. Thirdly, it demonstrates the fundamental lack of knowledge on the part of the Department as to the circumstances in which disclosure of sexual offending can be made to parents.

Imperfect Recollections

232. In the case of almost all the witnesses who were employees of the Department in December 2010, there is either no independent recollection of the events of December 2010 or, at best, an imperfect recollection. With few exceptions, none of these witnesses kept notes of events in December 2010. The exceptions are Mr Wuttke, Ms Stojanovich, Ms Reynolds and Mr Thredgold. Mr Thredgold kept a log of events. Most of the witnesses had to reconstruct events relying on contemporaneous documents. For these reasons, I have to a substantial extent made my findings of fact by reference to the contemporaneous documents, supplementing those documents with such of the oral evidence as is consistent with them.

Largs Bay Primary School

233. In 2010, the Largs Bay Primary School, like many schools, provided an Out of School Hours Care service (“OSHC”) for students at the school. The service was available both before and after school. The hours were 7.15 to 8.45am and 3.15 to 6pm. Full day vacation care was also provided to children from Largs Bay Primary School and other schools in the area. The service was operated by the Governing Council of the school. The Governing Council employed the staff who supervised the out of school hours care. In December 2010, the Director of the OSHC service was Mr Mark Harvey.

The Checks on Harvey’s Suitability

234. Mark Harvey commenced employment as the Director of the OSHC service at Largs Bay Primary School on 11 December 2006. Before it employed Harvey, the Governing Council required him to produce a certificate from the Commissioner of Police as to his criminal history. In 2006, a person seeking employment to work with children had to do no more than produce a certificate from the Commissioner of Police as to his criminal record. It was not then necessary to obtain a clearance from the screening unit at the Department for Families and Communities. Harvey obtained a National Police Certificate dated 21 November 2006 from the Commissioner of Police. That certificate stated that he had no convictions. In his application for employment, Harvey listed his previous experience in OSHC services. It read:

Relevant OSHC Experience

Largs Bay Vacation Care (Level 2) 1994-1995

Largs Bay Vacation Care (Acting Level 5) 1994-1995

Le Fevre Peninsula Primary School OSHV/Vacation Care (Level 2) 1996-1997

Le Fevre Peninsula Primary School OSHC/Vacation Care (Coordinator) 1997-1998

St Josephs Hectorville OSHC/Vacation Care (Assistant Coordinator) 2000-2003

Westport Primary School OSHC (Coordinator) 2001-2005

Westport Primary School OSHC (Director) 2005-current

He also listed employment in other organisations. In that list, he referred to service in the Scout Association of South Australia. He stated that he had had 15 years of service as a leader in the Scout Association of Australia. He added that he had obtained a Certificate of Merit in 2000 from the Scout Association and had been the Assistant District Commissioner in the Scouts Association for the North Western District for two years.

235. Given that Harvey had no police record, had a long record of employment in the OSHC services at other schools, and a certificate of merit from the Scout Association, the decision of the Governing Council to employ Harvey is understandable.

236. In September 2010, Harvey had applied for employment by the Department as a School Services Officer, commonly called an “SSO”. By September 2010, a person applying for employment working with children was required to obtain a clearance from the screening unit at the Department for Families and Communities. That screening disclosed that Harvey had no criminal offences and the Department for Families and Communities issued him with a clearance. The Department appointed him to the position. He was employed on a contract basis for two periods. These periods were from 6 September to 26 September and from 11 October to 12 December 2010.

237. It is apparent that both the Governing Council of the Largs Bay Primary School and the Department complied with the respective statutory duties to check on Harvey’s criminal record as they existed at 2006 and at 2010. Each took reasonable steps to check the suitability of Harvey to be appointed as the Director of the OSHC service and as a School Services Officer.

An Appalling Crime

238. After school on the afternoon of Wednesday, 1 December 2010, Harvey was on duty as Director of the OSHC service. He had a number of children under his care. While on duty, he tricked a girl aged seven years into having sexual intercourse with him. He took her into the canteen area to prepare snacks for other children. While in the canteen, he placed a blindfold over her eyes and inserted his penis into her mouth, pretending that it was a carrot. It was a shocking and appalling crime.

The Crime is Reported

239. That evening when at home, the girl told her mother of the incident. The girl’s mother contacted police that same evening. Police officers came to the house at about 9.15pm. They

were Detective Sergeant Rowe (“Det. Sgt. Rowe”) and Senior Constable McFarlane (“S/C McFarlane”). As the child was sleeping, the police officers agreed not to take a statement from her until the next day.

240. At about 10.15pm, Det. Sgt. Rowe telephoned Ms Julie Gale, who was then the principal of the school. He informed her of the allegations against Harvey. He gave her the telephone numbers for the day shift Western Adelaide CIB sergeant and for the Family Violence Investigation Sergeant. Det. Sgt. Rowe then typed a briefing paper for the purpose of briefing police officers who would be working the next day on the day shift. At about 11.45pm on 1 December, S/C McFarlane notified the Child Abuse Report Line of the allegations that had been made. In doing so, he was complying with the obligation imposed by Section 11 of the *Children’s Protection Act*.

The Morning of 2 December

241. Ms Gale was quite distressed by the allegations against Harvey. As is apparent from the evidence of a number of witnesses, Harvey was well liked by many in the school community. That is particularly evident from the fact that, when he had been absent on sick leave earlier in the year, a number of members of the school community had made a collection to raise money to assist him in paying his rent. Harvey was a friend of some members of staff and of some parents. Ms Gale, like others in the school community, was on friendly terms with him. She therefore found it difficult to accept the allegations against him. She had difficulty sleeping that night and, in consequence, woke late, not hearing her alarm clock. Instead of leaving for the school at her usual time between 7 and 7.15am, she left later.

242. On her way to school that morning, Ms Gale made two telephone calls. The first was to Ms Oggi Stojanovich, an investigator in the Special Investigations Unit of the Department. She informed Ms Stojanovich of the allegations against Harvey and told her that police officers were going to interview the victim that morning.

243. Ms Gale also rang the Western Adelaide CIB and spoke to Detective Sergeant Clark (“Det. Sgt. Clark”) who was in charge of the investigation that day. She was returning his call. He had rung her earlier but his call was not answered. Ms Gale was probably speaking to Ms Stojanovich when Det. Sgt. Clark called. Det. Sgt. Clark informed Ms Gale that police would be interviewing the victim that morning and that he would speak to her after the interview.

244. After receiving Ms Gale’s telephone call that morning, Ms Stojanovich spoke to Mr Ian Lamb. Mr Lamb was then and still is the officer in the Department responsible for the oversight of OSHC services. As a result of that call, Ms Stojanovich telephoned Ms Gale at 11.50am and told her to contact Mr Lamb who would assist her. Ms Gale told Ms Stojanovich that the police had not contacted her again. Ms Stojanovich suggested that Ms Gale again telephone the police. Ms Stojanovich asked if Harvey was at the school that morning. Ms Gale said that she did not know whether he had been to the school that morning.

245. There is a conflict between the evidence of police and the evidence of Ms Gale. The evidence of Det. Sgt. Rowe was that, in the course of his conversation with Ms Gale on the night of 1 December, she had asked him what she should do as Harvey was to start work the next morning. He replied that he could not direct her to do anything but, as Harvey would be

in contact with children, it would be best if Harvey was prevented from starting work that day. Ms Gale's evidence was that she could not remember that Det. Sgt. Rowe had made that suggestion to her. I find that Det. Sgt. Rowe did not give that instruction to Ms Gale. First, the evidence shows that Ms Gale did not know whether Harvey was on duty at the OSHC service that morning. In the course of her telephone call to Ms Stojanovich on the morning of 2 December, Ms Gale had said that she did not know if Harvey had been at the school that morning. Harvey was not the only member of the staff of the OSHC service. It would be most unlikely that she should be aware of the details of the roster for the OSHC service. She did, however, know that Harvey was coming to the school later that morning because he was one of four applicants who were to be interviewed for the position of the Canteen Manager at the school. In his evidence Det. Sgt. Rowe said that Ms Gale's main concern was the fact that she had to speak to Harvey that morning at an interview. I find, therefore, that Ms Gale did not say to him that Harvey was to start work next morning but she said words to the effect that Harvey was coming to the school that morning, referring to him coming to the interview. Det. Sgt. Rowe also said in his evidence that he had suggested to Ms Gale that she call the Department first thing in the morning and get advice on what to do. That is confirmed by his note in the briefing paper he prepared. The relevant part of the note reads:

Detective Rowe spoke with the principal of Largs Bay Primary School, Julie Gale (mobile number omitted) at about 10.15p.m. and informed her that allegations of a serious nature had been made against Mark HARVEY (sic). She advised that she will make contact with DECS Investigation Section first thing in the morning for further advice on what action to be taken.

That note is inconsistent with an instruction to prevent Harvey from attending at the school. Secondly, it is very apparent from her evidence that, from the time when she first learned of the allegations against Harvey and till after his arrest, Ms Gale was seeking assistance from police as to how she should conduct herself. That is confirmed by another note in Det. Sgt. Rowe's briefing paper. She acted in accordance with the directions she received. Had she been advised to prevent Harvey from attending the school that morning, she might have taken steps to contact her Regional Director, Mr Semmens, or her Assistant Regional Director, Mr Petherick, to see what steps should be implemented to prevent Harvey from attending. Thirdly, Ms Gale's recollection of Det. Sgt. Rowe's instructions was that nothing should be done to alert Harvey or interfere with the investigation. It is likely that any step to prevent Harvey from attending the school would have alerted him. Finally, the absence of any note in the briefing paper of an instruction to prevent Harvey from attending the OSHC service that morning points to the conclusion that he did not give any instruction to Ms Gale about Harvey. According to Det. Sgt. Rowe, he prepared the briefing paper in order to pass on relevant information to the day shift and to inform management of the details relating to the incident. Advice to Ms Gale that she should prevent Harvey from attending the school is, in my view, relevant information to pass on to the day shift but Det. Sgt. Rowe did not mention it in his briefing paper.

246. It was Det. Sgt. Clark's evidence that when he spoke to Ms Gale on the morning of 2 December, he asked her if she had taken steps to prevent Harvey from having any contact with children attending the OSHC service that morning. When asked what had caused him to ask that question of her, he said he thought he might have spoken to Det. Sgt. Rowe on the night of 1 December. I do not accept that he spoke to Det. Sgt. Rowe on the night of 1 December. First, Det. Sgt. Rowe did not state that he had spoken to Det. Sgt. Clark that evening. Secondly, Det. Sgt. Clark admitted that he could not be sure that he had spoken to Det. Sgt. Rowe on the night of 1 December about the matter of Harvey. He might have asked

Ms Gale whether steps had been taken to prevent Harvey from attending the school but it was not the result of a conversation with Det. Sgt. Rowe on the night of 1 December.

Did Harvey Work on 2 December?

247. There is no direct evidence whether Mark Harvey was working at the school on the morning of 2 December. No witness could recall whether he was on duty that morning. The rosters for the OSHC service do not exist. It appears that it was not the practice to retain the rosters. However, the timebook for his service as Director for the OSHC service does exist. It is apparent that he submitted a timebook for a fortnight at a time, writing it up at the end of each fortnight. The timebooks for October 2010 and until 22 November 2010 show that he worked to a regular pattern. On Mondays, Wednesdays and Fridays, he arrived at the school at 12 noon and left at 6pm, at the end of the OSHC service. On Tuesdays and Thursdays, he arrived at 7am and left at 10am. There are no timesheets for the fortnight commencing 22 November 2010. The evidence suggests that Harvey adhered to the pattern of hours he worked earlier in October and November 2010. There is clear evidence that Harvey was working in the OSHC service on the afternoon of Wednesday, 1 December 2010. Given his pattern of working, it is reasonable to infer that Harvey was present at the school on Thursday, 2 December 2010 from 7 o'clock until at least 10 o'clock that morning. However, in the absence of the roster, it is not possible to make a positive finding that he was working in the OSHC service that morning.

Harvey is Arrested

248. Det. Sgt. Clark and Senior Constable Kelly ("S/C Kelly") met the victim and her mother at 9.30 that morning. They began to interview the victim at about 10 o'clock. The interview ended at little after 11 o'clock. Det. Sgt. Clark and S/C Kelly returned to Port Adelaide Police Station. They decided to go to the school and arrest Harvey. They briefed three other police officers and allocated tasks for a search of the crime scene and for the arrest.

249. At about 12.50pm, those five police officers went to the Largs Bay Primary School. Det. Sgt. Clark asked to see Ms Gale. Ms Gale was then interviewing the applicants for the position of canteen manager. Ms Gale left the interview room and spoke to Det. Sgt. Clark. He informed her of the allegations against Harvey and stated that he wished to arrest Harvey and search the school. Det. Sgt. Clark also informed Ms Gale that she would need to send a letter to parents notifying them that an incident had occurred but said that the letter would have to be "generalised", to use his word. Ms Gale took the police officers to Harvey. Harvey was arrested shortly after 1 o'clock. Police then searched the crime scene. Later in the afternoon Harvey was charged and released on bail. The relevant conditions of his bail form were as follows:

- Not to attend at the Largs Bay Primary School.
- Not to approach or to communicate either directly or indirectly with the victim.
- Not to contact any staff or student of the Largs Bay Primary School or OSHC with the exception of complying with his obligations under an ANCOR notice.

- Not to be within 50 metres of any school, play group, kindergarten, child care centre, play ground.
- Not to have any unsupervised contact with any child of or under the age of 17 years.
- Not to attend any children's sports or any facility where children's sport is played.

Harvey was also served with a notice under Section 66 of the *Child Sex Offenders Registration Act* requiring him to notify his employer within seven days of the nature of the charges against him. That is the notice called "ANCOR Notice" in the conditions of bail.

Ms Gale Reports the Arrest

250. After the police had arrested Harvey, Ms Gale telephoned Mr Lamb and informed him of the arrest. She asked for his assistance in communicating with parents and the staff at the school. Mr Lamb arranged a telephone conference call to discuss those questions. The call was to be at 3 o'clock that afternoon. I find that the participants were to be Ms Gale, Mr Petherick, two officers in the Legislation and Legal Services Unit of the Department ("the Legal Unit") and Ms Julie Thorn from the Licensing and Standards Unit of the Department.

251. Soon after Harvey had been arrested, Ms Gale telephoned Mr Petherick, the Assistant Regional Director for the Western Area Region. Mr Petherick then telephoned Mr David Wuttke, the Manager of the School Care Unit, and informed him that Harvey had been arrested. Mr Petherick also told Mr Wuttke that the Licensing and Standards Unit and Mr Lamb had been notified and that Mr Rodney Gracey was drafting a letter to be sent home on 3 December. These findings are based on Mr Wuttke's notebook. Mr Wuttke died on 28 February 2012. I have relied on his notes. It is clear from the notebook that the notes were made either in the course of a conversation or very soon after it. I accept them as a reliable record.

An Important Email

252. Mr Wuttke then informed Ms Andrews of the arrest of Harvey. Ms Andrews was then the Deputy Chief Executive, Schools and Children's Services. She was the person with the ultimate responsibility for the management of critical incidents at schools. At 2.45 that afternoon, Ms Andrews sent an email to Mr Simon Blewett, the Chief of Staff to the then Minister for Education, the Hon. Jay Weatherill MP. She also addressed it to two other persons. They were Ms Lynne Hare, a Media Liaison Officer in the Department, and Mr Jadyne Harvey, one of the ministerial advisers to Minister Weatherill.¹ In addition to addressing the email to Ms Hare and Messrs Blewett and Harvey, Ms Andrews sent a copy to Mr Gracey, Mr Wuttke and Ms Emery. In December 2010, Ms Emery was the Director of the Office of the Chief Executive and Mr DeGennaro was the Acting Chief Executive of the Department. Ms Emery's duties were to manage Mr DeGennaro's office. She was also

¹ From 24 February 2012 until 21 January 2013, Mr Jadyne Harvey was Acting Chief of Staff to the Minister for Education, the Hon. Grace Portolesi MP.

responsible for communications between the office of the Chief Executive and the Minister's office.

253. The email sent at 2.45pm by Ms Andrews to Mr Blewett and others was in these terms:

Simon and Lynne hi

Just had a call to say that police last night arrested the OSHC Director at Largs Bay PS for alleged sexual behaviour with children – the regional office and the school are working on a message to go home today – not much time to do this so we will need to rely on their on the spot judgement about this.

A number of things might be noticed about the email. First, the email wrongly states that the OSHC Director had been arrested for “alleged sexual behaviour with children”. There was only one victim. Secondly, the email wrongly stated that a message is “going home today”. It was not intended to inform parents until 3 December. Mr Wuttke was the only person who had on 2 December 2010 spoken to Ms Andrews concerning the events at the Largs Bay Primary School. The notes kept by Mr Wuttke clearly refer to one child only and expressly state that a letter was being drafted to go home to parents the next day. Either Ms Andrews did not correctly hear what Mr Wuttke had said to her or she was quite careless. Ms Andrews cannot explain the two errors in her email. In the result, the errors are of no consequence. It is also to be noted that neither Mr Gracey nor Mr Wuttke sent an email correcting the misinformation in Ms Andrew's email of 2 December. They both knew the correct position but did not take any step to correct the errors. It is curious, to say the least, that Ms Andrews did not address the email to Mr DeGennaro. This was such a serious matter that, in addition to informing ministerial advisers, Ms Andrews should also have informed the Acting Chief Executive of the Department.

254. Neither Mr Blewett nor Mr Jadyne Harvey have any independent recollection of receiving the email. For reasons explained in the next chapter, I find that neither Mr Blewett nor Mr Harvey informed their Minister of the contents of the email or referred it to him in any way. I find also that Mr Weatherill had no knowledge of the email.

A Telephone Conference

255. The telephone conference call that had been arranged by Mr Lamb to begin at 3pm proceeded at about that time. The participants in the call were Mr Lamb, Ms Bechara and Ms Reynolds, Ms Gale, Mr Petherick and Ms Julie Thorn. Ms Reynolds was a Mediation Officer in the Legal Unit and Ms Bechara was a Senior Project Officer Legislation in the Legal Unit. Mr Don Mackie, the manager of the Legal Unit, was then on leave. Ms Julie Thorn was from the Licensing and Standards Unit of the Department.

256. Ms Bechara and Ms Reynolds gave advice to the effect that, as the allegations against Harvey had not been proved, it was necessary to act so as not to taint the police investigation and so as not to impair the presumption of innocence in favour of Harvey. They advised the other participants in the telephone conference that notice should be given to staff, to families and to the Governing Council of the school that Harvey would not be at the school until further notice and that arrangements had been put in place for the smooth operation of the OSHC service. The legal officers also advised that the leadership team at the school and the school counsellor should be given more information so that they could respond appropriately

to questions either from the school community or from individual children. If parents or children came forward with information about the alleged incident or related matters, they should be referred to the police. In this conference call, the participants agreed upon a course of action. The relevant steps were as follows:

1. Mr Petherick and Ms Gale were to contact the Human Resources Unit in respect of such matters relating to Harvey's employment as whether he should be stood down without pay and his entitlements.
2. If any parent or child came forward with information about the alleged incident or related matters, they should be referred to the police.
3. Ms Gale was to contact Ms Bechara and Ms Reynolds should she have any further questions or concerns.
4. Mr Lamb was to contact Ms Gale in respect of arrangements for the continuation of the OSHC service during the vacation.

The advice that notice should be given to staff, to families and the Governing Council did not distinguish between parents of children who participated in the OSHC service and parents in the general school community. In the result, notice was only given to the former group. The advice that the notice to parents should state that Harvey would not be at the school until further notice was to result in misleading advice to those parents.

A Draft Letter

257. Mr Gracey was preparing the draft letter to be sent to parents. At 3.50pm on 2 December he sent the draft to Mr Petherick by email. Mr Petherick immediately sent it by email at 3.52pm to Ms Gale. Ms Gale did not then act on the draft letter. In the afternoon of 2 December, her attention as principal was mainly focussed on the arrangements for the end of year school concert. The concert was to begin at 7pm but there were also to be musical items beginning at 6pm. In addition, she had to make arrangements with one of her deputy principals to replace Harvey who was to have been on duty in the school canteen that night. Although she was busy with the school concert, Ms Gale did send an email to Ms Reynolds at 8.28pm on 2 December. That email attached the draft letter prepared by Mr Gracey.

Harvey Contacts Ms Gale

258. At about 9 o'clock that evening, while Ms Gale and other members of the school staff were packing up after the school concert, Ms Elise Hutton, one of the two deputy principals of the school, told Ms Gale that there were two missed calls from Harvey on her mobile telephone. Ms Hutton was the person at the school to whom Harvey was required to report concerning the management of the OSHC service. Ms Gale instructed Ms Hutton not to respond to the calls. Shortly after, Harvey called Ms Gale on her mobile telephone. Ms Gale put the call on the loud speaker function and told Harvey that she and other staff could not speak to him. Harvey told her that he was required to tell her that he would not be returning to work. In this respect, he was complying with his obligation to inform his employer that he had been charged. Harvey then protested his innocence. Ms Gale ended the call.

259. Ms Gale was aware that she was obliged to notify the Child Abuse Report Line ("CARL") of the allegations against Harvey. However, because of the pressure of events on 2

December, she did not do so. I comment on this paragraph 283 below.

The Morning of 3 December

260. At about 8.30am on Friday, 3 December 2010, Mr Petherick came to the school and met the school's leadership team. They were Ms Gale, Ms Hill and Ms Hutton, the two deputy principals, and Ms Windsor. Ms Windsor was and is still the school counsellor. They discussed what needed to be done to manage the incident.

261. Ms Gale also spoke that morning to Ms Reynolds in the Legal Unit about the terms of the draft letter sent by Mr Gracey. Ms Reynolds suggested some changes. Ms Reynolds also spoke to Mr Petherick. In the course of this telephone conversation, Ms Reynolds repeated the advice as to what parents should be told and said that the leadership team at the school could be informed of the allegations in case parents came forward with relevant information. Ms Reynolds instructed Ms Gale that she could inform staff that a police investigation concerning Harvey had begun on 2 December and that Harvey had taken leave from his duties until further notice. She repeated that, as Harvey was not permitted to be on the school grounds, Ms Gale was to be informed immediately should he come to the school so that she could call police. Ms Reynolds did not then know the conditions of bail that had been imposed on Harvey.

262. At 10.48 that morning, Ms Reynolds sent Ms Gale a new draft of the letter to parents. It was in different terms from Mr Gracey's draft. However, neither letter stated why Harvey was on leave.

Limited Information to Staff

263. Ms Gale addressed the school staff at the morning recess time on 3 December. She informed them that Harvey was the subject of an investigation by police and that he had taken leave. However, she did not state that Harvey had been arrested. Nor did she specify the nature of the offending. She also informed the staff that Harvey was no longer allowed either to be on the school grounds or to communicate with anyone in the school community. She asked that, if any member of the school saw Harvey on the school grounds, they should let her know immediately so that she could contact police. Mr Petherick also addressed the staff meeting. He has no recollection of what he said to them. The only members of the school staff who knew why Harvey had been arrested were the school leadership team. The other members of the school staff, therefore, received very limited information.

Police Call Mr Thredgold

264. In December 2010 Mr Andrew Thredgold was an investigator in the Special Investigations Unit of the Department. At 10.20am on 3 December he received a call from S/C Kelly. She informed him that Harvey had been arrested and charged. She said that she would send an email with details of the charges. S/C Kelly was following the practice by which police inform the Department of allegations against teachers and other employees at schools. Despite the fact that Ms Stojanovich had been told by Ms Gale of the allegations against Harvey, this was the first knowledge that Mr Thredgold had of the fact that Harvey

had been arrested. That is but one instance of several where there was inadequate communication between officers of the Department.

265. At 10.30am, immediately after receiving that call from S/C Kelly, Mr Thredgold telephoned Mr Lamb and reported what he had been told. Mr Thredgold then telephoned Ms Gale at 10.40am and asked what had occurred. She told him that Harvey had been arrested and released on bail and that Harvey had contacted her and told her the terms of his bail conditions. Mr Thredgold told Ms Gale that a letter needed to be sent to Harvey removing him from the school pending a formal letter from the Chief Executive. Mr Thredgold drafted a form of letter to be sent to Harvey. He sent it by email to Ms Gale at 12.46pm.

266. At 12.19pm, Mr Thredgold sent an email to five persons with a copy to the Manager of the Special Investigations Unit, Mr Kelsey. The five addressees were Mr Gino DeGennaro, Ms Julieann Riedstra, Mr Phil O'Loughlin, Ms Mardi Barry and Ms Tassi Georgiadis. In December 2010, Mr DeGennaro was Acting Chief Executive of the Department, Ms Riedstra was Acting Deputy Chief Executive Resources, Mr O'Loughlin was Executive Director Human Resources and Workforce Development and Ms Georgiadis and Ms Barry were officers in the Human Resources Unit. In that email Mr Thredgold told them that he had received a call from police informing him that Harvey had been arrested and charged with rape. After noting the two positions in which Harvey was employed at the school, he stated that he was working with Ms Gale on a letter to be sent to Harvey directing him not to return to the school and not to contact potential witnesses. He added that the police officer was preparing a more detailed briefing for him and that he would send it to the Chief Executive when he received it. It is curious to say the least that Mr Thredgold did not address that email to any of the senior members in the School Care Unit, Mr Radloff, Mr Wuttke or Ms Kibble.

Police Send Email to Mr Thredgold

267. At 1.40pm S/C Kelly sent Mr Thredgold a long email in which she set out how the allegations had been made to police, gave a short summary of the interview with the victim, mentioned the arrest of Harvey, gave a short summary of the police interview with Harvey, and stated that he had been released on bail. She did not set out the conditions of bail but stated that there were conditions which prevented Harvey from attending the school or contacting any teacher or student. In that email S/C Kelly also stated that Harvey had been issued with a notice under Section 66 of the *Child Sex Offenders Registration Act* that compelled him to notify his employer within 7 days of the nature of the charges against him. Harvey had complied with that notice when he had called Ms Gale on the evening of 2 December.

268. The email contained nothing that in any way suggested that parents could not be informed about the arrest of Harvey. S/C Kelly's email concluded with a comment that was critical of Ms Gale. It read:

It is Police opinion, that Principal GALE (sic) did not deal with this matter, with the appropriate amount of urgency in line with her duty of care. Police are concerned that she did not take any positive action to ensure the safety of other students, and potentially put them at risk on the morning of 2/12/10. If she responded in any manner to the situation, then the nature of this response was not relayed to Police.

For the reasons that follow, while the conduct of Ms Gale might be open to criticism, there are questions also whether police should not have taken more positive action to ensure the safety of students using the OSHC service on the morning of 2 December.

269. It is appropriate to comment on the conduct of both Ms Gale and Det. Sgt. Rowe. I have found that Det. Sgt. Rowe did not suggest to Ms Gale that she should have taken action to prevent Harvey from attending the OSHC service on the morning of 2 December 2010. Nevertheless, Ms Gale had a duty of care towards the children who were to attend the OSHC service that morning. There is a real question whether she ought to have realised that there was a risk that Harvey might offend against other children. If so, she ought to have taken steps to arrange for another person, either herself or a teacher or another member of the OSHC staff, to be present at the school that morning so as to prevent the risk of further offending by simply being present with Harvey. As she lived a long way from the school and as the OSHC service began at 7.15am, it was probably more suitable for her to arrange for another person to be present. If she was unsure what to do, she should have rung her Regional Director or Assistant Regional Director.

270. The victim's mother had informed Det. Sgt. Rowe of what her daughter had said in a manner described by him as calm and matter of fact. The information given to Det. Sgt. Rowe by the victim's mother was sufficient for him to form a reasonable suspicion that a very serious sexual assault had occurred. He had told Ms Gale that Harvey was suspected of committing a serious sexual assault. If, contrary to my findings, he did say to Ms Gale that it would be best if Harvey was prevented from starting work that day, he was expressing a concern that Harvey might re-offend. Section 75 of the *Summary Offences Act* authorises a police officer to arrest any person whom a police officer has reasonable cause to suspect has committed or is about to commit an offence. The reasonable suspicion can be formed on the basis of information received from other persons.² In the course of consultations during this Inquiry, senior officers of SA Police have firmly expressed the view that nothing should be done by staff of the Department that might jeopardise a police investigation. Those officers also stated that if information has come to the attention of the principal of a school that suggests illegal conduct, the principal should not take any action but should immediately inform police and let police take whatever action is necessary. In addition, a principal should not do anything to alert the offender. In his conversation with Ms Gale, Det. Sgt. Rowe was giving information to a principal of allegations of a serious sexual assault. If Det. Sgt. Rowe had a concern that Harvey might re-offend, the question is whether the police, not the principal, should have taken steps to prevent the risk of re-offending.

271. There is no evidence that Harvey did commit any offence on the morning of 2 December 2010. There is no positive evidence that he was in fact on duty in the OSHC service that morning. Even if Ms Gale or Det. Sgt. Rowe did not know whether he was on duty, steps should have been taken at least to see that another person was present that morning in case he was in fact on duty. The Terms of Reference preclude a determination whether Ms Gale or Det. Sgt. Rowe failed in the exercise of their respective duties of care. This was a case where the two agencies, the Department and SA Police, should have acted together. There ought to have been greater communication and co-operation between police and the

² *Feldman v Buck* [1966] SASR 236; *Haifwa v Police* [2000] SASC 19, [17] - [21].

Department to manage the matter in the best manner possible to protect the children who might have been at risk that morning. In all circumstances, there are real questions whether both the Department and SA Police took adequate steps to prevent any risk of re-offending.

Two Letters Sent

272. Ms Gale adopted Mr Thredgold's draft of the letter to be sent to Harvey. She sent the letter on 3 December. It was in these terms:

Dear Mr Harvey

I am advised that you have been charged by South Australia Police with serious sexual offences involving a child.

I direct that until further notice, you are not to attend for duty at Largs Bay Primary School in any capacity. I also direct that you do not contact or communicate with, in any way, any potential witnesses, including staff, in this matter. Should you contravene my directions you may be liable for disciplinary action.

My direction has been made in the best interests of all concerned and does not imply that a judgement has been made of you.

I understand that in due course you will receive formal notification from the Chief Executive in regards to your employment with the Department of Education and Children's Services.

If have (sic) any personal belongings on site, please inform me via email or text message and I will have them delivered to you.

At 2 o'clock that afternoon, Mr Thredgold sent an email to S/C Kelly informing her that the letter had been sent to Harvey and summarised its contents.

273. Later that day, Ms Gale caused a letter to parents of the children in the OSHC service to be sent home with those children. The letter was in these terms:

Dear Families

I am writing to inform you that the Director of the Out of School Hours Care program is currently on leave until further notice.

The OSHC program will continue to operate as per usual and steps are in place to help ensure that the program Vacation Care continues with as little disruption as possible.

Please contact me if you have any questions in relation to the arrangements for the continuation of the OSHC and Vacation Care Service.

In Chapter 8 of this report, the inadequacies of this letter are examined. For the moment, it is sufficient to note that it was a misleading letter giving entirely inadequate reasons for Harvey's absence.

274. Soon after 2 o'clock on 3 December, Mr Thredgold had a meeting with Ms Janne Todd, the Manager of Standards & Investigations. They agreed that they should work together to prepare a briefing paper to Mr DeGennaro.

275. I list the key events from Wednesday, 1 December to Friday, 3 December.

Wednesday, 1 December

- At about 9pm, the victim's mother reported to police the allegations of the sexual assault of her daughter by Harvey.

- Later that evening Ms Gale was informed of the allegations.
- S/C McFarlane notified CARL at about 11.45pm.

Thursday, 2 December

- Shortly after 1pm, Police arrested Harvey. After he had been charged, Harvey was released on bail.
- Ms Gale informed the Special Investigations Unit of the allegations and later informed the Legal Unit as well as the Assistant Regional Director, Mr Petherick, of Harvey's arrest.
- Mr Petherick had informed Mr Wuttke of Harvey's arrest and Mr Wuttke had told Ms Andrews.
- At 2.45pm Ms Andrews sent an email to Mr Blewett and Mr Harvey and others informing them that the OHSC Director had been arrested and that a message was going home that day.
- Neither Mr Blewett nor Mr Harvey informed their Minister, Mr Weatherill, of the facts stated in the email from Ms Andrews. Mr Weatherill was, therefore, entirely unaware that Harvey had been arrested and charged with a sexual offence.

Friday, 3 December

- Police provided the Department with full details of the charges and allegations against Harvey in the email sent by S/C Kelly.
- Ms Gale sent a letter to parents of children in the OSHC service.
- Ms Gale sent a letter to Harvey requiring him to remain away from the school.

Three matters are worthy of comment. First, notwithstanding the importance of Ms Andrew's email on 2 December, neither Mr Blewett nor Mr Jadyne Harvey informed Minister Weatherill of its contents. In addition, as will be seen, the Department did not give the Minister any further briefing on the matter. Secondly, the letter sent home by Ms Gale was sent only to parents who had children in the OSHC service. Thirdly, the letter that was sent to the parents of children in the OSHC service did not in any sense disclose why Harvey was on leave. Although the letter did not name Harvey but referred to him as "the Director of OSHC", parents would have been in no doubt as to whom the letter referred. However, the letter is utterly silent as to why Harvey was on leave. The letter was in fact capable of conveying the wrong impression to parents since Harvey had been absent on sick leave earlier in 2010. Many parents might well have believed and, in all probability did believe, that Harvey was again on sick leave.

276. The Department had, however, taken all reasonable steps to ensure that Harvey did not come again to the school. In addition, it was aware that the terms of Harvey's bail prevented him from attending the school or contacting any teacher or student. In the result, the Department had done all that could reasonably be done to keep Harvey away from the school and to prevent him from communicating with teachers or to prevent him with coming into contact with students. However, it had done nothing to inform parents of the fact of his offending or the nature of his offending.

The Events of 6 December

277. Nothing occurred on the weekend of 4 and 5 December 2010. Mr Thredgold and Ms Todd had started to prepare the briefing for Mr DeGennaro on 3 December and completed it on 6 December. It was signed by Mr Kelsey on 6 December. The minute was in these terms:

1. BACKGROUND

- 1.1 Mark Harvey, DOB 11/11/1970, is a part-time, contract School Services Officer (SSO), level 1, who has been employed to work 10 hours per week at Largs Bay Primary School (the school) since 6 September 2010. He is currently tenured until 12 December 2010. Mr Harvey is also the school's Director of Out of Hours School Care (OHSC) (sic).
- 1.2 On 3 December 2010, the Special Investigations Unit (SIU) received a report from South Australia Police that Mr Harvey had been arrested and charged with rape and with aggravated unlawful sexual intercourse.
- 1.3 The charges relate to an incident that is alleged to have occurred in the school's canteen on 1 December 2010 and involved a Year 2 female student (name omitted).
- 1.4 Mr Harvey has been issued a notice under Section 66 of the *Child Sex Offenders Registration Act 2006* requiring him to notify his employer about the nature of the charges within seven days.
- 1.5 Mr Harvey has been bailed and his bail conditions state that he is not to attend the school or contact any teacher or student, with the exception of his obligation under the *Child Sex Offenders Registration Act 2006*.
- 1.6 The school's Principal, Ms Julie Gale, has advised that she has been in contact with Mr Harvey and that he has advised her of the charges.
- 1.7 Ms Gale has sent a letter to Mr Harvey directing him not to attend for duty at Largs Bay in any capacity until further notice and to not contact or communicate with, in any way, any potential witnesses.

2. KEY ISSUES

- 2.1 The allegations against Mr Harvey are very serious and imply a potential risk to the Department's duty of care obligations and reputation.
- 2.2 The allegations are being investigated by staff from Western Adelaide CIB, SAPOL.
- 2.3 Mr Harvey is also the Director of the school's OHSC (sic) program. DECS Family Day Care, Standards and Investigations is aware of the matter and has agreed that it simplifies matters if the matter is handled solely by the SIU.
- 2.4 Mr Harvey's SSO contract with the school expires on 12 December 2010.
- 2.5 SAPOL has raised some concerns about the way that this matter was dealt with by the Principal. This will be dealt with in a separate briefing.
- 2.6 Ms Gale advised that the alleged victim (name omitted) attended school on 3 December 2010.

3. PROPOSED ACTION

- 3.1 That the Chief Executive notes the contents of this briefing.
- 3.2 That the Chief Executive place Mr Harvey on Special Leave With Pay until his current contract on 12 December 2010 expires and direct that no further contracts be offered to Mr Harvey until the matter is resolved.
- 3.3 That the Chief Executive directs Mr Harvey not to attend any Department of Education and Children's Services (DECS) sites until further notice.
- 3.4 That the Chief Executive directs Mr Harvey not to contact or communicate in any way with DECS students until further notice.

- 3.5 That the Chief Executive signs the attached letter informing Mr Harvey of his directions, and return the signed letter to the Special Investigations Unit for posting. (Emphasis in the original)

All five recommendations were approved by Mr DeGennaro as Acting Chief Executive. There was clearly no sense of urgency in the Department. Although Mr Thredgold had prepared the minute on 6 December and it was signed on the same day by Mr Kelsey, the then Manager of the Special Investigations Unit, it was not approved by Mr DeGennaro until 14 December 2010. It was endorsed by Ms Georgiadis on 7 December but not endorsed by Mr O'Loughlin until 12 December. It was then endorsed by Ms Reidstra on 13 December before Mr DeGennaro approved it on 14 December.

278. It is unnecessary to set out the terms of the letter to Harvey. It stated the allegations against him and noted the terms on which he was employed. In respect of his employment as a School Services Officer, Harvey was informed that he had been placed on special leave with pay until the expiry of his contract on 12 December and thereafter no further contract would be offered to him. The letter directed Harvey not to attend any school sites or communicate with any students until further notice. As Harvey was employed by the Governing Council as Director of the OSHC service, the Department could not terminate his employment.

279. While the briefing note is to be commended for its attention to the question of keeping Harvey away from the Largs Bay School and other schools, the briefing note is more remarkable for what it does not state. Nowhere is there any reference to the letter sent on 3 December to the parents of children in the OSHC service. Nowhere is there any discussion of the question whether a letter should be sent to parents of all children at the school. Mr Thredgold's explanation for the failure to deal with these issues was that they were matters outside his area of responsibility and the question whether a letter should be sent was a matter for the School Care Unit to address. However, Mr Thredgold did not include the School Care Unit in his briefing.

280. Late in the afternoon of 6 December, Ms Gale spoke to the OSHC staff. She informed them that Harvey was on leave but said that she could say no more to them because to use her words "it was a police matter". She said that any concerned parents or members of staff should contact her. She informed them that she was making arrangements to replace Harvey. Harvey was ultimately replaced.

Police Make Further Inquiries

281. On the afternoon of 7 December, Det. Sgt. Clark and S/C Kelly and one other police officer went to the Largs Bay Primary School to pursue their inquiries. They asked Ms Gale for personal particulars of staff members and potential witnesses. In the course of their conversation with Ms Gale, they asked if a letter had been sent to parents. She replied that a letter had been sent and stated its terms. She handed a copy of the letter to S/C Kelly. Det. Sgt. Clark said to Ms Gale that, if any further victims or witnesses came forward in response to the letter, she should contact police. Det. Sgt. Clark also asked Ms Gale if she had notified CARL. She said that she had not and he cautioned her with respect to her duty to do so.

Ms Gale Notifies CARL

282. Ms Gale notified CARL at about 5 o'clock on the afternoon of 7 December 2010. She also called CARL on 8 December to confirm that her call on 7 December had been noted. Her evidence was that she had attempted to call CARL on the afternoon of 3 December but had hung up, after waiting for a long time without being answered. Families SA, a division of the Department for Education, keeps records of all calls made to CARL. That record notes, among other things, the time of the call and the number of the caller. It also records the telephone numbers of those callers who hang up before the call is answered. Families SA has checked its records and states that there is no record of a call from Ms Gale's telephone number on 3 December or at any time other than on 7 and 8 December. I have caused one of my legal officers to check the records and I have checked them myself. It is clear that Ms Gale did not call at any time other than 7 and 8 December. When confronted with these facts, Ms Gale said that her recollection may have been at fault. I find that Ms Gale did not ring CARL until about 5pm on 7 December 2010.

283. Although it is possible to criticise Ms Gale 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 Harvey 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 in 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.

Ms Gale Obtains Further Advice

284. Ms Gale had also been meeting Mr Petherick and Ms Larkin, the chairperson of the Governing Council of the school, to plan the calling of an extraordinary general meeting of the Governing Council. The purpose of the meeting was to inform the Governing Council of the arrest of Harvey and to ask the Council to delegate to Ms Larkin and Ms Gale power to dismiss Harvey and operate the OSHC service during the school vacation. The school year was to end on 10 December. They were concerned, therefore, that there would not be sufficient time to attend to all of the steps necessary to dismiss Harvey as the Director of the OSHC service before the end of the year. As it would be very difficult to convene meetings of the Governing Council during the school vacation, they sought the delegation of power. They decided to call the meeting on the evening of Thursday, 9 December.

285. On 7 December, Ms Gale had consulted Ms Mardi Barry, an officer in the Human Resources Unit, about sending a second letter to Harvey concerning his employment. On 8 December, Ms Barry sent an email to Ms Gale with a draft letter to be sent to Harvey. In that email she also gave Ms Gale advice on how to conduct the extraordinary general meeting of the Governing Council and what to say at that meeting. Her advice included the following statement:

Please note there is a current police suppression order on the identity of the person and details of the matter. Accordingly you are unable to provide much detail, other than, as employers, what they need to know. In addition, you are unable to provide any information

to parents using OSHC. This is a matter for the police at present. NB Also wellbeing of child, reputation of school etc.

Ms Barry cannot recollect who gave her the information that caused her to say that a police suppression order was in place. She first thought it was Mr Thredgold, then thought it was Mr Kelsey. They were both officers in the Special Investigations Unit.

286. Ms Gale adopted the draft letter sent by Ms Barry in the email of 8 December and sent it to Harvey that day. The letter was in these terms:

Dear Mr Harvey

I am writing to you on behalf of the Largs Bay Schools Governing Council, in relation to your position as Director, Out of School Hours Care (OSHC) at the Largs Bay Schools.

I am advised that you have been charged with serious sexual offences involving a child. Further to my previous letter to you dated 3/12/2010, I am also advised that your bail conditions preclude you from attending the school site, or contacting any teacher or student. Given you are unable to meet the terms and conditions of your employment contract, from the date of this letter you will be placed on leave without pay from your position as Director, OSHC at the Largs Bay Schools until further notice.

Please note that I intend to refer the matter of your ongoing employment as the Director, OSHC to the Governing Council for their confidential consideration. You will receive further communication from me in relation to this matter in due course.

At 5.07pm that day Ms Gale sent an email to Mr Petherick, stating that she had sent the letter to Harvey. In that email she also sent him a copy of the letter to Harvey dated 3 December. At 5.08pm she sent another email to Mr Petherick, attaching a copy of the email from Ms Barry sent on 8 December with the draft letter to Harvey and the advice concerning the conduct of the extraordinary general meeting of Governing Council to be held on 9 December.

287. Earlier on the afternoon of 8 December Mr Thredgold had a telephone conversation with S/C Kelly in which he asked for a copy of the conditions of bail. Mr Thredgold's note of that conversation includes this statement:

Kelly confirmed that there is an automatic suppression in place due to the nature of the charges.

The conversation occurred at about 3.05pm. Given the time of that conversation, it could not have been the source of the advice expressed in Ms Barry's email sent to Ms Gale earlier that day at 1.29pm. Mr Thredgold's note did not accurately represent the facts. There was no suppression order. What was in place was the restriction on the publication of anything that might identify both the person accused of a sexual offence and the alleged victim, a restriction that automatically came into effect by reason of the provisions of section 71A of the *Evidence Act*. The restrictions on publication of section 71A have the same effect as a suppression order but, generally speaking, the operation of section 71A(2) prohibiting the publication of the name of the accused person is of shorter duration than a suppression order and, in any event, permits publication of the name of the accused person when that person has been committed for trial or sentence.

288. Any questions as to how Ms Barry came to believe that there was, to use her words, "a current police suppression order on the identity of the person and the details of the matter" are unimportant. What is of significance is that she like Mr Thredgold believed that there was a form of suppression order in place. That belief obviously permeated among other officers in

the Department involved in the matter and it became a general Departmental belief that a suppression order had been imposed by police.

The Events of 9 December

289. On 9 December at 7.54am S/C Kelly sent an email to Mr Thredgold setting out the conditions on which Harvey had been released on bail. This was the first occasion on which the Department learned of all of the conditions of bail. It is both an indication of a lack of any sense of urgency on the part of the Department as well as an indication of the lack of adequate knowledge as to how to act when dealing with serious matters such as sexual offending against a child at a school.

290. On the morning of 9 December the fortnightly meeting of the Complaints Assessment Panel was held. The Complaints Assessment Panel had been established to examine critical incidents at schools and to co-ordinate the Department's response. Those present at the meeting were Mr Kelsey, Ms Barry, Mr DeGennaro, Ms Feltraco, Ms Georgiadis, Mr O'Loughlin, Mr Radloff, Ms Riedstra and Ms Williams. The first item on the agenda concerned Harvey. The agenda paper briefly noted that Harvey had been arrested and charged with rape and aggravated unlawful sexual intercourse with a child under 12 years and that his bail conditions required that he not attend the school or communicate with staff or students. It noted that Ms Gale had written directing him not to attend the school. It referred to the briefing paper prepared by Mr Thredgold in the Special Investigations Unit on 6 December. The meeting resolved that the Regional Director, Mr Brendyn Semmens, should offer counselling and support to the victim and the family of the victim.

291. The meeting did not discuss whether a letter should be sent to all parents of the students of the school. That is curious to say the least, given that the agenda for that meeting included two items concerning a Mr O'Dea, a teacher at another primary school who had been charged with possessing child pornography. In that matter the Crown Solicitor had, as recently as 30 September 2010, given clear advice in writing that a letter should be sent to parents of children at that school informing them that Mr O'Dea had been charged with possessing child pornography. The Crown Solicitor had drafted the letter to be sent. In the letter of advice, the Crown Solicitor had firmly expressed reasons why a letter should be sent to parents, stating:

I do not believe I can present the issues to DECS any more forcefully than I did previously, namely: If you were a parent of any of the relevant children, would you not want to know? Also, it is far better they hear from DECS than through the media. If, per chance, Mr O'Dea has committed any offence towards or involving any child in DECS' care, it is moving to limit any risk to it and Government. Worse than that, if parents are not advised and Mr O'Dea commits any offence towards or involving any child in DECS' care and knowing what it knows, DECS did not advise parents, the risk to it and Government are obviously seriously exacerbated.

I will return to this letter of advice in Chapter 8.

The Governing Council Meets

292. The extraordinary general meeting of the Governing Council of the school was held at 6pm on the evening of 9 December. Ms Gale told the meeting that Harvey had been arrested and charged with a serious offence of a sexual nature against a child at the school. She did

not give any further particulars of the offending. She said that a suppression order existed so that the matter could not be discussed. She also informed the meeting that Harvey was on bail and that the conditions of bail were that he should not attend the school or contact any student or member of the staff of the school. She asked the meeting to delegate to her and Ms Larkin power to take all necessary steps in relation to the dismissal of Harvey and the conduct of the OSHC service during the vacation. The delegation of powers was to end on 25 January 2011.

293. It is clear from the evidence that those present at the meeting were both amazed and upset by the news of Harvey's arrest. Some members of Governing Council were on quite friendly terms with him. The meeting discussed the question whether parents should be informed. They were told that, as a suppression order had been made, parents would not be given any information other than the letter dated 3 December 2010 stating that Harvey was on leave until further notice. Discussion ranged over a number of issues including the risk to the children at the school and how to manage that risk, the consequences should Harvey be acquitted, the duty of care to the children and school community, and the presumption of innocence. Mr Petherick instructed the members of Governing Council that, because of the suppression order, they were bound not to disclose anything concerning Harvey and, if they were asked about him, they should respond, "I am not able to comment at this time." The meeting resolved to delegate to Ms Gale and Ms Larkin the power to make all necessary decisions concerning the management of the OSHC service until 25 January 2011. Among other issues discussed was the provision of counselling. Mr Petherick stated that he had social workers available and that the school counsellor would also be involved in providing counselling.

294. It is quite apparent from the evidence and from the minutes of the meeting that there was again a significant degree of misunderstanding concerning what was believed to be a suppression order and what parents could or could not be told. Quite properly, the meeting was alert to the presumption of innocence and was concerned at the obligations of Governing Council should the charges against Harvey be withdrawn or he was found to be not guilty.

Harvey Resigns

295. On Friday, 10 December, Ms Barry prepared another letter to be sent to Harvey. The letter was sent on Monday, 13 December. It was signed by both Ms Larkin as chairperson of the Governing Council and Ms Gale. The letter was in these terms:

CONFIDENTIAL

Dear Mr Harvey

We are writing to you on behalf of the Largs Bay Schools Governing Council in relation to our concerns about your capacity and suitability to continue in your position as Director, Out of School Hours Care at the Largs Bay Schools.

On 2 December 2010 you were charged by SAPOL with rape and aggravated unlawful sexual intercourse. The alleged conduct occurred during the course of your duties as Director, OSHC and involved a Year 2 female student. Further, we understand that you have been placed on bail conditions that currently preclude you from attending the school or from contacting any teacher or student (with the exception of specific reporting obligations held by you).

Given your bail conditions it is apparent that you are unable to fulfil the requirements of your position as Director, OSHC. Furthermore, very serious criminal charges have been laid against you (sic) The fact of these charges suggest that your continuing role as Director,

OSHC represents an unreasonable risk to the safety and wellbeing of children in your care and to the reputation of the OSHC service at the Largs Bay Schools. Please note that we do not seek to draw any conclusions about the truth or otherwise of the charges and do not seek any information in this regard. That is a matter for SAPOL and the courts.

Given the circumstances we are proposing to terminate your position as Director, OSHC at the Largs Bay Schools. Before any such determination is made, we invite you to make a written submission on this matter. Any such submission should be provided within 7 days of the date of this letter. We will then consider your submission and make a final decision. Should you not provide a submission we will determine the matter on the information before us.

It will be recalled that on 16 December a letter signed by Mr DeGennaro as Acting Chief Executive had also been sent to Harvey. Harvey, therefore, received four letters, three from the school and one from the Department.

296. On or about 17 December, Harvey's mother telephoned Ms Gale and told her that Harvey had received the letter dated and sent on 13 December. On his behalf, she asked for a further seven days in which to respond. After speaking to the Legal Unit, Ms Gale telephoned Harvey's mother and agreed that he could have until 24 December in which to respond.

297. In the week commencing 20 December 2010 Ms Gale sought the advice of Ms Barry as to how to act should Harvey not resign his post as Director of the OSHC service. Ms Barry drafted a letter for her. It was not necessary to send the letter because Harvey resigned by letter dated 23 December 2010. A letter signed by Ms Gale and Ms Larkin accepting the resignation was not sent until 20 January 2011.

The Events of January 2011

298. On 4 January 2011 Ms Gale spoke at a meeting of the staff of the OSHC service. The meeting was held at 6pm. She informed the staff that Harvey had resigned and reminded them of telephone numbers to use should they or any parents seek counselling. She asked them to contact her or Ms Hutton, a deputy principal at the school, should they wish to discuss anything about Harvey. She also informed them that another person had been appointed to replace Harvey.

299. Harvey's first court appearance was in the Magistrates Court at Port Adelaide on 19 January 2011. The Court fixed dates for the conduct of the preliminary examination. Harvey was committed for trial on 15 June 2011. He entered a plea of guilty in the District Court on 29 August 2011.

300. In 2011 little occurred in the Department in respect of Harvey. It is clear that no one in the Department made any attempt to ascertain any information as to how the prosecution of the charges against Harvey was proceeding. No one in the Department knew that Harvey had pleaded guilty on 29 August 2011. That was an important date since it established that Harvey was guilty of the alleged offending.

301. The Complaints Assessment Panel met on 13 January 2011. The agenda item concerning Harvey was concerned only with the termination of his employment. The agenda item read:

A letter forwarded to Mr Harvey on 15/12/10, and received by him confirmed his Special Leave with Pay until the completion of his contract (on 12 Dec 2010). He was advised he would be offered no further contract. Mr Harvey's position as OHSC (sic) is being managed by HR.

The agenda of the meeting of the Complaints Assessment Panel on 10 February 2011 records that Mr Semmens had on 28 January 2011 offered counselling to the parents of the victim but they had declined the offer. The Complaints Assessment Panel took no further action in relation to Harvey in either 2011 or 2012. It did not manage the matter and, in this respect, it entirely failed to fulfil its function of co-ordinating the management of critical incidents.

302. On 19 January 2011 Ms Gale sent an email to members of the Governing Council informing them of events since the meeting on 9 December 2010. The relevant part of the email stated:

HIGHLY CONFIDENTIAL

Dear Governing Councillors

When I last wrote to you all via email, I said I was sending a letter to Mark Harvey advising him that since we had not heard from (sic) him within the given timeline, his tenure as OSHC Director would be terminated. Jacqui and I had signed the letter and it was sealed in an envelope and ready for posting. Then a phone call came from his mother who rang to say Mark was responding and a letter would arrive at the school within a couple of days. His mother said he only received the letter from Jacqui and myself on 17 December and therefore still had seven days to respond. After consulting with DECS, I did not send the letter. Mark had to be afforded the opportunity to respond and for the response to be duly considered. Mark did respond with a letter dated 23 December and said that he resigned from the position of OSHC Director effective from 23rd December.

After further consultation with DECS, the Governing Council Chair and I have acknowledged his letter, and accepted, his resignation.

I ask that the details of this matter be kept confidential. It will be a matter of public record that Mark has resigned. No further information need be related to persons outside of the Governing Council.

The members of Governing Council were being asked in the clearest terms not to discuss the matter with any person not a member of Governing Council.

Ms Oshinsky Becomes Principal

303. Ms Gale's appointment as principal of Largs Bay Primary School ended on 26 January 2011. She was replaced by Ms Tanya Oshinsky. Ms Oshinsky had had what she called "a handover meeting" with Ms Gale late in November 2010 before Harvey had been arrested. Ms Barry gave evidence that she had informed Ms Oshinsky about Harvey and told her that the school community were not to be informed. Ms Oshinsky cannot remember that conversation. Ms Oshinsky's evidence was that it was Mr Petherick who had informed her about Harvey. I find that both Mr Petherick and Ms Barry gave her information about Harvey as well as instructions not to tell the school community about Harvey's offending.

Three letters in February 2011

304. Soon after the school year began in 2011, Ms Oshinsky and Ms Thompson, one of the deputy principals of the school, sent three letters to different sections of the school community. Each contained a reference to Harvey. The first was a letter dated 7 February 2011 to parents who had children in the OSHC service. The letter began "Mark Harvey

resigned as OSHC Director at the end of last year”. The letter continued by informing parents that steps were being taken to appoint a new director in his place. A second letter dated 8 February 2011 was sent to members of the Governing Council. The letter referred to Harvey’s resignation as director of the OSHC service and explained the process being implemented to appoint a new director. The third letter was a newsletter to all parents of children at the school dated 11 February 2011. Under the heading “Staffing Update”, the letter referred to Harvey’s resignation in these terms:

Mark Harvey resigned as OSHC Director at the end of last year and processes are in place to appoint a new Director as soon as possible.

While the members of the governing council were aware that Harvey had been arrested, the general body of parents were not. Although the letter dated 7 February 2011 and the newsletter dated 11 February 2011 were correct in stating that Harvey had resigned, it did not state the reason for his resignation. In consequence, both documents repeated the misleading information given to parents in the letter of 3 December 2010.

Governing Council Meeting in March 2011

305. The first ordinary meeting of the Governing Council for 2011 was held on 21 March. One of the items of business concerned Harvey. The meeting noted that court proceedings had begun. Ms Oshinsky reminded the meeting that a suppression order was still in operation. Other issues relating to Harvey were discussed. They included counselling for children, instructing children about appropriate behaviour, and counselling for staff. The meeting noted that families had been informed that Harvey had left the OSHC service. Nothing was said at the meeting about informing parents of Harvey’s arrest. The topic of Harvey’s arrest was not mentioned at any other meeting of the Governing Council in 2011.

Harvey is Sentenced

306. As already mentioned, Harvey had pleaded guilty in the District Court on 29 August 2011. He was then remanded for sentence. He was sentenced on 9 February 2012 by Judge Griffin to imprisonment for 6 years. When fixing the non parole period, the Judge had regard to Harvey’s significant health problems and what he regarded as reasonably good prospects for rehabilitation. He therefore fixed a lower than usual non parole period, a period of two years. Judge Griffin began his sentencing remarks by recording Harvey’s plea of guilty and the particulars of his offending. The Judge then 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’, ‘the victim’ for this reason and I trust that my reference to her in this way is not thought to be impersonal.

The Judge then continued his sentencing remarks. As will be seen, the meaning and intent of the passage just quoted and in particular the first sentence were entirely misunderstood by a number of officers in the Department. No person from the central office of the Department attended the Court when Harvey was sentenced. However, two members of the school staff were present to lend support to the victim’s parents. They were Ms Ruth Hill, one of the deputy principals, and the school’s counsellor, Ms Danielle Windsor.

News Reports of the Sentence

307. A report of the sentencing was broadcast on the ABC radio station 891 twice in the afternoon of 9 February, in the news bulletins at 3pm and 6pm. Each report was in these terms:

NEWSREADER: The managing director of an out-of-hours school care program has been jailed for sexually abusing a young girl in his care.

Candice Marcus Reports.

REPORTER: The district court heard 41-year-old Mark Christopher Harvey of Largs North had unlawful sexual intercourse with a young girl in December 2010, while she was attending the out-of-hours school care program.

Judge Mark Griffin said Harvey's crime was a shocking offence that breached his position of trust. The court heard parents had relied on him to provide protection and care to young children and he exploited their trust to fulfil his own deviant sexual desires.

Judge Griffin said it was important for Harvey to be treated for his paedophilia. He sentenced him to six years jail with a non-parole period of two years, to allow a long period of supervision in the community.

At 7.51am on 10 February, a report of the ABC news article was posted on the ABC website. The article was in these terms:

After school carer jailed for sex abuse

The managing director of an out-of-hours school care program has been jailed for sexually abusing a young girl in his care.

The Adelaide District Court heard Mark Christopher Harvey, 41, of Largs North had unlawful sexual intercourse with the girl in December 2010, while she was attending the care program.

Judge Mark Griffin said Harvey's crime was a shocking breach of a position of trust.

The judge said it was important Harvey be treated for his paedophilia.

He sentenced him to six years' jail with a non-parole term of two years.
(Emphasis in the original)

There was no report in *The Advertiser* on 10 February 2012. The sentencing remarks were also available on the website of the District Court. Although it was not extensive, the reporting of the conviction was sufficient to result in a number of parents at the school being aware of it.

The Department's Response to the Sentencing of Harvey

308. On Friday, 10 February 2012 Ms Kibble, an officer in the School Care Unit, began to organise the Department's response to the sentencing of Harvey. Her first action was to cause a press release to be drafted by Ms Dale Webster, a Media Liaison Officer in the Department. Ms Webster's first draft was in these terms:

The Department of Education and Child Development has followed all due processes and worked closely with police in their investigation.

As in all matters involving minors, the confidentiality of the child is the primary concern. The court very sensibly suppressed the name of the school involved to ensure there was no way the child could be identified and further traumatised by unwanted attention. The department is also not prepared to jeopardise this confidentiality by commenting further.

In an email enclosing the draft, Ms Webster told Ms Kibble that she wished to emphasise that what was at stake was the privacy of the victim.

309. On Monday, 13 February, Ms Mandy Hay, the acting Media Manager of the Department, sent an email at 6.22pm to five persons. They included Mr Bartley, the Chief Executive of the Department, Ms Kibble and Mr Petherick. In that email she informed them that a suppression order no longer existed in respect to the name of the school. The email began:

In follow up to the below email a suppression order no longer seems to be in place regarding the name of the school, however the judge did not name the school involved in his summing up so it will not be in the transcript which will be available to the media. However this will not stop the local community identifying the school.

Ms Hay then attached an amended form of press release, suggesting that it might be used by the school staff. The draft press release was in these terms:

The Department of Education and Child Development has followed all due processes and worked closely with police in their investigation. As in all matters involving minors, the confidentiality of the child is the primary concern. The court very sensibly did not refer to the name of the school during the judge's remarks as a way of protecting the child's identity. The department is not prepared to jeopardise the identity of the child to prevent any further trauma by unwanted attention.

The main amendment to that press release was the deletion of any suggestion of a suppression order.

310. In the evening of 13 February, Ms Kibble had a telephone conversation with Ms Oshinsky. Ms Kibble reported the conversation in an email to the same persons who had received Ms Hay's email of 13 February. Ms Kibble's email was sent at 8.45am on 14 February and was in these terms:

Following on from this I spoke to the principal Tanya Oshinsky last night. We agreed to the following:

1. A draft letter will be prepared by media saying that the school was aware of the situation and has assisted police in the investigation. The letter would ask parents to be mindful of their children and report any issues or concerns to the principal only. It would ask parents to be respectful of the needs of the family and child involved by not speaking about the matter, but rather raise their concerns with the principal. (This would be similar to the one we used at Craigmore when the teacher was arrested which Mandy prepared).
2. The letter would not go out unless the story was released in the media.
3. Tanya will work with front office staff to prepare a standard response if they are asked.
4. The school will be notified if DECD release a statement.

Tanya said that some members of the community and Governing Council are aware of the situation while others are not so she did not want to forward a letter unless it became necessary to do so.

Any comments welcome.

The only comment came from Ms Hay. She circulated an email with the draft of a suggested letter to be sent to parents by Ms Oshinsky as principal of the school. The draft was in these terms:

Dear Parent/Caregiver,

As you may be aware a former member of OSHC staff has been convicted of a serious crime. The school is aware of the situation and has assisted police throughout the investigation. The staff member was with the school for a short period in 2010 and has not and will not be engaged by the school or DECD.

You can appreciate that this is a difficult situation and I would ask that you consider the needs of the family and child involved.

Arrangements are in place to provide assistance and support to those affected. If you have any questions concerning individual issues related to your child please discuss them with me or the police directly.

No one suggested any alteration to the letter. However, the letter was not in fact sent. It appears that the Department held the view that there was not sufficient media attention to require the letter to be sent.

311. I note in passing that the proposed letter was vague in its terms and was singularly uninformative. It did not convey any useful information to parents. It did not state the crime. The letter incorrectly stated that he had been at the school for only a short period. It did nothing to alert parents to the possibility that their children might have been victims of Harvey's offending. It was curious also that Ms Kibble decided that the letter should not be sent "unless the story was released in the media". The story had already been published in the media in the news bulletins on ABC radio and was available on the ABC website. Furthermore, no consideration was being given to the desirability of informing parents before any further publicity in the media. More importantly, once Harvey had been convicted and sentenced, there was no legal impediment to informing parents of that fact. That is apparent from the examination of section 71A of the *Evidence Act* in Chapter 2. However, it is clear that no one in the Department involved in the matter was aware of the provisions of section 71A nor of the fact that there was no reason in law why parents could not be informed that Harvey had been convicted and sentenced.

312. On 20 February 2012, Ms Hay sent Ms Kibble and Ms Jones a copy of the sentencing remarks of Judge Griffin. Curiously, a copy was not sent to Mr Bartley, the Chief Executive of the Department, nor to any of the others to whom Ms Hay had addressed her email dated 13 February.

Channel 7 Requests Information

313. On 24 February Ms Hay sent an email to Mr Bartley and to Mr Costello. She sent a copy to others including Messrs DeGennaro and Temperly. The email had been prompted by a request from the TV station Channel 7. The email read:

Channel 7 have contacted the department as they have been approached by parents at the school involved. We have been asked to confirm the name of the school and if parents were notified. Below is the proposed response as it stands at the moment however further approvals are required and I also need to liaise with the police media unit. I will send around a final version of the statement.

Thanks

Mandy

The Department can confirm that a serious incident occurred involving a child in OSCH, (sic) however is not prepared to jeopardise the identity of the child to prevent any further trauma by unwanted attention. The Department of Education and Child Development has followed all due processes and worked closely with police in their investigation. As this was a Police matter the Department did not want to jeopardise the investigation or pending court case.

As in all matters involving minors, the confidentiality of the child is the primary concern. The court very sensibly did not refer to the name of the school during the judge's remarks as a way of protecting the child's identity. The family of the child involved were provided support at the time of the incident. Parents at the school concerned who have raised concerns with the principal have been offered social work support and counselling.

The Department replied to Channel 7 but not in those terms. The response was in these terms:

The Department can confirm that a serious incident occurred involving a child in OSCH (sic), however as in all matters involving minors, the confidentiality of the child is the primary concern.

The family of the child involved were provided support and parents at the school concerned who have raised concerns with the principal have been offered support and counselling.

It will be noticed that, despite Channel 7 asking whether parents had been notified, the response said nothing about informing parents and the Department did not instruct the principal of the school to give any information to parents.

Parents Request Information

314. In late February 2012, some parents were asking whether all parents at the school were to be informed about the offending and what was to be done to support parents and children. Parents sent emails to, spoke to or left telephone messages with Ms Oshinsky, the school principal, referring to the report on the ABC website and asking why parents were not being informed by the school. Some expressed their anger at the failure of the school to give information. On 22 February, Ms Oshinsky sent an email to some parents stating that all details were suppressed other than Harvey's name.

315. Mr Simon Bohm and his wife Ms Tracy Bohm had two children at the school. Mr Bohm had been corresponding with the Minister concerning the issue of school amalgamation at Largs Bay Primary School. In an email to the Minister sent on 9 March 2012 he acknowledged the Minister's response on the issue of amalgamation and then went on to ask the Minister questions about Harvey. He quoted the whole of the report posted on the ABC website³ and continued:

To date, no information has been provided to support the children and parents of Largs Bay Schools. Many children have been directly or indirectly involved in this situation and I would like to know:

1. **What DECS and the Minister are doing to support the children?**
2. **What procedures and processes have been implemented to ensure this situation doesn't occur again?**

³ This is the second article in paragraph 307 above.

I believe this needs to be addressed because DECS and the Minister remaining silent and not supporting the children only exacerbates the children's stories and potential physiological impacts.

I have included DECS with the hope that I will get a satisfactory response.

I await your prompt advice on this urgent issue. (Emphasis in the original)

The Hon. Grace Portolesi MP was then Minister for Education. She had been appointed on 21 October 2011. She had not been previously briefed about Harvey's offending nor had she any reason to be aware of it. In late March, the Department provided her with a briefing paper relating to Mr Bohm's letter. Attached to that paper was a recommended reply to his letter. The briefing paper was a minute to the Minister in these terms:

1. BACKGROUND

- 1.1 On 9 March 2012, Mr Simon Bohm wrote to the Minister for Education and Child Development regarding the lack of information provided to parents following the gaoling of a former Director, Out of School Hours Care program, Largs Bay Schools.
- 1.2 In his email Mr Bohm asks what DECD and the Minister are doing to support the children at Largs Bay Schools.
- 1.3 Mr Bohm also asks what procedures and processes have been implemented to ensure such a situation does not occur again.

2. KEY ISSUES

- 2.1 As a result of police investigations, Mr Mark Harvey, then Director, Out of School Hours Care program at Largs Bay Schools was arrested in December 2010 for allegedly sexually abusing a child in his care.
- 2.2 In December 2010 Mr Harvey's employment was subsequently terminated by the Largs Bay Schools' Governing Council.
- 2.3 As the matter was an ongoing investigation, SA Police advised to keep the matter confidential.
- 2.4 Ms Julie Gale, Principal Largs Bay Primary School discussed with the parents of the victim, support available to them and their child. It is understood that the family accessed support through SAPOL.
- 2.5 In February 2012 Mr Harvey was sentenced to six years gaol. In sentencing the judge did not name the school or family involved to protect the interest and anonymity of the child.
- 2.6 Following the conviction, advice was received from Ms Anne Kibble, Director Programs and Regional Management that, given the sensitive nature of the matter, Largs Bay Schools not send any letter / information to the school community. Consistent with the Children's Protection Act, advice was also received that no public statement be made by the school.
- 2.7 Arrangements were made by the school for support through the Western Adelaide Region Office, Social Work Service to be available to children, families and school staff on an individual needs basis.
- 2.8 A number of measures are undertaken by Largs Bay Schools to ensure the care and safety of all students.
 - All students are provided with age appropriate child protection curriculum.
 - All staff working with students are screened. Volunteers who support school excursions and sports coaching are also screened.

- All staff and volunteers working with students receive regular, documented Reporting Child Abuse and Neglect training.
- Comprehensive procedures for managing allegations made against staff and volunteers are in place and
- All staff are given explicit advice about their duty of care to students and appropriate interactions with students.

3. PROPOSED ACTION

3.1 The Minister considers the attached response to Mr Bohm.

On 31 March 2012, the Minister adopted the Department's recommendation and sent the following letter to Mr Bohm. Mr Bohm's request for a prompt response was answered by a letter sent some three weeks after his request.

Dear Mr Bohm

Thank you for your email dated 9 March 2012 regarding your concern for children at Largs Bay Schools.

I asked for the Department of Education and Child Development (DECD) to investigate the matters you have raised and to ensure that the necessary and appropriate actions were undertaken by the school following the arrest and subsequent sentencing of Mr Mark Harvey, former Director, Out of School Hours Care, Largs Bay Schools.

I understand that as a result of police investigations, Mr Harvey was arrested in December 2010 and that following his arrest Mr Harvey's employment was terminated by the Largs Bay Schools' Governing Council. As the matter was an ongoing investigation SA Police advice to the school was to keep the matter confidential.

I also understand that in sentencing, Judge Mark Griffin did not name the school or family involved to protect the interests and anonymity of the victim. Consistent with the Children's Protection Act, advice to the school was that no public statement be made by the school following Mr Harvey's conviction and sentencing.

Ms Tanya Oshinsky and Ms Judy Anderson, Principals, Largs Bay Schools have liaised with the Western Adelaide Regional Education to arrange for social work support to be available to children, families and schools (sic) staff on an individual needs basis. Should you or a member of your family require such support please discuss this with either Ms Oshinsky or Ms Anderson and they will make the necessary arrangements.

Our schools place utmost importance on their responsibilities for the care and safety of all children and students and with this in mind Largs Bay Schools undertake a number of measures. The *Keeping Safe* Child Protection Curriculum is taught in all classes at all year levels. All staff working with children are screened, and undertake regular, documented Reporting Child Abuse and Neglect training and volunteers who support school excursions and camps and sports coaching are also screened. Staff at Largs Bay Schools have been given explicit advice about their duty of care to students and appropriate interactions with students and comprehensive procedures for managing allegations made against staff and volunteers are in place.

I am confident that Largs Bay Schools have acted appropriately and with sensitivity in this difficult situation and have undertaken the measures needed to provide a safe school for their students.

Thank you for drawing this matter to my attention.

Notwithstanding that Mr Bohm's email had stated that no information had been sent to parents or children at the school, the Department did not reconsider its decision to inform parents only if the media published details of Harvey's offending.

316. I have recited the terms of the briefing paper and the letter to Mr Bohm because they contain the germ of what was to be incorrect information provided by the Department to the Minister on 30 October 2012. The germ of that misinformation is contained in paragraph 2.3 of the briefing paper. It was not correct that SA Police had advised the Department to keep the matter confidential because the matter was under investigation. At no stage after Harvey's arrest had police asked the Department to keep the matter confidential. Indeed, Det. Sgt. Clark had suggested to Ms Gale that parents be informed and had been shown the letter sent to parents of children in the OSHC service. Furthermore, even if it was correct that police had asked that the matter be kept confidential because it was under investigation, the need for confidentiality had long passed once Harvey had been sentenced. Those simple facts seemed to have escaped the attention of the Department. The minute to the Minister was, therefore, misleading. The emphasis in the minute on the sensitivity of the matter and the statement that it was consistent with the *Children's Protection Act* not to inform parents were also misleading. The matter was certainly sensitive but that did not require that no letter be sent to parents. On any objective view, the principles of the *Children's Protection Act* required parents to be informed so that they might be aware of the nature of the offending and be alert to any untoward behaviour in their children that might require counselling and support. The Department was not providing either accurate or helpful information to the Minister.

317. Not long after Mr Bohm's email of 9 March another parent, Ms Kellie Holmes, sent an email to Ms Oshinsky on 15 March. Ms Holmes stated in her email that she was an Intelligence Analyst with SA Police as well as being a parent of a child at the school. She wrote in her capacity as parent. Her email referred to the fact that the sentencing remarks of Judge Griffin were available to the public and set out reasons for informing parents. It was in these terms:

Dear Principal

I am sure you are aware, and increasingly more members of the school community are becoming aware, that the previous Director of the Out of School Hours Care program has been convicted of unlawful sexual intercourse with a person under 14 years of age, who was a child under the care of the OSHC program at the time. This information is readily available to the public at the following link:

http://www.courts.sa.gov.au/sent_remarks/sr/0220_harvey_mark_christopher.htm

I feel it is important that parents and caregivers of children attending the school be advised of this matter immediately. They should also be provided with information that may help them to identify if their child has been affected and to prevent any future risk of such events reoccurring within the school community.

I stress the importance of parents/caregivers being formally notified by the school to enable our school to stay strong together, heal together and focus on a positive and safe environment for our children's future at the school. My child has been attending OSHC for over 5 years and I feel compelled to tell you that families in my situation all have a moral right to be notified.

You may wish to accompany your notification with a guide to help parents in this difficult time.

This was an unequivocal request to the school asking that the parents be informed of the events concerning Harvey.

318. Ms Oshinsky referred the email from Ms Holmes to Mr Petherick. He then answered the email from Ms Holmes by an email sent on Monday, 19 March. His email read:

Dear Kellie,

Tanya has forwarded your email to our office.

The DECD advice we are providing to the school in line with the judges (sic) recommendation and consistent with the Child (sic) Protection Act is not to make a public statement about this matter. This is to protect the identity of the child and family involved.

Tanya and/or a member of this office would be happy to meet with you and talk this through further though again we are bound about providing any specific details about the matter.

Our office also has trained counsellors available to support families and children. Counsellors can be contacted through our Student Services manager, Keith Christie [telephone number stated].

The person called Tanya in that email is Ms Oshinsky. This email is open to the same criticisms as have been made of the Department's minute to the Minister. It is quite apparent that Ms Oshinsky was acting as directed by her Assistant Regional Director, Mr Petherick. Mr Petherick's evidence was that he was complying with directions from the head office of the Department. He did not check with any person in the School Care Unit whether the Department might reconsider its position.

Governing Council Meets on 19 March 2012

319. The requests for information from parents did not cease. The first business meeting of the Governing Council for 2012 was held on the evening of 19 March, coincidentally on the same day as the request from Ms Holmes that parents be informed. Ms Danyse Soester had been a member of the Governing Council as a parent since 2010. She had been present at the meeting of Governing Council on 9 December 2010. In 2012 she was the secretary of the Governing Council and, as secretary, she took minutes of its meetings. At the beginning of the meeting on 19 March, she sought to ask questions about Harvey. Ms Oshinsky said that the matter could not then be discussed as it was not an item of business on the agenda but it could be discussed as "Other Business". Ms Larkin, the chairperson, ruled that the matter be dealt with later as part of the agenda item "Other Business".

320. When the meeting came to the item "Other Business", Ms Soester addressed the meeting and stated that Harvey had been sentenced and the suppression order had been lifted. She said that, as the Governing Council was the employer of Harvey, the time had come to send a notice to the school community informing them what had happened and what procedures and policies had been put in place. She added that such a letter might result in other victims coming forward and they could have access to counselling. Ms Oshinsky informed the meeting that such a letter would be contrary to the directions from the Department and that the school would not be sending a letter. Ms Soester attempted to put a motion to the meeting that the Governing Council send a letter to parents. Ms Oshinsky stated that Ms Soester could not move that motion and that legal advice should be obtained. She added that an adviser from the Department would attend the next meeting of Governing Council. Ms Soester did not move her intended motion.

A Dispute About Minutes

321. Ms Oshinsky was concerned as to what might be stated in the minutes of the meeting of the Governing Council held on 19 March. On 26 March she sent the following email to Ms Soester.

Given the highly sensitive nature of some of the discussions at the last GC mtg (sic) and the legal implications, it is imperative that either Judy or I sight the minutes prior to sending them out to other GC members and becoming a permanent record. Once you have prepared the minutes could you please email them to one of us so that we can ensure that the wording does not place the school in an unwarranted position. If you can get them to us by the first week of next term, we will respond within a reasonable timeframe to ensure that you have time to then send them out to other GC members prior to the next meeting.

Thanks for continuing on as secretary. This is one of the office bearer positions that does take personal time and we know how busy you are with your own business.

Ms Soester consulted others before she replied by an email sent at 1.49am on 3 May. Her email was in these terms:

Sorry I should have long answered this email with "be patient please I will seek counsel on this matter".

Since having sought counsel,

I was informed that minutes are a factual direct reflection of the meeting, they are not for any GC member to vet or change, not even the chairperson or principal.

If anyone has a problem with them they raise their hand at the next meeting and say I have a problem with xyz. I have written them directly from my notes taken in the meeting (without too much fluff).

I am sure that you will find them to be true and correct.

I will send the mins out to the GC late Thursday afternoon in the meantime if you find anything that causes you concern feel free to contact me. I am working today but available on my mobile [telephone number stated] all day.

Ms Soester's assertions were partly correct. While no single person could alter the minutes, they could be altered by a resolution of the Governing Council.

322. That part of the minutes of the meeting of 19 March that recorded the discussion relating to Harvey as drafted by Ms Soester was in these terms:

Mark Harvey has now been sentenced as a paedophile. (sic) & the suppression order has been lifted.

DS asked that since the GC were his official employer, & we are the LBSs community voted us as their spokesperson and representatives that it was now time to send (sic) a letter out to our community informing them of what (sic) has happened, what procedures & policies (sic) have been put into place, so that this can't repeat itself.

Also that any other victims can be found & have access to counselling. Intense discussion was had about our legal & moral obligations to the (sic) LBS community.

We were told that a letter would not be in line with the DECD Directive & the school would not be sending any letter out.

There was discussion around the possible community effects & DS wanted to make a motion to send a letter out from the GC. The principal said that DS was not able to make a motion & she needed to seek legal advice & a DECD advisor would be attending the next meeting.

Danielle has been reinforcing the stranger danger and keep your body safe message.

In the event Ms Oshinsky proposed one correction to the minutes that was adopted at the next meeting of the Governing Council. It was to add the words "only on his name" to the sentence "Mark Harvey has now been sentenced as a paedophile and the suppression has been lifted". The correction reflected the mistaken impression that the remarks of Judge Griffin constituted some kind of suppression order.

Ms Soester Makes Inquiries

323. Later, at 10.55am on 3 May, Ms Soester sent an email to Ms Karen Gilbert, who was the personal assistant to Mr Semmens, the Regional Director. Ms Soester asked that her email be sent to Semmens. Her email was in these terms:

Hello Karen Thank you for sending this on asap for me. Have a great weekend. Danyse

Hello Brendyn,

I write to you to voice my disapproval about the last GC meeting & consequent "bullish" behaviour from the Principal Tanya Oshinsky at Largs Bay Schools.

In the last GC meeting I was ...

1. I was told by Tanya that I was not allowed to speak about Mark Harvey OSHC Director (paedophile) – a matter that had just become business arising due to his sentencing!
2. I was told I was not allowed to make a motion to the council to see if they wanted to send a community information letter out!
3. Post meeting the principal has sent emails directing me that the minutes were to be sent to her for vetting, approval & changes!

I sought consultation and...

1. No GC member can tell another what will or won't be open for discussion. The agenda committee decides what will be discussed at the GC meeting, & as per the constitution the Chairperson & secretary should make the agenda alongside the principal. However I have been the secretary for 3 years and I have been invited to only 1 agenda setting meeting, and I forced that invite as things were getting avoided from the agenda for so long that the GC wanted to discuss, & GC frustration was growing.
2. No GC member can forbid another GC member from making a motion.
3. No GC member can demand the minutes & expect to vet and make changes to them. Changes can only be made at the next following meeting.

I do expect this situation to change & that the Principal to be instructed about her inappropriate behaviour. I have spoken with both SAASOO & the chairperson about this and we decided that it was easier & more tactful to send this to you & have you address personally with her so that this could be cleared pre Mondays (sic) meeting instead of it being tabled at the meeting as incoming post and causing embarrassment & tying up meeting time.

We have many new members on our GC and if they continually see the principal depicting and controlling the GC process instead of the Chairperson then they will misunderstand & not grow in the role of the GC.

Thank you for looking into this & confirming to me that this has and will be addressed, as I know that we really don't want this to demand further action.

I do look forward to meeting you on Monday night.

Many Thanks & Kind Regards

Danyse Soester

Jacqui I have only cc'd you on this for your info, post our discussion.

Thanks D

(The person Jacqui named at the end of the email is Ms Jacqui Larkin, the chairperson of the Governing Council). It is clear that there was tension between Ms Soester and Ms Oshinsky. That tension stemmed from their different views on the question whether information should

be sent to parents. It is unnecessary to comment further as the events speak for themselves. Ms Oshinsky was acting in accordance with the Departmental directive that no letter should be sent to parents while Ms Soester was clearly of the view that it was proper to inform parents.

324. Ms Soester continued in her quest to have parents informed. At some time near the end of April and before 2 May 2012, she made a telephone call to Mr Mackie, the manager of the Legal Unit. Mr Mackie made handwritten notes of the conversation. He later dictated a more detailed note from those handwritten notes. Ms Soester told Mr Mackie that she was calling on behalf of the Governing Council. She said that the Council wished to write to parents who had children in the OSHC service informing them of the arrest and later conviction of Harvey. She said that the principal had prevented the Governing Council from sending such a letter. Mr Mackie informed her that the decision was ultimately a matter for the principal. Ms Soester questioned his view and argued that the Governing Council had a duty to inform those parents. She asked if members of Governing Council could hand out a pamphlet stating the position to parents when they collected their children at the end of the day. Mr Mackie informed her that members of the Governing Council could not do that. He said that she could act if she wished but she might be personally liable for her actions. Mr Mackie's record of the conversation concluded with these notes.

9. I further informed her that with respect to the operations of the OSHC, the council as the operator **could** make decisions relating to **the operation of the service** and if the council decided they wished to make all participating service parents, that is parents who had children in the service who may have been in contact with the Director, aware of the situation then this was something they could in fact do and the only direction that could be applied to them was a direction by the Minister (either through an existing administrative instruction, a provision of statute or by way of a specific instruction relating to this matter).
10. I did indicate that in my view even such a limited step as only advising those parents of children who had had contact with the past director was however ill advised and would serve no legitimate purpose. I explained that as the media had run with the story and given the local community networks I would have been surprised if there were parents who had sent their children to that service who weren't aware of the conviction etc.
11. Furthermore, if it was seen as being an action activated by malice then they may not be protected against any legal liability that could arise (although it is difficult to imagine what liability could in fact arise). I tried to explain the nexus between the operation of the service and the constitution and why the protection mechanism operates in the manner it does. Ms Danyse didn't seem particularly happy with the advice and the call was finalised. (Emphasis in the original)

The thinking in paragraph 10 of Mr Mackie's note is curious especially when it is considered in light of the decision of Ms Kibble on 13 February to send a letter only if the media published a more detailed account of Harvey's offending and named the school. His statement that giving information to those parents who had children who had been in contact with Harvey would be ill advised and would serve no legitimate purpose is extraordinary. The letter would provide information to parents who had not seen the media reports and who knew nothing of Harvey's offending. The evidence shows that there were a number of parents who were entirely unaware of his offending until questions were asked in the House of Assembly in late October and in early November 2012. The simple fact is that Mr Mackie did not know and, unless he surveyed the parents, he could not know how many parents knew of Harvey's offending. Furthermore, a letter to parents would serve the very legitimate purpose of informing parents of Harvey's offending so that they could then be alert to any

untoward behaviour in their children that might require counselling and support. Mr Mackie had no basis for the assertions in paragraph 10.

Actions of Mr Semmens Before Next Governing Council Meeting

325. The next meeting of the Governing Council was to be held on Monday, 7 May 2012. Mr Semmens was to attend the meeting because Mr Petherick was on leave and the Governing Council had asked that an officer from the Department more senior than Mr Petherick attend the meeting. Mr Petherick had given Mr Semmens an oral briefing. Mr Semmens was aware that some members of the Governing Council wished to send a letter to parents.

326. On Friday, 4 May 2012 Mr Semmens telephoned Ms Soester and had a telephone conversation with her. That call was clearly prompted by the email Ms Soester had sent to him on 3 May. In the course of that conversation they debated a number of topics including the question whether it was proper for a letter to be sent to all parents informing them of the events concerning Harvey. Mr Semmens stated that the Department held the view that a letter should not be sent. It is apparent from the evidence of both Ms Soester and Mr Semmens that each held strong and different views on the issues they had discussed and in particular the question whether a letter should be sent to parents.

327. On 7 May, before he went to the meeting of Governing Council, Mr Semmens rang Ms Kibble to seek advice. She informed him of the decision not to send a letter to parents made on 13 February and she sent him a copy of the email dated 14 February reporting on her conversation with Ms Oshinsky. She also sent him a second email attaching a copy of the sentencing remarks of Judge Griffin. That was the first occasion on which Mr Semmens had seen the sentencing remarks.

Governing Council Meets on 7 May 2012

328. The meeting of Governing Council on 7 May began shortly after 7pm. The first item of business was the question whether a letter should be sent to parents informing them of the events relating to Harvey. Mr Semmens had little independent recollection of the meeting. The following account is based on the minutes of the meeting. Ms Oshinsky introduced Mr Semmens, stating that he had come to bring clarity on the issue. Mr Semmens then addressed the meeting. He began by recognising the difficulty of the situation and stated that Ms Oshinsky had sought advice on the issue and had acted in accordance with directions from the Department. He said that the sentencing judge had suppressed the names of the victim and of the school in order to protect the victim and her family. He went on to say that, if the Governing Council were to inform parents, it would be acting contrary to what he called the suppression order made by Judge Griffin as well as the directions from the Department. Ms Soester questioned his assertions. She said that she had obtained advice from Mr Mackie in the Legal Unit of the Department to the effect that it was lawful for Governing Council to inform the school community. She said she had consulted others who confirmed that it was appropriate to inform the school community. The issue was debated between Ms Soester and Mr Semmens. Mr Semmens emphasised that the Governing Council needed to put this issue behind it and move on to other issues. The motion "that the Governing Council should move to support families by holding child safety parent evenings and promote the OSHC service

and close any further discussion about the case” was put to the meeting. Voting was by secret ballot. The motion was carried by 12 votes to 2. The latter part of the resolution to close any further discussion defeated Ms Soester’s attempts to send a letter to parents. The advice given by Mr Semmens was plainly wrong. In fairness to him, he was acting on instructions from the Department.

Ms Soester Seeks Further Information

329. Ms Soester was not dissuaded by the resolution from making further inquiries. On 10 May, she telephoned the Parent Complaint Unit of the Department. She wished to speak to someone in the Department who could inform her on the rights and responsibilities of a governing council. She was put through to Mr Costello, who then was and still is the Head of Schools. After she had explained her concerns, Mr Costello told her that it would be better if she spoke to someone who was more knowledgeable than he on the topic. Ms Soester agreed with this course. Mr Costello called Ms Lynley Page into his office and for a time she participated in the telephone conversation. Mr Costello told Ms Soester that he would arrange for Ms Page or Mr Mackie to contact her and give her more information. In May 2012, Ms Page was Principal Policy Adviser in the Office for Schools. In particular, she was the adviser to Mr Costello as Head of Schools.

330. The evidence at the Inquiry disclosed that misunderstandings existed as to what Ms Soester was seeking. Her evidence was that she wanted a letter to be sent to all parents who had children in the OSHC service. Mr Mackie said that Ms Soester wanted a letter to be sent to the parents of all children at the school. There might have been misunderstandings on both sides. At times their discussion might have confused the two groups of parents. It is not necessary to determine where the truth lies since, as I later find, it was appropriate to have informed the parents of all children at the school of Harvey’s conviction.

331. After that telephone conversation, Ms Soester sent an email on 14 May to Ms Lynley Page asking for confirmation that it was lawful for the Governing Council to send a letter to parents with children in the OSHC service. The relevant part of her email was in these terms:

I spoke to our GC chairperson and she has asked for written confirmation from you & Don that the GC are legally allowed to send a letter to the affected community. She also asked for a draft letter that could legally be sent out. (for consideration) I know you said that you are meeting with Don today & I thank you both for your efforts.

I find that Ms Soester’s reference to “the affected community” is a reference to parents of the children in the OSHC service. Ms Soester had incorrectly addressed the email. She corrected the address and sent it again on 16 May. Ms Page responded the same day in a long email. It is necessary to set out the relevant parts in full as it illustrates the Department’s attitude to any letter being sent to parents.

Hi Danyse,

My apologies for not contacting you earlier ...

Having said this however I have sought advice from the Manager, Legislation and Legal Services, Mr Don Mackie, in relation to the concerns that you raised with the Manager, Parent Complaint Unit, Meredith Evans and (sic) the Head of Schools, Mr Garry Costello last Thursday.

From my conversation with you on Friday I was made aware that you feel that the council should be able to write to all parents of the school advising them of the situation and the

conviction, but that such a decision has been vetoed by the school. I understand that Mr Mackie previously informed you that the use of student information in the form of a letter or a notice of the type under consideration is ultimately a decision of the Principal given that student address information is the property of the Minister and is collected for school purposes and this clearly isn't (sic) a school purpose. As such the decision made by the Principal was appropriate in the context of who can make such decisions.

As explained to you in our conversation, the council has no role to play in "informing" the broader school community on such issues and the councils (sic) powers and functions are limited to those matters set out in the Education Act and its subordinate instruments such as the constitution. As Don also (sic) advised you when you contacted him a few weeks ago, if you step outside of this then the protections that you have via the council under the Act may be voided and you could be held personally liable for your own actions.

I am aware from speaking with you that you have floated the idea of standing outside of the school's gates and handing out a pamphlet advising parents of the situation (and that you would be doing this as a GC member). As Don and I have both indicated, should you choose this course of action you will be doing so in your own right and will therefore be personally subject to liabilities of this nature.

As I explained to you in our phone conversation last Friday, in relation to the operations of the OSHC, the council as the operator could make decisions relating to the operation of the service and if the council decided that it would like to make all participating service parents, that is parents who had children in the service who may have been in contact with the Director at the time, aware of the situation then this was something that the council could in fact do and the only direction that could be applied to the council is a direction by the Minister (either through an existing administrative instruction, a provision of statute or by way of a specific instruction relating to this matter). Council members would however need to agree to this course of action by way of special resolution.

As Don has explained to you previously, advising parents whose children have had contact with the past director is not recommended as this will serve no legitimate purpose. As you are aware, the media at the time ran the story about and given the local community networks we would be surprised if there were any parents who had sent their children to that service who weren't aware of the conviction etc.

Have a think about the advice that I have provided and please contact me via e-mail if you have any further questions in this regard.

(The person referred to as "Don" in this and subsequent emails from Ms Page is Mr Mackie.) Three remarks in that email should be especially noticed. The first is the extraordinary remark that sending a letter to inform parents of the conviction of a person employed at the school "isn't a school purpose". It is most clearly a school purpose. The second is the assertion in the fourth paragraph that the Governing Council had no role to play in informing the broader school community. The third is that, if the Governing Council did send a letter to parents, it may lose the statutory protections available to it. This was one occasion on which a remark was made to the effect that sending a letter might cause the Governing Council to lose its statutory protection. I will comment later on those two assertions⁴. I have already commented on the remark, in the penultimate paragraph, that informing parents whose children had had contact with Harvey would "serve no legitimate purpose"⁵. Although the email made a distinction between a letter to all parents and a letter to parents with children in the OSHC service, it positively discouraged any letter.

⁴ See paras 449-457 below.

⁵ See para 324 above.

332. Ms Soester was entirely dissatisfied with the views expressed by Ms Page. On 30 May 2012 she sent a very long email to Ms Larkin as chairperson of the Governing Council, asking her to accept the email as an official letter of complaint to the Department. She asked Ms Larkin to send it to the Department as soon as possible. Ms Soester also sent a copy of the email to Ms Oshinsky, Ms Page and Mr Costello. It is unnecessary to recite the whole of this email. I summarise its main points. Ms Soester asserted:

- (a) That she had received advice from Mr Mackie and others that the Governing Council was the employer of Harvey and, as such, would be acting with due diligence if it informed the affected community of the events concerning Harvey. If Governing Council informed those who had children under Harvey's care, it would be acting lawfully and would not be in breach of the suppression order.
- (b) That Mr Semmens had misled the meeting of Governing Council on 7 May 2012 in stating that Governing Council should not inform parents.
- (c) That it was possible to read on the ABC website the report on 10 February 2012 of Harvey's conviction. She gave the necessary web link.
- (d) That she had asked for a special meeting at which Mr Mackie or Ms Page would be present so that the Governing Council could obtain legal advice directly from them.
- (e) That a parent on Governing Council was not aware of what had happened.

She attached a schedule to her email showing a variety of persons and organisations to whom she had spoken who had supported her view that parents should be informed. Ms Page sent the email to Mr Mackie on 30 May and asked to meet him to discuss it. In that email she said:

Clearly, Danyse is getting confused with the advice provided. We have never disputed that the GC could inform parents whose children were attending the OHSC are (sic) the time of Mr Harvey's conviction.

Ms Page and Mr Mackie met on the afternoon of 30 May.

The Department Prepares Its Response

333. Ms Soester's email of 30 May was sent by Ms Page to Mr Semmens. At 3.56pm on the same day Mr Semmens sent an email to Ms Page and Mr Mackie and others, attaching that part of the sentencing remarks of Judge Griffin where the Judge had said that he did not intend to name the suburb, the school or the child in order to protect the identity of the child and her family. In his email, Mr Semmens said that the judge's remarks were central to his comments to Governing Council on 7 May.

334. On 31 May, Ms Page replied to Mr Semmens by an email sent at 10.40am. That email read:

Many thanks Brendyn. I tried ringing you this morning as I wanted to clarify the advice that you gave the GC when you attended the meeting. Don and I met yesterday to discuss the contents of the e-mail from Danyse and we will be responding back to the GC Chair today about this. I will send you a copy of this draft response before I send, so that you can see what it contains.

Her email prompted a long response from Mr Semmens in the form of an email sent at 5.49 on the afternoon of 31 May. I set out the relevant parts of that email as it explains Mr

Semmens' approach to the matter and as well as the views he had expressed at the meeting of Governing Council on 7 May.

Having just talked to Greg Petherick about his discussions with Jacqui Larkin about the email below, this is to flag my concerns about the directions this whole issue is taking... There is a great danger that unless the written feedback to Jacqui Larkin is clear and unequivocal then this WILL get dragged back into discussions with the Governing Council and destabilise the school. I am not worried about the personal comments aimed at me but I (sic) greatly concerned about throwing the GC back into disarray and fuelling pressure on the Principal ...

It was confirmed between myself and Anne (and were the clear opinions of Greg P and the Principal) when I rang her on May 7 that I was correct to make two statements to Governing Council:

1. The Judge had "ordered" or declared that the name of the child and the school should not be released. Hence his comment: **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.**

Whether this was a suppression order or not (this seems unclear or whether the suppression order has lapsed – do they lapse??) the judge was making a very clear statement about the importance of protecting the identity of the girl and the school. My advice to the GC was that for them to put out any sort of correspondence would be contradicting the position of the Judge on this matter.

2. SAPOL was in ongoing communication (sic) with DECD about this matter and was satisfied that this was an isolated incident that did not affect any other children. They may have contacted other families but no-one would know because it was confidential. Hence my advice to the GC was that there was no need for the school to contact the other families because there was no evidence that anyone else was affected. (Emphasis in the original)

I am requesting most emphatically that these two messages are clearly confirmed as correct in writing to Jacqui Larkin as soon as possible. The highlighted section below implies that the GC could choose to send out a letter. That is not what I said on the basis of the above. My advice to the GC was that they could NOT send out a letter (morally or otherwise) because it would jeopardise the identity of the school and the family and the child and they could be reasonable (sic) assured that no other children were involved.

My other piece of advice to Danyse in particular was that the GC could not send out correspondence to the community if the Principal was not happy to endorse it. In this case the Principal is clearly not happy for any letter to be sent out.

The GC voted 12 to 2 NOT to send out a letter. It agreed therefore that this was the end of the matter. The vast majority of the council want to move on.

It is vital that this message is clearly sent to Ms Larkin so that she will not allow the same matter to be dredged up by Danyse. For your information Don, Ms Larkin is suggesting that a "legal person" be present at the next GC meeting on Monday. My sense is that a clear written message to her would mean that that was not necessary. (Emphasis in the original)

I have considered whether Mr Semmens was attempting some kind of *ex post facto* justification for his conduct. I am satisfied he is not. His remarks are clearly consistent with all that the Department was directing. As Regional Director, Mr Semmens was acting in accordance with directions from Ms Kibble and the Department.

335. At 9.20am on 1 June, Mr Mackie sent an email to Mr Semmens, Ms Page and Ms Kibble concerning Ms Soester's complaints. I set out the email. It should be noted that in the email Mr Mackie confused Ms Soester with Ms Larkin. A little later that morning he sent an

email to Mr Semmens, Ms Page and Ms Kibble correcting his mistake. All the references to Ms Larkin in his email should be read as references to Ms Soester.

I checked with the Court and the registry advised no suppression order was made therefore the “press and public” could “publish” such if they chose to do so. It appears the Judges (sic) remarks were aimed at influencing the way the matter was reported and appropriately so.

The school:

Although the judges (sic) comments are not of a binding nature, they do assist in providing a reference point for people to make a decision on some aspects of this matter. In my view the actions of the council and school need to be seen separately as they are operating from different legal positions. It is clear the Principal acting on advice from whomever she chooses (sic) has the authority to determine if a letter was to go out or not – this is clearly not a matter for council to determine. The principal may choose to take advice from the council but that’s all it can be, advice. The principals (sic) decision/authority is overridden if her line manager etc chooses to instruct her not to take a particular action. As long as the instruction is lawful then it is binding on the principal. In this case I was advised the principal did not need instructing as she agreed with the position not to send one out. In my view the correct decision for a raft of very good reasons. This was and should be communicated to council as I understand it was. In my view this is the end of the matter with respect to whether the school itself is involved in any action. Cut and dusted!

The council:

The matter of the council’s actions must now be seen in their capacity as the operator of the OSHC service and therefore the employer of the person in question and the agency/entity with the duty to the users of the service. I was advised the council received advice from you and I don’t particularly think that whether the advice was “legally correct” or not need be at issue. It was simply sensible advice and the matter was voted on by the council as you state below. Once again, this should have been the end of the matter.

The advice to Ms Larkin

I provided advice to Ms Larkin in accord with all of the above except from (sic) indicating to her that the council had the right to make a decision on whether they sent information to the users of the service or not (not the school community as she wished). She informed me that they had voted on this (once again in concurrence with your information) and the council determined not to take further action. I told her that this was then the end of it and if she couldn’t accept that decision **she had no right to take any action on behalf of the council or even in a manner where others might think she was doing so on behalf of the council.** She didn’t appear to be able to accept that and I informed her that if she couldn’t agree with councils (sic) actions and comply with such the only action for her would be to resign from council. I further advised her on her civil liability if she acted as an individual or even as a council member and acted contrary to a council decision. She did appear to be concerned about such a situation. She kept trying to put her moral position on this and I told her she could think what she liked but this was a decision of council and therefore the council considered the matter closed. I could not have been clearer in my frank discussion with her and I suspect she hung up not thinking very highly of me or the department (so be it, she is not alone!).

Moving on:

I agree that a strong position should be put to Ms Larkin but it can be no more than stating the position we have taken with the school and letting her know that this is the end of that side of things and the decision will not be revisited and that the school’s decision is not a matter for council. We could put in the letter our reasons for arriving at this position but in all truthfulness I don’t believe we have a hope in hell of convincing Ms Larkin that her position will do more harm than good.

With respect to the actions of the council, this is for them to determine. If Ms Larkin is able to find someone to second a motion that the matter be revisited then she has every right to put such a motion. I have no doubt it will not be successful but as I indicated if she can find a seconder she can at least put the motion to council. In my view we should not attempt to

coerce council in any way to influence their position. This is a matter for them to determine unless instructed by the Minister that they do not consider this issue (I would suspect that such an instruction will not be forthcoming).

Happy to assist with drafting a letter to Ms Larkin. I have no intention of attending at a council meeting to discuss or provide any advice as to whether the council should or should not send something out. If this office is approached for advice on what powers the council has in this situation then they will be provided with such advice. (Emphasis in the original)

Mr Mackie's observation in the third paragraph of that email that it need not be an issue whether the advice given by Mr Semmens was "legally correct" is curious. It betrays an unwillingness to consider whether Ms Soester might, in fact, have been correct. It suggests that Mr Mackie did not know whether she was correct. I later find that he was unaware of s 71A of the Evidence Act⁶. It also focuses too much on the fact that the Governing Council had resolved on 7 May to close any further discussion. The Governing Council might have reached a different conclusion had it received correct information. Ms Soester's persistence ought to have caused the Department at least to seek legal advice on the question whether a letter should be sent to all parents.

336. One further matter for note in Mr Mackie's email is that he had only just recently checked with the Registry of the District Court to ascertain whether a suppression order had been made. Although on 13 February Ms Mandy Hay had questioned whether a suppression order had been made, Mr Mackie was the first person to check that fact. His inquiry was made almost four months after Harvey had been sentenced!

337. On 31 May, Ms Page had drafted a letter to Ms Larkin. It was the Department's response to the questions raised by Ms Soester and dealt with the question of disclosure of information to parents at the school. Ms Page's draft was later amended by Mr Mackie. It became a letter in the form of a minute to Ms Larkin and was dated 4 June 2012. I do not accept Mr Mackie's evidence that Ms Page did not draft the minute. His evidence is belied by the evidence of Ms Page and, in particular, by two emails sent by Ms Page on 1 June 2012, the first at 9.19am and the second at 4.32pm. The email sent at 9.19am was addressed to Mr Semmens, Mr Mackie, Mr Radloff and Ms Kibble. In the course of that email, Ms Page referred to what would be covered in the letter to Ms Larkin. The last sentence of that email reads:

I will run my correspondence past Don, before I send it through to you for final perusal. I will send this through ASAP.

Ms Page sent the second email on 4.32pm to Mr Semmens with a copy to Mr Petherick. The subject of the email was described as "Letter from Don to Jacqui". The email read:

I have just completed the letter from Don to Jacqui. Don has just read through this and has approved of its contents. As such could you pls have a look and if you are okay with its contents Don will e-mail a signed copy of the letter to Jacqui on Monday.

The letter from "Don to Jacqui" to which that email refers is Mr Mackie's minute of 4 June to Ms Larkin. Mr Mackie did not send any other letter to Ms Larkin. When read together, those two emails clearly establish that Ms Page had drafted the reply to Ms Jacqui Larkin and that it was settled by Mr Mackie.

⁶ See para 439 below.

Mr Mackie's Minute of 4 June 2012

338. On Monday, 4 June Mr Semmens informed Ms Page that he and Mr Petherick were happy with the draft letter to Ms Larkin. Over the weekend of 2 and 3 June Mr Mackie had reviewed the draft and had made slight additions. It is unnecessary to note the changes. He sent the amended draft to Mr Semmens and Mr Petherick at 1.15pm on 4 June. At 1.50pm Mr Petherick replied that he and Mr Semmens approved the draft.

339. Mr Mackie sent his minute to Ms Larkin by email at 2.41pm. He sent a copy of that email to Messrs Petherick and Semmens at 4.18pm. At 4.01pm Ms Oshinsky sent Mr Petherick an email informing him that Ms Larkin had come in after school and had received the email but had not then read the minute.

340. The minute of 4 June 2012 to Ms Larkin is important. Although it is very long, it is desirable to set it out in full as it provides a good illustration of the Department's thinking. Both the incorrect numbering of the sub-paragraphs in paragraph 6 of the minute and the emphasis are in the original.

TO: MS JACQUI LARKIN, CHAIRPERSON, LARGS BAY GOVERNING COUNCIL

SUBJECT: DISCLOSURE OF INFORMATION TO SELECTED FAMILIES OF THE SCHOOL'S OSHC SERVICE

1. I refer to earlier conversations and correspondence circulated via e-mail by a member of the Largs Bay Governing Council, Ms Danyse Soester. In response to your communication with me regarding a number of matter (sic) set out within that email I provide the following information for your attention and consideration. I set out the advice this office provided to Ms Soester and draw your attention to a number of important Council issues that you will need to deal with.

This correspondence includes Ms Soesta's (sic) email (as attachment one) which I understand has gone to all Council members. If this is the case I have no difficulty with the document and attachment one being tabled.

In my view the email may contain defamatory material and therefore should not be further published. If council members have not received the email then it should not be provided to them.

I thank (sic) your invitation to attend your Council meeting this evening but must advise I am unable to do so. I have set out the relevant issues that you may wish to raise with your council in response to our discussion.

2. **In a recent e-mail Ms Soester stated:**

See attachment one

3. **Advice provided by this office to Ms Soester**

Ms Soester in her email intimates her comments are as a result of my conversation with her when she contacted me by telephone. Ms Soester advised me her contact was with your concurrence as you were unable to contact me given you were in Sydney at the time. Ms Soester informed me of your approval for her to seek such advice once I explained to her that I would normally only give advice to the Chair as this was more efficient than having individual Council members contact this office. The issues raised in her email are as follows:

Ms Soester: *The GC is legally allowed to contact (letter/workshops) all of those who came into his care & inform them without infringing upon suppression orders.*

Response: The reason/rationale for making it (the suppression of information) **an order of the Court** is the very fact it then becomes binding on all persons in the State. In this instance there was no formal suppression order made by the Court, however the judge in providing his reasons for judgment chose to indicate (and thus hopefully influence the media and broader community etc) that he would not identify the school and the child in question to **recognise their rights to privacy**. He used the following language –

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

I understand that the Judge’s comments were interpreted by the Regional Director as being an order and it was on this basis he advised Council. Clearly no intention to mislead but to simply draw the Council’s attention to the **importance of respecting the privacy of those involved**. It was only at a later date when the department contacted the Court registry to confirm there was an order in place that this mistake came to light.

I would urge Council to give very weighty consideration to the judge’s comments and his decision to not name the child or school in this matter. Such an approach is unusual and highlights how important considerations of privacy were for the court.

Ms Soester: *Not only do the GC have the legal right to inform the affected community, this community have a legal & ethical right to this information & the only person that can demand that the GC do not fulfil that legal right is the Minister.*

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 Ms Soester 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 Councils (sic) legal position or ensure the safety of those who have used the service.

The comments by Ms Soester 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 Ms Soester 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.

4. **The role of the school in informing the school community of the conviction of Mr Harvey**

The Principal of the school has the clear authority to determine what and how school resources and information may be utilised. The Principal is also subject to the authority of the Director General of Education and his delegates (ie the Regional Director as line manager). I am advised the Principal chose not to circulate information concerning the conviction of Mr Harvey to the parents of the school. It is not necessary to canvass the rationale behind this decision.

Given that this decision was in accord with the Principal's line manager it is a decision of the school that stands. The council has no role to play in such circumstances.

5. **The role of the Council in informing the school community of the conviction of Mr Harvey**

As previously indicated, the Council has no role in informing the community of the conviction of Mr Harvey (see 3 above).

6. **The role of the Council in informing the parents of students who attended the Council operated OSHC services of the conviction of Mr Harvey**

As the operator of the OSHC service (and therefore the employer of the person in question and the agency/entity with the duty to the users of the service) the Governing Council does have the authority subject to its legal framework to engage/determine whether or not parents of students who were attending the OSHC at the time the Director was employed, are informed of the conviction. In making a decision in such matters the Council must consider a number of key matters, including the following:

- 5.1 What, if any, are the Council's obligations towards any parents and children who utilised the service during the time Mr Harvey was employed and has it met these?
- 5.2 What is in the best interest of the children who attended at the service during the relevant time period?
- 5.3 Has the Council breached its duty of care to the students and parents who utilised the service given its employment of Mr Harvey?

I would urge you to give full attention to the following when looking at the issues set out in 5.1, 5.2 & 5.3 above. These are not the only important matters but such an assessment will assist in forming your decision on this important matter.

- The Police have advised there was only one child who was subject to any form of abuse by Mr Harvey.
- The matter has been the subject of the Courts and the Judge in setting out his finding although not issuing a binding suppression order did make it very clear his view was that no good would be served by naming the child, the school and the suburb. It would be difficult to argue the Council is in a better position than the Court and Police to make a decision that will effectively put into the public arena those matters the Court felt it appropriate to not mention.
- If further communication occurs with parents of children who attended the service it will in all likelihood cause the identity of the school, the suburb and perhaps the child to become known to a wider range of individuals than currently is the case, with all of the potential for unintended adverse consequences that this may cause.
- Experts have considered this matter with access to detail the Council will not have access to and consider the events to date are the best way to deal with such. Although Ms Soester indicates a range of persons and organisations have "supported" her position, I would urge such declarations to be taken lightly as they will have been arrived at with limited information and with respect to organisations such as Child Protections (sic) Services I would doubt this is their official position. If any reliance was to be given to such I would urge this only be undertaken subject to written confirmation.
- If by acting contrary to the earlier decision of Council and information is distributed to the community and this brings about an adverse

circumstance, the Council could be subject to litigation proceedings and the Council will have to show why this was the correct course of action.

Please note: I do not believe it will be possible for Council to justify such a course of action in the case of an adverse event occurring. Given the indemnity provided by the Crown to the Council, I will need to advise the Minister of any such steps the Council is to take that could bring the indemnity into play. As such it will be necessary for the Council to advise this office of any decision to further inform parents of children who were in attendance during the time Mr Harvey was employed.

7. **Prior action of council and moving forward**

In providing you with advice on this matter I understand the Council has previously considered this matter and a vote was taken (12-2) that effectively finalised the Council's deliberations/actions.

Therefore it should be noted that prior to any further consideration of this matter and regardless of any of the content of Ms Soester's email, the following would need to occur.

A motion needs to be put and seconded to reconsider this issue. If such occurs the Council would then take a formal vote on the issue and this will determine whether any further consideration of Council can be undertaken. Without such a motion and vote the issue cannot be further discussed by Council. Please do not hesitate to contact me if you have any further questions. I hope the above information will assist you in your decision making.

Don Mackie

MANAGER LEGISLATION AND LEGAL SERVICES

4 June 2012

I will examine and comment on this minute in Chapter 8.

Governing Council Meets on 4 June 2012

341. The meeting of Governing Council on 4 June began shortly after 7pm. Mr Petherick attended the meeting. The minute from Mr Mackie was the third item of business. Most members of the Governing Council had only a short time to read the minute. The minute was read and discussed. Ms Soester asked that the minutes record that she had at all times acted within the guidelines of the Code of Practice for the Governing Council of the Largs Bay School and that she had used the official grievance policy of the Governing Council and had acted according to law. The minutes recorded her statement. It was moved that the Governing Council re-open the discussion on the question of a letter to parents. A secret ballot was held. The motion was defeated by 10 votes to 4. The Governing Council did not revisit the issue until November 2012.

342. In the meantime, parents were continuing to express concern about the lack of information. On 6 June 2012 the duty officer at the Department's central office at 31 Flinders Street, received a telephone call from Ms Hodgkiss, a psychologist. The duty officer's note of the call was in these terms:

- Stated she had been advised by a client that an out of hours school care co-ordinator had been charged and convicted of paedophilia
- Her information is that the community has not been informed and believes this has not been managed properly in the school community- is concerned that children may be suffering

- She rang FSA who told her to contact IU – she is highly concerned and states that kids need education on good touch / bad touch and a letter needs to go out to parents
- She stated there is a duty of care to ensure children are getting treatment
- She would like a response so she knows what steps to take next

The duty officer reported the call both in a telephone conversation and in an email to Ms Thilan Legierse, the Manager of the Human Resources Support Unit, and Ms Samantha Jones, the Manager of the Investigations Unit. Ms Legierse then sent that email to Ms Kibble with a comment that Ms Hodgkiss was very concerned that the information about Harvey had not been properly managed at the school level. Ms Legierse had earlier spoken to the duty officer and this comment reflected what had been said to her during that conversation. The Department decided that Mr Petherick should speak to Ms Hodgkiss. At 4.06pm, Mr Petherick reported to Mr Semmens and Ms Legierse that he had contacted Ms Hodgkiss at 4pm that day. He added:

Talked through her concerns. Outlined the actions that the school and we as a department had taken.

She was very much reassured by this and felt the matter had been well dealt with.

Have given her my contact details should any other matters arise.

It is readily apparent that nothing would cause the Department to reconsider its decision reached on 13 and 14 February.

Ombudsman Begins An Inquiry

343. Ms Soester continued to be concerned that a letter was not to be sent to parents. She decided to seek assistance elsewhere. Early in June, she lodged a complaint with the Ombudsman. The Ombudsman decided to conduct an inquiry into her complaint. On 22 June 2012 he sent a letter to Mr Bartley, the Chief Executive of the Department. The letter was received on 25 June. In that letter the Ombudsman set out Ms Soester's complaint in these terms:

- 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 Largs Bay Out of School Hours Care (OSHC) about the conviction and sentence of the former OSHC Director, Mr Mark Christopher Harvey 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 Largs Bay School principal incorrectly determined not to inform parents of the school of the circumstances of the conviction, despite the willingness of the family involved for the community to be informed, and the need for parents of the school who may utilise the OSHC whose children may have been at risk.

The Ombudsman asked for the following information.

- a copy of the department's policy that applies in these circumstances
- a brief chronology of this matter, including attendances by staff of the department at governing council meetings

- your response to the above allegations, including comment about the role the department takes in advising governing councils.

The Ombudsman requested an answer by 6 July 2012. The Department did not answer the Ombudsman's request until 6 August.

344. It is inappropriate to comment in this report on the Department's reply to the Ombudsman and I will not refer to the further exchanges of correspondence between the Ombudsman and the Department. However, in paragraph 468 of Chapter 8 of this report, I do identify some inaccuracies in the Department's reply to the Ombudsman. It is relevant to note also that not even the inquiry by the Ombudsman caused the Department to pause and consider whether it was acting correctly in not informing parents of Harvey's conviction.

Parents Continue to Seek Information

345. Requests by parents at the school for information continued. On Friday, 21 September Ms Fewings, a parent, sent an email to Ms Larkin, the chairperson of the Governing Council. Her email attached an article in *Adelaide Now*, an internet news publication. The article reported that a teacher was to be tried, among other things, for possessing child pornography. The article had also stated that the Department had written to parents to inform them of the incident. Ms Fewings wished to know why the Department had not informed parents of the Largs Bay Primary School of Harvey's offending. Ms Fewings asked Ms Larkin to send her email to the Department. The relevant part of her email read:

I would appreciate if you could forward this on to the relevant parties in the Department of Education and the Minister responsible for that department with my question as follows:

With reference to the article via the link below, can you please explain why you have failed to advise the parents of Largs Bay Schools that the previous OSHC Director (Mark Harvey) was arrested while employed by the school and subsequently convicted and given a custodial sentence for the sexual abuse of a young student?

The article attached states that you have recently advised another school of a charge against a suspected paedophile prior to a true and proper court process.

In failing to advise the Largs Bay School community you have failed in your duty of care towards the children and also failed to provide them with appropriate counseling (sic) in a timely manner to inform students about inappropriate behaviour by an adult and potentially mitigate any long term impacts on those abused by the perpetrator.

On 24 September, Ms Larkin sent Ms Fewing's email to Ms Oshinsky and Ms Hill asking them to reply to it. The same day Ms Oshinsky sent a reply to Ms Fewings in these terms:

Thank you for your email expressing your concerns. As I am sure you can appreciate each case is different. With regards to Mark Harvey we have been receiving advice and instructions from relevant departments that have governed our actions.

As requested by you to Jacqui, our governing council chairperson, I have forwarded your email to Greg Petherick, Assistant Regional Director of the Western Adelaide Region of DECD, who can forward your concerns as appropriate.

I am currently on leave at present but would be happy to meet with you when school resumes if you wish to speak further about this matter.

As noted in her email, Ms Oshinsky had sent Ms Fewing's email to Mr Petherick. He in turn referred it to Mr Mackie, asking him to draft a reply. Mr Mackie did so. Ultimately, some three weeks after her email, Mr Petherick replied to Ms Fewings in an email sent on 11 October. It read:

I refer to your email to the Chair of the Largs Bay Primary School Governing Council. Ms Larkin has referred the matter to my office for consideration.

I note your comments concerning the media article that appeared online in Adelaide Now (sic) and your extrapolation of that set of events to those involving Mr Mark Harvey. You allege the department has failed in its duty of care to its students and that we have failed in providing appropriate counselling to those students.

We reject your allegations and note any parent who believes this is the case can bring appropriate action against the department by utilising the relevant grievance procedures or if they are inclined including bringing litigation against the department for negligence. If there are students you are aware of who have needed counselling and this hasn't been made available I would be happy to receive advice from you as to their identity so I can follow this up.

Where there are occurrences of this nature each individual event will have unique circumstances and will require an individual approach. In the Harvey matter the department has taken the steps it felt appropriate to those circumstances as was no doubt the case in the Andrews matter.

The tone of the email borders on the aggressive. It is certainly not conciliatory. Ms Fewings had done no more than request an explanation of the reason why the Department was prepared to inform parents at other schools of sexual misconduct by members of staff but had failed to advise parents at Largs Bay Primary School of Harvey's offending. This was another request that should have prompted the Department to reconsider its position. The only explanation provided to Ms Fewings was that each case had to be considered on its merits. That information was preceded by an unnecessarily aggressive and entirely misplaced assertion of correctness on the part of the Department. While it is certainly true that each case would need to be considered on its merits, it is not an adequate reason for failing to provide an explanation to Ms Fewings and, furthermore, there was absolutely no reason why the Department could not inform parents. I will return to the failure of the Department to reconsider its position in Chapter 8.

A Question in the Parliament

346. Other parents of children at the school, who were concerned at the failure to inform parents of Harvey's offending, had approached the Hon. David Pisoni MP, the Shadow Minister for Education. On 30 October 2012, in the House of Assembly, Mr Pisoni asked the Minister for Education the following question.

My question is to the Minister for Education and Child Development. Does the Department for Education and Child Development have a policy that protects children by informing parents and staff when an employee at a public school has been charged and/or convicted with sex offences committed against children in their care?

The relevant part of the Minister's answer was in these terms:

Of course this government, this department, puts the protection of children uppermost in every act that we undertake- every policy. I would like to report-Madam Speaker, this is a very serious, legitimate question and I am happy to answer it in the same vein. I am advised that a situation arose in late 2010 at a school in Adelaide's west. Allegations of a serious nature were raised. Police were immediately alerted and an individual was charged over the allegations. The staff member's employment was immediately terminated. The individual was sentenced to six years' gaol. In sentencing, the judge did not name the school or family involved to protect the child. I am advised that, given the sensitive nature of the incident and on advice of SAPOL, who I have to say do an outstanding job, the school did not send information to the community about this incident- on the advice of SAPOL.

Of course, a number of measures were undertaken by the school- and I accept that this is a legitimate issue- to ensure the continued care and safety of all students, including the following steps: all students provided with age-appropriate child protection curriculum; all staff working with students are screened and volunteers who support school excursions, for instance, and sports coaching are also screened; all staff and volunteers working with students receive regular documented reporting child abuse and neglect training; comprehensive procedures for managing allegations made against staff and volunteers are in place; and all staff are given explicit advice about their duty of care to students and appropriate interactions with students. In addition, I understand arrangements were made by the school for support to be provided on an individual basis to children, families and any staff following this incident.

The answer given by the Minister was based on a briefing by one of her ministerial advisers which in turn was based on oral information from officers in the Department. The briefing to the Minister was inaccurate.

347. Mr Pisoni asked a number of other questions on 30 October and both he and the Hon. Isobel Redmond MP, the then leader of the Opposition, continued to ask questions concerning the failure to inform parents of Harvey's offending and related issues on each sitting day for the rest of the Parliamentary sessions in 2012. It is unnecessary to repeat the questions. A number of issues raised by them will be addressed in this report. In addition to that a number of the questions were directed to the Premier concerning his knowledge of Ms Andrew's email of 2 December 2010. I will examine whether the Premier knew of this minute in the next chapter.

SA Police Publishes a Reply

348. The SA Police did not agree with the Minister's assertion in her answer to Mr Pisoni that the decision not to give information to parents was based on advice from SA Police. On the evening of 30 October it published this media release:

On Wednesday, 1 December 2010, police received allegations from the parent of a primary school student that her child had been indecently assaulted by a school staff member. Police made arrangements for the child to be interviewed the following day by a police officer qualified in obtaining statements from children.

That same evening the school Principal was advised of the allegations due to their serious nature and immediate concerns that the staff member was still working with and having access to children in his role.

It was recommended to the Principal that the staff member be immediately prevented access to children.

On Thursday, 2 December 2010, Police arrested the staff member and charged him with several sexual offences. He was subsequently convicted for these offences and is currently serving a term of imprisonment. The principal was present at the time of the arrest and was advised by police that she should consult with DECS to formulate a method of advising the school community what had occurred. The Principal was also advised that it was not the role of the police to inform the school community.

Once the school principal had been advised and SAPOL lodged a notification with the Child Abuse Reporting Line (CARL) its mandatory notification processes were complete.

The dispute between the police and the Department caused the Minister to establish this Inquiry on 1 November 2012. I note that the remarks in the third paragraph of this media release are inconsistent with the finding in paragraph 245 above that Det. Sgt. Rowe did not make such a recommendation.

349. On the afternoon of 30 October, Ms Samantha Jones, the Manager of the Investigations Unit, had learned that Harvey had been charged with three counts of indecent assault on three other children at the school. At 4.02pm that afternoon she sent an email to Mr Bartley, Ms Emery, Ms Kibble and Mr DeGennaro informing them of that fact.

350. On the evening of 30 October and over the following days the Department was occupied in giving further briefings to the Minister. It is not necessary to record the activity of the Department in briefing the Minister other than to note that it is readily apparent that there was a hurried scramble in an attempt to obtain all relevant facts in order to brief the Minister. Ms Portolesi in her evidence described the effort to gather information as “a mad scramble”. The task was not easy because there was no single file relating to Harvey and there was no single person who had detailed knowledge of all relevant events. The information had to be gleaned from a number of sources. In the result, the Minister did not always receive correct information.

The Department Seeks Legal Advice

351. On 31 October 2012 Mr Waterford, who was the Executive Director of Families SA in the Department for Education, asked the Crown Solicitor for urgent advice on two questions. His questions were:

- (a) Do suppression order provisions come into play when a person is charged with a child sex offence – how does it operate?
- and
- (b) Does it impact upon the Minister’s capacity to tell others, (eg parents etc.) if there has been an incident?

This was the first occasion after the arrest of Harvey on which the Department had sought legal advice concerning the provisions of the *Evidence Act* relating to suppression orders and whether there was any restriction upon publication of names when a person has been charged with a sexual offence against a child. It is remarkable that advice on these questions had not been sought earlier especially given the desire of some members of the Governing Council at the Largs Bay Primary School to inform parents. The advice was provided the same day. It is not necessary to set out the terms of the advice as the issues have already been addressed in Chapter 2 of this report. The letter of advice pointed to the difference between suppression orders made under section 69A of the *Evidence Act* and restrictions on publication pursuant to section 71A of the *Evidence Act*. The advice stated that section 71A did not prevent the Minister from informing parents.

Department Sends a Letter to Parents

352. On Friday, 2 November, a news item on a radio station had identified the school. The Department urgently set about drafting a letter to be sent home to parents that day. The letter was prepared in consultation with SA Police. Police altered one paragraph. The letter was given to children to take home to parents. The letter was also sent to parents of those children who were at the school in 2010 but who had since left and to all families who had used the vacation care program provided by the OSHC service. The letter was in these terms:

Dear Parents and Caregivers,

It is with sadness that I write to inform you that Largs Bay Primary School is the school referred to in the media and in Parliament in relation to the sexual abuse of a child in 2010.

I appreciate that this information will give rise to a range of mixed emotions and raise a lot of questions. To assist, counselling services are available at the school from today.

The incident occurred while the victim was attending the OSHC program and was reported to police in early December 2010. The Director was arrested and immediately removed from the school and from contact with children. He was convicted and jailed earlier this year.

At the time of the incident the school community was not informed. The reason behind this decision is now subject to an investigation by the state Ombudsman and independent review announced by the Minister for Education this week. However, it is important that you know that practices have now changed. Parents and caregivers will be provided with as much information as possible so they can assess whether their child may have been impacted.

If you have any concerns in relation to your child(ren), I urge you to raise these with your principals, Tanya or Ruth in first instance. Alternatively, you can contact the police or the Regional Office on 8416 7333. We have also set up a call centre through the Parent Complaint Unit on 1800 677 435.

Please be assured that the Department for Education and Child Development will work closely with you and your school to provide all necessary support during this time.

On behalf of my department I apologise for the anxiety caused by not informing you and your families sooner.

Yours sincerely,

Garry Costello
Head of Schools

Although the letter was signed by Mr Garry Costello as Head of Schools, I think the letter should have been signed by Mr Bartley as Chief Executive of the Department. The original draft had been over the name of Mr Bartley. Given the extreme tardiness of the letter and the fact that the Department had been forced by public pressure to write it, it would have been more tactful and more considerate to the parents of the school if the letter had been over the hand of Mr Bartley. As Chief Executive, he is the person responsible for the errors of the Department. Mr Bartley explained that his reason for not signing the letter was that he might have to discipline officers in the Department so that it was preferable for Mr Costello to sign as Head of Schools. I do not think that is a satisfactory explanation.

353. The Department's efforts to remedy the situation were not successful. Although it had placed counsellors at the school, parents expressed concerns as to the suitability of the counsellors. In addition, the Department had failed to give proper instructions to the person who was to be the operator of the call centre referred to in the fifth paragraph of Mr Costello's letter. The operator did not have any adequate knowledge of the particular problems at the school and could not effectively answer parents' complaints or deal with their questions.

Anger at the School

354. A copy of the draft of this letter had been sent to Ms Larkin on the morning of 2 November. She replied by email later that morning. Among her comments was the following:

The following statement, I don't think "anxiety" cuts the mustard **for the anxiety not informing you sooner, has caused you and your families**. How about betrayal, anguish, concern because they are just three I am getting from parents. A little more depth because parents (sic) emotion around this issue has been simmering for 2 years now.
(Emphasis in the original)

Ms Larkin's anger was quite justified. The evidence given to this Inquiry by teachers, parents and members of the Governing Council of the school confirms the force of her comment.

355. Mr Petherick was present at the school on 2 November. He reported in an email to Mr Bartley that he had spoken with the principal and staff at the school. He added that, while he was speaking to the principal and some members of the staff, he had been approached by three other members of staff who had expressed concern with the content of Mr Costello's letter to parents in that it did not make the actions of the school at all clear nor did it state that the school had worked within the Department's instructions. As will be seen, this report did not correctly state the concern of teachers. They were concerned that the letter inferred that they should have done things differently.

Premier's Unfortunate Remarks

356. On Monday, 5 November Mr Petherick was at the school early in the morning and for most of the day to assist the principal and other members of staff. He was joined in the afternoon by Ms Kibble and they met the principal and the two deputy principals, Ms Hill and Ms Hutton. Ms Kibble and Petherick also spoke with Ms Larkin.

357. On Monday, 5 November the Premier participated in a press conference to mark the 150th anniversary of the Metropolitan Fire Service. After the Premier had concluded his remarks, he was questioned about the management of the Harvey matter. After a large number of questions whether in December 2010 he had been informed about Harvey's arrest, he was asked a series of questions to the effect of why parents had not been informed and how the Minsiter's Office deals with critical incidents. In the course of his answer, he said:

Well that's what we need to get to the bottom of, why would it seem the case that they would be on a projectory to tell parents and why that stopped and it was advanced that the police told them that they should. The police deny that, we need to find out what it is that they are acting on because it seems they were getting set to tell parents and for some reason it didn't happen. Remembering here that there is a complexity, the school isn't the employer – the actual employer in this case is the school council because it is an OSHC, so ultimately the decision process fell to the school council which was informed about this matter. But they took that step, why they were told the information shouldn't go out to parents is a matter we need to get to the bottom of.⁷

The remarks were unfortunate in two respects. First, apart from the letter of 3 December 2010, the Department had had a consistent view that it would not inform parents unless compelled by the media to do so. More significantly, while the latter part of the remarks were strictly speaking correct, in that the Governing Council of the school was Harvey's employer, the Premier's remarks failed to state that it was the Department that had prevented the Governing Council from informing parents of Harvey's conviction. His remarks were reported as shifting the responsibility for the decision not to inform parents to the Governing

⁷ It seems that when the Premier said "they were getting set to tell parents", he was referring to the email sent to Mr Blewett on 2 December 2010 that stated that the school was working on a message to go home. However, the Premier is incorrect in stating that a letter was not sent to parents. It will be recalled that Ms Gale sent a letter (albeit an inadequate letter) to parents with children in the OSHC service. It is the letter referred to in paragraph 273 above.

Council. For example, under a headline “School Blamed For Secrecy”, the first paragraph of an article in *The Advertiser* on 6 November read:

THE (sic) decision-making process that led to keeping secret sexual abuse at an Adelaide primary school ultimately rest with the schools governing council, Premier Jay Weatherill says.

The article later quoted the remarks of the Premier noted earlier in this paragraph. Quite understandably, the Premier’s remarks angered some members of the Governing Council and staff at the school.

358. Early on the morning of Tuesday, 6 November Mr Petherick went to the school. At 8.54am he reported by email to Mr Bartley, Ms Kibble and Messrs Radloff and Semmens saying:

At the school this morning and there is a level of frustration and anger over the comments the Premier allegedly made on the evening news last night saying that the school was the body responsible for not informing the community and by default implying the school had been negligent in its duty.

The chair of the Governing Council was also in contact with the principal last night expressing her anger over the comments. This will no doubt not be helped by the Advertiser item today with the Premier identifying the Gov Council as the (sic) being responsible for the lack of communication.

The feeling at the school is that at all times they acted in accordance with DECD advice and now they are being unfairly being (sic) singled out by the government as being at fault.

Staff feeling is running very high on this matter as well. Given their close connections to the AEU I think we can expect some wider response.

The staff and the principals expressed last night to Anne prior to these events the need for some communication from DECD to outline that the school had always acted in accordance with the advice provided at the time.

We need to discuss urgently how we will support the principals and the school in working this through.

(The person called “Anne” in that email is Ms Kibble). In view of the history of the matter and the Department’s firm insistence that a letter not be sent to parents, the Premier’s remarks were most unfortunate. Mr Petherick’s report that “staff feeling is running very high” correctly reflected the position. The staff were concerned that the letter sent to parents on 2 November did not state that the staff at the school had always acted in accordance with advice given to it by the Department.

The Department Sends a Second Letter

359. The evidence of teachers to this Inquiry confirms Mr Petherick’s comment in his email that teachers were angry. Teachers present at the meeting with Mr Costello and Ms Kibble on 5 November expressed real concern that Mr Costello’s letter of 2 November had inferred that the staff and the school should have done things differently. This caused Mr Costello to send a second letter to parents on 5 November. The letter read:

Dear Parents and Caregivers

This letter is a follow up to information I provided in my letter dated 2 November regarding issues at the Largs Bay Out of School Hours Care Service.

SA Police have advised that further charges of a similar nature have been laid against the same person. We have been advised that the charges relate to the time period 2007 and 2008.

As stated in my letter to you on Friday, counselling is available at the school for children, parents and staff. So again I urge you that if you have any concerns in relation to your child(ren), contact the Police or the Regional Office on 8416 7333.

You can also call the Parent Complaint Unit on 1800 677 435 who are managing all correspondence in regard to this matter.

This is a very difficult situation for any community to comprehend and come to terms with. The children will be hearing and taking in information that they may not understand, so can I ask that you are mindful of what is said in front of them in order not to cause additional anxiety.

I also wish to acknowledge the efforts of staff during this difficult time for the school community.

Legal advice is that South Australian law prohibits publication of any report that the person concerned is the subject of further charges. For that reason, this fact cannot be publicly reported by the media or by way of any information published on the Internet by any person.

Although the penultimate paragraph is an attempt to address the concerns of staff, the Department failed to state that the staff had been acting as directed by its central office. That was in fact the true position.

The Premier and the Minister Respond

360. In November 2012, both the Premier and Minister Portolesi at different times met either parents or staff at the school. It is unnecessary to examine those meetings in detail. It is sufficient to note the following meetings.

1. On 7 November, the Minister met a parent and a member of the Governing Council at her office.
2. On 12 November, the Minister went to the school and met the principal and staff of the school to discuss the concerns of staff. The staff strongly voiced their anger that they were being blamed by the Department.
3. On the afternoon of 12 November, the Premier attended a meeting at a home of a member of the Governing Council of the school. He met some parents who were former members of the Governing Council. The issues discussed included concerns that the Premier had misrepresented the role of the Governing Council. After that meeting, the Premier went to the school and met members of the Governing Council. The members of the Governing Council voiced a number of concerns including the Premier's remarks on 5 November, the fact that parents had not been promptly informed that Harvey had been sentenced, and the failure of the Department to provide a proper operator for the call line who had adequate knowledge of the issues at the school.
4. On 14 November, the Premier and Minister Portolesi met the same person who had seen the Minister on 7 November.

Both the Premier and the Minister would have been left in no doubt at the anger and exasperation of parents and staff with the Department's mismanagement of the matter.

Some Consequences

361. The events of October and November 2012 provide a graphic example of some the consequences of failing to give proper and adequate information to the school community when a member of staff has sexually assaulted a child at a school.

362. It is plain that the failure to give appropriate and timely information to the parents of children at the Largs Bay Primary School has led to a considerable degree of anger among those parents. Parents of children who attended the OSHC service as well as parents of other children at the school are very angry that they were not informed that Harvey had been convicted. That anger will not be abated by learning that a number of parents and some members of the Governing Council had asked that parents be informed but those persons were denied the opportunity to do so by the Department. The failure to give timely information to parents had the consequence that parents were not in a position at an earlier time to be alerted to any behaviour on the part of their children that might suggest that they had been assaulted so that the parents could support their child and work through any problems consequent on the assault and, if necessary, seek counselling or other support for their children.

363. A number of teachers at the school are also angry that they were not fully informed. Some teachers had no proper knowledge of the facts concerning Harvey until early November 2012 when details were published in the media. The failure to inform teachers was most undesirable. In the absence of information, teachers will not be in a position to be alert to the reasons for behavioural issues in children in their respective classes. It is desirable for a teacher to know that a child in that teacher's class has been sexually assaulted so that the teacher can be aware that the child might require support. In this particular case, the teacher in whose class the victim had been a student in 2010 decided to disregard the direction not to disclose the offending so that she could inform the person who would be teaching the victim in 2011. She correctly believed that it would assist that teacher to be aware of the fact. A teacher should not be placed in the position of having to decide to go against a Departmental direction in that way.

364. In addition, the directions that Ms Oshinsky received from Mr Petherick and from the central office of the Department placed her in a very invidious position vis-à-vis parents at the school. It was quite unnecessary for the Department to have placed her in that position. Ms Oshinsky had no alternative but to act as she was directed by Mr Petherick and Ms Kibble. She did at times inform them that parents were asking that letters be sent. In any event, Mr Petherick and his Regional Director, Mr Semmens, clearly knew that some members of the Governing Council were asking that parents be informed. Similarly, the central office of the Department knew that fact. Yet the Department did not reconsider its position and continued to require Ms Oshinsky to uphold its decision not to inform parents. It is apparent from the evidence that one unfortunate consequence of the directives given to Ms Oshinsky is that there is a great deal of anger directed at her by some members of the Governing Council and by some parents. That need not have happened if the Department had decided that parents could be informed.

365. There is an especially sad irony in a large number of the documents tendered in this Inquiry. They are emails sent by officers of the Department to each other. Almost every one of these many emails has the following message printed across the foot of the email:

Children and young people are at the centre of everything we do.

All too sadly, both the letter and the spirit of that message were ignored in this case.

CHAPTER 7 – WAS THE MINISTER INFORMED?

366. One topic that, in November 2012, excited attention both in the Parliament and in the media was the discovery on 2 November of the email dated 2 December 2010 sent by Ms Jan Andrews, who was then Deputy Chief Executive of the Department. The email had been sent to Mr Simon Blewett and to Mr Jadyne Harvey, two of the ministerial advisers to the then Minister for Education Mr Weatherill and to officers in the Department. It will be recalled that the email was in these terms:

Just had a call to say that police last night arrested the OSHC Director at Largs Bay PS for alleged sexual behaviour with children - the regional office and the school are working on a message to go home today - not much time to do this so we will need to rely on their on the spot judgement about this.

The subject of the email was called “urgent fyi”. The email had a heading describing its importance as “High”.

367. Mr Weatherill is now the Premier. Mr Blewett was in December 2010 and still is the Chief of Staff for Mr Weatherill and Mr Jadyne Harvey was then one of Mr Weatherill’s ministerial advisers. The discovery of the email prompted extensive questioning of the Premier both in the House of Assembly and by the media whether either Mr Blewett or Mr Jadyne Harvey had informed him of the arrest of Mark Harvey. I will examine whether Mr Blewett or Mr Jadyne Harvey did inform Mr Weatherill in December 2010 and, if not, whether they ought to have done so.

Some Relevant Principles

368. Before examining those questions, it will be helpful to note briefly some of the conventions and practices that operate in respect of dealings between a Minister and the Minister’s department and also to consider the question of ministerial responsibility. This is not the occasion for a detailed examination of these important aspects of public administration. Instead, it will suffice to refer only to those conventions and practices that are relevant to the issues concerning the conduct of Messrs Blewett and Harvey. They are the extent to which a Minister becomes involved, if at all, in operational matters in the Minister’s department, the obligations of a department to inform its Minister, the system of responsible government and one aspect of the role of ministerial advisers.

369. The governments of the States of Australia act in accordance with the Westminster system. The Westminster system refers, among other things, to the conventions and administrative practices that shape the way the public service interacts with Ministers and the government of the day.¹ The principles of public administration as they operate in the

¹ Richard Mulgan, *Where have all the Ministers gone?* (2010) 69 AJPA 289; T Moran (Chairman), *Ahead of the Game. Blueprint for the Reform of Australian Government Administration*, Canberra (2001) Department of Prime Minister and Cabinet; R A W Rhodes, *Australia: The Westminster Model as Tradition* in H Patapan, J Wana and P Weller (eds), *Westminster Legacies* (UNSW Press, 2005) 129; G Lindell, *Responsible Government* in Paul Finn (ed), *Essays on Law and Government* Vol.1 (Law Book Co. Ltd, 1995).

governments of the States have not been extensively examined.² However, the relationship between Ministers in the Commonwealth Parliament and their departments has been examined relatively frequently.³ Since the Commonwealth Government, like the governments of the States, operates according to the principles and conventions of the Westminster system, it is appropriate to have regard to those writings that deal with the position in the Commonwealth Government. Reference can also be made to the conventions as they operate in England, Canada and New Zealand where the Westminster system also operates. Notwithstanding the fact that Canada and Australia are federations while England and New Zealand are not, there is a broad similarity in the principles and conventions of government.

Operational Matters

370. Speaking generally, those aspects of the role of the Minister relevant for present purposes are to set budget priorities for the department, to direct the department to implement the policies and objectives of the government, and to have general oversight and responsibility for the operations of the department. It must be emphasised that this is not a complete list of the functions of a Minister.

371. The Minister will, as a general rule, work in close liaison with the head of the department. A relationship of trust is essential.⁴ The heads of government departments in South Australia are styled chief executives.⁵ The chief executive is responsible for the effective management of the department and the general conduct of its employees. The chief executive is also responsible to the Premier and to the Minister for implementing the policies and objectives of the government. The functions of the chief executive include tendering specialist advice to the Minister.

372. The chief executive and his departmental officers are responsible for the day to day operations of the department. It is well acknowledged that a Minister does not, as a general rule, become involved in the day to day operations of the department. Ministers in different governments may from time to time seek to exercise a greater degree of control over a

² Three discussions are M Laffin, *No Permanent Head: Politician-Bureaucrat Relationships in Victoria* (1987) 46 AJPA 37; M Laffin, *Let the Managers Govern: Minister-Bureaucratic Relationships in New South Wales* (1992) 51 AJPA 490; Richard Mulgan, *On Ministerial Resignations (and the Lack Thereof)* (2002) 61 AJPA 121; reference might also be made to B M Selway QC, *The Constitution of South Australia*. (Federation Press, 1997).

³ There is a host of references. A starting point is A Reilly, G Appleby, L Grenfell and W Lacey, *Australian Public Law* (Oxford, 2011). Other references include H C Coombs, *Report of the Royal Commission in Australia on Government Administration*; J B Reid (Chairman), *Report of the Review of Commonwealth Administration* (1983); Prime Minister Howard, *A Guide on Key Elements of Ministerial Responsibility*, Department of Prime Minister and Cabinet, Canberra (1998); *Supporting Ministers, Upholding the Values* (2006) Australian Public Service Commission; P Weller and D Jaensch, *Responsible Government in Australia* (Drummond, 1980); P Finn (ed), *Essays on Law and Government* Vol.1 (Law Book Co. Ltd, 1995).

⁴ A S Podger, *Beyond Westminster: Defining an Australian Approach to the Roles and Values of the Public Service in the 21st Century*; Prime Minister Howard op.cit. at 17.1.

⁵ See Division 3 of the *Public Sector Act 2009*.

department.⁶ Nevertheless, operational matters remain the responsibility of the chief executive and the department. The principle is stated in unequivocal terms in paragraph 3.5 of the Cabinet Manual, 2008 published by the Cabinet Office of the New Zealand Government:

Ministers decide both the direction and the priorities for their departments. They should not be involved in their department's day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.

A little later in paragraph 3.16(c) the Cabinet Manual also states:

Ministers should also take care to ensure that their actions could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive.

There are practical reasons for this principle. There is the problem of the transience of Ministers compared with the permanency of the public service.⁷ Another is the sheer size of the department.⁸ That is particularly so in the case of the Department for Education in this State. It is a very large department. It has a total staff of some 28,400 employees. It administers approximately 1200 sites. Those sites include junior primary schools, primary schools and secondary schools, area schools and special schools. The sites also include pre-schools and children's centres. Different kinds of critical incidents are likely to occur in one school or another each day. Clearly, it is inappropriate for a Minister to intervene in such operational matters unless the Minister is aware of mismanagement of a matter.

373. Other practical pressures that inhibit a Minister's capacity to manage the department were identified by a former Prime Minister, the Honourable R J L Hawke AC, MP, to be:⁹

- responsibilities in relation to the Minister's electorate and constituents;
- unavoidable party political duties outside the Parliament and in the broader party organisation;
- legislative and parliamentary obligations;
- an overriding responsibility as a member of the executive government, and associated responsibilities to Cabinet and Cabinet committees; and
- a responsibility derived from the Constitution to administer his or her department.

Plainly, if the Minister becomes involved in operational matters, the Minister is assuming the role of the chief executive of the department.

⁶ M Laffin, *Let the Managers Govern: Minister-Bureaucratic Relationships in New South Wales* (1992) 51 AJPA 490.

⁷ Ibid.

⁸ Ibid; Roger Beale, *Ministerial Responsibilities for Administrative Actions: Some Observations of a Public Service Practitioner* (2002), Agenda, vol. 9, No.4, 292 at 296.

⁹ R J L Hawke AC, MP, *Challenges in Public Administration* (1989) 48 AJPA 7 at 11. See also J B Reid op.cit. at paras. 3.8–3.22.

374. A former Minister for Education, Dr Lomax-Smith AO, in her evidence described it as inappropriate for a Minister to assume the role of the chief executive of a department. She likened the Minister's role to that of the chairperson of a board of a company. That analogy has been adopted by some commentators.¹⁰ The chairperson exercises general oversight of the organisation and answers to shareholders for its performance. Another former Minister for Education who gave evidence was the Hon. Robert Lucas MLC. He believed that a Minister should ensure that he is fully briefed on any matter so as to be in a position to be able to make his own assessment on the proper course of action and exercise proper oversight of the Department. He acknowledged that other Ministers might take a different view from his and be more inclined to leave all management to the Department. Mr Weatherill believed that the Minister should exercise oversight over the Department and that proper ministerial oversight required establishing a policy framework that required information to be supplied by the department on critical incidents that occurred in schools. Ms Portolesi said that politicians should not interfere with operational matters unless something did not look correct or remedial action was necessary. There is no significant difference between the views of these former Ministers for Education. Such differences as do exist are matters of emphasis. While Ministers in State Governments have greater difficulty in distancing themselves from operational matters than Ministers in the Commonwealth Government,¹¹ they do not as a general rule intervene in operational matters unless there is good cause to do so.

Informing the Minister

375. One most important obligation of the chief executive and the department is to keep their Minister fully informed of all matters that concern the department and are of political interest in the broadest sense of the word "political". The chief executive and the officers of the department should be guided by the principle of "no surprises". They should inform the Minister promptly of matters of significance within the responsibility of the Minister's portfolio, particularly where those matters may be controversial or may become the subject of political debate.¹² Both Dr Lomax-Smith and Mr Lucas were in entire agreement on this matter. Mr Weatherill also believed that the Department for Education should keep the Minister informed of critical incidents. It is a well-established principle. Lord Bridges, Permanent Secretary to the Treasury and Head of the Civil Service in England from 1945 to 1956, has expressed the principle in these terms, "Never let your Minister be in the position of saying to you, 'Why was I not told?'"¹³

376. In the context of critical incidents at schools, Mr Weatherill, Dr Lomax-Smith and Mr Lucas all agreed that the Department had an obligation promptly to inform them of serious critical incidents and, in particular, allegations of sexual misconduct at a school. That view was shared by senior officers of the Department, including the Chief Executive, Mr Keith Bartley. Information concerning a serious critical incident should be given at the earliest opportunity, even if the information is sketchy because little is then known. Mr Weatherill,

¹⁰ M. Laffin op.cit. at note 6, p.502.

¹¹ R Mulgan, *The Processes of Public Accountability* (1997) 56 AJPA 25 at 33.

¹² Cabinet Manual 2008 published by Cabinet Office of New Zealand Government, para. 3.16(a).

¹³ Lord Bridges, *The Relationship between Ministers and the Permanent Departmental Head* (1964) 7 *Canadian Public Administration* 269 at 270.

Dr Lomax-Smith and Mr Lucas also agreed that early information should be followed by one or more briefings as events unfolded and desirably should include a written briefing. Mr Bartley also shared that view.

Responsible Government

377. The doctrine of responsible government is one of the key features of the Westminster system. It is one of the central characteristics of our system of government.¹⁴ It is enshrined in the Constitution of South Australia by section 66 of the *Constitution Act*. The doctrine requires that Ministers of the Crown must be members of Parliament. Section 66(1) of the *Constitution Act* provides:

No person shall hold office as a Minister of the Crown for more than three calendar months unless the person is a member of Parliament.

By limiting the period in which a Minister of the Crown may hold office without becoming a member of Parliament, the government of the State is conducted by officers who enjoy the confidence of the people.¹⁵ In this way, Ministers of the Crown are responsible to the Parliament and ultimately to the electorate.

378. There are two aspects of ministerial responsibility. They are first, the individual responsibility of Ministers to the Parliament for the administration of their departments and, second, the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of administration.¹⁶ For present purposes it is necessary to note only the former. The individual responsibility of a Minister means that the Minister is responsible to the Parliament both for his own acts and omissions and for the administration of the department or departments in his portfolio.¹⁷ The doctrine provides a mechanism by which Ministers are held accountable through the Parliament to the people for the governmental powers they exercise and the public funds they expend.¹⁸

379. It is now well established that, while a Minister is answerable to the Parliament for bad administration in his department, the Minister will not be required to resign unless the Minister is personally at fault or there is, in the words of two commentators,¹⁹ a “smoking gun” to make the Minister directly culpable. Should the Minister’s department err or be guilty of some administrative failure or should faults be exposed in the department, the Minister will be required to acknowledge responsibility for the department and implement action to remedy the situation.²⁰ While obliged to acknowledge responsibility for the

¹⁴ *Victorian Stevedoring and General Contracting Co. Pty Ltd. and Meakes v Dignan* (1931) 46 CLR 73, 114 (Evatt J.).

¹⁵ Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) p.17 cited in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.

¹⁶ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364.

¹⁷ Simon Evans, *Continuity and Flexibility: Executive Power in Australia* in D. Craig and A. Tomkins (eds.), *The Executive and Public Law* (Oxford, 2006) at 102.

¹⁸ *Ibid.* 101.

¹⁹ E Thompson and G Tillotson, *Caught in the Act: The Smoking Gun View of Ministerial Responsibility* (1999) 58 AJPA 48.

²⁰ R Mulgan, *The Processes of Public Accountability* (1997) 56 AJPA 25 at 31.

department, the Minister, as a general rule, will not be required to resign. There have been cases where Ministers have resigned or been forced to resign as a result of personal misconduct such as misleading the Parliament or conflicts of interest. It is, however, a rare event for a Minister to resign over the wrongdoing or incompetence of departmental officials.²¹

380. In 1965, the then Attorney-General for the Commonwealth, the Hon. B M Snedden MP, described what little remains of the individual responsibility of a Minister in these terms:

Resignation or ... dismissal may be the punishment for personal misconduct. What of cases where the Minister is not personally involved? The Minister is responsible, the saying goes, for every stamp stuck on an envelope. Responsible, yes, in the sense that he may have to answer and explain *to* Parliament, but not absolutely responsible in the sense that he has to answer *for* (is liable to censure for) everything done under his administration! To pursue the postal example, no one would dream of suggesting the Postmaster-General should resign because a postal clerk misappropriated mail while on the job.

The reality is that there is no absolute vicarious liability on the part of the Minister for the 'sins' of his subordinates. If the Minister is free from personal fault and could not by reasonable diligence in controlling his department have prevented the mistake, there is no compulsion to resign. It is becoming more generally recognised that this is in fact the position — see, for example, the discussion in G Marshall and G C Moodie, *Some Problems of the Constitution*, where the British position is considered.²² (Emphasis in the original)

Mr Snedden's remarks are reflected in the *Guide on Key Elements of Ministerial Responsibility* where it is stated:²³

The secretary of a department is, pursuant to the Public Service Act, responsible "under the minister" for the general working of the department and for advising the minister in all matters relating to the department.

This does not mean that ministers bear individual liability for all actions of their department. Where they neither knew, nor should have known about matters of departmental administration which come under scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take the responsibility.

Ministers do, however, have overall responsibility for the administration of their portfolios and for carriage in the Parliament of their accountability obligations arising from that responsibility. They would properly be held to account for matters for which they were personally responsible, or where they were aware of problems but have not acted to rectify them.

Although that document is a guide for Ministers in the Commonwealth Government, it applies with equal force to Ministers in the State Governments. The corollary of reduced ministerial responsibility is the greater accountability of heads of departments who are directly and personally responsible for the performance of their departments with their pay and their position being at risk if they fail to live up to expectations.²⁴

²¹ G Lindell, *Responsible Government* op.cit. at 95.

²² Paper entitled *Ministerial Responsibility in Modern Parliamentary Government* delivered at the Third Commonwealth and Empire Law Conference, quoted in J Fajgenbaum and P Hanks, *Australian Constitutional Law* (Law Book Co. Ltd, 1973) at 104.

²³ Prime Minister Howard op.cit. at 13.

²⁴ Roger Beale op.cit. at 297.

381. In addition to the accountability of any chief executive of a department, a department is accountable in a number of other ways to the public. That accountability is achieved through

- inquiries made by the office of the Ombudsman;
- applications made pursuant to the *Freedom of Information Act*;
- the protection of whistleblowers contained in the *Whistleblowers Protection Act*;
- applications for judicial review of administrative action made in the Supreme Court of South Australia; and
- Commissions of Inquiry.

Scrutiny by the media is another powerful form of requiring a department to be accountable.

Ministerial Advisers

382. The number of ministerial advisers has rapidly increased. Writing in 2006, Dr Simon Evans noted that in the Commonwealth Government, the number of ministerial staff had roughly doubled in the past 30 years.²⁵ It appears that the number of ministerial advisers continues to increase in the governments of the States as well as of the Commonwealth. It is neither necessary nor appropriate in this report to review the entire role and function of ministerial advisers. Instead, it is sufficient to note only one aspect of their role as a liaison between the department and the Minister.

383. The duties of the Minister require frequent absences from the Minister's office. In addition, a department does not wish to interrupt a busy Minister. It is, therefore, convenient for departments to use ministerial advisers as a conduit to convey information to the Minister.

384. In my view, when a ministerial adviser receives information from a department, his obligation to inform his Minister is very like the obligation of the department to inform the Minister. Just as the guiding principle for the department is the "no surprises" principle, so a ministerial adviser is also subject to the same principle. Ministerial advisers are an important means by which a Minister receives information. A Minister is, in my view, entitled to expect that his ministerial adviser will inform him promptly of any matter of significance to the proper discharge of the responsibilities of his portfolio, particularly where those matters might be controversial or might become the subject of public debate or scrutiny in the Parliament or in the media. The evidence in this Inquiry clearly demonstrates that one aspect of the role of the ministerial adviser is that of an intermediary between a department and its Minister. The department is, therefore, entitled to expect that the ministerial adviser will inform the minister of matters significant to the discharge of the portfolio that have been sent to the ministerial adviser. While it might be appropriate for a ministerial adviser to filter information received from the department, the ministerial adviser should not fail to disclose to his Minister matters significant to the discharge of the responsibilities of the Minister's portfolio. Mr Weatherill's

²⁵ Simon Evans op.cit. at 109.

view was that ministerial advisers should inform him of any matter that might be the subject of some controversy or of media attention. Dr Lomax-Smith and Mr Lucas had a like view. They both believed that the “no surprises” principle applied also to ministerial advisers. In truth, the position could not be otherwise. If it were, one consequence, among others, would be a significant breakdown in the communication of important information between the department and the Minister. Mr Bartley expressed the view of the Department for Education saying that he would expect that, if the Department had informed a ministerial adviser of an important issue relating to the safety of children at a school, he would expect that information to be relayed to the Minister.

385. A Minister is always liable to be asked a question in the Parliament or by the media concerning a serious incident at a school or on any other matter relating to his or her portfolio. It is not uncommon for a Minister to be required to answer what is commonly called a “doorstop question”. Ministers for Education also visit schools. When visiting a school, a parent or a teacher might ask a question about a serious incident at that school or at another school. These are obvious reasons why a Minister for Education needs to be aware of any serious incident that has occurred at a school.

386. It is against the above principles that the conduct of Mr Blewett and Mr Jadyne Harvey must be assessed.

An Email is Discovered

387. I set out first the events leading to the discovery of the email.

388. On 1 November 2012, in the course of question time in the House of Assembly, the Hon. Isobel Redmond MP, the then Leader of the Opposition, asked the Premier, Mr Weatherill, the following question:²⁶

Following the Premier’s comments yesterday in relation to the incident of child sex abuse at the Western suburbs primary school, and I quote, “I don’t recall it at all”, has the Premier since sought further advice on this matter and can he inform the House whether he was advised of this case of child sexual abuse when he was the education minister?

Mr Weatherill replied, “Yes, I have and, no, I have not.” Ms Redmond’s question caused searches to be made in both Mr Weatherill’s office and in the Department to check whether any notification had been given to the Minister or to the Minister’s Office.

389. At 11.25 pm on 1 November, the Chief Executive of the Department, Mr Bartley, sent an email to managers of relevant units in the Department asking that they urgently inquire and give him “a specific assurance that no briefing, notification, or advice relating to the disclosure, arrest and subsequent sentencing of Mark Harvey was given to the office of the Minister for Education and Child Services at any time between the first notification on

²⁶ South Australia, *Parliamentary Debates (Hansard)*, House of Assembly, 1 November 2012, 3587 (Isobel Redmond)

1/12/10 and the briefing given to the Minister on 24/03/12.”²⁷ Mr Bartley said his request was “a matter of the utmost urgency.” The fact that Mr Bartley had to make this inquiry is yet another example of the problems resulting from the fact that there was no central file relating to Mark Harvey. A copy of such an important email as this should have been kept on a central file. The searches at the Department did not disclose that a briefing or notification had been given to the Minister.

390. Although the search by the Department did not then locate any communication to the Minister, it did locate the Critical Incident Detail in relation to Mark Harvey, a document that had been created in the Department on 3 December 2010. It noted the first steps taken in response to the arrest of Harvey. The document included this note made on 3 December:

School Care spoke with Julie Gale (Principal) and offered further assistance if required. A letter to parents has been drafted and is being considered for distribution. Special Investigations Unit and Licensing & Standards (Early Childhood Services) are working together and liaising with SAPOL. Media and the Ministers Office are being kept informed.

The sentence “Media and the Ministers Office are being kept informed” was drawn to the attention of the Premier’s office. This prompted Mr Blewett and Mr Jadyne Harvey on 2 November to make another search for any email or other communication from the Department.

391. On the morning of 2 November the Premier held a press conference. It appears that the media were aware that the Critical Incident Detail had been reported to his office. The Premier said that he had not been informed of the arrest of Harvey. Later in the press conference, the Premier said that there was a policy that the Minister should be informed of a critical incident of this kind. Shortly after he added, “We are routinely told about major incidents that occur in schools. It beggars belief that I wasn’t told about this.”

392. A little later, the Premier received a telephone call from Mr Blewett asking the Premier to return to his office. On his return, Mr Blewett told the Premier that he had found the email sent to him on 2 December 2010. Mr Blewett had found it in a folder on his computer entitled “School Issues”. Mr Blewett acknowledged to the Premier that the email should have been found earlier. He told the Premier that he had no recollection of receiving it and that his belief was that he had not discussed it with him, when he was Minister for Education.

393. On learning that the email had been located, the Premier called a media conference that afternoon. At that conference, he produced a copy of the email dated 2 December 2010 as well as the copy of the Critical Incident Detail. On each document the names of the school and the names of the individuals other than Mr Blewett and Mr Jadyne Harvey had been blacked out. In the course of the media conference, the Premier said that he had no knowledge about the email until it had been found that day. In answer to a question, he said that he was certain that he had not been told about the existence of the email. In answer to

²⁷ The latter date was the briefing to Minister Portolesi in March 2012 in relation to the letter from Mr Bohm referred to in paragraph 315 above.

another question, he said that Mr Blewett had told him that he had not drawn the email to his attention.

394. On Saturday, 3 November 2012, Mr Blewett released a statement through the Premier's media adviser. That statement explained his actions. It is appropriate to repeat it:

From Tuesday this week I asked for searches to be undertaken of the records of the Office of the Minister for Education and the Department to uncover any advice given to the office about this matter whilst Jay Weatherill was Minister, Mr Blewett said.

I was advised that no records were found in the Minister's office and no briefings or minutes had been provided by the Department.

On Friday morning I was advised that an incident report had been found that referred to the Minister's office being informed. I undertook a search of archived emails from my time in the Minister for Education's office and discovered the email from 2 December 2010. I advised the Premier of this late Friday morning and in the interest of full disclosure the Premier released both of these documents yesterday.

The email I received did not disclose the details of the incident and advised that an arrest had occurred and that parents were being informed.

I did not advise the Minister. I can only presume that I thought that the matter was being dealt with appropriately by the relevant officers.

The statement was reported in the *Sunday Mail* newspaper on 4 November 2012.

395. The next sitting of the House of Assembly was on 13 November 2012. Very shortly after the sitting had opened, the Premier made a Ministerial Statement. He apologised for the fact that parents had not been informed and later added that he had not been informed about Harvey's arrest. He accepted responsibility to rectify the harm. It is sufficient to quote two parts of the statement. The Premier began:²⁸

About two years ago a despicable act of child sexual abuse was perpetrated at a western suburbs school. The perpetrator was arrested and removed from the school. However, the broader school community was not advised of his arrest, charge or subsequent conviction. An independent review by a former Supreme Court judge will determine why and how this happened.

There is no doubt that parents should have been informed; I am sorry they were not and I have apologised on behalf of the government. The fact it was not disclosed has led to much suffering. This pain has been felt by families and by staff at the school who feel that they have had their opportunity to support their children taken away from them. I worry about the enormous strain on families and staff involved with the school at his time and I want the school community to know that they will get all the support they need from me and this government to overcome these awful events.

Later in the course of that Ministerial Statement he said:

On 1 November 2012 I was asked in this place whether I had checked the records and if I had been advised of this case of child sexual abuse when I was the responsible minister. I replied that I had checked and that I had not been advised. After that answer was given, an email to my office was discovered by my chief of staff and immediately disclosed to the public. The email advised that a person had been arrested for alleged sexual behaviour with children and a message was being prepared to go home to parents. What happened after this

²⁸ South Australia, *Parliamentary Debates (Hansard)*, House of Assembly, 13 November 2012, 3641 (J.W. Weatherill, Premier)

is a matter for the review...My recollection is that I was not advised of this incident personally and my staff at the time maintain that I was not advised. However, I accept my responsibility to help rectify the harm that has been caused.

On 13 November and the following days in the House of Assembly the Premier was asked a number of questions on this issue seeking to test the Premier's assertion that he had not been informed of the contents of the email. The Premier adhered to his position that his Ministerial advisers had not informed him of the contents of the email.

No Memory of the Email

396. I heard evidence concerning the email of 2 December 2010 and other topics from Messrs. Weatherill, Blewett and Harvey. In my view each gave his evidence truthfully. Their evidence is also consistent with the objective facts. I have no hesitation in accepting the evidence of each of them. Messrs Blewett and Harvey were both obviously nervous but each gave the clear impression that he was being totally frank and honest in giving his evidence. It is manifestly clear that it was not in the interest of either to admit that he had not informed Mr Weatherill of the email. In addition to the evidence of those witnesses, I caused searches to be made of the computers of Mr Weatherill, Mr Blewett and Mr Harvey.

397. Mr Blewett's evidence to this Inquiry confirmed what he had said to Mr Weatherill. He said that, despite its obvious importance, he still had no recollection of receiving the email. He had no recollection of receiving it when the matter was first raised in the Parliament nor did he have any present recollection of receiving it. Similarly, he had no recollection of his reaction on receiving the email. He could do no more than surmise that he had read the email and had taken the view that the matter was being appropriately dealt with by the Department in that the alleged offender had been arrested and that a letter was being sent home to parents. For those reasons, it was his belief that he did not think that there was any occasion to inform Mr Weatherill.

398. Mr Harvey's evidence was to like effect. He said that, despite the obvious importance of the matters raised in the email, he has no recollection of either receiving the email dated 2 December 2010 nor his reaction on receiving it. He said that, while the email dealt with the kind of matter he should have referred to his Minister, he had no recollection whether he had done so. In his evidence, Mr Weatherill said that he had not been informed of the email.

Computers Searched

399. The evidence disclosed that Mr Blewett had forwarded the email he had received from Ms Andrews to another person at 2.49pm on 2 December 2010, some four minutes after he had received it. There is no record of the person to whom the email had been sent. Mr Blewett could not recall sending the email or to whom it had been sent. He thought he might have sent it to Ms Bronwyn Hurrell, who was then and still is Mr Weatherill's media adviser. I called Ms Hurrell to give evidence. She had no recollection of receiving the email. She consented to a search being made of her computer. As will be seen, the email was not on her computer.

400. I caused inquiries to be made for the purpose of ascertaining to whom Mr Blewett had sent the email at 2.49pm on 2 December 2010. I was assisted by police in undertaking those

inquiries. Detective Senior Sergeant Blundell conducted the investigation. He is the Officer-in-Charge of the Electronic Crime Section of SA Police and he has wide experience in forensic examination of computers. He was assisted by Mr Robert Taylor, the Senior Electronic Evidence Specialist in SA Police. I also heard evidence on this issue from Mr Rainho, an IT support person employed by the Department. Mr Rainho explained that it is the practice of the Department that, on a change of Minister, computers used by the Minister and the Minister's staff are returned to the Department where they are decommissioned and undergo a process called DBAN. The computer is then reused. The purpose of the DBAN process is to overwrite every sector in the hard drive on numerous occasions and thereby make it impossible to recover data from the computer. That process prevents forensic analysis of the hard disc. This process had been followed when Mr Weatherill had ceased to be Minister.

401. Mr Blundell searched a number of items for the purpose of endeavouring to ascertain to whom Mr Blewett had sent the email on 2 December 2010. The first was a laptop computer used by Mr Blewett in 2010. When Mr Weatherill had ceased to be Minister for Education in 2011, Mr Blewett had returned the laptop computer to the Department for use by another person. In accordance with its standard practice on a change of Minister, the Department had subjected the contents of the hard drive of the computer to the DBAN process. Mr Blundell searched the computer but could not locate any copy of the email of 2 December 2010.

402. Mr Blundell was given a computer disc that contained a back-up of the email files of Mr Blewett made on 24 December 2010. The search of that computer disc disclosed the email Mr Blewett had received from Ms Andrews. An inspection of the metadata of those emails confirmed that the email had been forwarded to another person at 2.49pm on 2 December 2010. Metadata is information about the contents of emails. The metadata did not contain information as to whom the email had been sent. It was not possible to obtain any other relevant information from that computer disc.

403. In addition, Mr Blundell searched another computer disc that was a back-up of emails for the period ending 30 June 2011. It contained the emails of both Mr Blewett and Mr Jadyne Harvey. A review of the emails stored on that disc did not contain any information that assisted in relation to the email of 2 December 2010. Mr Blundell also searched other compact discs that were back-ups of emails of Mr Blewett. However, they were for time periods that did not include December 2010.

404. At my request, Mr Blundell also searched Ms Hurrell's computer. That search was made in case Mr Blewett had sent the email to Ms Hurrell. The search of Ms Hurrell's emails showed that the email of 2 December 2010 was not on her computer. While I accept Ms Hurrell's evidence that she has no recollection of receiving the email, her memory may be at fault. She is not the only person who has no recollection of the events of 2 December 2010. The fact that the email is not on her computer establishes nothing as she might have deleted it. In all the circumstances, it is not possible to find whether Mr Blewett did or did not send her a copy of the email of 2 December 2010.

405. I also asked Mr Blundell to check Mr Jadyne Harvey's computer to ascertain if he might have sent it to another person. On 25 January 2013, Mr Blundell spoke to Mr Harvey who informed him that, as a result of the changes in ministries on 21 January 2013, he had

placed all of his emails on a USB storage device. Mr Harvey handed the device to Mr Blundell. A review of the emails stored on that device did not disclose any information concerning the email of 2 December 2010.

406. Searches were also made of computers used by Mr Weatherill when Minister for Education. As already noted, his desktop computer had been subjected to the DBAN process. Mr Blundell could not find anything relating to the email of 2 December 2010 on that computer. Mr Blundell also searched a laptop computer that had been retained by Mr Weatherill for his personal use. It was a computer that enabled Mr Weatherill to read emails but not to store them. Mr Blundell searched that computer. It contained no relevant information. Mr Blundell also searched two DVDs that contained information provided by Telstra in an attempt to restore emails of a particular date. That process did not recover the email of 2 December 2010.

407. I am satisfied that Mr Blundell has taken all reasonable steps to ascertain to whom Mr Blewett might have sent the email on 2 December 2010. In the result, no more has been ascertained than that Mr Blewett sent the email to an unknown third person at 2.49pm on 2 December 2010 and that, at some later time, Mr Blewett stored the email in a folder on his computer entitled "School Issues". In these circumstances, I find that, after storing the email in the folder entitled "School Issues", Mr Blewett either deleted the email of 2 December 2010 from items in his sent box or that the email was later deleted from the sent box when he returned the computer to the Department for Education and the contents of the hard disc were then erased. It is not possible to ascertain to whom Mr Blewett sent the email.

No One Informed the Minister

408. In light of all this evidence, I am entirely satisfied that neither Mr Blewett nor Mr Harvey nor any other person in the office of Mr Weatherill informed him in December 2010 of the email or in any way drew it to his attention. I am satisfied that Mr Weatherill, as the then Minister for Education and Child Services, was completely unaware both of the contents of the email and of the arrest of the Director of the OSHC service at Largs Bay Primary School.

409. With the benefit of that evidence, it is possible to have a better understanding of Mr Weatherill's comment as Premier on 2 November 2012 that it beggars belief that he was not told of the arrest of Harvey. That comment must be understood in the context in which that remark was made. The Premier was responding to questions whether this was the kind of matter on which the Minister should be informed by the Department and whether there was any policy to that effect. The Premier's reply was:

Look, I think that the policy about being told about the rape of a child in a school is clear that the Minister's Office should be told about this. We are routinely told about major incidents that occur in schools. It beggars belief that I wasn't told about this.

When pressed on the question whether there was a written policy, he replied that it was a basic proposition that he should be informed. The evidence shows that there was no Departmental policy as to the kinds of matters on which the Minister should be informed. Nevertheless, it was the practice of the Department to inform the Minister of serious critical incidents. The email had been sent by Ms Andrews in accordance with that practice. If Mr Weatherill's comments are read in context, it is apparent that, when he said that it beggars

belief that he was not told, he was stating in strong terms that this was the kind of matter on which the Minister for Education should be informed by the Department. That statement was made at a time when he did not know that his office had in fact been informed. He was speaking of the obligations of the Department to inform the Ministerial office, not of the obligations of his ministerial advisers.

Should the Minister Have Been Informed?

410. I turn to examine the question whether Messrs Blewett and Harvey should have informed their Minister of the content of the email dated 2 December 2010.

411. Mr Blewett's belief as to his reason for not informing the Minister of the email is that he then took the view that the Department was taking appropriate action so that there was no need to inform his Minister. In his evidence, he said that the Department was acting appropriately because the email disclosed that the alleged perpetrator had been arrested and that a letter was being sent home. He acknowledged that he did not know the content of the letter that was to be sent to the parents but said that he was entitled to assume that the Department was drafting an appropriate form of letter. The Department, he said, had the necessary expertise but the Minister's Office did not. This was, he said, an operational matter and it was not for the Minister's Office to second guess the Department. Mr Blewett also admitted that he did not know the level of the seriousness of the offending, especially given that the email had referred not to a sexual assault of one child but to a sexual assault of children. While he acknowledged that it was open to him to have asked the Department for more information, he said that there was nothing that indicated the Department was not taking the matter seriously and it appeared that the Department was dealing with it appropriately. When asked whether he should have informed the Minister in case the media should learn of the sexual misconduct, he said that he must have made a judgement whether that would occur and decided that it would not. It was then that he suggested that it was possible that he might have sent the email to the Minister's media adviser, Ms Hurrell. As already mentioned, it is not possible to find whether he did or did not. Mr Blewett's evidence was that he did not believe that he had spoken to anyone in the Minister's Office about the email.

412. Mr Blewett was asked whether, with the benefit of hindsight, he would have informed his Minister. He responded:²⁹

I don't think I can give you a proper response to that question because so much now has emerged. I just don't think I can give you a proper answer.

Shortly after, he added that this matter was of an operational nature where the primary responsibility lay with the Department:

I do think the primary responsibility of those is with the department, and I say that because

- (a) there's too much that happens to be farmed up to the minister's office;
- (b) there's a range of expertise within the department that ought to be relied upon to deal appropriately with things;

²⁹ Transcript p. 614

- (c) I think people would find it offensive if politicians were involving themselves in the matters which occur within schools, as a general rule.

I think creating a culture where ministerial officers are checking to see that the department is acting appropriately creates a bad culture. I think departments ought to be trusted to do the right thing within the province of their remit. There is also a responsibility, I think, on an agency to – where matters are complicated – bring those matters to the attention of senior executives and then form a judgment about whether they ought to be brought to the attention of the minister. That often happens. Briefings are provided about matters that arise.

I don't know enough about what occurred here but clearly at some point there were discussions and differences about whether to advise people and, if so, what to advise people. I don't know at what level in the agency that was all determined but, given that there was that controversy, I imagine within the agency, I think that ought to have been brought to the attention of people further up and then a judgment made as to whether that was something that was appropriately brought to the attention of the minister.

In my view the reasons given by Mr Blewett for believing that the primary responsibility lay with the Department are valid. I also accept his view that he was entitled to assume that the Department was acting appropriately. However, I do not think that either of those matters relieved Mr Blewett from the obligation to inform his Minister. I set out my reasons for that conclusion.

413. For the reasons already expressed, it is my view that the responsibility of a ministerial adviser for informing his Minister of information relevant to the proper conduct of the Minister's portfolio is very similar to that of the Minister's department. As with the department, the Minister is entitled to insist on the principle of "no surprises". The Minister should always be informed of any important issue concerning the operations of the department especially when it relates to the safety and welfare of children. The information contained in the email was to the effect that the Director of the OSHC service at Largs Bay Primary School had been arrested for alleged sexual behaviour with children. The email was giving notice to the Minister of a matter of high importance. The fact that the matter was of high importance was agreed by officers of the Department as well as by Messrs Weatherill, Blewett and Harvey. The email itself described the matter as being of high importance. The matter ought to have been perceived to be especially important given that the email had stated (albeit incorrectly) that the alleged sexual behaviour involved not one child but children. On any view, it was a matter of the gravest importance. Mr Blewett was entitled to take the view that this was an operational matter for the Department to manage and to assume that the Department was acting appropriately. Nevertheless, it was always a matter of which he should have informed his Minister. Furthermore, given that the email referred to the sexual assault of children, Mr Blewett ought to have asked the Department to let him know how many children and told his Minister what he had learned. In the absence of such an enquiry, he simply had no idea how grave the offending might have been.

414. The action being taken by the Department was clearly of an operational nature. Most regrettably, sexual misconduct at a school by a member of staff at the school occurs from time to time. The Department has to deal with it and take appropriate action in the course of its day to day operations. While it was an operational matter, it was nevertheless an operational matter of a very serious kind so that it was appropriate for the Department to inform the Minister or the Minister's Office of the incident and to state the information correctly. The Department was entitled to assume that at least one of the two ministerial advisers to whom

the email had been sent would have informed Mr Weatherill as Minister. The Minister's advisers were entitled to assume that the Department was taking appropriate action but were obliged to inform their Minister.

415. When it was put to Mr Blewett that he should have informed his Minister of the email because it might have suddenly become a matter attracting media attention, he responded that he did not think it was necessary to inform his Minister and, on the question whether it might appear in the media, it did not. That is not an adequate answer. It is entirely inconsistent with his earlier answers that one of the duties of a ministerial adviser is to alert the Minister to matters that he thought might attract media attention and that might include sexual misconduct at a school. As subsequent events have clearly demonstrated, this was a topic that was very likely to attract media attention. Mr Blewett's judgment was sadly at fault. That fault would have been particularly apparent if representatives of the media had asked Mr Weatherill a question about the arrest of Mark Harvey on the morning of 3 December 2010 or within a few days thereafter.

416. In contrast to the evidence of Mr Blewett, Mr Jadyne Harvey believed that, with the benefit of hindsight, he should have informed Mr Weatherill of the contents of the email of 2 December 2010. For the reasons already expressed, I believe that Mr Harvey's assessment is correct. In my view, both Mr Blewett and Mr Harvey should have informed Mr Weatherill, as Minister, of the contents of the email of 2 December 2010. Both fell short of their duty to their Minister in failing to inform him. Mr Weatherill's comment at the press conference on 2 November 2012 that it beggars belief that he was not told could apply with equal force to the failure of Messrs Blewett and Harvey to inform him of the content of the email dated 2 December.

417. Mr Weatherill said that he could understand why he had not been informed about the email of 2 December 2010. In his view, it was apparent from the email that the very things that should happen at the school were, in fact, happening. They were that the alleged offender had been arrested and removed from the school and parents were being informed of the arrest. In consequence, Messrs Blewett and Harvey were entitled to assume that the Department was attending to matters satisfactorily. If there were any difficulties, they would learn about it later. With respect, Mr Weatherill's attempt to defend his Chief of Staff and ministerial adviser is inadequate and misses the point. It ignores the fact that the email concerned a matter that was of high importance. It also overlooks the fact that, as the email had incorrectly referred to the sexual assault of children, the matter could have been a matter of the utmost gravity. Neither Mr Blewett nor Mr Harvey made any inquiry of the Department to ascertain how serious the matter was. For all they knew, it could have been a matter of much greater magnitude than it, in fact, was. Furthermore, it is for the Minister, not a ministerial adviser, be that ministerial adviser the Chief of Staff or another ministerial adviser, to decide whether the Department is acting satisfactorily. I do not think Mr Weatherill would have had the same view if, on the morning of 3 December 2010, the media had asked him about the circumstances in which an arrest had been made of the Director of an OSHC service at a metropolitan school. He would have been wholly unaware of the matter and would have been justified in reprimanding both his Chief of Staff and his ministerial adviser for not having informed him about it.

A Subsequent Briefing Was Necessary

418. Even if it is assumed that Mr Weatherill had been informed of the content of the email of 2 December 2010 and his ministerial adviser had ascertained the true position, he was, in my view, entitled to assume that the Department had taken appropriate action. That was especially so in light of the fact that the Department did not provide any further information either orally or by an email or in any other form of briefing.

419. Mr Weatherill, Mr Lucas and Dr Lomax-Smith all agreed that, when the Department has notified the Minister's office of a serious critical incident, the Department should give the Minister a further briefing on the matter either orally or in writing. Mr Bartley agreed with the view of the former Ministers. I respectfully agree with that view. The briefing should be given when more is known about the matter and desirably should be given within a few days of the first notification. Depending on the circumstances, it might be necessary for the Department to give more than one briefing. After the email of 2 December 2010, the Department failed to give Mr Weatherill's office any further information.

420. It is appropriate to note one other occasion when the Department failed to inform Mr Weatherill that Harvey had been charged. On 6 December 2010, Mr DeGennaro met Mr Weatherill for their regular weekly meeting at which the Department would brief Mr Weatherill as Minister. Although that meeting was to deal with a specific item of business, it would not have taken more than a few minutes for Mr DeGennaro to inform his Minister of this highly important matter. Yet, Mr DeGennaro, who on 3 December had learned that Harvey had been charged, did not even mention the matter to Mr Weatherill. I find it quite remarkable that a matter that, at the time, was acknowledged to be of high importance was not even briefly mentioned by Mr DeGennaro at that meeting. Mr DeGennaro did not know that Ms Andrews had sent an email to Messrs Blewett and Harvey on 2 December. It would have been a simple matter, if not also a common prudence, for Mr DeGennaro as Acting Chief Executive to inform the Minister of this important and significant event. Yet Mr DeGennaro did not even ask Mr Weatherill whether he had learned of the matter.

421. The Department, therefore, failed in its duty to its Minister. It also failed in that it did not at any time give any further information to Mr Weatherill about Mark Harvey. Mr Weatherill visited Largs Bay Primary School as Minister for Education in 2011. His purpose was to discuss with the school community the proposed amalgamation of the two schools. Before going to the school, he was not given any information concerning Harvey. He was fortunate that no parent or teacher asked him any question or sought any other information concerning the arrest of Harvey or any step in the prosecution of Harvey.

422. In fact, no further information was given to the Minister's Office concerning the matter of Harvey until March 2012, when Minister Portolesi received a briefing with a reply to a letter from Mr Bohm. That briefing failed to give accurate information to Ms Portolesi. Furthermore, it did nothing to alert Ms Portolesi to the question whether sufficient information had been given to the parents of the Largs Bay Primary School. The whole tenor of the minute was to the effect that no letter should be sent to the school community and that other measures were being taken to ensure the care and safety of students at that school. In short, the Department entirely failed to provide adequate information either to Mr Weatherill or to Ms Portolesi.

CHAPTER 8 –DEPARTMENTAL FAILINGS

423. The Department erred in a number of respects in its management of events that followed the arrest of Mark Harvey and his subsequent conviction. Those errors are noted in this chapter. They were

1. the failure to inform parents after Harvey had been committed for trial;
2. the inadequate letter sent on 3 December 2010 to parents of the children in the OSHC service;
3. the compounding of misleading information that Harvey was on leave;
4. a failure to take legal advice;
5. the failure of the Department to reconsider its position;
6. the flaws in Mr Mackie's minute;
7. the failure to monitor the prosecution of Harvey.

This chapter will also examine other questions that stem from the Department's failure to make timely disclosure to parents of children at the Largs Bay Primary School of the fact that Harvey had been convicted. It concludes with an examination of the questions whether the Department had a policy to inform parents and a policy to inform the Minister of sexual misconduct in schools.

A Failure to Inform Parents

424. As is abundantly clear from the narrative in Chapter 6, the Department failed to give appropriate or timely notice of Mark Harvey's offending to all of the parents of children at the Largs Bay Primary School. The only notice given to parents was the letter dated 3 December 2010 sent home to parents who had children in the OSHC service. For the reasons given in the next section of this report, the letter of 3 December 2010 was wholly inadequate.

425. Initially, at the time when Harvey had just been arrested and charged, it might have been appropriate for the Department to take the view that, as the only children who had been in regular and frequent contact with Harvey were the children in the OSHC service, it was appropriate only to inform the parents of those children.¹ It would be reasonable to conclude that they would be the group of children who might have been most at risk. However, once Harvey had been committed for trial, there was no reason why the Department should not have instructed the principal of the school to inform parents of all children at the school of that fact.

426. Mark Harvey was committed for trial on 15 June 2011. He was arraigned in the District Court on 18 July 2011. On 29 August 2011, he pleaded guilty and was convicted and remanded for sentence. He was not sentenced until 9 February 2012. A number of factors caused the delay between 29 August and 9 February 2012. It is unnecessary to examine them.

¹ The reasons for this conclusion appear in Chapter 12 of this report.

On 21 December 2011, counsel for Harvey had made submissions for leniency on Harvey's behalf. The judge considered those submissions over the vacation period.

427. In 2011 and 2012, there were at least three occasions when the Department could lawfully have arranged for information to be given to parents. The first was when Harvey was committed for trial on 15 June 2011. A letter to parents could then have stated that he had been arrested and charged with committing a serious sexual assault on a child in the OSHC service. The second occasion was when Harvey pleaded guilty on 29 August 2011. On any view of the matter, if there had been no prior letter to parents, that was the occasion to inform all parents in the school community. A letter could then have been sent to parents stating that Harvey had pleaded guilty to the offence of unlawful sexual intercourse with a child in the OSHC service. However, the Department was not following the progress of the trial of Harvey. It was not aware that he had pleaded guilty. Finally, the Department should have informed parents when Harvey was convicted and sentenced on 9 February 2012. The fact that the Department failed to inform parents when Harvey pleaded guilty only made it the more imperative that the Department should have informed all parents when Harvey was convicted and sentenced.

428. There is one other aspect of informing parents that the Department failed to address. It will be recalled that, in addition to being the Director of the OSHC service, Harvey was employed by the Department as a part-time School Services Officer. In that capacity, he was responsible for the care of a child under the guardianship of the Minister for Families and Communities. The relevant Minister at that time was the Hon. J Rankine MP. As that child would have been in regular and frequent contact with Harvey, the Department should have realised that there was a risk that that child could have been abused by Harvey. As Minister Rankine was the guardian of that child, the Department ought to have written to the Minister to inform her that Harvey had been arrested and charged and to have stated the nature of the offending. It failed to do so.

An Inadequate Letter to Parents

429. For the reasons that follow, the letter sent on 3 December 2010 to the parents who had children in the OSHC was entirely inadequate. The fault of the letter is contained in its first paragraph. It is convenient to repeat it. The first paragraph read:

I am writing to inform you that the Director of the Out of School Hours Care program is currently on leave until further notice.

The letter was both uninformative and misleading. It is highly likely that the parents who received the letter knew that Mark Harvey was the Director of the OSHC service and would have realised, therefore, to whom the letter was referring. However, the statement that he was on leave was entirely misleading. He was not on leave. He had been charged with a serious sexual offence and he had been ordered by the Department to stay away from the school. The letter was misleading in another respect. As noted in Chapter 6, Harvey had been seriously ill earlier in 2010 and had been unable to attend to his duties as Director of the OSHC service for some time. It was very likely that most, if not all, of the parents who had children in the OSHC service knew that Harvey had been absent on sick leave earlier in 2010. Those parents would have been induced by the letter to believe that Harvey was again on sick leave. It was a shocking mis-statement of the true position. The Department should not have advised the principal, Ms Gale, to write a letter that so badly misrepresented the true position.

430. The Department failed in one other respect. The evidence given to this Inquiry disclosed that the letter dated 3 December 2010 was sent home with the children who were in the OSHC service that afternoon. In the result, some parents did not receive the letter as their child was not using the service that afternoon. The principal of the school should have arranged either to send the letter by post to all parents of the children in the OSHC service or, in addition to sending the letter home with the children present that afternoon, to send the letter by post to those parents whose children did not attend the OSHC service that afternoon. Later in this report, a recommendation is made that letters informing parents of allegations of sexual misconduct should be sent by post. If the letter is sent by post, it is more likely that all parents will receive the letter.

The Inadequate Letter Compounded

431. As mentioned in Chapter 6, in February 2011, the new principal of the Largs Bay Primary School and the deputy principal communicated both with parents of children in the OSHC service and with all parents of the school. In the letter dated 7 February 2011 to parents of children in the OSHC service the principals said:

Mark Harvey resigned as OSHC Director at the end of last year.

They continued by referring to the fact that the process of appointing a new director had begun. On 11 February 2011, the principal and deputy principal sent a newsletter to parents of all children at the school. In a paragraph under the heading “Staffing Updates”, they referred to the fact that Harvey was no longer the Director of the OSHC service in these terms:

Mark Harvey resigned as OSHC Director at the end of last year and processes are in place to appoint a new director as soon as possible.

Both communications repeated the misleading information in the letter dated 3 December 2010 to parents of children in the OSHC service. In that sense, those two communications compounded the misleading information contained in the letter dated 3 December 2010.

A Failure to Obtain Legal Advice

432. The Department’s reasons for deciding not to inform parents of the fact that Harvey had been convicted and sentenced were based on a complete misunderstanding of the effect of the remarks made by Judge Griffin when sentencing Harvey. The Department believed that the judge’s comments that he would not name the victim, the school, or the suburb in which the school was located constituted a suppression order. It is a matter for remark that the Department did not obtain legal advice as to the effect of the order until 31 October 2012. It will be recalled that the Crown Solicitor has what are called “outposted solicitors” in the central office of the Department in the Education Building. The Department had obtained advice on at least one earlier occasion on the question whether parents could be informed that a teacher had been arrested. That advice was obtained on 30 September 2010 when the Crown Solicitor gave clear and unequivocal advice that it was lawful to inform parents of a school in the north eastern suburbs of metropolitan Adelaide that a teacher at that school (who was to be named in the letter) had been charged with serious criminal offences involving child pornography. The fact that the Department had received the advice obviously escaped the corporate memory of the Department. Had the Department taken advice in relation to the remarks made by Judge Griffin, it would have ascertained that the judge’s remarks were not a

suppression order. The Department could then have obtained advice whether parents could be informed of the conviction and sentence of Harvey. The Department was at fault in failing to obtain advice both on the question whether the judge's remarks constituted a suppression order and on the question whether it could inform parents of Harvey's conviction and sentence.

A Failure to Reconsider

433. One matter that is especially striking about this unhappy saga is the fact that the Department did not pause to think whether it should reconsider its view that parents should not be informed until it was compelled to do so in consequence of the questions in the Parliament and media attention in late October and early November 2012. Four sets of circumstances occurred that should have given the Department cause at least to ask itself whether it should reconsider its decision not to inform parents unless there was media attention to the matter. The first was the fact that parents were seeking information. The second was that some members of the Governing Council of the school and, in particular, Ms Soester, were of the view that parents should be informed and the matter had been discussed at three meetings of the Governing Council. The third was the discovery that no suppression order had been made when Harvey had been sentenced. The fourth was the commencement of the Ombudsman's investigation. None of those events caused the Department to think whether it should reconsider its position. I spell out those four circumstances in more detail.

434. It will be recalled that Ms Oshinsky commenced duty as principal of the Largs Bay Primary School in January 2011. She continued as principal until December 2012. From February 2011, a number of parents orally asked Ms Oshinsky for more information concerning Harvey. She acted as directed by the Department and did not give any information as to the true position. In addition, she received an email from Ms Holmes dated 15 March 2012 that contained sound reasons to notify parents. The answer to that email was drafted by Mr Petherick who relied on the incorrect view that the judge's remarks constituted a suppression order and on the view that the *Children's Protection Act* prevented the school from giving information to parents. The Department had also received the email from Channel 7 stating that parents had approached it and asking if parents had been notified. Finally, there was the clear statement in Mr Bohm's email to the Minister that stated that no information had been given to parents. His email included the comment that the failure of the Department and of the Minister to give information and not supporting the children "only exacerbated the children's stories and potential physiological impacts". Perhaps Mr Bohm meant to say "psychological impacts". Be that as it may, Mr Bohm was pointing to an obvious consequence of the failure to inform parents. Notwithstanding these requests by or on behalf of the parents, the Department did not even contemplate reconsidering its position.

435. Not even the persistent requests from Ms Soester caused the Department to rethink its position. Ms Soester might not have articulated her requests in the clearest manner. However, her point was clear. In addition, she had a degree of support from a few, albeit a minority, of the members of the Governing Council of the school. Furthermore, she had sought advice from sources other than the Department and that advice supported her position. She gave the Department a schedule stating persons and organisations she had contacted. Mr Mackie did not believe that the schedule correctly stated the views he had expressed in his telephone conversation with her. Nevertheless, it did state that she had consulted child protection agencies in New South Wales and the Australian Capital Territory and those

agencies had supported her view that parents should be informed. Significantly, it stated that the parents of the victim had told her that parents should be informed. However, this was not only ignored by the Department but entirely dismissed. In the result, the Department was to learn that Ms Soester was correct.

436. When Mr Mackie's minute of 4 June 2012 was being drafted, Mr Mackie and Ms Page knew that Ms Soester had a strong view that parents should be informed that Mark Harvey had been convicted and that Ms Soester was agitating very strongly to achieve that outcome. Ms Soester had had lengthy telephone conversations with both Mr Mackie and Ms Page and had written a long email to Ms Page. The minute did not examine whether Ms Soester might have been correct. Instead, it attempted to rebut the arguments she was advancing.

437. The Department knew that the matter whether parents should be informed was raised at meetings of the Governing Council on 19 March and 7 May 2012. At the meeting on 19 March, the principal had advised the meeting that it should not vote on the matter until further information was obtained. Further information was given to the next meeting of the Governing Council on 7 May 2012 when the meeting was addressed by Mr Brendyn Semmens. He informed the Governing Council that the remarks made by Judge Griffin constituted a suppression order so that it was inappropriate of parents of the school to be informed. The information he gave the meeting was as factually incorrect as it was misleading and, as his advice was grounded on incorrect information, his advice, too, was misleading.

438. By the time of the next meeting of the Governing Council on 4 June 2012, Mr Mackie, the manager of the Legal Services Unit, had ascertained that a suppression order did not exist. However, instead of reconsidering the question whether parents should be informed, Mr Mackie blindly adhered to the Department's existing decision not to inform parents. Consistency of conduct might be a sound principle of government. However, on occasions, it will be necessary to reconsider the wisdom of an earlier decision. That might require a government department or even a Minister to confess and avoid the issue, that is to say, to admit to the initial error, explain how it came to be made, and avoid further difficulty by implementing appropriate remedial measures. In this case, the Department could have informed parents at the Largs Bay Primary School of the judge's sentencing remarks, stated that the Department had misunderstood them, and explained that it was now remedying the situation by informing parents. It is not unreasonable to infer that, had the Department acted in that way, while some parents might have been angry at the delay in being informed, others would have understood the Department's reasons for that delay. Instead, Mr Mackie on behalf of the Department attempted to defend the indefensible, even to the point in his minute of 4 June 2012 of seeking to place what I later find to be a form of pressure on members of the Governing Council. Had the Department in June 2012 acknowledged its misunderstanding of the effect of the remarks made by Judge Griffin and remedied the matter, it might have avoided the attacks that occurred in the Parliament and in the media in late October 2012 and thereafter.

439. Although Mr Mackie had not been asked by the Department to consider whether its position was correct, he ought to have realised that section 71A(2) of the *Evidence Act* permitted disclosure of Harvey's name. Mr Mackie said in his evidence that he was aware of the terms of section 71A of the *Evidence Act*. I do not accept his evidence. Even if it is assumed that Mr Mackie was familiar with the provisions of section 71A, he failed to have

any regard to them. A person familiar with section 71A(2) would have realised that, once it was clear that a suppression order had not been made, there was no legal impediment to informing all parents at the school of the fact that Harvey had been convicted for committing unlawful sexual intercourse against a child at the school and that that information could have included details of the sentence that he had been ordered to serve. However, the whole tenor of Mr Mackie's minute of 4 June is inconsistent with the terms of section 71A(2) of the *Evidence Act*. If Mr Mackie was uncertain whether parents should be informed, he ought to have obtained advice from the Crown Solicitor whether it was lawful to inform parents.

440. When the Ombudsman informed the Department in his letter dated 22 June 2012 that he was investigating a complaint that the Department had failed to inform parents of the Largs Bay Primary School of Harvey's conviction, the Department did not even pause to consider whether it had acted correctly. That is quite remarkable. It is equally remarkable that it did not then seek advice from the Crown Solicitor. The advice could have readily been obtained from one of the solicitors from the Crown Solicitor's Office outposted to the Department.

441. The failure of the Department to reconsider its position is the more remarkable given the fact, as noted in paragraph 432 above, that the Department had, on 30 September 2010, received quite clear and unequivocal advice from the Crown Solicitor that it was lawful to inform parents of a school in the north eastern suburbs of metropolitan Adelaide that a teacher had been charged with serious criminal offences involving child pornography. One reason for that advice being overlooked might lie in the fact that there is no proper central system of filing legal advice. However, even if such a filing system existed, it would have required someone to remember that legal advice on sending letters to parents had been received. The advice had been given to the Special Investigations Unit and had not come to the attention of the Legal Unit. However, it would have been known to officers in the School Care Unit and it was the officers in the School Care Unit who had to consider whether a letter should be sent to the parents at Largs Bay Primary School. Even if no one in the Department recalled the advice given on 30 September 2010, it is curious that advice was not sought from the Crown Solicitor's Office either when the Department ascertained that a suppression order did not exist or when the Department received the Ombudsman's letter of 22 June 2012. Had advice been obtained, it would no doubt have been to the same effect as the advice given on 30 September 2010 and, in all likelihood, a letter would have been sent in June 2012 before the Department was compelled to do so in November 2012.

The Flaws in Mr Mackie's Minute

442. Mr Mackie's minute of 4 June 2012 contained several instances of faulty reasoning. I note only the following flaws. The first point made in Mr Mackie's minute was that, although no suppression order existed, the judge who had sentenced Mark Harvey had said that he would not name either the child or the school in order to protect their privacy. The minute added that the judge's comments should be respected in order to respect the privacy of those involved. That reply entirely ignores the fact that Ms Soester did not wish to name the child and that a letter would be sent only to parents at the Largs Bay Primary School. Furthermore, it fails to give sufficient weight to the fact that the Australian Broadcasting Commission had in two news bulletins on radio station 891 reported the fact that Harvey had been sentenced, a fact of which Mr Mackie was aware. He should have realised that it was likely that some parents would have heard that report and in all likelihood would have spoken to other parents. For many parents, a letter stating that Harvey had been convicted and sentenced would simply

confirm what they already suspected. The comment in the minute that the judge's approach was unusual was simply incorrect. It is not unusual for judges to decide not to name victims or say anything that might identify the victim.

443. The fundamental problem with Mr Mackie's minute is that it fails to address the provisions of section 71A of the *Evidence Act*. As mentioned in paragraph 439 above, a person familiar with section 71A would have realised that there was no legal impediment to informing all parents of children at the school that Harvey had been convicted and sentenced. Instead, Mr Mackie examines at length the question whether Governing Council had power to inform either all parents at the school or only those parents who had children using the OSHC service.

444. Mr Mackie asserted in the minute that, in his experience, the broadcasting of such information is "counter-productive" to the safety of the community. That is an astounding conclusion. To the contrary, the letter would not cause any harm to the safety of the school community. Instead, it would be conducive to the safety of the school community if parents were informed of a matter that plainly might affect the safety and well-being of some children at the school.

445. Mr Mackie made the point that the principal had decided that no letter should be sent and that the principal was subject to the authority of the Chief Executive of the Department and his delegates who included the Regional Director. Accordingly, the Governing Council had no role to play. Mr Mackie was correct in stating that the principal was subject to the authority of the Chief Executive and the Regional Director. But that argument does not advance the position. It merely restates the Department's position without considering whether the Department's position was correct. It also fails to address the fact that the Governing Council is responsible for the operations of the OSHC service and has the capacity to inform parents who use that service of matters that affect the safety, health and welfare of children in the care of that service. Mr Mackie said in his evidence that the sending of a letter to the school was a day to day operational matter that was the responsibility of the principal of the school and that the Governing Council had no power to require reconsideration of that decision. I do not share that view. Far from being a day to day matter, a letter informing parents that the Director of the OSHC service has been convicted and sentenced for an appalling crime, the crime of sexually assaulting a child using that service, was a rare event of particularly special importance to parents.

446. Mr Mackie did acknowledge that the Governing Council could inform those parents who had used the OSHC service for their children. However, he advanced a number of reasons why it should not do so. The reasons again overlook section 71A(2) of the *Evidence Act*. At the end of those reasons, he added the following:

If by acting contrary to the earlier decision of Council and information is distributed to the community and this brings about an adverse circumstance, the Council could be subject to litigation proceedings and the Council will have to show why this was the correct course of action.

Please note: I do not believe it will be possible for Council to justify such a course of action in the case of an adverse event occurring. Given the indemnity provided by the Crown to the Council, I will need to advise the Minister of any such steps the Council is to take that could bring the indemnity into play. As such it will be necessary for the Council to advise this office of any decision to further inform parents of children who were in attendance during the time Mr Harvey was employed. (Emphasis in the original)

Mr Mackie's letter concluded with correct advice to the effect that, if the Governing Council wished to send a letter, it was first necessary for it to vote on a motion whether it wished to revoke its earlier decision.

447. It is relevant to note also that the advice that the Governing Council should think very carefully before sending a letter entirely overlooks the fact that the Department had instructed the principal of the school to send a letter (albeit an inadequate letter) to parents with children in the OSHC service. That was the letter sent by Ms Gale on 3 December 2010. It is apparent that Mr Mackie was either unaware of the letter of 3 December 2010 or had overlooked it.

448. I have tried to view Mr Mackie's minute of 4 June in the best possible light. However, even if he held the view that it was better for the victim not to send a letter to parents, he was entirely overlooking the safety and well-being of other children in the school and the possibility of other victims. The minute was, on any view, most unfortunate. On learning that there was no suppression order, the Department had an opportunity to reconsider its position. It failed to grasp that opportunity.

Did the Department Make Threats?

449. When dealing with Mr Mackie's minute, it is convenient to examine the question whether the Department threatened to remove the indemnity of members of the Governing Council of the Largs Bay Primary School. On 30 October 2012, the Hon. David Pisoni MP asked Minister Portolesi the following question:²

Can the Minister confirm that the Minister for Education's office or the Department for Education did not apply pressure to the western suburbs governing council to keep the conviction of Mark Christopher Harvey, the director of the out of school hours care, for the rape of a child in his care, away from the parents of the school?

The Minister replied that she would take the question on notice. The next day, the Hon. Isobel Redmond MP asked the Minister a similar question:³

Did the Government, via its department or otherwise, threaten to remove the school council members' indemnity if they told parents about the child sex offences that had occurred at the western suburbs primary school?

The Minister replied that she would check the position. She added that the question was one of the reasons why she had asked for an independent inquiry.

450. The indemnity to which Ms Redmond referred is provided to members of a governing council by section 100 of the *Education Act*. Section 100 states:

- (1) No personal liability attaches to—
 - (a) a member or former member of a school council; or
 - (b) a member or former member of a committee established by a school council; or
 - (c) a member or former member of an affiliated committee,

² South Australia, *Parliamentary Debates (Hansard)* House of Assembly, 30 October 2012, 3433 (D. Pisoni)

³ Ibid, at 3514 (Isobel Redmond)

for an act or omission in good faith in the exercise or discharge, or purported exercise or discharge, of a power or function of the council or committee (as the case requires).

- (2) A liability that would, but for subsection (1), lie against a person, lies instead against the Crown.

The effect of section 100 is to indemnify members of a governing council for any act, or failure to act, done in good faith in the course of exercising any power or function of the governing council.

451. It is clear from the minutes of the meeting of the Governing Council held on 7 May 2012 that no threat was made by Mr Semmens when he spoke to the Governing Council at that meeting. Ms Soester took the minutes of that meeting. Had any threat been made, there could be no doubt that she would have recorded it.

452. There are three statements that might have been understood to be threats or at least a form of pressure. A very similar statement was made on each occasion. The statement was to the effect that, if members of the Governing Council decided to inform parents, the Governing Council or those members of the Governing Council who informed parents might lose the indemnity provided by section 100 and individual members of the Governing Council might be personally liable for their actions. The precise form of the advice varied on each occasion. For the reasons that follow, while it might be overstating the position to say that the Department threatened to remove the indemnity of the members of the Governing Council of the school, it is readily apparent that members of the Governing Council could have interpreted what was said by the Department and, in particular, by Mr Mackie to be a threat. If it was not a threat, it was a form of pressure.

453. The first suggestion that individual members of the Governing Council might incur some kind of legal liability was made towards the end of Mr Mackie's telephone conversation with Ms Soester in late April or early May 2012. Part of Mr Mackie's note of what he said to Ms Soester in that conversation reads:

Furthermore, if it was seen as being an action activated by malice, then they may not be protected against any legal liability that could arise (although it is difficult to imagine what liability could, in fact, arise).

The note itself is vague and his statement to Ms Soester might have been sufficiently vague not to have been interpreted by Ms Soester as a threat or some kind of pressure.

454. The next occasion when it was stated Ms Soester might be personally liable was more explicit. It is to be found in two paragraphs of the email sent by Ms Lynley Page to Ms Soester on 16 May 2012. It will be recalled that Ms Page said:

As explained to you in our conversation, the council has no role to play in "informing" the broader school community on such issues and the council's powers and functions are limited to those matters set out in the Education Act and its subordinate instruments such as the constitution. As Don also advised you when you contacted him a few weeks ago, if you step outside of this then the protections that you have via the council under the Act may be voided and you could be personally liable for your own actions.

I am aware from speaking with you that you have floated the idea of standing outside of the school's gates and handing out a pamphlet advising parents of the situation (and that you would be doing this as a GC member). As Don and I have both indicated, should you choose this course of action you will be doing so in your own right and will therefore be personally subject to liabilities of this nature.

The person referred to as “Don” in those two paragraphs is Mr Mackie. I have already held that Mr Mackie was not aware of the provisions of section 71A of the *Evidence Act*. I make the same finding in respect of Ms Page. Even if they were aware of section 71A, they did not have regard to the fact that it was entirely lawful for the Governing Council and, indeed, Ms Soester alone if she wished, to inform the school community that Mark Harvey had been convicted and to name the offence. Provided any statement simply stated the true facts without elaboration and did not name or identify the victim, there could be no risk of any legal liability. The last sentence in the second paragraph of the passage quoted above is relatively free from meaning. The expression “subject to liabilities of this nature” is extraordinarily vague. However, the first paragraph clearly states that Ms Soester was at risk of personal liability.

455. The third statement of the risk of personal liability is to be found in the concluding paragraphs of Mr Mackie’s minute of 4 June 2012 quoted in paragraph 340 above. There is a vague reference to “an adverse circumstance” but the adverse circumstance is not specified. The sending of a letter to parents who use the OSHC service for their children would not have caused any adverse circumstance since it would be a letter published only to those parents and was a publication permitted by section 71A(2) of the *Evidence Act*. It is not possible to conceive how the sending of a letter to parents stating that Harvey had been convicted and naming the offence would expose the Governing Council or any member of it to litigation unless the letter in some way defamed Mark Harvey. The letter would not be defamatory if it simply stated that Harvey had been found guilty of unlawful sexual intercourse with a child at the school.

456. I have tried to consider each of these three statements in the most generous light. Mr Mackie might have believed that he should give conservative advice in case some untoward event happened and the Governing Council was involved in litigation. However, the whole tenor of the minute of 4 June 2012 is to seek to buttress the Department’s position without any consideration of whether it is correct. In all the circumstances, I find that I must conclude that, while it is not possible to state that the minute contained threats, it could readily be understood as a threat. Ms Soester understood it to be a threat. Certainly, if it was not a threat, it was intended to bring pressure to bear on Ms Soester and other members of the Governing Council.

457. Later in September 2012, Mr Mackie drafted a reply to the email from Ms Fewings of 21 September when she sought further information. I have already noted that the tenor of the reply bordered on the aggressive⁴. Mr Mackie’s responses to those who asked that parents be informed had a belligerent tone that was quite unnecessary in the circumstances, especially given the fact that the Department was entirely at fault.

Court Proceedings Not Monitored

458. The failure to inform parents was in part caused by the failure of the Department to monitor the course of the criminal prosecution against Harvey. Immediately after Harvey had

⁴ See para 345 above.

been arrested and charged, the Special Investigations Unit of the Department liaised with SA Police and informed the Department of such matters as the conditions on which Harvey had been released on bail. Thereafter, neither the Special Investigations Unit nor any other unit in the Department made any attempt to follow the subsequent steps in the prosecution of Mark Harvey. Two members of the staff at the Largs Bay Primary School knew that Harvey was to be sentenced on 9 February 2012 and attended the District Court to support the parents of the victim. However, no one at the central office of the Department followed the course of the prosecution. It is essential that the Department does follow the course of the prosecution of a teacher or other member of staff of a school. It is then in a position to know of such significant events as whether the defendant has been committed for trial, if that person has pleaded guilty or not guilty, and the result of the trial of that person. It is appropriate that the Department should inform parents of the school of the significant steps in the course of the prosecution. It is not a difficult task to follow the course of the prosecution. Initially, the Investigations Unit will be told by SA Police of the date and the Magistrates Court at which the defendant must attend as required by his conditions of bail. The Department can then inquire at the Registry of that court as to the progress of the matter. Similarly, if the defendant is committed for trial or sentence, inquiries can be made at the Registry of the District Court. Had the Department monitored the course of Harvey's prosecution, it would have been aware that he had pleaded guilty on 29 August 2011. It could then have obtained legal advice and given much earlier notice to parents.

Inadequate Management

459. From a very early stage in this Inquiry, it became strikingly obvious that there had been a failure adequately to manage the events and circumstances that followed the arrest of Harvey. Even if the Department's failure to give proper and adequate information to parents is put to one side, there are significant shortcomings in the rest of the Department's management of the matter.

460. One striking fact is that no one person ever took over the management and supervision of the Harvey matter and saw it through to its conclusion. Instead, different individuals performed different roles at different times and no-one was responsible for supervising the matter as a whole. At times, people acted without a complete or accurate understanding of the relevant facts. It must be acknowledged that a number of separate units in the Department at different times have to perform different roles in the management of a matter of this kind. The case of Harvey is a convenient example of how different units of the Department will be involved in a matter. The Special Investigations Unit (as it was then called) liaised with SA Police and kept the Department informed of the progress of the investigation, the arrest and charging of Harvey, the fact that Harvey was released on bail, and the conditions of bail. The Human Resources Unit managed matters relating to the employment of Harvey, in his case the termination of his services by the Department as a School Services Officer and advice to the Governing Council to terminate his employment as Director of the OSHC service. If Harvey had been a teacher, the Human Resources Unit would have again been involved as it would have been necessary to suspend him from duty while the allegations were being investigated. The Legal Unit with Mr Lamb's assistance had drafted the letter sent to some parents on 3 December 2010. The School Care Unit had a responsibility to advise the principal how to act at different stages in the matter. The fact that different units will be involved at different times does not in any respect lessen the need for a person to take over the management of a matter but, instead, increases that need. It is essential to ensure that each

unit in the Department who will be called upon to act is proceeding on the same factual basis. It is equally essential to ensure that each unit is acting as it should and at the correct time or times. That becomes even more critical after an alleged offender has been arrested because the prosecution might extend over a period of 12 months or more. In the case of Harvey, it was a period of eight months between his arrest and his plea of guilty and a period of 14 months between his arrest and when he was sentenced to a period of imprisonment. Had there been a trial, the period between arrest and sentence would, in all likelihood, have been even longer. In short, while each unit has its function to perform, it is desirable that one person has the overall supervision and management of the matter in order to ensure that all appropriate steps are taken, that each unit is liaising with every unit that needs to be involved, and that each person who is called upon to act does so on the basis of accurate information.

461. In short, although different people at different times had some involvement in the matter, no single person assumed the overall supervision and co-ordinated the Department's management of the matter. One consequence was that action was sometimes taken on the basis of incorrect information. That was never so obvious as when Minister Portolesi (unbeknown to her) received totally incorrect information at the end of October 2012 as to the reasons why neither the school nor the Department had informed parents of Harvey's conviction and on the basis of that information gave an incorrect answer in the House of Assembly.

Emails Not Correctly Targeted

462. The history of this matter demonstrates that there was an extensive exchange of emails but, notwithstanding those emails, the response of the Department was not always co-ordinated. Had someone been responsible for the overall supervision of the matter, that person could have ensured that all those who needed to know of the matter would have been appropriately notified. More significantly, not every email was addressed to all those who should have received it. For example, Mr Thredgold addressed emails to the Human Resources Unit but did not include the School Care Unit, the very unit which ought to have been kept informed. That fault also existed at higher echelons of the Department. It was extraordinary that Ms Andrews did not include Mr DeGennaro as one of those to whom she sent a copy of her email of 2 December to Messrs Blewett and Harvey. Mr DeGennaro was in December 2010 the Acting Chief Executive of the Department. This was a matter of such high importance that Ms Andrews should have immediately drawn it to the attention of both the Acting Chief Executive and the Minister. Yet Ms Andrews did not send Mr DeGennaro a copy of her email. She did send it to Ms Emery who was then, and still is, Director of the Office of the Chief Executive and whose duties included informing Mr DeGennaro of important emails of that kind. However, that does not excuse Ms Andrews because it depended upon Ms Emery informing Mr DeGennaro. The fact was that on 2 December 2010, Ms Emery was not in her office. Instead, she was on Eyre Peninsula with Mr Radloff conducting a review of the Eyre region with its regional director. When she returned on 3 December, she failed to inform Mr DeGennaro. Her first recollection of the matter is when Harvey was sentenced in February 2012. She has no recollection of seeing the email from Ms Andrews. Matters of such high importance should not be left to the chance that an officer might pass on the information to her superior. In addition, as Mr Bartley acknowledged in his evidence, it is essential that care is taken to ensure that emails are addressed to those who need to know what is contained in the email.

No Central File

463. A related matter is the failure of the Department to keep a central file in which all documents relating to the matter and a copy of all relevant emails are kept for future reference. Instead, the Special Investigations Unit had two small separate files with little information. The Human Resources Unit had another file with little information. The School Care Unit had no file. Yet, the School Care Unit was in some respects the most important unit in that it was the unit that should have had the continued future management of the matter and would, in the course of that management, have had to advise the principal of the Largs Bay Primary School.

464. The failure to keep a central file had another consequence. It meant that on at least three occasions it was necessary for someone to conduct an extensive search to gather together all documents or find a particular document. The first was when the Ombudsman began his inquiry in June 2012. The absence of a file meant that Ms Page, who had been assigned the task of reporting to the Ombudsman, had to gather information from all those who might have been involved in the matter. While she might have known some of those who had been involved in the matter, one obvious handicap was that she could not be sure she had contacted all who had been involved. She had to garner information by requiring those whom she believed were involved to let her have copies of relevant emails and other documents. Ms Page described the task as difficult. In order to find documents, she had to ascertain who was handling the matter at each of its different stages. She was unclear which unit in the Department was handling it at different times. The files were not in one place.

465. The second search was made only a few months later when the Department had to give the urgent briefing to Minister Portolesi at the end of October 2012. The task of preparing that briefing and a chronology was given to Mr Kym Tidswell and to Dr Stanley. Dr Stanley had succeeded Ms Page as principal policy adviser to Mr Costello. Dr Stanley and Mr Tidswell had to search for documents. They found some documents in Ms Page's files but had to search for others. They suffered from the same handicaps as Ms Page. As Dr Stanley said, they were starting from scratch. In short, two officers in the Department who had had no prior involvement with the matter of Harvey were required urgently to prepare a brief to the Minister. When she began the task of preparing the briefing paper, Dr Stanley knew no more about Mark Harvey and the Largs Bay Primary School than that the Ombudsman had initiated an inquiry. Plainly, this task would have been more quickly achieved if a file had existed or if they could have made enquiries of the person who had managed the matter. It is readily apparent that a central file would have made both searches unnecessary or, alternatively, the search would have been a short one to check that all recent documents had been included in the file. In the result, the briefing paper prepared by Dr Stanley and Mr Tidswell was not used. Furthermore, the inefficiency and wasted time in conducting urgent searches for the same documents, one so soon after the other, is manifestly obvious.

466. The third occasion when a central file would have enabled a document to be located quickly was on 1 November 2012. Mr Bartley had sent an email to managers of relevant units in the Department asking that they urgently search to ascertain if any notice or advice had been given to the Minister concerning Mark Harvey. What the Department was searching for was the email of 2 December 2010 from Ms Andrews to Mr Blewett and Mr Jadyne Harvey. However, no one in the Department was aware of what in fact was the document they were

endeavouring to find. Had that email been placed on a central file, it would have been quickly located.

467. It is reasonable to infer, as I do, that the absence of a single person to manage the matter of Mark Harvey and the failure to keep a single file relating to Mark Harvey combined to result in the Department providing the Minister with incorrect information. That incorrect information is contained in a number of Ministerial briefings. Errors were not limited to the Ministerial briefings. A number of errors of fact also occur in the Department's letter to the Ombudsman dated 6 August 2012.

Some Errors in the Letter to the Ombudsman

468. I note some of the errors in the Department's letter dated 6 August 2012 replying to the Ombudsman's initial request for information. Many are reflected in later Ministerial briefings. Early in that letter is a section headed "Chronology of Events". It reads:

On 6 December 2010 Mr Mark Christopher Harvey was charged with unlawful sexual intercourse with a girl who was in his care at the Largs Bay Out of School Hours Care (OSHC). Mr Harvey was the Director of the service at the time the incident took place. As the charges were of a sexual nature an automatic suppression order was put in place by SA Police. This meant that DECD could not inform parents whose children attended the Largs Bay OHS (sic) service that Mr Harvey had been charged.

As Mr Harvey was employed by the Largs Bay Governing Council and not the Largs Bay Primary School, the Assistant Regional Director met with the Governing Council on Thursday 10 December 2010 to inform them of the criminal investigation involving Mr Harvey. The Governing Council was advised by the Assistant Regional Director that Mr Harvey would need to be dismissed effective immediately due to the nature of the allegations. Mr Harvey was removed from the site and SA Police commenced an investigation into the allegations made by the family involved. Families of children who were attending the OSHC service at the time were not contacted by the department as SA Police advised that the incident was a police matter and relevant families would be interviewed as part of their enquiries. As investigations are confidential, it is unknown how many parents were identified and contacted for information in this regard.

Between 6 December 2010 and 9 February 2012 a suppression order was in place which prevented the department from contacting parents whose children attended the Largs Bay OSHC service.

I list the errors in those three paragraphs

1. Harvey was arrested on 2 December 2010 not 6 December 2010 as stated in the first paragraph.
2. An automatic suppression order was not put in place by SA Police. Instead, section 71A(2) of the *Evidence Act* operated preventing publication of Harvey's name.
3. It was not correct to state that the Department could not inform parents whose children attended the Largs Bay OSHC service that Harvey had been charged with a sexual offence. As noted earlier, it was entirely lawful for those parents to be informed.
4. While it was correct to state that Harvey was employed by the Governing Council of the school, it was not entirely correct to state that Harvey was not employed by the Largs Bay Primary School, if that was intended to imply that

Harvey was not employed by the Department. In December 2010, Harvey was in fact employed by the Department as a School Services Officer pursuant to a contract that was to expire on 12 December 2010.

5. There are several errors in the sentence that reads

Families of children who were attending the OSHC service at the time were not contacted by the department as SA Police advised that the incident was a police matter and relevant families would be interviewed as part of their enquiries.

The first error is the statement that families of children who were attending the OSHC service were not contacted. A letter was sent to parents of those children who attended the OSHC service on 3 December 2010. It was sent home with the children on 3 December 2010. The second is that the police did not consent to a letter. Police had in fact suggested that a letter be sent to parents. The letter was seen by Det. Sgt. Clark on 7 December 2010.

6. It is incorrect to state in the third paragraph that a suppression order was in place between 6 December 2010 and 9 February 2012. No such order was in place. The only restriction on publication was that contained in section 71A(2) and, as already noted, that did not prevent the Department from contacting parents whose children attended the OSHC service at the school. Furthermore, that restriction ceased on 15 June 2011, when Harvey was committed for trial. Thereafter, no restriction on the Department informing parents of the fact that he had been charged. The fact that the error is repeated as late as 6 August 2012 is remarkable given that Mr Mackie had in an email on 1 June informed Mr Semmens, Ms Page and Ms Kibble that no suppression order existed. This is another example of how the absence of a central file can lead to error.

A number of these errors are also found in other documents.

Lack of Accuracy

469. A lack of accuracy is another striking feature of written briefs delivered either to the Minister or to other officers of the Department. I immediately acknowledge that I have only seen documents relating to the matter of Mark Harvey and a few documents in other matters where members of staff of schools have been charged with sexual offences. Nevertheless, the number of occasions when errors of fact occur are so numerous that it is necessary to comment. The errors are often simple errors of fact that could readily be avoided by checking against previous documents or making a simple inquiry. Other errors are more substantial. In part, the frequency of errors of fact might be explained by the absence of a single file for a particular matter. However, many result from a simple lack of care to check basic facts. One consequence readily apparent in the Harvey matter is that, once an error of fact has been made, that error will in all likelihood be repeated by other officers who later prepare a minute, a briefing, a letter or some other document. There are several instances of errors in documents being repeated in later documents. It is necessary for senior management in the Department to emphasise the need for accuracy and verification of basic facts. Once an error has been made, there is every likelihood that it will be perpetuated. The consequences of errors of fact were dramatically demonstrated in the Department's failure correctly to brief Minister Portolesi on 30 October 2012.

Did a Failure to Send a Letter Impede the Police Investigation?

470. It is convenient at this stage to examine another question that was asked in the House of Assembly. The question was whether the failure to notify parents had impeded the police investigation. The short answer to that question is “No” because Harvey was subsequently convicted of the offence with which he was charged. A more appropriate question is whether the failure to send a letter to parents prevented an earlier investigation of other offences by Harvey against children at the school. There is no straightforward simple answer to that question. It depends upon a number of factors.

471. Before examining those factors, it is relevant to recall that a letter was sent to parents of children who in the OSHC service in the afternoon of 3 December 2010. After Harvey had been arrested, Det. Sgt. Clark advised Ms Gale, the principal of the school, that she should send a letter to parents notifying them that an incident had occurred. He said that the letter would need to be “generalised” to use his words. The Department assisted Ms Gale in preparation of that letter. Ms Gale showed the letter to Det. Sgt. Clark on the afternoon of 7 December 2010. He did not question any aspect of the letter. It would be to overstate the position to say that SA Police approved the letter. Certainly, Det. Sgt. Clark did not object to the terms of the letter. However, as stated above, the letter was inadequate in that it did not state the true facts and so failed to alert parents that their own child might have been at risk.

472. As the evidence of Professor Jureidini referred to in Chapter 12 shows, a child will decide whether and when he wishes to disclose that he has been the victim of some form of assault or sexual abuse. The child might not wish to make any disclosure for one of a number of reasons. As Professor Jureidini also said, it is better for parents not to interrogate children but instead support the child and let the child make the disclosure at a time of the child’s choosing.

473. The children of the Largs Bay Primary School with whom Harvey had the most frequent and most regular contact were the children in the OSHC service. They were, therefore, the group of children who would be most likely to include any other possible victim of Harvey’s offending. In the course of their investigation, police had seized documents listing the names of the children who were attending the OSHC service in December 2010 and the names of the staff of the OSHC service for the purpose of ascertaining potential witnesses. That was also a list of potential victims. It is the role of police to identify all possible witnesses and victims and to conduct a thorough investigation. The Department should not trespass on the police investigation. Later investigations by police have resulted in Harvey being charged with committing offences against five other children. As he is yet to be tried, it is inappropriate to make any further comment.

474. In all the circumstances, given that it is not possible to state whether or when children will disclose offending against them, the only reasonable conclusion is that an earlier letter to parents might have caused parents to be alert sooner to some form of behaviour that might have led to a child making some disclosure that would have caused the parent to report it to police and for the police to interview the child. Given that Harvey has been charged with other offences, it is not possible to conclude that the failure to send a letter impeded the police investigation.

A Policy to Inform Parents?

475. One of the questions examined in this Inquiry was whether the Department had a policy to inform parents that a teacher has been charged with an offence or has been convicted of that offence. Some witnesses asserted that the Department had a policy to inform parents when a teacher had been arrested and charged with a sexual offence and that each case had to be considered on its merits. I am not satisfied that in truth such a policy existed. The Department had guidelines as to the management of allegations of sexual misconduct but those guidelines concerned only aspects of internal management: they did not extend to informing parents. It is apparent that from time to time the Department has on occasions informed parents when a teacher has been arrested and charged with a sexual offence. However, it cannot be said that it is a practice that is consistently observed. In some cases, a letter is not sent. In one instance, the Department did not inform parents of an arrest, despite having received advice from the Crown Solicitor's Office that it was not only lawful but desirable to do so. In some cases, the letter states no more than that a teacher has been arrested and charged so that little useful information is given to parents. On other occasions, the Department has failed to give prompt notice of the fact that a teacher has been arrested and charged. That is evident from the fact that in November 2012, the Department set about sending letters to parents in respect of matters that had been completed some time before. In one case, the letter was to inform parents that an offender had been sentenced in 2011.

476. There will be occasions when it is not possible to give prompt notice to parents. Chapter 10 contains an example.⁵ In another instance, although the teacher was arrested early in 2012, the notice was not sent to parents until the end of 2012 because the teacher who had been arrested and charged had a daughter at the same school who was completing Year 12. In that case, the Department did not wish to prejudice the girl's studies. That was an instance where it seemed most unlikely that there would be other victims at the school and the decision to delay the matter was understandable.

477. It is desirable that the Department should have a policy that parents be informed when a teacher has been arrested and charged with an offence. The reasons are addressed in Chapter 11 of this report. The manner in which parents should be informed is examined in Chapter 12. Even if there are occasions when it might not be appropriate to inform parents that a teacher has been charged with an offence, there is no reason why the school should not inform parents when that teacher has been committed for trial or sentence or when the teacher has been convicted and sentenced.⁶ There was nothing that justified the Department's decision not to inform parents at the Largs Bay Primary School that Harvey had been convicted and sentenced.

Did a Policy to Inform the Minister Exist?

478. It is essential that the Department should inform its Minister of serious incidents that would affect the proper discharge of the Minister's portfolio or that have the potential to

⁵ See paragraphs 519 to 521 of Chapter 10.

⁶ Or any other relevant date.

become matters of interest in the Parliament or in the media. The reasons have been discussed in Chapter 7.

479. There is no doubt that the Department has, from time to time, informed its Ministers of critical incidents of a serious nature that have occurred in schools. That was clear from the evidence of Dr Lomax-Smith, Mr Lucas and Mr Weatherill. Their evidence was confirmed by the evidence of Mr Blewett as well as by evidence of Departmental officers including, Mr DeGennaro, Ms Andrews and Ms Emery. However, it is equally clear that no protocol or set of guidelines existed in the Department as to the kinds of matters on which the Minister should be informed. It is also clear that the Minister was not always informed about serious critical incidents at schools. Instead, the evidence points to the conclusion that the decision whether the Department would inform the Minister was made on an *ad hoc* basis.

480. There is further evidence that the Department has from time to time informed Ministers of serious incidents in schools. Towards the end of the Inquiry, the Minister's Office sent me a document that had been discovered in a search of documents in response to a request made pursuant to the *Freedom of Information Act*. The document is a note made after a meeting on 13 October 2010. It records matters discussed at that meeting. The persons present at the meeting were Ms Emery, Ms P Jarrett and Mr Damian Smith. In 2010, Ms Emery was the Director of the Office of the Chief Executive of the Department. She still holds that position. In 2010, Ms Jarrett was the Manager of the Minister's Office and Mr Damian Smith was an administration officer in the Minister's Office. The purpose of the meeting was to discuss aspects of the process of informing Ministers of critical incidents. Ms Emery and Ms Jarrett were both called as witnesses. Neither had any recollection of the meeting and could only attempt to interpret what was contained in the note. Ms Jarrett had prepared the note of the meeting. The first four paragraphs of the note are relevant. They read:

Pat mentioned that the process of monitoring all critical incident reports within the Minister's Office had "dropped off" since the election and she had organised a meeting with Lucille Lord to have the name of an MLO on the database so that we could pick up the previous procedures.

Jen stated that at present, all critical incident reports are monitored by designated officers in the Department. The Director OCE is one of the designated officers and is expected to inform the CE &/or MO of any incident/s which may impact on the Minister or may appear in the media. For high level incidents this is done in consultation with the DCE, S&CS.

The Media Liaison Officer in the CE's office contacts the Minister's Media Adviser immediately if there are any reports which are or may become critical to the Minister especially through the media.

The Deputy Chief Executive, Schools and Children's Services (or her nominee) makes regular contact with the Minister's Chief of Staff immediately she is aware of any unusual or threatening event which could be contentious or dangerous. The Director, Office of the Chief Executive, may also contact the MO, through the Chief of Staff.

I explain the abbreviations used in that note.

- MLO means Ministerial Liaison Officer.
- Director OCE means Director, Office of the Chief Executive.
- DCE, S&CS means Deputy Chief Executive, Schools and Children's Services.
- MO means Minister's Office.
- CE means Chief Executive.

It was Ms Emery's evidence that the note recorded the process that existed for informing Ministers of serious critical incidents. The intended process was that designated officers in different units of the Department should monitor the reports of critical incidents. Those designated officers would report serious incidents to Ms Emery whose task it was then to inform the Chief Executive or the Minister, or both, of the matter. In the case of what the note calls "high level incidents", it was the task of the Deputy Chief Executive, Schools and Children's Services to inform the Minister. In December 2010, Ms Jan Andrews held that position. The note confirms that the Department did have a practice in 2010 of informing Ministers of serious critical incidents. The meeting was discussing a process and examining how it might be improved.

481. While there was a practice of briefing the Minister in relation to serious critical incidents at schools, the practice was not consistently followed. Although Ms Andrews, as Deputy Chief Executive, Schools and Children's Services, had sent the email of 2 December 2010 to Mr Blewett pursuant to that practice, she failed to follow it up with a written briefing to the Minister. Ms Andrews, for reasons that are quite unsatisfactory, failed to ensure that there was any proper management of the matter. Further evidence of a failure to adhere to the practice of keeping the Minister informed is provided by the fact that on 23 November 2012, the Department had to brief Minister Portolesi on a number of matters, some of which had occurred some time before the Minister had been appointed.

482. The fact that it is intended that the Minister should be informed of serious critical incidents is also confirmed by the November 2012 edition of the document called *Critical Incident Reporting* referred to in paragraph 214. That document states that the intended practice is that the Director, Programs and Regional Development is the person responsible for contacting both the Minister for Education and the Chief Executive of the Department to inform them of a critical incident. The Director, Programs and Regional Development is Ms Kibble. She is employed in the Office for Schools. Since the events of October and November 2012, the Department has improved its practices of informing the Minister. However, it is desirable that the Department should establish a policy that expressly states that the Minister is to be informed immediately after allegations of sexual misconduct have been made against a teacher and follow that initial advice reasonably quickly thereafter with one or more written briefings as required to keep the Minister abreast of all developments. The Minister is entitled to expect to be informed by the Department of those and other serious critical incidents that occur at schools. The establishment of such a policy is likely to avoid the risk of the Department failing to inform the Minister in a timely manner.

Briefing Minister on Appointment

483. Another occasion when the Department does not always adequately brief the Minister on serious critical incidents is upon the Minister assuming office. The Minister is entitled to expect that, on assuming office, the Department will provide a thorough briefing. That briefing should include information as to serious critical incidents that are currently being managed by the Department. It is an obvious step to take. The briefing will enable the Minister to give a ready response should some aspects of the matter be raised either in the Parliament or in the media. One remarkable aspect of this matter is that when the Hon. Grace Portolesi MP became Minister for Education, the Department did not brief her in any way about the matter of Harvey. Harvey had pleaded guilty to a very serious offence. His conduct ranks as one of the most appalling sexual assaults on a child at a Government school in South

Australia. When Ms Portolesi assumed office, Harvey had pleaded guilty but had not then been sentenced. The Department should have informed Ms Portolesi as the new Minister that Harvey had pleaded guilty and was yet to be sentenced. It had failed to do so because the matter had slipped from the corporate memory of the Department. That itself was a consequence of the failure of the Department to monitor the course of the prosecution of Harvey. Even when Harvey had been convicted, the Department failed to inform her of that fact. The first information she had received about anything relating to Harvey was the inaccurate briefing in late March 2012 recommending a reply to the letter from Mr Bohm referred to in paragraph 315 in Chapter 6.

484. For these reasons, it is recommended that the Department establish a policy that it will inform the Minister of serious critical incidents, including allegations of sexual misconduct, immediately on learning of them. That information should initially be given by email or telephone to the Minister or to the Minister's ministerial advisers. That initial information should be followed as soon as reasonably practicable with one or more written briefings as required to keep the Minister informed of developments as they occur. In addition, upon a new Minister assuming office, the Department should provide the Minister with a written brief of serious critical incidents, including allegations of sexual misconduct, that are still current. The brief should inform the Minister of the current state of the matter and any likely developments.

Departmental Reforms

485. It would be quite unfair to the Department to list the above failings without stating that, since this Inquiry began, the Department has taken some steps to put its own house in order. Some of those steps have been mentioned in the Introduction to this report. It has implemented some other procedures that reflect suggestions made by this Inquiry in the course of the hearings and at the discussions with Departmental officers, for example, the establishment of a unit to manage critical incidents. That procedure would be improved by the appointment of a person to manage and have the oversight of a critical incident until the matter has been entirely resolved.

486. I have examined two bundles of documents supplied by the Department concerning the arrest of members of staff or volunteers at schools in the period 19 November 2012 to 15 May 2013. I have been told by the Department that they are the only matters where members of staff or volunteers have been arrested and charged in that period with sexual offences. I wished to limit my inquiries to the question whether parents or the Minister had been informed. The documents supplied to me were limited to briefings to the Minister and letters to parents in relation to each matter. The documents supplied demonstrate that the Minister is receiving prompt notice. Parents have also received prompt notice in all cases, save two where the notice to parents was given about one month after the arrest. One of those matters is mentioned in Chapter 10. In the other matter, the school had written a letter to parents of students in the class of the teacher alerting them to the allegations before any arrest had been made. That letter was sent on 28 November 2012. On 21 February 2013, another letter was sent to the parents of that same group of students. The teacher was ultimately arrested on 28 February 2013. On 22 March 2013, a letter was sent to all parents in the school informing them that a teacher had been arrested. The letter stated the name of the teacher and the offence with which he had been charged. There appears to be no reason why the letter stating that the teacher had been arrested could not have been sent sooner. However, it cannot be

said that a delay of one month is critical. The important thing in that matter is that notice was given to parents of the students in the class of the accused teacher informing them of the allegations.

487. As the two bundle of documents concern matters outside the Terms of Reference of this Inquiry, it was not appropriate to make a detailed investigation of the facts of each matter. Such an investigation would not only have been outside the Terms of Reference but would have considerably delayed the Inquiry. I can do no more than report that, on the face of the documents, the Department's procedures for informing parents and the Minister are more timely and more consistent than before. However, the Department needs to improve those procedures in order to ensure that in all cases, notice is given to parents within a reasonable time. What is a reasonable time is addressed in paragraph 629 of Chapter 12.

CHAPTER 9 – SEXUAL OFFENDING IN SCHOOLS

488. The Terms of Reference require recommendations to be made as to the appropriate procedures that should be put in place to manage allegations of sexual misconduct made against members of staff at schools. In order to be able to draft appropriate recommendations, it was necessary to obtain an understanding of the nature of the sexual misconduct alleged to have occurred at schools. That understanding would also enable an assessment to be made of the number of occasions on which alleged sexual misconduct was likely to involve more than one victim. I, therefore, caused a survey to be made of allegations of sexual offending in schools operated by the Department in the four years from 2009 to 2012. It disclosed that, if attention had been confined to the events relating to the conviction of Mark Harvey, it would have resulted in a most incomplete understanding of the kinds of the sexual offending alleged to have occurred in schools.

489. The starting point for the survey was a brief by the Department to Ms Portolesi, the then Minister for Education, of a list of matters in which allegations of sexual misconduct had been made against teachers. The brief was dated 23 November 2012. It is a confidential exhibit. I then asked the Investigations Unit of the Department to let me have all files where there had been allegations of sexual misconduct committed by a teacher or other member of staff at a school in the four year period from 2009 to 2012. The Director of Public Prosecutions keeps records of prosecutions being handled by the Office of the Director of Public Prosecutions of persons who are registered teachers or are believed to be or to have been registered teachers. The Director of Public Prosecutions kindly consented to the use of those records to use as a cross-check of the information received from the Investigations Unit. As a further cross-check, the Inquiry requested and obtained from the Teachers Registration Board case summaries of all inquiries by the Board into the conduct of teachers for the financial years ending 30 June 2009 to 2012. Where necessary, additional information was obtained from the SA Police.

490. It is not possible to assert that the survey has examined the records of every matter in which an allegation of sexual misconduct had been made against a teacher or other member of staff at a school operated by the Department in that four year period. There were difficulties in matching all of the records obtained. In addition, it was not possible to be satisfied that the Inquiry had received from the Department all documents and other information on every matter in which an allegation of sexual misconduct had been made in relation to a member of staff at a Departmental school in the four year period 2009 to 2012. One reason for that was the fact that allegations made in the years 2009 to 2012 occasionally concerned conduct alleged to have occurred before 2009. Another reason is the inadequate record keeping of the Department. Although the Inquiry had asked the Investigations Unit at the Department to provide all files relating to sexual misconduct in the four years from 2009 to 2012, examination of the records kept by the Director of Public Prosecutions disclosed that the files produced by the Investigations Unit did not include every matter in which a member of the staff of a school had been charged with a sexual offence in that four year period.

491. However, the cross-checks made against the records of the Director of Public Prosecutions and the Teachers Registration Board have supplemented the material provided by the Investigations Unit of the Department. I am satisfied, therefore, that the survey has captured almost all, if not all, of the separate allegations of sexual misconduct made in the

four years from 2009 to 2012 and has provided sufficient information for the purpose of this Inquiry. For that reason, I decided not to cause a detailed search to be made in the Department in an attempt to obtain all files relating to allegations of sexual misconduct. As the purpose of the survey was to gain an understanding of the nature of the alleged sexual misconduct, of the outcome of those allegations and of the number of occasions on which alleged sexual misconduct was likely to involve more than one victim, it was not necessary to have a detailed statistical analysis. The survey provides quite sufficient information for the intended purpose and I am satisfied that it is appropriate to rely on it. In the result, the survey examined 75 matters in which allegations had been made against teachers or other members of staff in schools operated by the Department. It also examined another 20 matters that involved teachers and other members of staff in non-government schools.

492. The following remarks are based on information obtained from the survey as well as on other evidence given in the course of the Inquiry.

Place of Offending

493. Allegations of sexual misconduct will be made in respect of offending at different locations. The greater proportion of the offending will occur at a school. However, it might occur at a number of other locations. It might occur on the way to or from school, for example, on a school bus. It might occur while children are in the care of a school at a place other than a school, for example, at a school camp or while children are participating in a swimming carnival at a swimming centre. It might occur at a location that has nothing to do with a school, for example, a male teacher might be alleged to have had unlawful sexual intercourse with a female high school student at the teacher's residence. There might be other locations. The school and the Department will have to be prepared to manage allegations of sexual misconduct concerning teachers and students at a school wherever the alleged offending might be said to have occurred.

494. There will be instances when it will be alleged that a teacher has engaged in sexual misconduct that does not involve a student at the school. One example is where a male teacher has been charged with rape or some other form of sexual assault of a woman who has no association of any kind with a school. Another example is where a teacher is charged with committing an indecent act in public. In two of the matters in the survey, the teacher coached children at local sporting clubs and was alleged to have offended against one or more of those children who were not students at the school at which the teacher taught. If the conduct is of a kind that is inconsistent with the proper discharge of the duties of a teacher, the Department might have to suspend or dismiss the teacher or take other disciplinary action.

The Nature of the Offending

495. All forms of sexual misconduct against children are serious. Nevertheless, it is not inappropriate to state that there is a spectrum of offending ranging from the less serious to the most grave and appalling kind of sexual assault. Sexual offences range from an indecent assault of a minor kind that might involve no more than an inappropriate touching through to unlawful sexual intercourse and rape. The survey demonstrates that allegations of sexual misconduct in schools reflect that range of offending. Broadly speaking, the alleged offending falls into four kinds of misconduct. They are:

1. **Improper touching.** There are different levels of seriousness. It might be a very brief touching of a clothed child such as touching a female student's breast or touching a female student on the stomach. More serious offending in this category would include touching the genitals or genital area of a clothed child. In some cases, the touching may be accidental and in others deliberate. The touching might be brief or protracted. It might occur when other persons are present or when no person other than the alleged offender and the alleged victim are present. A large proportion of the alleged offending fell into the category of improper touching. There are 23 instances of this kind of behaviour which is 31 per cent of all allegations made. In 19 of those matters the alleged offender was not charged. Four of those matters were not reported to police and the remaining 15 were filed by police because the evidence was not sufficient to charge the alleged offender. One matter is the subject of a continuing investigation. In each of the three remaining matters, the alleged offender was charged with indecent assault. One matter is still the subject of a criminal prosecution. In the other two matters the alleged offender was acquitted after a trial.
2. **Inappropriate relationship involving no physical contact.** These are allegations where there has been no physical contact or sexual assault but where the teacher has engaged in inappropriate conduct. An example is the exchange by electronic means of inappropriate messages between a teacher and a student. A teacher may engage in a long exchange through emails or on Facebook or by telephone, sending messages of an overtly familiar or personal or flirtatious kind. In some cases, such an exchange might constitute the grooming of a child for some kind of later sexual activity. In other cases, the conduct suggests an infatuation with a particular student. Another example of inappropriate relationships of this kind would be a teacher repeatedly taking a boy or small group of boys on excursions to a museum, art gallery, theatre or cinema or some other venue that provides instruction or entertainment without being accompanied by any other adult. There were twelve allegations of an inappropriate relationship involving no physical contact.
3. **Sexual relationships.** There were 21 instances where it was alleged that a teacher had engaged in a relationship with a secondary school student involving sexual contact. In two instances a middle-aged male teacher had had a sexual relationship with a female student he was teaching. There were three instances of female teachers having sexual relationships with male students. There was one instance where a female teacher had had a relationship with a female student. There were five instances where it was alleged that a male teacher had had sexual contact with a male student. In some instances, the allegations were made soon after the alleged offending. In others, the allegation was made some years later. In some instances, the sexual intercourse had occurred on one occasion only while in other cases it was alleged that the intercourse had occurred on several occasions and over a period of time.
4. **Child pornography.** Eight matters involved being in possession of child pornography or other related offences involving pornography. Most of the allegations stemmed from police investigation of "chat rooms" and internet sites

notorious for activity involving child pornography. In one instance, child pornography was discovered while a school computer was being repaired.

These four groups do not represent the full extent of the alleged offending. It does not include the offending by Harvey. That was the only instance of that kind of offending. There was one instance of persistent sexual exploitation of children. The offending was with several boys aged about 10 years. The offending involved acts of gross indecency as well as unlawful sexual intercourse. The offender was convicted.

496. The survey examined the age of the victims. In seven of the 75 matters involving staff employed by the Department, it was not possible to determine the age of the victims. Of the remaining 68 matters, 38 (or 56 per cent) involved a victim of the age of 14 years or over. In 30 matters (or 44 per cent) the victim was under the age of 14 years.

497. In eleven of the 75 matters relating to staff employed by the Department, the matter was not investigated by police. There was a variety of reasons why they had not been referred to police. In one instance, the matter was reported to the Teachers Registration Board but the complainant asked the Department not to refer the matter to the police. In another, the allegations were so weak that they were not investigated. In another, the allegation was withdrawn. In another, an allegation was made but the alleged victim was not identified, thus preventing any investigation. In five instances, there were valid reasons for not referring the matter to police for investigation. In the other six instances, the Department deemed that they were of sufficient seriousness to require an investigation by police. In one of those cases, allegations were made against an employee in an OSHC service. On the allegations being made, the employee resigned. Given his resignation, the Department did not pursue the allegations. The resignation did not justify failing to report the matter to police. The proper authority to investigate allegations is the police, not the Department. The general rule should be that the Department refers all allegations to police for their investigation and assessment unless the allegation is manifestly frivolous or vexatious. If police do not believe that the matter is appropriate for investigation, they can inform the Department to that effect. I am, nevertheless, satisfied that the Department does, as a general rule, report all allegations to police. It could not be said that there is a culture of failing to inform police.

Some Statistics

498. In the case of the 64 matters involving teachers employed by the Department that were investigated by police:

- twenty-eight were filed by police with no further action being taken because the investigation had not disclosed sufficient evidence with which to charge the alleged offender;
- thirty resulted in charges being laid; and
- in six matters no charges have yet been laid because police are still investigating the allegations.

Thus, no charges were laid in almost half of the matters investigated by police. Of the 30 matters in which charges were laid, the outcome was as follows:

- seven are still proceeding;

- two were withdrawn after the complainants admitted that the allegations had been fabricated;
- two were withdrawn for other reasons prior to the trial;
- eight of the accused persons were acquitted after a trial; and
- eleven resulted in a conviction.

One matter of particular note is the two instances where the charges were withdrawn after admissions of fabrication. That fact underlines the need to have regard to the presumption of innocence, a matter that will be discussed in more detail later in the report.¹

499. If the seven matters that are still proceeding are put to one side, of the 23 remaining matters where the alleged offender was charged, eleven resulted in a conviction, that is to say, almost half of the offenders who had been charged were later convicted. However, the total number of convictions is a relatively small percentage of the total number of allegations of sexual misconduct. If the seven matters that are still proceeding are put to one side, there were eleven convictions out of a total of 57 matters where police investigated the allegations. Thus, the convictions represent some 20 per cent of the matters where police investigated the allegations. It is difficult to draw any firm conclusion from these figures.

Matters When Conviction Recorded

500. The nature of the offending in those matters where convictions were recorded is as follows. Three matters involve offending against another member of the offender's family. The offending did not occur in the school and had no connexion of any kind with the school. One of those offences was unlawful sexual intercourse with a foster child. A second was for physical assault of the offender's daughter and the third involved covert filming by a male of his stepdaughter in her bathroom and bedroom. While the offending disqualified those persons from teaching, none of this offending gave rise to any reasonable belief of offending against children at a school.

501. In addition to the one instance of unlawful sexual intercourse mentioned in the previous paragraph, there were five other convictions for unlawful sexual intercourse. One was the matter of Harvey. A second was unlawful sexual intercourse by a male teacher with a 17 year old male student. A third was unlawful sexual intercourse by a male teacher upon a 13 year old Year 9 female student in a high school. That same offender pleaded guilty also to two counts of unlawful sexual intercourse in 2009 upon a 16 year old female student as well as one count of possessing child pornography. A fourth was unlawful sexual intercourse by a male teacher with a 14 year old male student.

502. A volunteer tutor was convicted of persistent sexual exploitation of five boys aged approximately 10 years. He was a tutor in a learning assistance program. In another case, a tutor was convicted of one count of sexual exploitation of a 14 year old boy. He was a retired

¹ See para 556 below.

teacher working as a tutor and the offending occurred in the victim's home. None of this offending occurred at a school.

503. Two matters concerned grossly improper relationships with 14 year old boys in which sexual assaults occurred. In one instance, the offender was a close and trusted friend of the boy's family and the offending occurred at the house of the boy's family. None of this offending occurred at a school. In that case, the Director of Public Prosecutions did not proceed with the charges because the evidence was not sufficient to prove the offence beyond reasonable doubt but the teacher was found guilty by the Teachers Registration Board. The standard of proof in the Teachers Registration Board is the balance of probabilities. That is a lower standard of proof than that which the Director of Public Prosecutions has to apply.

504. In those matters where convictions were recorded, the offending occurred at a school on two occasions only. All of the offenders were male. There are only three occasions where the offending involved children under the age of 14 years. The only matter in which a girl under the age of 14 years was involved was the matter of Harvey.

505. One matter that the survey demonstrates is that a very large portion of the alleged offending was of a kind that did not suggest that children in addition to the alleged victim might have been abused. In the case of Harvey and the volunteer tutor, it was possible to identify children who had been in regular and frequent contact with the offender. That would give rise to a reasonable suspicion that there might be other victims. In the case of Harvey, it was children in the OSHC service. In the case of the volunteer tutor, it was other boys whom he had tutored.

506. Lest the matters in which the offender was convicted might present a distorted picture as to the number of occasions when there might have been more than one victim, the survey also examined all instances where a person had been charged. The alleged offending in those matters was examined for the purpose of making an assessment whether the alleged misconduct gave rise to a reasonable suspicion that there might be other victims. The factors taken into account when making that assessment were

- the nature of the alleged offending;
- the circumstances in which the alleged offending occurred;
- the date of the alleged offending; and
- the age of the victim or victims.

That assessment suggested that there were only five instances where the alleged offending was of such a kind that there was a reasonable suspicion that there might be more than one victim. It is reasonable to conclude on the basis of the evidence of the past four years that the occasions where it will be likely that there will be more than one victim will be relatively infrequent. However, that fact does not relieve the Department of the obligation on each occasion when an allegation has been made to consider whether there might be other victims.

A Postscript

After this report had been completed, the Inquiry learned of the events concerning Mr David Bonython-Wright (hereinafter called "Wright") who was sentenced on 20 May 2013 for five

sexual offences, including four offences of unlawful sexual intercourse committed against two teenage school boys. The offending had occurred in 1984 and 1985. The Department had no knowledge of the matter. On 3 May 2013 the Department made enquiries of SA Police and obtained certain information. The Department then proceeded to conduct further investigations. It has supplied this Inquiry with the information it has obtained. That information discloses that Wright was not employed by the Department. He was self-employed and was engaged by the Department on a contractual basis to provide counselling services at a particular school. He continued to provide those services after he had been arrested in mid 2010. He was able to continue to have contact with children after his arrest because, at his first court appearance on 6 August 2010, he persuaded a magistrate to delete a condition from his bail agreement requiring him not to have unsupervised contact with any child under the age of 16 years. He ceased to have contact with children on 12 December 2011. On 15 December 2011 he informed the principal of the school at which he was working of the charges against him. That was the first knowledge that any officer in the Department knew that he had been charged. It appears that the principal failed to notify the School Care Unit or any other person in the central office of the Department. In addition, it seems that another officer of the Department might also have failed to inform the central office of the Department of the charges against Wright. The Inquiry has not been able to investigate this matter. The matter is not within the Terms of Reference and I have no authority to investigate the facts and circumstances in any detail. However, the information provided to this Inquiry raises at least two questions. Those questions are whether the prosecution opposed the application by Wright to delete the condition of his bail agreement preventing him from having contact with children and why two employees of the Department who knew of the allegations against Wright did not report them immediately to the central office of the Department. It should be noted that, soon after learning of the matter, the Department sent letters to the parents of children with whom Wright had been working informing them of the conviction. It also gave the Minister prompt information about the matter.

CHAPTER 10 – TWO ARRESTS IN 2013

507. The separate arrests in January and February 2013 of two men provide useful examples of the kinds of issues with which the Department has to deal when managing allegations of sexual misconduct. One was a case manager in a special educational program and the other a teacher at a primary school. In both cases the prosecution is still proceeding. Neither person has yet been committed for trial. In order not to prejudice the trial of either, the case manager will be called “A” and the primary school teacher will be called “B”. For the same reasons, this section of the report will not state the names of the persons or organisations that might identify A or B.

A Case Manager is Arrested

508. The first matter concerned A, an employee of a non-government organisation (“NGO”) that had entered into a contract with the Department to provide a program called Flexible Learning Outcomes (“FLO”). The FLO program is provided from a number of high schools and other schools. The program is designed for and is available to young people between the ages of 10 and 19 years of age who are either at risk of disengaging from or have already disengaged from the mainstream schooling system. These young people are involved in the program that is delivered personally to each student by a case manager. The role of the case manager is to set an individual program for the student and to supervise the student. It involves regular and frequent contact with the student, often without any other person being present. A was a case manager employed by the NGO.

509. On 15 January 2013, police arrested A. He worked with students enrolled at several high schools and other schools at which the FLO program is available. A was charged with 10 counts of unlawful sexual intercourse with one of his female students and with three counts of aggravated indecent assault of the same student. The student was 16 years old at the time of the alleged offending. A was released on bail. The conditions of bail required him not to approach, communicate or associate with any person under the age of 18 years and not to attend any educational or recreational facility that persons under the age of 18 years might attend.

510. SA Police informed an officer of the Investigations Unit of the Department on 11 January 2013 that they were investigating allegations against A. In order to protect the integrity of the investigation, the police asked the Investigation Unit to keep the information confidential. On 15 January 2013, the police informed the Investigations Unit that A had been arrested. The very same day senior officers in the Department met and decided, among other things, to send letters to parents of students who had had contact with A and to prepare a Ministerial briefing.

511. As the FLO program is available at a number of high schools and other schools, it was necessary to ascertain the schools at which A acted as a case manager and then to ascertain the students for whom A had been acting as case manager. There were eleven such schools. It was then necessary to obtain the addresses of both the students and their parents. As some of the students did not live with their parents, it took a little time to ascertain all addresses. As it had been decided also to send a letter personally to those students who were over the age of 18 years, it was necessary to check which students were over the age of 18 years. Another

difficulty was that the Department was making these enquiries during the school holiday period. A list of 35 students had been ascertained by 16 January but full details were not available until 21 January.

512. On 15 January, the Department asked the investigating police officer if he had any objection to a letter being sent to parents of participants in the FLO program as well as to independent older students in the program. On 16 January, the investigating officer informed the Department that he had no objection to letters of that kind but said he wished to see a copy of the letters before they were sent. The draft letter was subjected to a number of revisions. It was sent to the investigating police officer for his approval on 22 January. On 23 January, Superintendent Powell, the head of the Sexual Crimes Investigation Branch of SA Police, informed the Department that the letter could be sent.

513. In the meantime, a Ministerial briefing had been sent to Minister Portolesi on 17 January 2013. The Minister was then on leave. A copy was given to the acting Minister. On 21 January, the Premier announced that he had re-ordered the Cabinet Ministries. One consequence was that the Hon. J Rankine MP replaced the Hon. Grace Portolesi MP as Minister for Education.

514. Although SA Police had consented to the intended letters to parents and older participants in the FLO program, Ms Kibble decided that, as it was intended to name A in the letter, the Department should obtain advice whether it was lawful to name him from one of the solicitors in the Crown Solicitor's Office outposted to the Department. She asked for the advice on 23 January. The letter of advice was prepared on 24 January but for reasons that are not clear it was not received by Ms Kibble until 29 January. (Monday, 28 January was the public holiday for Australia Day).

515. It was intended to email the letter to the regional director and for the regional director to send it to the high schools who in turn would send it to parents on 31 January. However, the Crown Solicitor's Office had advised Ms Kibble that the Department should check whether a suppression order existed before sending the letter. A check was made on 4 and 5 February. Early on the morning of 5 February, the Department ascertained that no suppression order had been made. At 9.20am Ms Kibble sent an email stating that the Department would go ahead and arrange for the two letters to be sent.

516. At about that time, Ms Kibble was very busy with a number of separate matters, including the matter of B that will be mentioned in a moment. B had been arrested on 2 February. It was also necessary for Ms Kibble to obtain approval to send the letter. That approval was not obtained until 13 February. The evidence did not make it clear why that approval was necessary. In the event, the letters were delivered on 13 February to the regional director for him to deliver to the high schools so that the high schools could in turn post the letters to parents on 15 February. The letters were posted to parents on 15 February. In the result, the letters were sent some eight days after they were ready to be sent.

517. The Department also conducted a review of the work history of A and asked the NGO whether A had received a clearance to work with children. It learned that A had a criminal history but had received a clearance from the Department for Families and Communities to work with children. Further enquiries disclosed that A had a conviction for the offence of indecent behaviour.

518. These events give rise to four questions, namely:

1. whether there had been an undue delay in sending the letter;
2. whether there had been a failure to conduct a proper screening of the suitability of A to work with young people;
3. was it appropriate for the Department to name A in the letter to parents; and
4. did the Department act in breach of the Information Privacy Principles?

It is convenient first to examine the questions whether there had been undue delay and the failure to conduct a proper screening process. The next two questions will then be addressed.

An Undue Delay?

519. As is apparent from the narrative above, the process of sending a letter to the parents and participants in the FLO program was not as simple as it would usually be when a letter is sent to parents at a school. Instead of being able to rely on a single list of addresses at one school, the Department had to ascertain the names and addresses of parents from several high schools and had to do so during the school holiday period. It therefore took some time for the Department to ascertain the names and addresses of parents. That delay was compounded by the decision to send a letter to those students who were over the age of 18 years.

520. The process of obtaining the consent of SA Police, of obtaining advice from the Crown Solicitor's Office, and of checking whether a suppression order existed all added to the time taken to send the letters. While each process in itself was quick, each step added further time to the sending of the letters. What is important is that on 15 January 2013, immediately on learning of the arrest of A, the Department had decided that it should inform parents and commenced the process by ascertaining the persons to whom that it should be sent. It proceeded with all reasonable expedition until 5 February. Thereafter, eight days elapsed before Ms Kibble received the authority to send the letters. The letters were immediately thereafter delivered to the school to be sent by the school to the parents.

521. While the delay of eight days was unfortunate, it was not critical. The delay must be considered in its factual context. The alleged offending by A is alleged to have occurred between 1 October and 20 December 2012. The students who had dealings with A were aged between 14 and 20 years. Fifteen were over the age of 18 years. Nine of the students were females. Although those students are students at risk, they are, nevertheless, capable of knowing whether A had offended against them. A was arrested some three months after the first of the alleged offences and some three weeks after the last. Viewed in that factual context, the delay was not significant. It would not have had any adverse consequences for the students who had dealings with A because A had been immediately suspended, it was the vacation period, and the program for 2013 had not started. I repeat, the important fact is that the Department had decided to send the letters on 15 January, immediately after A had been arrested.

522. Shortly after the letters had been sent on 15 February, the Department was advised by the NGO that A had been the case manager for 15 other students at three other high schools. The Department immediately arranged for letters to be sent to the parents of those students. It was a very appropriate action.

A Defective Screening

523. The contract between the Department and the NGO required that all persons employed in the FLO Program should have a current criminal history clearance. The obligation to obtain the clearance for those employees is expressed in the Second Schedule of the contract in these terms:

All personnel delivering programs must have a current Criminal History clearance through either the Departments (sic) for Education and Children's Services (DECS) or the Department for Families and Communities (DFC).

It was a mandatory requirement with which the NGO had to comply. This contractual obligation reflected the terms of section 8B of the *Children's Protection Act* that required an organisation intending to employ a person to work with a young person under the age of 18 years to obtain an assessment of that person's criminal history. Thus, it was the NGO, not the Department, that had the obligation to obtain a clearance for its employees to work with children in the FLO program.

524. In 2011, screening conducted by the Department for Families and Communities was carried out by a unit in that Department. On 21 October 2011, the name of the Department for Families and Communities was changed to the Department for Communities and Social Inclusion ("DCSI"). The screening unit acts in response to requests from organisations seeking criminal history checks in respect of persons who wish to work with children. It uses the services of the CrimTrac Agency, commonly called "CrimTrac". CrimTrac is an executive agency established under the *Public Service Act* of the Commonwealth. It maintains a central index of information that identifies whether a particular individual is recorded in police records maintained in each of the States and Territories of the Commonwealth. CrimTrac, in co-operation with the Australian Police Services, uses that central index to provide a record of the criminal history of individuals.

525. In May 2011, the NGO had asked the screening unit to conduct a screening of A. The unit made a search through CrimTrac. CrimTrac reported that A had three convictions. One of those convictions was for indecent behaviour. The conviction had been recorded in the Christies Beach Magistrates Court on 9 September 1996. The court had ordered A to pay a fine of \$400. The other convictions were for offending of a relatively minor kind.

526. The Department for Families and Communities had in July 2010 published a document entitled *Standards for dealing with information obtained about the criminal history of employees and volunteers who work with children*. I will call it "the DFC Standards". It had been prepared in consultation with a number of organisations, including SA Police, the Association of Independent Schools and Catholic Education SA. The document establishes standards by which to assess the suitability of persons to work with children and includes advice on the process of assessing the suitability of a person to work with children. Standard 5 is a section of the document that is a guide to assessing criminal history reports. It states the kinds of offending that could be considered to disqualify a person from working with children. The first part of that section is a list of offences that indicate a prima facie risk of harm to children. That list included sexual assaults, violence in relation to a child, and any child abuse offence. It is followed by another category of offences described as "Relevant offences that potentially indicate unsuitability to undertake prescribed functions". Those offences include sexually motivated offences and offences of violence and assault. The offence of indecent behaviour did not fall within either list. However, the document also

expressed the need to examine the offending and to ascertain what the document called the “contextual factors” surrounding the conviction and the “situational factors” relating to the position in which a person is to be employed in order to determine the likely risk of harm to children. There are fourteen contextual factors. They include:

- the nature, gravity and circumstances of the offending and its relevance to child related employment;
- the length of time since the offending occurred; and
- the severity of the penalty ordered by the court.

There are seven situational factors which relate to the circumstances in which the employee would be working with children. They include the likelihood of unsupervised access to children or transportation of children, two matters particularly relevant to the intended employment of A. The DFC Standards also state the burden of proof that applies for particular offences. In the case of the offence of indecent behaviour, the person making the assessment would have to be satisfied on the balance of probabilities, that is to say, whether it was more probable than not that the individual posed a risk of harm to children. If the screening unit requires more information in relation to an offence, it would contact SA Police or the person seeking the clearance or both.

527. In 2011, Mr Laity was the manager of the screening unit. He is a former police officer. He was aware of the DFC Standards. Mr Laity has no independent recollection of the matter. His memory of events is reconstructed from the records of the screening unit. Mr Laity explained that, in June and July 2011, the screening unit was understaffed. It had two assessment officers less than its usual complement. From January 2011 the unit had received an unexpectedly large number of applications for clearances. That heavy flow had continued into June and July 2011. Because the unit was understaffed, Mr Laity decided to triage the assessment process and allocate tasks according to the resources available to the unit. CrimTrac had provided the screening unit with the details of the criminal history of A on 30 June. On 1 July Mr Laity decided that he would himself assess the information provided by CrimTrac. He examined the information provided by CrimTrac in respect of A. Because of his earlier experience as a police officer he was aware that the offence of indecent behaviour embraced a very wide variety of offending, ranging from relatively minor offending such as bathing naked to more serious kinds of offending. Noting that the penalty was only a fine of \$400, he concluded that the offending was relatively minor and would not disqualify A from working with children. He was encouraged to reach that conclusion by the fact that, on the information before him, the offending had occurred almost 15 years before. He, therefore, decided that it was not necessary to instruct a member of his staff to ascertain from SA Police the facts and circumstances of the offence of indecent behaviour. His decision was clearly influenced by the unit’s lack of resources. He then arranged for a clearance for A to be issued.

528. On 1 July 2011, Mr Laity caused an email to be sent to the NGO stating that A had been cleared. The relevant part of the email read:

The Screening Unit has completed a national criminal history record check and screening assessment and has cleared the following person: (The email then named A).

A clearance letter will be posted direct to the applicant.

On the same day, the screening unit sent a letter to A. The first two paragraphs read:

As a result of the recent National Criminal History Record Check and Screening Assessment I am pleased to advise you that you have been cleared to work with children, vulnerable adults and recipients of Aged Care Services pursuant to paragraph 63-1 of the Aged Care Act 1997 (Cth).

Criminal History assessments are conducted in accordance with the guidelines published pursuant to Section 8A of the Children's Protection Act 1993 (SA) and, where applicable, the Aged Care Act 1997 (Cth).

A was, therefore, given a clearance to work with children.

529. The fact that the offence of indecent behaviour includes a very wide range of offending was not a valid reason for Mr Laity not making enquiries of SA Police to determine the facts of the offending. Indeed, the fact that the offence comprehends a wide range of offending emphasises the need for inquiry because, standing alone, the fine does not sufficiently indicate the level of seriousness of the offending. Furthermore, when an assessment indicates that further inquiry is required, it is not sufficient to ask any person seeking the clearance to explain the circumstances of the offending but it is necessary also to ascertain the facts from SA Police. It is a common human failing for an offender to put the facts of any offending in the best possible light. The absence of information from SA Police could result in the assessment officer acting on inadequate information. When asked whether, with the benefit of hindsight, he believed he should have checked with SA Police to ascertain the facts of A's offending, Mr Laity honestly and candidly admitted that he should have done so.

530. There was another reason why Mr Laity should have enquired further before granting A a clearance. When Mr Laity made the assessment, he was aware that earlier in 2011, another organisation had applied to the screening unit for a criminal history check on A. That check had disclosed the same three convictions that Mr Laity had read on 1 July 2011. The assessment officer who had read those convictions had noted the conviction of indecent behaviour. On 16 March 2011, the assessment officer wrote to A stating that the offence "raises an issue of concern that requires further assessment". The officer asked for written details as to the nature and circumstances of the offence. A did not answer the letter and a second letter was sent on 19 April. A did not answer the second letter. The application was withdrawn by the agency in June. Mr Laity said that the application could have been withdrawn for a number of reasons, including the fact that the agency had decided to employ someone else. Notwithstanding that Mr Laity knew that a letter had been written to A asking him to explain the circumstances of the offending and that the letter had remained unanswered, Mr Laity made the decision to issue a clearance. He erred in doing so. The fact that a colleague had considered it necessary to make further inquiry should have caused Mr Laity to inquire further. Mr Laity said he accepted full responsibility for his decision. He added that, if a screening process is to operate effectively, it must be properly resourced and staffed.

531. The NGO was aware that A had committed the offence of indecent behaviour. It had asked him to produce a National Police Certificate. A National Police Certificate is a certificate as to criminal record of a person. It records the information that is kept by CrimTrac. A produced a National Police Certificate to the NGO. It stated the same three convictions that Mr Laity had seen. The manager of the NGO and a fellow employee had interviewed A and questioned him about the events of indecent behaviour. A admitted the offending and explained that he was drunk at the time. The NGO manager's evidence was

that as the offending did not involve a young person, that as a fine of only \$400 had been ordered, and that as the conviction was about 14 years before, she came to the conclusion that A was not disqualified from being employed in the FLO program. She also relied on a favourable report from A's TAFE lecturer. The manager said that the clearance from the screening unit had confirmed her decision to employ A.

Should A Have Been Cleared?

532. It is readily apparent that the screening unit did not conduct a thorough screening process. It should have asked SA Police for further information as to the offence of indecent behaviour and it should have interviewed A. However, even if it had acted appropriately, it cannot be presumed that A would not have been given a clearance. Any consideration of the question whether the screening unit should have decided not to give a clearance to A must be made on the facts that would have been available to the screening unit had Mr Laity made appropriate requests in July 2011. The fact that A has been subsequently arrested and charged must not be taken into account. It must be ignored. He has not yet been tried. Not only is A entitled to the presumption of innocence but the matter must be considered only on the basis of facts that should have been obtained in 2011.

533. The DFC Standards do not state that offences with a sexual element automatically disqualify a person from working with children. If that were so, no person who had committed an offence with a sexual element could ever be employed to work with children, no matter how trivial the offending might have been and no matter how long ago the offending had occurred. Fair minded members of the community would regard that as too absolute and too inflexible a standard. Further assessment is required to establish whether the offending disqualifies the person from working with children. The DFC Standards require a judgment to be made. When making that judgment, regard is to be had to the factors listed in those standards. Those factors include the circumstances of the offending, the period of time since the offending occurred, the age difference between the victim and the offender, the severity or leniency of the penalty imposed by the court, and whether there is any pattern of criminal behaviour. None of the factors listed in the DFC Standards are absolute. They are all of a kind that require a value judgment to be made. Reasonable people might, therefore, reasonably reach different conclusions on the weight to be attached to each of the relevant factors. As a consequence, reasonable people might for justifiable and understandable reasons reach a different conclusion on the question whether a person should be permitted to work with children.

534. I have examined the Police Apprehension Report that would have been available to Mr Laity had he requested it. I have also heard evidence from the manager of the NGO who interviewed A. She recounted A's explanation of the offending. As A has yet to be tried, it is essential that nothing is stated in this report that would prejudice a fair trial. For that reason, this report will not set out the facts of the offending which led to the conviction for indecent behaviour. It is sufficient to note that the Police Apprehension Report disclosed that at the time of the offending A was 19 years old, that the offending had in fact occurred 17 years before, and that there had been no subsequent offending that had any sexual element. Having considered the facts that would have been available to Mr Laity had he asked, it is sufficient to report that this was a borderline case. It is a case where reasonable people could for valid reasons have reached different conclusions on the question whether A was disqualified from working with children.

Should A Have Been Named?

535. The question whether it is desirable in a letter to parents to name a teacher who has been charged with a sexual offence is discussed in Chapter 12. The conclusion is that, as a general rule, it is preferable not to name the teacher. I will not state the reasons for that conclusion. They are set out in Chapter 12. In this case, it was not necessary to name A. He could have been described as “your son’s (or your daughter’s) case manager” or some other similar expression could have been used. Such a description would readily identify A to the recipient of the letter. It would have been preferable if the Department had not named A. It is proper to add that, as at present advised, there do not appear to be any adverse consequences of the fact that A was named.

A Breach of the Information Privacy Principles?

536. As noted in Chapter 4, Cabinet amended the Information Privacy Principles on 4 February 2013 to permit, among other things, disclosure of information in reporting concerns to relevant persons. It did so by adding the following paragraph to clause 4(10):

- (e) The agency has reason to suspect that unlawful activity has been, is being or may be engaged in, and discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.

That paragraph permits both the naming of the alleged offender and a statement of the nature of the offending to be made in a letter to parents where there is a concern that there might be other victims in addition to the alleged victim. Those students for whom A was case manager and their parents would be relevant persons within the meaning of paragraph (e). The letter sent in this case did not, therefore, breach the Information Privacy Principles.

A Primary School Teacher is Arrested

537. The arrest in February 2013 of B, a primary school teacher, provided an example of questions that need to be considered when it is difficult to determine whether a teacher’s offending might have involved children at the school. It also illustrated that there are some who are prepared to ignore a request to keep the terms of a letter to parents confidential.

538. On Saturday, 2 February 2013, B was arrested by police at his house and charged with being in possession of child pornography. Next morning, on Sunday 3 February, B informed the principal of the school of his arrest. The information was quickly drawn to the attention of appropriate officers in the Department, including Ms Kibble. Ms Kibble took over the management of the matter. She arranged for instructions to be given to the principal and asked an officer in the Investigations Unit to contact SA Police to obtain details of the offending so that a letter could be sent to parents. Soon after 1.00pm, Ms Kibble sent an email to both the Minister’s Chief of Staff and the Chief Executive and Deputy Chief Executive of the Department informing them that B had been arrested and B’s access to the school had been stopped. During the afternoon, the principal of the school obtained B’s keys to the school and took possession of B’s laptop computer at the school.

539. On the morning of 4 February, SA Police had consented to the Department informing parents of the fact that B had been arrested. On the morning of 5 February, the principal of

the school informed staff of B's arrest and briefly described the allegations. He asked staff to keep the matter confidential. Later that morning he made the mandatory report to CARL.

540. Ms Kibble managed the preparation of the letter to parents. It was sent to the school on 7 February so that the school could in turn post it to parents that evening. On the same day the Minister received a written briefing. In this instance, the Department was in a position to send the letter promptly. It was assisted by the fact that a list of parents was readily available. In addition, it did not have to seek legal advice as it had just received the advice relating to the letter sent concerning the charging of A.

541. The letter to parents was in the following terms. Although the letter named the teacher on four occasions, his name has been omitted in the copy below and replaced with the letter "B".

NOTICE TO PARENTS

Dear Parents and Caregivers,

This letter is to inform you that I have been advised that a teacher at our school, B, has been arrested and charged with "*one count of produce child pornography (Basic Offence)*".

B was immediately stood down from his duties as a teacher in keeping with Department for Education and Child Development (DECD) procedures. The outcome of the court proceedings and any subsequent DECD internal investigations will determine whether B returns to teaching in the longer term.

DECD is committed to keeping parents informed in regards to this matter and that further correspondence will be sent to you at significant milestones in the court process and, should the matter be committed for trial, at the culmination of the court case with information on the outcome.

DECD has disclosed this information to you as parents and caregivers. At this stage of the court process South Australian law prohibits anyone from publishing the fact that B has been charged in the media (including a newsletter) or on the internet. It is therefore strongly recommended that you do not distribute this letter or post it on a website or social media such as Facebook.

I understand that with this information you are likely to hold concerns about the safety and welfare of your child. Please feel free to contact me directly at the school or seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198
- SA Police on 131 444
- Kids Helpline on 1800 55 1800

Please respect the sensitivity of this matter for the students and staff by raising any concerns with me personally.

The letter was signed by the principal of the school. Notwithstanding that the letter included the recommendation not to distribute the letter or post it on a website or social media such as Facebook, the letter was posted on Facebook the next morning. The media quickly became aware of that fact. At 12.29pm a report of the letter appeared in *AdelaideNow*. It was also reported in news bulletins on radio stations that afternoon and on at least three television stations in the evening news programs on 8 February.

542. The Department had decided to name the teacher because he had been employed since 2007 as a teacher of children in Grade 3 at that school. All the children at the school could, therefore, have been in contact with the teacher. Later in this report, the question whether it is

appropriate to name a teacher before the teacher has been committed for trial will be examined. The fact that irresponsible persons will post a letter on Facebook or publish it in some other way is one of the factors to be considered when examining that question. For the same reasons as apply in the case of A, the letter did not breach the Information Privacy Principles.

CHAPTER 11 – RESPONSIBLE DISCLOSURE TO PARENTS

543. When a school learns of allegations of sexual misconduct, the principal will have to consider whether and, if so, when to inform three groups in the school community of the allegations. Those three groups are the parents of the children at the school, the staff of the school, and the members of the governing council of the school. A school should always ensure that it acts responsibly when disclosing information to parents. Its purpose should be to provide factual information at an appropriate time: it should not circulate unsubstantiated allegations. There are a number of factors that must be considered when deciding whether and when to disclose information to each of these three groups. This chapter will examine those factors and other issues that affect disclosure to parents, staff and the governing council. It will also examine the need for the Department to keep the Minister informed of allegations of sexual misconduct.

544. The recommendations in this chapter apply with equal force if it should occur that allegations of sexual misconduct are made against a principal. If the allegations against the principal are reported to a teacher, the teacher should report the allegations to School Care Unit and the regional director. If the principal is arrested and charged with an offence, the deputy principal will assume the responsibilities of the principal as outlined in this chapter.

545. The survey by this Inquiry of allegations of sexual misconduct at schools under the aegis of the Department demonstrates that the majority of the alleged offenders were teachers. Hence, the discussion that follows will proceed on the assumption that the allegations have been made against a teacher at the school. The issues that are examined will apply with equal force to any member of the staff of a school and, as well, to employees of OSHC services.

546. There will be three possible occasions when a school will have to consider whether it should inform parents of allegations of sexual misconduct. The first is at the time when the school knows no more than what is contained in the allegations. The second is after the alleged offender has been arrested and charged with a sexual offence. The third is after the alleged offender has been committed for trial.¹ In some cases, the first knowledge that the school will have of the allegations is when a teacher has been arrested and charged. In that case, the school will have to consider whether to inform parents on two occasions only. The first will be on the arrest and charging of the teacher and the second will be when the teacher has been committed for trial or sentence.

547. Before examining the circumstances in which information should be disclosed, it is necessary to examine the factors that apply generally to the issue of disclosure of allegations of sexual misconduct. It is desirable that any proposed reforms should be grounded on principle and not be a knee jerk response to a particular crisis. That is especially so in this context where a number of factors compete against one another and have to be weighed in the balance when deciding whether to send a letter and what to state in the letter. The balancing

¹ In the discussion that follows the expression “committed for trial or sentence” includes, in the case of a teacher charged with a minor indictable offence or a summary offence, the date when the teacher pleads guilty or is found to be guilty.

of the interests of the victim and the interests of parents and the protection of their children on the one hand and the legitimate interests of the alleged offender on the other is an ever present factor in considering how to manage allegations of sexual misconduct at a school. Some aspects of that question were discussed in paragraphs 218 to 221 in Chapter 5. Other aspects will now be considered together with the legal and practical constraints upon disclosure to parents.

FACTORS RELEVANT TO DISCLOSURE

The Evidence Act

548. Reference has already been made in Chapter 2 to section 71A of the *Evidence Act*. Section 71A(4) prohibits the naming of the alleged victim of a sexual offence or publication of anything that might identify the alleged victim. Section 71A(2) prohibits publication of the name of a person accused of a sexual offence before that person has been committed for trial. The rationale for the latter prohibition is that a person should not be publicly associated with a sexual offence until a magistrate has determined that there is sufficient evidence for the accused person to have a case to answer. As noted in Chapter 2, while a letter to a small group of parents will, in all likelihood, not be a publication that infringes section 71A(2), questions remain whether a letter sent to parents in a school with a large number of students might be a publication that does infringe section 71A(2).

549. Section 4 of the *Evidence Act* defines a sexual offence for the purposes of that Act. The definition reads:

sexual offence means—

- (a) rape; or
- (ab) compelled sexual manipulation; or
- (b) indecent assault; or
- (c) any offence involving unlawful sexual intercourse or an act of gross indecency; or
- (d) incest; or
- (da) any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; or
- (e) any attempt to commit, or assault with intent to commit, any of the foregoing offences.

Paragraph (da) of the definition is very wide and is wide enough to include the various kinds of offending relating to child pornography. However, the definition of sexual offence does not include all offences of sexual misconduct. The kinds of sexual offending that might occur in schools are listed in Chapter 3. While only a few kinds of offending in that list do not fall within the definition of sexual offence in the *Evidence Act* (for example, stalking, indecent behaviour and sexual harassment), it is desirable that the Department should have one procedure in relation to the management of allegations of sexual misconduct in schools and, in particular, in respect of the question whether an accused person should be named in any letter to parents of children at a school.

Law of Defamation

550. Regard must also be had to the law of defamation. A statement that a person has been arrested and charged with a sexual offence is not defamatory provided that the statement is made so as not to carry any implication that he or she is guilty of the offence. Thus, a letter that states no more than the fact that a teacher has been charged with an offence and naming the offence will not be defamatory. However, a statement that allegations of sexual misconduct have been made against a teacher may be defamatory because it might carry the innuendo that he is guilty of the alleged conduct.

Consult Police

551. One practical restraint is that it will always be necessary to consult SA Police as to the timing and content of a letter if the letter is to be sent before the alleged offender has been committed for trial or sentence. It is both essential and manifestly obvious that nothing should be done to hinder or impede the police investigation or that might cause evidence to be tainted. It is essential, therefore, that a letter to parents sent during an investigation does not have any of those consequences. For that reason, SA Police insists that a school should not inform parents unless it has been consulted both as to the timing and the content of the letter. Consultation with SA Police is necessary even if the alleged offender has been arrested and charged. That is necessary because, in some instances, the investigation may be continuing even though the alleged offender has been charged with an offence. I do not think it is desirable for SA Police to be able to veto the sending of a letter. But at the same time, the Department should not send a letter where it might hinder or impede an investigation. It is unlikely that there will be any dispute on the question of whether a letter should be sent. If a dispute did arise, the Department should require SA Police to state in writing that it does not consent to the letter being sent with the reasons for that decision. The Department can then obtain legal advice as to how it should then act. It is not, however, necessary to consult SA Police after the alleged offender has been committed for trial or sentence.

552. On other occasions, there might be an issue as to the identity of the alleged offender or some other particular question that might require that no letter be sent to parents or that, if a letter is sent, it has regard to the particular issue. For example, if there is an issue as to identity, a letter to parents should not name the alleged offender.

Alleged Offender Removed

553. As already noted, the alleged offender will have been suspended while the police investigation is proceeding. The suspension of the alleged offender will reduce the risk that that person might commit further offences against either the victim or other children at the school.

Protecting the Victim

554. Plainly, any information to parents must be given in a way that does not contain anything that identifies the alleged victim or from which the identity of the alleged victim might reasonably be inferred. That obligation not only stems from section 71A(4) of the *Evidence Act* but it is also a matter of common prudence that the best interests of the alleged victim require that he or she not be named.

Safeguarding Other Children

555. Perhaps the most fundamental factor to be considered when an allegation is made in respect of a teacher at a school is the duty of the school and its staff to ensure the safety, health and well-being of children at the school. In this context, ensuring the safety, health and well-being of children at the school requires an assessment to be made of the question whether, in addition to the alleged victim, other children might be victims of the alleged offending. In this report, that assessment will be called “the risk assessment”. The risk assessment is necessary so that the school is able to inform parents whether the alleged sexual misconduct does or does not give rise to a concern that other children in addition to the alleged victim might also be victims. That information will enable parents to be alert to behaviour of their children that might indicate sexual abuse. The risk assessment is part of the process of making responsible disclosure. It will also assist the school in identifying children who might need support. The risk assessment will have to be made by the Department. The manner in which the risk assessment is made will be considered later in this chapter.

Presumption of Innocence

556. While due weight must be given to the interests of the victim and the safety and welfare of other children at the school, it is necessary to have regard also to the proper interests of the teacher against whom the allegations have been made. In this respect regard must also be had to another important principle, the presumption of innocence. It is a fundamental principle of our criminal justice system that, apart from some statutory exceptions, the prosecution has the burden of proving all the elements necessary to establish that a person is guilty of a criminal offence. Expressed another way, a person is presumed to be innocent until the prosecution has proved guilt. This has been said to be the golden thread that runs through our criminal justice system.² A teacher against whom an allegation has been made is, therefore, presumed to be innocent until guilt is proved. The survey by this Inquiry of allegations of sexual misconduct made against teachers and other staff at schools demonstrates that in quite a large proportion of cases there was not sufficient evidence to warrant charging the alleged offender with an offence. In addition, there were two instances when the persons making the allegations withdrew them stating they were fabricated. In other cases, a teacher will be charged but the prosecution does not proceed because of a lack of evidence or because the victim and the victim’s family decide not to proceed. That decision could be made for any number of reasons. Regard, therefore, must be had to the possibility that it might not be possible to substantiate the allegations or that victims might not wish to proceed or that an unfounded allegation might have been made for some frivolous or other purpose. One particular difficulty confronting a school in those cases where an allegation has yet to be investigated is not knowing whether the allegation will ultimately be substantiated.

² *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481-482. The principle is also embodied in Article 14(2) of the International Covenant on Civil and Political Rights.

Other Hardship

557. Another factor that is related to the presumption of innocence is hardship to members of the family of the teacher. It is not uncommon for the spouse of the alleged offender to be a teacher at the same school. There will also be occasions when the teacher has a child who is a student at the same school. An example of the latter occurred in May 2012, when a teacher at a metropolitan high school was arrested and charged with unlawful sexual intercourse with a 17 year old student at that school who had left the school in 2011. The teacher had a child who was studying for Year 12 examinations at that same school. Soon after the teacher had been arrested and charged, he was suspended on full pay. The removal of the teacher from the school reduced the risk of re-offending. The school and the Department had a number of questions to address. They included the question whether there was any benefit to be gained by informing parents of the alleged offending. The nature of the offending did not suggest other victims. In addition, there were the interests of the child of the suspended teacher. Clearly, disclosure to parents of the name of the teacher could have had adverse consequences for that child. In that case the Department did not inform parents until after the 2012 school year had ended. One reason for the Department's decision was that it was appropriate to wait until the child had finished Year 12 before informing parents. This case not only illustrates the fact that members of the family of the alleged offender might be affected by disclosure but it also provides a forceful example of the difficulties that might have to be addressed when a school has to deal with allegations of sexual misconduct.

558. In small towns in rural areas, the publication of the name of an alleged offender has a real potential to affect members of the family of the alleged offender. No matter what safeguards are in place, it will not be long before others in the town will know of the allegations. Those same factors might also operate in a rural area that includes a number of towns. If, for example, a teacher at a school in a rural area were to be arrested and charged with an offence and the staff and parents at that school are informed of that fact, there is a real likelihood that that information will soon be known at all schools in that region or rural area and by residents of towns other than the town in which the offending occurred. Submissions from the Australian Education Union demonstrated that these are valid concerns.

A Stigma that Cannot be Removed

559. In most cases, the alleged offender will be a teacher. An accusation of sexual misconduct is likely to have a very serious effect upon that teacher's reputation, even if the allegations are not substantiated or if the teacher is acquitted after a trial. A further consequence is that the teacher's career will be adversely affected. This is but one instance of the fact that accusations of sexual offending leave a stigma on the accused person. That was one of the reasons for the enactment of section 71A of the *Evidence Act*. Almost 30 years ago, Chief Justice King referred to that stigma in these terms:³

Some charges leave a stigma on the person charged, irrespective of whether he has been proved to be guilty; such a stigma may never be erased however innocent the accused may turn out to be. This has been recognised by the legislature in respect of sexual offences by the enactment of section 71A.

³ *G v The Queen* (1984) 35 SASR 349, 352.

In the 30 years since, nothing has occurred to cause that stigma to abate. If anything, it is the greater. There will always be a real likelihood of public odium and personal embarrassment, even if the accused person is innocent.

560. These issues were recognised in the Martin Report. Mr Martin said:⁴

It is easy to feel great sympathy for those charged with a sexual offence who are not committed for trial or are acquitted, but whose identity is the subject of publication in the media. The traumatic and distressing aftermath of publication of identity is well recognised and those effects persist notwithstanding acquittal. They will similarly continue to exist if the identity of a person charged with a sexual offence is published and the accused person is not committed for trial. While the failure of the evidence to justify a committal for trial is a stronger pointer to innocence, in the eyes of many in the community the suspicion will remain.

Notwithstanding those considerations, Mr Martin concluded that there were other competing public interests that operated against maintaining section 71A(2) in its present form. As noted above,⁵ the Government did not accept that conclusion but preferred the alternative conclusion recommended by Mr Martin.

Possible Retribution

561. The public odium that attaches to a person charged with a sexual offence can on occasions lead to unlawful conduct. There will be those who, out of their own misguided sense of justice, believe it is appropriate either to impose some form of retribution upon or to victimise the alleged offender or the family of the alleged offender in some other way. In its submission, the Australian Education Union referred to vigilante activity that some teachers had experienced. On occasions, it has resulted in damage to the house occupied by the teacher. In his review of section 71A, Mr Martin cited examples of hardship reported to the Legislative Review Committee in 2005:⁶

In many cases, through the eyes of retributionists, families of offenders are perceived as though they were the offenders!

Examples of victimisation and the impact on offender's children:

- Extended family and friends withdrawing contact
- Children are teased and abused about their parent's offence
- Children are excluded from activities and groups because they are seen to be different
- Other parents do not want their children mixing with "those" children
- Families receive hate mail, being threatened or assaulted
- Property damaged after being followed home from court
- Families being publicly taunted
- Children physically abused/harassed.

⁴ Paragraph 93 of the Martin Report.

⁵ Paragraph 80 of this report.

⁶ Paragraph 92 of the Martin Report.

The increasing use of the internet, and especially Facebook, for the purposes of victimisation is, sadly, becoming a reality of life in this technological age. Reference has already been made to the publication on Facebook of a letter from a school despite a clear request not to do so.

562. All due regard must be had to the possible consequences of sending a letter, to the public odium and to the risk of retribution and vigilante activity, some of which would no doubt be unlawful. They are weighty and serious matters. Retribution and vigilante activity are to be thoroughly condemned. However, as weighty and as serious as these matters may be, they do not lead to the conclusion that parents should not be informed. Instead, they point to the care that must be taken when deciding whether to inform parents and, if so, when and how parents should be informed and what information should be given. Another question is whether the teacher should be named in the letter. One obvious means of seeking to avoid victimisation of a teacher and his family is not to name the teacher. If parents are informed by letter, the letter can be expressed in such a way that helpful information is given to the parents while at the same time not naming the teacher. However, it must be acknowledged that failing to name the teacher will not necessarily mean that the teacher will not be identified as the alleged offender. Those who know that the teacher has been suspended from duty will quickly draw the conclusion that he is the alleged offender. That is not an argument for disclosing the name of the teacher. Instead, it points to the care that must be taken as to the timing of the disclosure to parents and others as well as to the care that must be taken as to the content of any disclosure.

Correcting Misinformation

563. Another factor to consider is whether it is necessary to correct misinformation. No matter what precautions might be taken when an allegation of sexual misconduct is made, there is an ever present risk that rumours will circulate and incorrect information will be passed around. In the case of the Largs Bay Primary School, rumours soon circulated despite the fact that only some members of staff and the members of governing council had been told of the offending by the school principal. Later, after Harvey's conviction had been reported in news bulletins on ABC radio station 891, a number of parents were aware of the offending. Some of those parents asked the principal and the Department to provide information to the school community. When rumours are circulating, there is a real risk that wrong information will be passed around. The use of social media only serves to increase the risk of rumour and misinformation. One effective means of correcting rumour and misinformation is to provide correct information. That might require a letter to be sent. There is also a risk that rumour might circulate as to the identity of the victim. However, that risk will exist even if no information is given. One advantage of providing information is that the information can be accompanied by a request to have due regard to the interests of the victim by not speculating as to the identity of either the victim or the alleged offender.

Maintaining Confidence in the School

564. One benefit that flows from provision of information is that it helps parents to maintain confidence in the school. It is clear that the failure to provide proper information to parents at the Largs Bay Primary School has had a very negative effect on that school. In 2012, the number of parents who removed children from the school was twice as many as in

previous years. Although other factors could also have caused parents to remove children, it is reasonable to infer that the increase in the number of children removed to other schools was caused in large part by the concern of parents at the failure to provide timely and proper disclosure of the offending by Harvey. Allegations of sexual misconduct by a member of the staff of a school will be likely to have a negative impact on the school. However, a school that is capable of managing those allegations and at appropriate times giving appropriate information to parents is more likely to retain the confidence of parents. One thing that is clear is that the confidence of parents in a school will be considerably undermined if parents learn of the allegations from the media but do not receive any information from the school. These considerations are not advanced for the purpose of preferring the interests of the school over the interests of either the alleged victim or the alleged offender. Instead, it is a recognition of the fact that parents need to have confidence in the school that their children are attending. That confidence will be the greater where parents are also aware that, when managing allegations of sexual misconduct, the school is following procedures established by guidelines that are publicly available. The question of guidelines is examined in Chapter 14.

The Length of the Investigation

565. Another relevant factor is the time that is necessary to investigate allegations of sexual misconduct. Some investigations will be quick and result in charges being made within a day or two. In other cases, the investigation may be very lengthy. As a general rule, where the allegation of sexual offending is of a serious kind and corroborative evidence is available, little time will elapse between the making of the allegation and the arrest and charging of the alleged offender. In the case of Harvey, the initial investigation was very short. The allegations were reported to police by the victim's mother on the evening of 1 December and Harvey was arrested and charged early in the afternoon of 2 December. In other cases, the investigation might extend over more than 12 months. SA Police gave evidence that high priority is given to the investigation of alleged sexual offending against children. In addition, SA Police has two different review processes to ensure that matters are promptly investigated. At the local service area, investigations are reviewed once a month. At a State level, the Sexual Crimes Investigation Branch of SA Police reviews the investigation of sexual crimes on a daily basis.

THREE OCCASIONS TO CONSIDER DISCLOSURE

566. As already mentioned, there might be three stages in the management of allegations when a school will need to consider whether to disclose allegations of sexual misconduct against a teacher. They are at the time when the school knows no more than that allegations have been made, at the time when the teacher has been charged, and at the time when the teacher has been committed for trial or sentence. The weight that should be given to each of the factors mentioned in the previous paragraphs will vary at each stage. It is convenient to examine the question whether disclosure should be made in the reverse order, that is to say, at the time of the committal, at the time when the teacher has been arrested and charged and, finally, at the time when the school knows no more than what is contained in the allegations.

After Committal - Inform Whole of School Community

567. It will be recalled from the earlier discussion of section 71A of the *Evidence Act* that, once a person accused of committing a sexual offence has been committed for trial or sentence, it is lawful to publish the name of that person. Once those events have occurred, there is no restriction upon publishing the name of the accused person, unless a suppression order has been made. It is not then necessary to obtain the consent of SA Police. A school is at liberty to inform the whole school community of the fact that the accused person has been charged with a sexual offence. The school may lawfully inform staff, members of governing council and parents of the name of the accused person and the offence with which he has been charged. At that time, the school will in all likelihood wish to maintain the confidence of parents by sending a letter disclosing those facts. There would be a reasonable likelihood that the fact of the committal would be published in the media. Although each form of the media, be it newspapers, radio, television or the internet, is in a better position than the school to disseminate information quickly to a wide audience, the school would, nevertheless, wish its community to learn the news from the school and to be aware that the school is actively taking steps in the course of its duty of protecting the children at the school and ensuring their continuing education notwithstanding the absence of the suspended teacher. It must be emphasised that, although it is lawful to publish the name of the accused person, the allegations are still allegations. The accused person has not been tried and the offending has not been proved.

568. It should also be noted that it is lawful to name the accused person if that person is acquitted of the offence of which he has been charged or if the proceedings lapse by reason of the death of the accused person or for want of prosecution or for any other reason. If the school has, on some earlier occasion, sent a letter to parents informing them that a person has been charged with an offence and that person is later acquitted or that the proceedings lapse, it is essential that the school should inform parents of that fact. That is a matter of fundamental fairness.

569. In the interests of maintaining the confidence of the school community, the school might also wish to inform parents, staff, and the members of the governing council of the progress of a prosecution of an alleged offender. There are significant steps in a prosecution that provide convenient points at which to give additional information to parents. They are

- when a plea of guilty has been made;
- at the end of a trial, to inform whether the teacher has been acquitted or convicted; and
- after the teacher has been sentenced.

Unless a suppression order has been made, there will be no restriction on informing parents of any of those facts at any of those times.

INFORMING PARENTS

After Teacher Has Been Charged

570. The fact that a teacher at a school has been charged with committing a sexual offence is, on any view, an important event at a school. At the same time, it must be remembered that

although the teacher has been charged with an offence, the allegations against that teacher are still only allegations. They have not yet been proved. Care must be taken, therefore, to ensure that the letter does not imply that the teacher is guilty of the offence with which he has been charged. The arrest and charging of the teacher has significance both for the administration of the school and for parents. As the teacher will have been suspended, the school will have to make arrangements to replace the teacher. The school might have to manage a situation that in some cases might be of real concern to parents. For their part, parents will have a very natural concern for the welfare of their respective children. They will wish to know the nature of the offending in case it is of a kind that might have affected their own child. In addition, a failure to inform parents has a real capacity to erode the confidence of parents in the management of the school. It is appropriate, therefore, that the school should consider sending a letter to parents as soon as is reasonably possible. The Department will have made a risk assessment (as explained in paragraphs 588 to 592 below) to determine whether there is a reasonable suspicion of other victims. The purpose and content of any letter sent to parents will depend on the result of that risk assessment. The letter will inform parents whether or not the offending gives rise to any concern for children at the school. The matters that need to be addressed in such a letter are considered in the next chapter.

Mere Allegations

571. Allegations of sexual misconduct might be made either to a teacher or the principal of a school or to the Department. In each instance, the allegations should be referred to the police for investigation. It is not the task of either the school or the Department to investigate the allegations.

572. On learning of the allegations, the Department will have acted to enable the school to fulfil its duty of care to its students by suspending the teacher against whom the allegations have been made. The teacher will no longer be at the school and the risk of any re-offending will, therefore, be substantially reduced.

573. While police are investigating the allegations, the school will not know whether the allegations are true, partly true or entirely without foundation. Alternatively, the actual facts might be different from what was stated in the initial allegations. In addition to those considerations, it is necessary to have regard to the presumption of innocence which, as has already been stated, is a fundamental principle of the criminal law. While the investigation is proceeding, the police are not in a position to disclose to the school the results of the investigation. In short, the school knows no more at this stage than what is contained in the allegations and has nothing of substance to report to parents. A letter to parents will be so vague as to render it meaningless. Furthermore, a letter that names a teacher and reports what are no more than allegations has a real capacity to be defamatory. It is unlikely that such a letter would be written on an occasion of qualified privilege because the allegations have not been substantiated. As a general rule, the school should not, therefore, send a letter to parents informing them of allegations. If there is an occasion when it is necessary to send a letter referring to allegations, that letter should not name the teacher against whom the allegations have been made. Legal advice should be obtained before sending such a letter. If, after investigating the allegations, police then arrest and charge the teacher, the school will be able to inform parents in the manner already described.

574. While allegations are being investigated, some parents might ask other teachers why the suspended teacher is no longer at that school. The teacher should refer the inquirer to the principal. The principal should give the inquirer an answer that is as neutral as possible and does not disclose the nature of the alleged offending. One example of an appropriate answer is

The teacher has been suspended. I am sorry I cannot give you any further information at this stage. As soon as I am in a position to do so, I will let you have more information.

If the inquirer persists, the principal should do no more than state that the teacher has been suspended because his conduct is being investigated by police and the principal will give more information when the outcome of the police investigation is known. It is necessary to adopt a neutral approach of this kind because of the presumption of innocence and to avoid the risk that any further statement might cause rumours to be circulated. Should the investigation prove to be lengthy, it might be necessary to send a letter to parents informing them of the allegations. The letter should not name the teacher. It is highly desirable to obtain legal advice on the terms of the letter before the letter is sent.

INFORMING STAFF

575. Not all of the factors mentioned earlier in this chapter apply when considering the question whether and when staff should be informed. Certainly, regard must be had to the protection of the victim, the safety and welfare of other children at the school and the presumption of innocence in respect of the alleged offender. To a large extent, the question whether and when staff should be informed is determined by the practical realities involved in the management of the school once allegations have been made against a teacher.

After Teacher Has Been Charged

576. Should a teacher be arrested and charged with committing a sexual offence, be it the first occasion on which the school learns of the allegations or not, there is no reason why the principal of the school should not inform all members of the staff of that school. The principal is doing no more than stating a matter of fact to the staff, a fact that also affects the operation and management of the school. The principal should call a meeting of the staff of the school and inform them that the teacher has been arrested and charged with an offence and name the particular offence. At the same time, the principal should inform or remind staff that the teacher has been placed on leave and ordered by the Department not to approach the school grounds. It is likely that that instruction from the Department will be reinforced by one of the conditions of bail upon which the teacher has been released. Those conditions usually include a condition requiring the alleged offender to stay away from and not to approach the school. The principal should also ask staff to inform him if the teacher is seen on or near the school grounds. In addition, the principal should instruct staff to keep the matter confidential and not to disclose the information to anyone outside the school community.

Mere Allegations

577. In those cases where the allegation has been made to the school and police are investigating the allegations, practical realities associated with the operation and management of the school again determine what should be said to staff. The first is that the teacher against

whom the allegations have been made will have been suspended from duty and will have been instructed by the Department to stay away from the school. The next reality is that, as a general rule, steps will have to be taken to replace the teacher. That will involve either a new member of staff taking over the teaching duties of the alleged offender or a re-allocation of duties among existing members of the staff of the school. In addition, the principal and some other members of the school leadership team will be involved in making the necessary re-arrangements of staff. If the person replacing the absent teacher will be teaching the alleged victim, it might also be necessary to inform that teacher of the allegations so that the teacher will be both alert and sympathetic to any untoward behaviour of the alleged victim. It is desirable to obtain the consent of the victim or the victim's parents before informing the replacement teacher.

578. Another practical issue in relation to staff is that a long absence of a teacher from duty will be noticed by staff. The absence of a teacher from the school for a few days will be unlikely to attract attention. That teacher could be absent because of illness, because he is taking a few days' leave, because he is taking compassionate leave or for some other reason. However, after a week or so, it is very likely that staff will notice that absence and ask why the teacher is absent. Furthermore, the number of staff at most schools is not so large that the staff do not have a real sense of collegiality. The staff of a school will, in all likelihood, include friends of the absent teacher. Questions will, therefore, inevitably be asked by some members of staff as to the reasons for the absence of the teacher.

579. Good management of the staff of a school will require that the principal gives all members of staff an explanation for the absence of the teacher. Generally speaking, it is desirable that all members of staff have the same level of information. If staff have different levels of information, there is a risk that discord might result. However, as already noted, it might be necessary for the proper management of the school that some members of staff will have to be given a little more information than others. Evidence to the Inquiry indicated that, if given reasons, staff are likely to respect the fact that some members might have more information about allegations than the general body of staff.

580. Soon after a teacher has been suspended from duty, the principal should call a meeting of the staff and inform them of the fact that the teacher has been suspended. Nothing should be said that might indicate that allegations of sexual misconduct have been made. The statement that the teacher has been suspended on full pay is a statement of the actual fact. It is an even-handed statement. It does not suggest any particular kind of wrongdoing. Some teachers at the school will be aware of the practice of the Department to suspend a teacher while allegations of misconduct of any kind are investigated and may infer that allegations of some kind of misconduct have been made against the teacher. Since the Department will have instructed the suspended teacher not to come to the school grounds, it will be necessary for the principal to inform staff of that fact. It will also be necessary for the principal to ask staff to inform him should any member of staff see the suspended teacher on or near the school grounds. Such an instruction might cause some members of staff to infer that allegations of sexual offending of some kind have been made but they will not know the nature of the allegations or the nature of the offending. Such an approach is as fair to the alleged offender as circumstances permit. Finally, staff should be instructed to keep the information confidential and not to disclose it to any person. They should also be instructed that, if any parents or other persons have questions, to refer the questions to the principal.

581. As is apparent from the discussion above, some members of the staff who have administrative responsibilities in the school might have to be given more information about the allegations. At the same time, they should be instructed not to disclose the allegations to any person.

INFORMING GOVERNING COUNCIL

After Teacher Has Been Charged

582. An approach similar to that used to inform staff should be adopted when informing members of the governing council. At the time of the arrest of the alleged offender, the members of governing council should be informed at a meeting that a teacher has been arrested and charged with an offence and the offence should be named. Members of governing council should be instructed to keep the information confidential and not to disclose it to any person other than a member of the school community. It is advisable to inform members of the governing council when parents will be informed.

Mere Allegations

583. At the time when no more is known than what is contained in the allegations, the members of governing council should be told that the teacher has been suspended on pay until further notice and has been instructed not to attend the school. At that time, members of governing council should be instructed to keep the matter confidential and not to disclose it to any other person. They should also be instructed to refer any questions from parents to the principal of the school.

INFORMING THE MINISTER

584. The discussion in Chapter 7 demonstrates that the Minister is entitled to insist on the “no surprises” rule and is entitled to be informed about serious critical incidents that occur at schools. It was common ground between all former Ministers who gave evidence and senior officers of the Department that an allegation of sexual misconduct at a school was clearly a very serious critical incident of which the Minister should be informed.

585. The Minister is entitled to be informed as soon as reasonably practicable after the Department becomes aware of the allegations. That might occur when a teacher has been arrested and charged or at the stage when no more is known than that there are allegations against the teacher. Even at the stage of mere allegations, the Minister should be informed since the risk always exists that in some way the allegations may become more widely known and the Minister may be called upon to respond to them. In the case either of allegations against the teacher or the arrest and charging of a teacher, the Department should always inform the Minister as soon as possible of what it knows. Although at these early stages, the Department might have little to report, it should report what it knows. If a teacher has been arrested and charged, the Minister should be told the name of the school, the name of the teacher and the nature of the offending. The information can be given orally or by email. If given orally, it should be confirmed by an email. In all likelihood, the information will be given to one of the Minister’s advisers, be it the Chief of Staff or another of the ministerial

advisers. Whoever receives the information from the Department should inform the Minister because the “no surprises” rule applies equally to all of the ministerial advisers.⁷

586. The initial brief information to the Minister should be followed by a more detailed briefing preferably in writing, when the Department has more information. If it is proposed that the school will send a letter to parents, a draft of the letter should be included in the briefing. Some Ministers will wish to satisfy themselves that the letter is, in all the circumstances, appropriate. Others may take the view that it is for the Department to prepare an appropriate form of letter. Whatever the view of the Minister, the letter should be attached unless, of course, the Minister has directed otherwise.

587. The requirement to inform the Minister on those two occasions, that is to say, the initial brief notice of allegations followed by a more detailed written brief, is the minimum. In all likelihood, there will be some occasions when it will be necessary for the Department to give the Minister further briefings as events unfold so that the Minister is in a position to respond quickly and appropriately to any issue that might arise in the course of the management of the allegations.

RISK ASSESSMENT

588. If a school intends to send a letter to parents stating that a teacher has been arrested and charged with a sexual offence, it is desirable to consider what is to be stated in that letter. The Department has on occasions sent a letter that does no more than state the fact that an unnamed teacher has been charged with a sexual offence. Such a letter conveys little useful information to parents. Parents will wish to know whether the offending occurred at the school and, if it did, whether there are concerns for the safety of their own child and other children at the school. In addition to informing parents of the fact that a teacher has been charged, the letter should, therefore, have the additional purpose of informing parents whether there is any concern for the safety and welfare of other children.

589. In order to determine whether there is any concern for the safety and welfare of other children, it will be necessary for a risk assessment to be made whether the teacher might have offended against other children. The risk assessment should be made before sending the letter because it will be necessary to state in the letter whether or not there might be other victims. The risk assessment should be carried out by a special unit in the Department established for that purpose. That unit should consult with the principal who might be able to provide information from the school. It is desirable that that unit should, when necessary, consult experts who might be able to assist its deliberations.⁸ Any letter to parents should be sent soon after the teacher has been arrested. It is, therefore, important that the risk assessment be undertaken promptly.

⁷ See paras 384 and 385 above.

⁸ The Department is already considering the use of an expert panel - see *Interim Guidelines for Disclosing Information* published by the Department in April 2013.

The State of Mind

590. When making the risk assessment, two matters must be considered. One is the test or yardstick by which a determination is made that there is a risk that other children might be victims. The second is the factors to which regard should be had when making the risk assessment. I deal first with the question by what test the determination should be made whether there is a risk that other children might be victims.

591. The test or state of mind required for a notification pursuant to section 11 of the *Children's Protection Act* is a suspicion on reasonable grounds. Section 11 imposes a duty to notify on a person to whom the section applies if that person "suspects on reasonable grounds that a child has been or is being abused or neglected". The state of mind currently required by clause 4(10)(e) of the Information Privacy Principles for disclosure of personal information when reporting concerns to relevant persons or authorities is suspicion on reasonable grounds. That is another way of expressing the test in section 11 of the *Children's Protection Act*. An alternative test is a reasonable belief that there might be other victims. However, for the reasons that follow, the more suitable test is the test of reasonable suspicion. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a slight opinion without sufficient evidence.⁹ Suspicion requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not.¹⁰ Given that the purpose of the risk assessment is to safeguard the health and welfare of children at the school, it is desirable that the test for making the risk assessment should be the test of reasonable suspicion. It has a lower threshold than the test of reasonable belief and so enables a greater measure of protection to those children. It has the additional advantage of being a test with which teachers are reasonably familiar by reason of their obligations under section 11 of the *Children's Protection Act*. The test should, therefore, be that there are reasonable grounds for suspecting that there might be other victims.

Some Factors for Consideration

592. The risk assessment should have regard to such factors as

- the nature of the alleged offending;
- the circumstances in which the alleged offending occurred;
- the place or places where the alleged offending occurred;
- the age and gender of the victims;
- the age and gender of the alleged offender;
- whether the alleged offender had regular and frequent contact with other children or a group or groups of children and the nature and circumstances of that contact; and

⁹ *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J.).

¹⁰ *Commissioner for Corporate Affairs v Guardian Investments Pty Ltd* [1984] VR 1019, 1025.

- the opportunities that were available to the alleged offender on which to offend against other children.

In some cases, the risk assessment will be a relatively straightforward and simple task. That will be especially so if the offending has not occurred at the school and does not involve children at the school. Similarly, if, for example, a young teacher has been arrested and charged with having unlawful sexual intercourse in the course of a relationship with a 17 year old secondary school student, it might be clear that the teacher has not offended against other students at that school. An example of where it might be a relatively straightforward task to form a reasonable suspicion that there might be other victims is where the alleged offender has had regular and frequent contact with a particular group of students at the school. If, for instance, the alleged offender is the driver of a school bus or is a member of the staff of the OSHC service or is a teacher of a particular physical education class, it might not be difficult to form a reasonable suspicion that other children in each of those groups might be victims. In other cases, the task will be more difficult. One example is the offence of possession of child pornography. A teacher might have done no more than collect pornography on his computer and might not have offended against any child at the school. Alternatively, that same teacher might have not only stored pornography on his computer but have also offended in some other way, for example, by filming some students at the school while they were changing for a swimming carnival.

Police Assistance

593. The task of risk assessment will in some cases be materially assisted if police are able to provide relevant information. For example, police might have obtained evidence that there were other victims or evidence pointing to the reasonable possibility of other victims. If the offending is against older children, those children may have informed police whether there were other victims or not. If the offending is against younger children, say, between the ages of seven and ten years, it will be less likely that such information will be available. However, even with younger children, the victim might have disclosed that other children had been groomed in a like manner to the victim. It must be recognised that police will not wish to disclose information that might prejudice their investigation or prejudice any later criminal trial. Nevertheless, there will be occasions when police can provide information to the Department in a general way that will not prejudice either the investigation or the trial.

594. SA Police are bound by the Information Privacy Principles and the Information Sharing Guidelines. The information should be disclosed pursuant to paragraph (e) that was added to clause 4(10) of the Information Privacy Principles in February 2013. It will be recalled that paragraph (e) was in these terms:

The agency has reason to suspect that unlawful activity has been, is being or may be engaged in, and discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.

That paragraph would permit police to disclose information to the Department. The information could be disclosed to the officers in the Department's Investigations Unit with whom police currently liaise. Given that the information has been disclosed pursuant to the Information Privacy Principles, it will continue to be confidential notwithstanding the disclosure by SA Police to the Department.

Where Police Do Not Charge Alleged Offender

595. If the police investigation does not ascertain sufficient evidence on which to charge the alleged offender, the Department should decide whether to conduct its own investigation and institute disciplinary action. There will be cases when the police will report to the Department that the allegations do not have any substance. The Department might be prepared to act on that information and conduct no further investigation. In other cases, it might decide to conduct its own investigations and, if the evidence is sufficient, institute disciplinary proceedings. In other cases again, the evidence might be sufficient for proceedings to be instituted before the Teachers Registration Board.

596. The standard of proof for disciplinary proceedings is different from that in a criminal prosecution. The standard of proof in a criminal prosecution is proof beyond reasonable doubt. In disciplinary proceedings conducted before the Teachers Registration Board or by the Department, the standard of proof is proof on the balance of probabilities, that is to say, whether it is more probable than not that the alleged offender did commit the offence. It is clearly a lower standard of proof. As noted earlier, in one matter the Director of Public Prosecutions decided there was not sufficient evidence to prove an offence beyond reasonable doubt. The matter was then prosecuted before the Teachers Registration Board and the Board found on the balance of probabilities that the teacher was guilty of the alleged misconduct.

597. If the Teachers Registration Board or the Department does institute disciplinary proceedings and the teacher is found to be guilty of unprofessional conduct or other misconduct, the Department will have to consider whether it is appropriate to inform parents of the outcome. It is not possible to describe the circumstances in which parents should be informed. To a large extent, the decision whether to inform will depend on the seriousness of the offending and the penalty imposed. For example, it would be appropriate to inform parents if a teacher had been deregistered as a teacher or suspended for serious misconduct. Equally, it may be quite unnecessary if the offending is of a minor kind and the teacher received no penalty other than a reprimand. It might also be unnecessary to inform parents where the offending was of a kind that did not indicate any risk to other children. The Department will have to assess each case on its merits.

598. In those cases where the allegations have not been substantiated or where it has been established that the allegations have no foundation, the Department will have to determine whether the teacher should resume his duties at the school where he had been employed or whether he should be employed elsewhere. Each case will have to be considered according to its own facts and circumstances.

CHAPTER 12 – PROVIDING BETTER INFORMATION TO PARENTS

599. A simple and effective means of communicating with parents is to send a letter. A school should not send a letter concerning sexual misconduct unless the school has a particular purpose or reason for sending the letter. The purpose of sending a letter will be examined in this chapter. Furthermore, there will be occasions when it is desirable for the Department to do more than send a letter. This chapter will also examine when those occasions will occur and the steps that should be taken as well as the matters that should be addressed in a letter informing parents that a teacher has been charged with a sexual offence.

Two Courses of Action

600. It will be convenient to examine first the questions whether and in what circumstances the Department should do more than write a letter to parents. The answer to those questions will depend upon the result of the risk assessment described in the previous chapter. If, after the risk assessment, it is believed that there are no other victims, it will suffice if a letter is sent to all parents stating that fact. However, if the risk assessment leads to a reasonable suspicion there might be other victims, it will be desirable to send a letter and, as well, take other action. The purpose and content of those letters will be discussed later in this chapter. In both instances, it is desirable to send a letter as parents will have a natural concern for safety and welfare of their children and will wish to know whether the offending is of a kind that could have affected their children.

Meetings of Parents

601. Where it is suspected that there might be other victims, it is desirable that parents should be informed of that suspicion so that they may be alert to behaviour of their children that might be indicative of some form of sexual offending against them. It will be also necessary for parents to know how to deal with a disclosure by their children that there has been any offending against them. It is not unusual for parents, with the best of intentions, to seek to question their child. However, it is well established that interrogating a child can be very counter-productive and parents should be informed of that fact. Most importantly, parents will need guidance as to good parenting practice to manage this difficult situation. In short, parents need advice and instruction of a kind that cannot be provided in a letter. It is the kind of advice and instruction that is best provided at a meeting of parents. An additional advantage of holding a meeting is that it provides a forum at which parents can ask questions or express concerns. The meeting will enable the school and the Department to answer questions and address the concerns of parents. It is more likely that parents will maintain confidence in the school if such a meeting is held.

602. Several witnesses including staff and parents at Largs Bay Primary School gave evidence recommending meetings at which parents will receive instruction, information and support. Their views were supported by two expert witnesses who gave evidence that touched on different aspects of this question, Emeritus Professor Freda Briggs AO and Professor Jon Jureidini. Emeritus Professor Briggs has had extensive experience in the field of child abuse. She has written widely on the topic. Professor Jureidini is a psychiatrist. He is the Head of the Department of Psychological Medicine at the Women's and Children's Hospital and is the Professor of Psychiatry at the University of Adelaide. He holds a

doctorate of philosophy and is a Fellow of the Royal and New Zealand College of Psychiatrists. He has experience in psychiatry with both adolescent and younger children.

603. Both Emeritus Professor Briggs and Professor Jureidini expressed the view that, where there is a belief that there might be other victims, there is a need to instruct and inform parents on good parenting practice when managing children who might be possible victims. That information and instruction will deal with such matters as informing parents of the kind of behaviour that is indicative of a child having been the victim of abuse, the appropriate way to provide opportunities for the child to talk about what has been a traumatic experience and how to support the child and manage the situation. The information and instruction would be directed to the type of offending that had been alleged. It would include a strong message to be available to the child but not to interrogate the child. Both Emeritus Professor Briggs and Professor Jureidini were very firm in their view that it would be counter-productive to interrogate a child.

604. The observation that it is desirable not to interrogate the child is consistent with the need not to taint evidence. One problem for police investigations that occurs from time to time when a child has been the victim of a sexual assault is that parents will have interrogated the child. It is a natural and understandable response by parents who are seeking to assist and support their child. However, no matter how well-intentioned the questions might be, they have the potential to taint the evidence of the child because, instead of asking open questions, parents tend to ask leading questions which suggest the answer that the child should give. The child might adopt the suggested answer as the fact when, in truth, the facts are different. This will lead to difficulty should police later interview the child or when the child comes to give evidence in court.

605. Professor Jureidini expressed the view that a child will decide whether and when that child wishes to disclose that he has been the victim of some form of abuse. Professor Jureidini said that the role of parents is to support the child and not to ask questions. He pointed out that, while there is no evidence to suggest that it is necessarily unhealthy for a child not to talk about a traumatic experience, there is evidence that pressing a child, or even an adult, to talk about a traumatic experience can be harmful. It is preferable to recognise that a child is suffering and to provide opportunities for the child to talk about the traumatic experience. Professor Jureidini added that there might be a number of reasons why a child might not wish to communicate the fact of an assault or abuse to his parents. Those reasons might include either an inducement not to tell parents or anyone about the assault or abuse, a threat of harm if parents or others are told, the fact that the child is wanting to put the matter out of his mind, or dysfunctionality within the family. Another is that the child might expect negative consequences for themselves or another person if they make a disclosure.¹

606. Professor Jureidini also said that the most powerful determinant of how a child will cope with sexual abuse is how parents cope with the knowledge that their child is a victim or a possible victim of child abuse. He said that a child whose parents can cope well with the fact that the child has been abused is much less likely to need therapy than a child whose

¹ Cathryn Hunter, *Responding to Children and Young People's Disclosure of Abuses* (Australian Institute of Family Studies, September 2011).

parents cannot cope with it. In that respect, there is more of a sense of urgency to ensure that parents are supported in the process than there is for providing therapy for the child. He said that the benefit of therapy for the child would be marginal if the child is living in an environment that is dysfunctional, either as a result of the trauma or because the child is already living in a dysfunctional environment. The child will spend a short time, perhaps one hour a week, with a therapist but will spend most of the rest of the week with his parents. It was Professor Jureidini's view that minor assaults upon children such as touching over or underneath clothing and tickling the feet of children are the kind of assaults that can be managed by most families without the need for therapy. However, he recognised there might be families who do not have the resources and support to manage those situations. He added that, if the child is a victim of an assault as grave and as appalling as that perpetrated by Mark Harvey it would, as a general rule, be desirable for a qualified person outside the family to counsel and support the child as well as the family and help them work through the experience.

607. Information, instruction and support of the kind identified by Emeritus Professor Briggs and Professor Jureidini can best be provided at a meeting. It certainly cannot be provided in a letter. It is, therefore, recommended that, if after the risk assessment has been made, there is a reasonable suspicion that there might be other victims, the school should arrange to hold a meeting of parents of those children identified by the risk assessment as being possible victims. The meeting should be called for the purpose of giving parents information and instruction on how to manage and support their children, to instruct them in good parenting practice, and to provide general support for parents, at the same time informing parents that it is a suspicion only so that no child is necessarily a victim. The information would be directed to assisting those parents whose children might be victims. It is critical that the information and instruction should be addressed to the kind of abuse that is alleged to have occurred. That information and instruction should be provided by a qualified and experienced expert. That expert is likely to be a qualified and experienced psychologist who is knowledgeable on issues relating to assisting children who are victims of child abuse and their parents. In addition, parents at the meeting should be provided with an information sheet or pamphlet that contains information concerning good parenting practice when dealing with a victim or possible victim of sexual abuse. That document should also include guidance as to how best to respond to disclosure by a child who has been abused. The information sheet should also be made available to those parents who cannot attend the meeting.

608. The information sheet should be prepared by the Department with the assistance of psychologists and other experts. This Inquiry does not have that expertise. There are documents from which assistance might be gained. An example is a document prepared by the Australian Institute of Family Studies entitled *Responding to Children and Young People's Disclosure of Abuses* by Cathryn Hunter, published in September 2011.

609. It is important that the meeting of parents should be held as soon as reasonably possible after the teacher has been charged. It is a matter that deserves high priority. Once parents begin to learn that a teacher has been charged, they will be anxious to know whether there are victims and whether their own child is safe. It is necessary also to prevent rumours spreading with the attendant risk of misinformation.

Counselling for Parents and Staff

610. Some parents and staff might have particular difficulty in coping with the fact that a teacher has been charged with a sexual offence. It is recommended that the school offer counselling to those parents and staff who seek it and, if necessary, to any child who is not a victim. One constant criticism from parents with children at the Largs Bay Primary School who gave evidence at this Inquiry, including the parents of the victim, was the failure by the Department to provide appropriate or sufficient counselling.

THE PURPOSE AND CONTENT OF A LETTER

611. The following discussion will examine in greater detail the purpose and the content of a letter sent to parents informing them that a teacher has been arrested and charged with a sexual offence. Here, as with so many issues in this context, it is not possible to be prescriptive. Every case will have to be considered on its own facts and circumstances. Nor is it possible to design a letter to deal with every situation. All that can be done is to note the essential principles and to provide the framework for the letter. The Department will have to resolve what form any letter should take, having regard to those principles and that framework.

Consult with SA Police

612. At the risk of repetition, a letter to parents should not be sent unless SA Police has been consulted, both as to the timing and as to the content of the letter. That consent is necessary to ensure that the letter does not hinder or impede the police investigation. It is also necessary to check whether a suppression order has been made and, if so, obtain advice whether it prevents a letter to parents.

The Purpose of a Letter

613. As already mentioned, a letter will be sent for one of two reasons. If after conducting the risk assessment, the school believes that no child other than the victim has been harmed, the letter will be sent for the purpose of informing parents of the charges and of the belief that there are no other victims. If, after conducting the risk assessment, the school has a reasonable suspicion that there might be other victims, the purpose of the letter will be to state the fact of the arrest and the suspicion that there might be other victims and to invite parents to a meeting of the type already described. The content of the letter will, of course, vary according to the purpose of the letter.

614. One question is whether it is necessary to inform parents that a teacher has been charged with a sexual offence when the alleged offending has no connection of any kind with the school other than the fact that it is a teacher who has been charged. For example, a male teacher might have been charged with the sexual assault of an adult woman at a place quite removed from the school. In another case, the alleged offending might be intra-familial and so might not give rise to any concern about children at the school. These are matters that will have to be considered when the risk assessment is made. If the offending is of a kind that requires the teacher to be suspended, the general rule should be that parents should be informed. The letter should not name the teacher but would state that a teacher has been

arrested and charged with offending that is quite unrelated to the school and there is no concern for the safety of children at the school.

A Statement of the Alleged Offending

615. The statement of the alleged offending in the letter must be managed with real care. When stating the nature of the alleged offending, the preferred course would be to express it simply. One risk in providing too much detail is that it could identify the victim. Generally speaking, it will be sufficient to do no more than state the offence with which the teacher has been charged. For example, if a teacher has been charged with possessing child pornography, it is desirable to state only that the teacher has been charged with possessing child pornography. If a teacher has been charged with indecent assault, it will also be desirable to do no more than name the offence with which the teacher has been charged. However, in some cases, consideration should be given to the question whether some other description of the offending is desirable. The offence of unlawful sexual intercourse is an offence where in some cases it is appropriate to name the offence while in others it might be better to describe the offending in some other way. The name of the offence is not widely known and it comprehends a wide variety of offending. If the letter states the teacher has been charged with unlawful sexual intercourse, some parents might form entirely wrong opinions as to the nature of the offending. It must be remembered that the purpose of the letter in such a case is to inform parents so that they will be alert to unusual behaviour in their own children. That purpose would be sufficiently served by describing the offending with such words as a serious sexual assault, as indeed the alleged offending is. Furthermore, respect for the interests of the victim might require the offending to be described in some other way than by naming the actual offence. Every case will have to be considered on its own facts and circumstances. If the offending is not to be described as “unlawful sexual intercourse”, a letter to parents could begin in these terms:

I write to inform you that a teacher at the school has been arrested and charged with a serious sexual assault on a child at the school.

If the alleged offending is described in that way, it might be less confronting to those parents who might be offended by a direct statement of the offending. In whatever manner the offending is described, it is essential that it is described briefly. Nothing is to be gained by giving particulars of the nature of the offending. Indeed, providing particulars might jeopardise police investigations. It also carries the risk of stating something that might identify the victim. If it is necessary to state that there has been a sexual assault on a child at the school, every care should be taken to ensure that nothing is said to identify the victim.

Assurance of Safety

616. On learning that a member of staff at the school has been arrested and charged with a sexual offence, parents will naturally have concerns as to the safety and well-being of their children. It is desirable, therefore, for the letter to state the steps that have been taken to remove the alleged offender from the site. For that reason, a letter to parents should contain a message to the effect that the alleged offender has been suspended from his duties as a teacher and has been directed by the Chief Executive of the Department to stay away from the school. In an appropriate case, it might be useful to reinforce the statement that the alleged offender has been ordered to stay away from the school site by adding that it is a condition of his bail that he stay away from the school. Submissions were made that a reference to bail conditions

would make the matter too legalistic and technical. There is some force in that view. However, there might be occasions when it is appropriate to state that the conditions of bail on which the alleged offender has been released include a condition that he stay away from the school. Reference to the bail conditions might provide added reassurance to parents where, for example, the offending has been very serious. For these reasons, it is recommended that, as a general rule, it is not necessary to refer to the bail conditions but state that the alleged offender has been suspended and has been directed to stay away from the school. In cases, where the offending has been particularly serious, consideration should be given to the question whether it is desirable to refer also to the conditions of bail. Consideration should also be given to reassuring parents that the school continues to function efficiently. In some instances, the letter could refer to such matters as the fact that the teacher has been replaced, that staff will be vigilant in the care of children at the school, and that the school educational program continues unaffected by the arrest. Here, as with other parts of the letter, it will be necessary to tailor the letter to the particular circumstances.

Contact Information

617. Parents who have concerns for the welfare of their children might wish to consult police or seek assistance from other agencies. Some will be more comfortable speaking in the first instance to the principal of the school. The principal will then be able to direct the parents to an appropriate agency. Others will be content to make direct contact with police or such other agency as is appropriate. It is desirable, therefore, to give contact details for such agencies as are appropriate to provide support or assistance in the particular circumstances of each case. An example of an appropriate paragraph follows.

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

As is manifestly apparent, careful consideration should be given to the agencies which are listed. It has been the practice of the Department to include SA Police as an agency that might be contacted and to give the telephone number 131 444, which is the general contact number for police. As a general rule, the letter should make it clear to parents that they should contact police if they believe that they have information that might assist the police investigation. When stating that fact, it is undesirable to provide the general contact number for police. The preferred course is to give the number at which the investigating officer can be contacted. The letter could include a paragraph to this effect:

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

The Department will know that telephone number since the Investigations Unit will know who is the investigating officer.

Request for Confidentiality

618. As noted in the earlier discussion on section 71A of the *Evidence Act*, the law does not permit publication of the name of a person accused of a sexual offence before that person has

been committed for trial or sentence. A letter to parents when a teacher has been charged is a private communication to those who have a legitimate interest in the matter. It is important, therefore, to do all that is reasonable to ensure that there is no widespread publication of the letter in a way that could defeat the intent of section 71A. As already mentioned, on at least one occasion, a letter sent to parents of a school with a request not to distribute the letter in any way or post it on social media such as Facebook was published on Facebook within hours of receipt of the letter. Irresponsible conduct of that kind provides grounds for recommending that no letter should be sent to parents until the alleged offender has been committed for trial. However, that is not an appropriate response. The better approach is to take steps to induce those who might be inclined to publish the letter to refrain from doing so. Parents may be more inclined to comply with a request for confidentiality if they are asked to respect the confidence out of sensitivity for the interests of the victim and the presumption of innocence of the accused person. For that reason, it is appropriate to include a paragraph to the following effect:

You have been given this information in confidence because you have a child at the school. Out of respect for the interests of the victim, and bearing in mind the allegations have not been proved, I ask that you do not distribute this letter or post it on a website or social media such as Facebook.

An alternative form is:

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

Another means to seek to discourage recipients of the letter from publishing it on the internet or in some other way is not to name the alleged offender.

Concluding the Letter

619. The tone of the concluding paragraph is important and should, where appropriate, be reassuring. For example, the letter could assure parents that all is being done to protect and support the safety and well-being of the children at the school. The letter could include a paragraph to this effect:

A relief teacher has been appointed and classes will proceed as normal.

It is important for the parents to know that the school is managing the issue without impairing the provision of education at the school.

Should the Teacher be Named When No Suspicion?

620. Whatever is contained in the letter, one question that should be examined is whether it is necessary or appropriate to name the teacher as the alleged offender. The amended Information Privacy Principles permit disclosure of the name of the alleged offender. However, other factors need to be considered when addressing that question. They are

- the presumption of innocence;
- the fact that section 71A(2) of the *Evidence Act* restricts publication of the name of the alleged offender until committal;
- the fact that a person who receives the letter might post it on Facebook;

- the fact that the name of the teacher alleged to have committed the offence can lawfully be published once the teacher has been committed for trial or sentence; and
- the question whether a suppression order has been made.

If, after the risk assessment, it has been determined that there is reasonable suspicion that there are no other victims, due regard will be had to each of those factors if the letter does not name the teacher. Given that it is believed that no other child at the school might be a victim of the offending, there is no reason for naming the teacher. It is sufficient to report the fact that a teacher has been arrested and charged, to state the offence with which the teacher has been charged, and to state that it is believed that no other child is a victim. The letter would state that the school will give more information to parents when it is available. Obviously on such occasion is when the outcome of the committal hearing is known. A letter in these terms satisfies each of the factors mentioned above. The fact that the alleged offender is not named or identified has regard to the presumption of innocence. It might also discourage publication, either on Facebook or in some other form on the internet. If the school is a large school and the letter has to be sent to a large number of parents, the letter will not infringe section 71A(2) of the *Evidence Act* because it does not name the teacher who has been charged.

621. The letter to all parents when there is no suspicion that there might be other victims can be expressed in a number of ways. However, it should contain all of the following:

1. a statement that a teacher has been arrested and charged but not naming the teacher;
2. a statement of the offence with which the teacher has been charged;
3. a statement that the teacher has been suspended and cannot attend the school;
4. a statement indicating that the school does not believe that there are other victims;
5. an assurance that the Department will keep parents informed;
6. a request to keep the matter confidential in order to protect the victim and the victim's family;
7. contact numbers of support services for concerned parents;
8. a statement that parents who have information that might assist police should contact the investigating police officer, giving his name and telephone number;
9. a statement that those who have questions or concerns may contact the principal of the school; and
10. that the school is managing the situation without impairing the education at the school.

There is no one letter that will be suitable for all occasions. With the assistance of the Department, the school will have to prepare a letter suitable to the occasion in question. The following is a sample showing the kind of matters that need to be stated:

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

The information available to the school suggests that there is no need for any concern for any other children at the school.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

A relief teacher has been appointed and the classes will proceed as normal.

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

Should the Teacher be Named Where Suspicion of Other Victims?

622. The question is more difficult if it is reasonably suspected that there might be other victims. There are two possible outcomes of the assessment. In one case, the assessment will be that there is a group of children who have been in regular and frequent contact with the alleged offender and it is suspected that children in that group might be victims. The other alternative is that all students in the school, at different times, might have had regular and frequent contact with the alleged offender and any of those children might be possible victims. An example of the latter occurred at a primary school where a teacher had been charged with possession of child pornography. That teacher was a teacher of Grade 3 at that primary school and students in all the upper grades of that school had been taught by him.

623. It is possible to avoid naming the teacher in a letter by holding a meeting of parents as previously described. The parents who attend that meeting will be told the name of the teacher and will be asked not to disclose the name of the teacher to any person outside the school community. If the school proceeds in that way, it will have had regard to the presumption of innocence. If the letter has to be sent to a large number of parents, the fact that the teacher is not named will avoid the risk of the letter infringing section 71A(2) of the *Evidence Act*. In addition, it reduces the risk that the teacher will be named on the internet by posting a letter on Facebook that names the teacher. It must, however, be acknowledged that it does not eliminate the risk that the teacher's name might be posted on the internet. The school can do no more than appeal to the decency of parents not to disclose information that might identify the victim or the family of the victim and point out that it is a serious offence against the law to publish anything that might identify the alleged offender or the victim.

624. Where the result of the risk assessment is a suspicion that there might be a group of children who might be victims, regard can be had to each of the five factors listed in paragraph 620 by sending two letters to parents, neither of which names the alleged offender. One letter would be sent to parents of those children in the group in which it is suspected that there might be other victims. It would inform parents of the fact that a teacher had been arrested and charged with committing an offence. It would name the offence but not name the teacher. It would inform those parents that a meeting is being called to give advice to parents. At the same time, it would endeavour not to suggest that the children of those parents who receive the letter are in fact victims. It would contain a request to keep the information confidential. The letter could be in terms similar to the following:

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of those children who have had regular and frequent contact with the teacher. Your child might have had regular and frequent contact with the teacher. I invite you to attend a meeting. The meeting will be held at 6.00pm on the [insert date] in the School Hall.

I appreciate that this is short notice but I urge you to attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform you of behavioural signs and possible effects of child abuse and will answer any questions you might have.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this matter confidential. I ask you not to post this letter on Facebook or on any other internet site.

A relief teacher has been appointed and classes will proceed as normal.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

625. The second letter will be addressed to all other parents at the school. It will contain essentially the same information save for the fact that it will state that, while there is no evidence that any other child at the school is involved, a meeting is being called of parents whose children have been in regular and frequent contact with the teacher. The following is the kind of letter that could be written:

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of those children who have had regular and frequent contact with the teacher and am writing separately to their parents and invite them to attend a meeting. The meeting will be held at 6.00pm on in the School Hall. If you wish, you may also attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform parents of behavioural signs and possible effects of child abuse and will answer any questions parents might have.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

A relief teacher has been appointed and the classes will proceed as normal.

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

One advantage of this letter is that it gives all parents an opportunity to attend the meeting. In that way, it avoids excluding parents who might wish to attend.

626. The decision not to name the alleged offender in the letter might be more difficult in those cases where there is a reasonable suspicion of other victims but it is not possible to narrow down the group of children as the alleged offender has had regular and frequent contact with most of the children at the school. It is still necessary to have regard to the factors listed in paragraph 620. Again, the decision not to name the teacher has regard to the presumption of innocence. If a school has a large number of students, particular regard must be had to the question whether naming the alleged offender may constitute a breach of section 71A of the *Evidence Act*. A school could avoid naming the alleged offender in the letter if it decided to hold a meeting for all parents of the kind just discussed. This latter course is to be preferred because, as stated earlier, a letter cannot provide either appropriate or sufficient guidance or information to parents on good parenting practice in this situation or provide the necessary support. In that case, it will be necessary for only one letter to be sent to parents. The letter would not name the alleged offender but state that, because of a concern that there might be other victims, a meeting of parents is being held at which parents will be given further information and instruction as to how to manage children whose behaviour might suggest that they have been the victim of some form of abuse. The alleged offender could be identified at that meeting. In this case, the letter would be sent to all parents at the school so it can be in the same or similar terms as the letter in paragraph 624. Depending on the size of the school, it might be necessary to hold more than one meeting of parents. The following is a suggested form of letter:

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of all children at the school because they have all been in contact with the teacher at one time or another. For that reason, I invite you to attend a meeting to be held at 6.00 pm on the [insert date] in the School Hall.

I appreciate that this is short notice but I urge you to attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform you of behavioural signs and possible effects of child abuse and will answer any questions you might have.

For the sake of the victim and the victim's family and especially to protect the identify of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or any other internet site.

A relief teacher has been appointed and classes will proceed as normal.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

627. As a matter of practical reality, the fact that the alleged offender is not named in a letter will not prevent parents at the school from being able to identify the teacher who has been charged with committing the offence. In accordance with the practice of the Department, the teacher will have been suspended from duty. If that person is a teacher in a primary school, parents of children in that teacher's class will soon know that the children are being taught by a different teacher. If that person is a teacher of a particular subject in a secondary school, the parents of children who are taught by that teacher will soon be aware that another teacher has taken over his duties. It is likely that the information will percolate through the school community. Although the name of the alleged offender might be spread through the school community, that course is to be preferred to a letter naming the teacher being posted on Facebook.

Letters to be Translated

628. In those schools where some parents cannot read English, it is essential that the letter should be translated into the native language of those parents. That is particularly necessary in those cases where the letter states that there is a belief that there might be other victims. A letter to parents who could not read English would be entirely useless if it was not translated.

Timing of the Letter

629. There is nothing in the evidence to suggest that there is any need for the Department to send a letter immediately upon learning that a member of the staff of a school has been charged with a sexual offence. However, it goes without saying that the Department should send the letter to parents within a reasonable time after it has gained that knowledge. What is a reasonable time will depend on all the circumstances of each case. It will be necessary in every case to conduct a risk assessment. That is an important process and must be carefully considered. In some cases, it might be necessary to obtain legal advice or to check whether a suppression order has been made or to do both. In other cases, where more than one school site is involved, the process of collating the addresses of parents might cause delay. All of these important steps will take some time so that it is not possible to send the letter immediately. The evidence indicates that as a general rule, it is possible to send a letter within seven to fourteen days of the Department learning that a member of the school staff has been charged. Generally speaking, a period of up to fourteen days is a reasonable time in which to send the letter. On one occasion, a number of steps had to be taken and addresses were not readily available so that a period of one month elapsed between the Department learning that a person had been charged and the sending of a letter. That delay was not of any significance. On occasions, the timing of the letter might depend on when SA Police grants consent to the sending of the letter. To put the matter shortly, there will be cases when it will be possible to send a letter to parents within a few days. In other cases, the particular circumstances of the matter will make it necessary for a longer time to be taken to send a letter to parents. This is but another instance of the fact that there is no single prescription that will apply in every case.

How Should the Letter be Sent?

630. The next question is how the letter should be sent to parents. It is essential that the letter is sent in a manner that ensures that the letter remains a private communication. It must not be communicated in any way that might involve a risk of the letter becoming available to the public. A letter of this kind must not be sent home in a student's school bag. That method of delivery has the risk that the letter might not be seen by the parent for any number of reasons. The letter might fall from the child's school bag or might remain in the bag without the parent being aware of it. For that reason, the letter should always be sent by post or by email.

631. In some schools, parents have asked that they receive letters from the school by email. However, not all parents have access to computers. It is preferable that there be one form of communication so that all parents receive the letter at the same time. In order that all parents receive the letter at the same time, it is desirable to send all letters by post. However, it must be recognised that there might be schools where parents have asked that any letter to them not be sent by post but be sent by email. In those cases, the school should respect that request and send the letter by email. The school can attempt to ensure the parents receive the information on the same day by sending the emails on the morning after the day on which the letters were sent. Even if that course is not adopted there will not be a great difference as to the time when parents receive the information because, generally speaking, there will only be a difference of one day between a receipt of a letter by email and receipt by post. The question whether the letter should be sent by post or by email must be kept under review. The increasing use of emails as a form of communication might ultimately mean that most letters

will be sent to parents by email. Should that occur, it is essential that the letter be sent by post to those parents who do not have computers or some other kind of device to receive electronic mail.

Letters to Previous Students

632. There will be occasions when it is necessary to consider whether the offending is of such a kind that former students at the school might have been victims. An example is where a member of the staff of the OSHC service of a school has been employed for several years before being arrested. The nature of the offending might be such that it gives rise to a suspicion that children who had been in that service in earlier years might also have been victims of the offending. In cases of that kind it is appropriate to write to the parents of those children and inform them of the offending. The letter should include the information sheet that would have been distributed at a meeting of parents. It must be recognised that it might not be possible to contact all of the parents of those children as they might have changed address.

633. Similarly, there will be occasions when it will be desirable, if not necessary, to inform another school that a member of staff has been charged with committing a sexual offence. The matter of Harvey again provides an example. Before commencing duty at Largs Bay Primary School in December 2006 Harvey had been employed as the OSHC service Director at Le Fevre Peninsula Primary School and at Westport Primary School. The Department sent letters to the principal and to the chairperson of the governing council at each of those schools. In each case, the letter to the principal enclosed a letter to be sent to parents of students at each school. The letter to parents was in similar terms to the letter sent on 2 November 2012 to the parents at Largs Bay Primary School. It was desirable for those schools to be notified so that they in turn were in a position to inform those parents who had children in the OSHC service at that school. Once again, there will be limits upon the ability to notify all parents as some will have changed address.

Two Prohibitions

634. It must be emphasised that there are two courses that a school should **not** adopt. The school should not either

1. place the letter on a notice board at the school, or
2. place the letter on the school's website or include it in a school newsletter.

Publications on a notice board at the school have the capacity to be seen by any member of the public. For this reason, the letter should not be published on a notice board at the school. A school's website is a facility to which any member of the public could readily gain access. Indeed, that is the very purpose of a website. A publication of any kind on the website would amount to a form of publication that would be in breach of section 71A of the *Evidence Act*. Many schools publish a newsletter on the school's website or in some other way on the internet. As already mentioned in the discussion concerning section 71A of the *Evidence Act*, publication of a school's newsletter or the school's website is a form of publication prohibited by section 71A. There would be little doubt that a person who had published the letter to parents in such a newsletter would be guilty of breaching section 71A and be liable to a very substantial fine. For those reasons, the letter to parents should not be published in the

school's newsletter on the internet or in any other public way. These prohibitions apply only until the time when the alleged offender has been committed for trial or sentence. After the committal, there is no restriction on informing the public unless a suppression order has been made.

Keeping Parents Informed

635. As mentioned earlier, it is desirable that the school should inform parents of the process of the prosecution of a teacher. That can be done at critical stages in a prosecution. Letters could be sent to parents after the teacher has been committed for trial or sentence. Another important stage will be when the guilt of the teacher is known, either because the teacher has pleaded guilty or the teacher has been found guilty after a trial. Another stage will be when the teacher has been sentenced. Should there be an appeal against a conviction, it will be appropriate to inform parents of the outcome of the appeal. It is absolutely essential that parents are informed if the teacher is acquitted of the charges against him or if the charges against him are withdrawn. That is a matter of fundamental fairness. On some occasions, despite the fact that he has been acquitted, the teacher will be subject to disciplinary action by the Department or the Teachers Registration Board. If that should occur, it is desirable that parents should be informed of that fact and of the outcome of the disciplinary proceedings.

CHAPTER 13 – OTHER ISSUES

636. This chapter deals with several unrelated topics associated with either the notification or management of sexual misconduct in schools. Those separate issues are

1. The role of a governing council.
2. Reviewing mandatory notification.
3. Student on student behaviour.
4. Third parties using DECD sites.
5. Informing teachers and principals.
6. Recruiting investigators.
7. Counselling for victims and victim's parents.
8. Increasing the resources of the Screening Unit.
9. Note taking.
10. Managing critical incidents.
11. Child Sex Offenders Registration Act.
12. Liaison with Police.
13. Information on prosecutions.

This chapter examines those separate issues and makes recommendations.

THE ROLE OF A GOVERNING COUNCIL

637. The events at the Largs Bay Primary School draws attention to the role of governing councils in schools operated under the aegis of the Department and, more particularly, to the extent of the powers and functions of governing councils. At least four members of the Governing Council of Largs Bay Primary School held the view that the school should send a letter to parents who had children in the OSHC service, if not also to all parents with children at the school informing them of Harvey's conviction. Questions were being asked as to the extent of the powers of the Governing Council to send a letter. The principal of the school, acting on the direction of the Department, did not agree to send such a letter. It is relevant to ask what the position would have been had a majority of the members of the Governing Council resolved that a letter should be sent to all parents of the school informing them of Harvey's conviction and the principal, acting on the advice or direction of the Department, had disagreed with that resolution.

638. A number of separate questions have to be considered. They are:

1. Does a governing council have power to send a letter to parents to inform them that a member of the staff of the school has committed a sexual offence?
2. What mechanism is available to resolve a dispute between a governing council and the principal of the school?
3. By what means can a governing council obtain independent legal advice?

These questions then lead to the question what is the true extent of the powers and functions of governing councils in schools operated by the Department and to the further question as to what in truth is the position of the governing council. Is it a body that in fact governs the school or is its role more akin to that of an advisory body? Questions concerning the extent of the powers and functions of governing councils are not confined to Largs Bay Primary School. Evidence at this Inquiry demonstrated that governing councils at other schools have from time to time sought legal advice as to the extent of their role and responsibilities.

The Powers of a Governing Council

639. Governing councils are school councils established pursuant to section 88 of the *Education Act*. Although the Act distinguishes between governing councils and school councils, it does not spell out if there is in reality any difference between them. It is clear that in order to become a governing council, a school council must have particular provisions in its constitution. Beyond that, there is no apparent difference.

640. The *Education Act* does not spell out the powers of a governing council, although it does impose several limitations upon those powers. The powers of a governing council are listed in its constitution. The Minister has power to publish a model constitution for a school council. The Minister has published a model constitution and that model has been adopted by governing councils. The model constitution is a convenient source of reference by which to ascertain the powers of a governing council. The constitution lists the powers and functions of the governing council in clauses 4 and 5 and the functions of the principal in clause 6.

641. The powers of a governing council are set out in clause 4 of the constitution. They are stated in the model constitution in these terms:

POWERS OF THE GOVERNING COUNCIL

- 4.1 In addition to the powers conferred under the Act, the Council may:
 - 4.1.1 employ persons, except as teachers, as members of the staff of the school on terms and conditions approved by the Chief Executive;
 - 4.1.2 enter into contracts;
 - 4.1.3 construct any building or structure for the benefit of the school or make any improvements to the premises or grounds of the school, with the approval of the Chief Executive;
 - 4.1.4 purchase or take a lease or licence of premises for student residential facilities, and enter into any other agreements or arrangements for the establishment, management, staffing and operation of such facilities;
 - 4.1.5 establish and conduct, or arrange for the conduct of, facilities and services to enhance the education, development, care, safety, health or welfare of children and students;
 - 4.1.6 do all those acts and things incidental to the exercise of these powers.
- 4.2 The Council's powers must be exercised in accordance with legislation, administrative instructions and this constitution.

A number of limitations upon those powers are set out in sections 91, 92 and 93 of the *Education Act*. Section 91 of the Act states that a governing council may enter into a transaction involving the acquisition or disposal of real property only with the Minister's written consent and section 92 stipulates that a governing council may only borrow money

with the Minister's written consent. Section 93 states that a governing council must not interfere or take any action that interferes with the provision of instruction at a school or the day to day management of the provision of instruction at a school or in relation to the administration of discipline within the school. Furthermore, a governing council must not give directions to the principal or any other member of the staff in relation to the manner in which that person carries out his or her duties: see section 93(2). Should a governing council receive a complaint against the principal, it must pass on the complaint without comment to the Chief Executive of the Department: see section 93(3)(a). If a governing council receives a complaint against any other member of the staff, it must pass it on without comment to the principal: see section 93(3)(b).

The Functions of a Governing Council

642. The functions of the council are provided in clause 5 of the model constitution. Clause 5 is in these terms:

5. FUNCTIONS OF THE COUNCIL

- 5.1 In the context of the Council's joint responsibility with the Principal for the governance of the school, the Council must perform the following functions:
 - 5.1.1 involve the school community in the governance of the school by:
 - (i) providing a focus and a forum for the involvement of parents and the school community;
 - (ii) ascertaining the educational needs of the local community and the attitude of the local community to educational developments within the school; and
 - (iii) ensuring that the cultural and social diversity of the community is considered and particular needs are appropriately identified.
 - 5.1.2 set the broad direction and vision of the school.
 - 5.1.3 strategic planning for the school including:
 - (i) developing, monitoring and reviewing the objectives and targets of the strategic plan; and
 - (ii) considering, approving and monitoring human resource and asset management plans.
 - 5.1.4 determine policies for the school including policies for the safety, welfare and discipline of students.
 - 5.1.5 determine the application of the total financial resources available to the school including the regular review of the budget.
 - 5.1.6 monitor and review the Site Learning Plan.
 - 5.1.7 report to the school community and the Minister on:
 - (i) the strategic plan;
 - (ii) the finances of the school;
 - (iii) operational plans and the Council's operations.
- 5.2 The Council must be responsible for the proper care and maintenance of any property owned by the Council.
- 5.3 The Council may perform such functions as necessary to establish and conduct, or arrange for the conduct of:

- 5.3.1 facilities and services to enhance the education, development, care, safety, health or welfare of children and students;
- 5.3.2 residential facilities for the accommodation of students.
- 5.4 The Council may raise money for school related purposes.
- 5.5 The Council may perform other functions as determined by the Minister.
- 5.6 The Council may do all those acts and things incidental to the exercise of these functions.
- 5.7 The Council's functions must be exercised in accordance with legislation, administrative instructions and this constitution.

Like clause 4.2 that impose limits on the powers of a governing council, clause 5.7 expressly states that those functions must be exercised in accordance with legislation, administrative instructions and the constitution. I will return to the limitations upon the powers and functions of a governing council.

The Functions of the Principal

643. It is unnecessary to set out all of the functions of the principal in council. It is sufficient to refer to the opening words of clause 6 and clause 6.1. They are in these terms:

6. FUNCTIONS OF THE PRINCIPAL IN COUNCIL

The functions of the Principal in Council are undertaken in the context of the Principal's joint responsibility with the Council for the governance of the school.

- 6.1 The Principal is answerable to the Chief Executive for providing educational leadership in the school and for other general responsibilities prescribed in the Act and Regulations.

The opening words of both clauses 5 and 6 state that the governing council and the principal of the school are jointly responsible for the governance of the school. Standing alone, those clauses suggest that the governing council has quite extensive powers. The word "governance" is of wide import. It derives from the Greek verb meaning "to steer". Governance denotes the manner of governing an organisation. If the opening words of clauses 5 and 6 were the only clauses to consider, it would appear that a governing council of a school had wide powers to exercise in the discharge of its duty of governing the school jointly with the principal. However, as has been noted, both the powers and functions of a governing council must be exercised in accordance with the legislation, administrative instructions and the constitution of the governing council.

Limits on the Powers and Functions

644. The legislation and administrative instructions significantly limit the powers of a governing council. One important piece of legislation that limits the power of governing council is Regulation 42 of the *Education Regulations*. It is sufficient to refer to the terms of Regulation 42(1). It provides:

- (1) A head teacher of a school is answerable to the Director-General and –
 - (a) in the case of a school with a governing council, is jointly responsible with the council for the governance of the school;
 - (b) in any case, is responsible for –
 - (i) providing educational leadership in the school;

- (ii) the management of the day-to-day operations of the school;
- (iii) the welfare and development of the students;
- (iv) the establishment and maintenance of a social and educational environment within the school favourable to-
 - (A) learning; and
 - (B) acceptable forms of behaviour; and
 - (C) the development within students of self-control, self-discipline and a respect for other persons and their property;
- (v) the provision, and the day-to-day management of the provision, of instruction in the school in accordance with the curriculum determined by the Director-General under Part 7 of the Act;
- (vi) ensuring that staff, students and parents are consulted about, and informed of, the disciplinary rules governing students' behaviour both inside and outside the classroom;
- (vii) the administration of discipline within the school;
- (viii) promoting the continuing professional development of the staff of the school;
- (ix) encouraging staff of the school to participate in processes for determining policies for the school and resolving problems;
- (x) the conduct of regular staff meetings-
 - (A) as an integral part of decision making and communication within the school; and
 - (B) in a manner providing full opportunity for staff involvement;
- (xi) keeping the school council informed of relevant educational and other policies;
- (xii) fostering community participation in school programs and in educational developments generally;
- (xiii) the proper care and safekeeping of school property belonging to the Minister.

The person described as “the Director-General” in Regulation 42 is the Chief Executive of the Department for Education. Plainly, a head teacher is the principal of a school. Thus, a principal is answerable to the Chief Executive of the Department. The fact that a principal is answerable to the Chief Executive means that a principal is both accountable to the Chief Executive and is subject to the direction of the Chief Executive.¹ That is also the effect of clause 6.1 of the Constitution. The fact that the principal must comply with the directions of the Chief Executive clearly has the consequence that, should there be a difference of opinion between the principal and the governing council, the principal will be bound to act as directed by the Chief Executive.

645. In addition, it appears that the intention of Regulation 42(1)(b) is that the matters listed therein are matters that are excluded from the powers and functions of a governing council.

¹ *Australian Education Union (SA Branch) v Chief Executive, Department for Education and Children's Services* [2007] SASC 458, [43].

In other words, the principal is at liberty to deal with any of those matters independently of the governing council. This is a further limitation upon the powers of the governing council.

The Question of Joint Responsibility

646. Yet another limitation upon the powers and functions of a governing council might stem from the requirement that the governing council is jointly responsible with the principal for the governance of the school. That requirement is stated in clauses 5.1 and 6 of the constitution and in Regulation 42(1). The Oxford English Dictionary defines the adjective “joint” in relation to a thing or action as “held, done, made etc. by two or more persons, parties, or things, in conjunction”. It defines the adverb “jointly” to mean “unitedly, conjunctly”. It is arguable, therefore, that the requirement that the principal and the governing council are jointly responsible for the governance of the school means that they must agree on the acts and things to be done to govern the school. In short, they must act in conjunction. If they do not agree, there is a stalemate. Neither the word “jointly” nor the words “jointly responsible” have a technical legal meaning.² However, it is well established that, if two persons or organisations have power to act “jointly and severally”, they may act either individually or together. It is arguable, therefore, that the absence of the words “or severally” from the expression “jointly responsible for the government of the school” could add further weight to the argument that the fact that the governing council is jointly responsible with the principal for the governance of the school means that they must act in conjunction. On the other hand, the expression “jointly responsible” might mean that both the governing council and the principal have a responsibility to govern the school in the sense that they may act independently of each other but within the limits upon their respective powers. It is neither appropriate nor necessary for this report to venture a conclusion as to the true meaning of the expression “jointly responsible for the governance of the school”. However, the fact that there is doubt as to the meaning and intent of the expression suggests that a review of the powers and functions of a governing council is required.

647. It is apparent that a great deal of co-operation between the governing council and the principal is necessary if the school is to be efficiently and effectively governed. However, it must be observed, that there is potential for conflict if the principal of the school must act as directed by the Chief Executive of the Department on a matter where the governing council holds a contrary view to that of the Chief Executive.

Other Limits on Power

648. Reference has already been made to the limitations on the powers contained in sections 91, 92 and 93 of the *Education Act*. In addition to those limitations, section 96 of the *Education Act* invests the Minister with power to issue administrative instructions to school councils. Section 96 provides:

² *Kidson (Inspector of Taxes) v MacDonald* [1974] 1 All ER 849, 858.

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.

The Minister has issued administrative instructions. They are called Administrative Instructions and Guidelines. They are designed to guide governing councils in the exercise of the powers and functions provided in the constitution. They are lengthy and comprise 168 pages.

649. In addition to the power to issue administrative instructions, the *Education Act* invests the Minister with other powers in respect of governing councils. Those parts enable the Minister to exercise quite a degree of oversight over a governing council. They are:

1. The Minister may direct a governing council to make amendments to its constitution.³
2. The Minister has a discretion whether to approve an amendment to the constitution of a governing council.⁴
3. The Minister has power to remove members of a school council for misconduct, failure or incapacity to carry out the duties of the office satisfactorily, or if irregularities have occurred in the conduct of the council, or for any other reasonable cause.⁵
4. The Minister also has power to prohibit or restrict the exercise of the power of a governing council if, in the opinion of the Minister, it is necessary or desirable to do so.⁶

These powers of the Minister, together with the limitations on the powers of a governing council in sections 91, 92 and 93, and the extensive powers of the Minister in section 96, demonstrate the extent to which a governing council is subject to the control of the Minister. Given that the Minister is likely, as a general rule, to follow the advice of the Department, the governing council is in effect subject to the control of the Department.

Power to Send a Letter?

650. There can be little doubt that a governing council has the power to decide that a letter should be sent to parents who have children in its OSHC service informing them, say, that a

³ Section 88(1) of *Education Act*.

⁴ Section 88(5) of *Education Act*.

⁵ Section 97 of *Education Act*.

⁶ Section 98 of *Education Act*.

member of the staff of that service of the school has been convicted of committing a sexual offence. Clause 5.6 of the constitution invests the council with power to do all acts and things that are incidental to its functions. Clause 5.3 states that a governing council may perform such functions as are necessary to establish and conduct facilities and services to enhance the care, safety, health and welfare of students. There are several reasons why governing councils establish the service of OSHC. Those reasons include enhancing the care and safety of students by arranging a service to care for students before and after school hours. The establishment of an OSHC service, therefore, falls within the meaning of Clause 5.3 as the OSHC service is a service that enhances the care, safety, health or welfare of students at the school. The governing council may wish to inform parents who use that service about any number of matters. Those matters will include information about the operations of the service, the retirement of staff and the employment of staff. They are at liberty to inform parents by letter. Information as to the operation of the service will also include a letter to parents informing them that a member of the staff of the OSHC service has been convicted of a sexual offence. It is beyond argument that these are all matters that relate to the care, safety, health or welfare of those students who are cared for by that service and so fall within the meaning of clause 5.3 of the constitution. If that is not so, they are at least matters incidental to that function and so fall within Clause 5.6 of the constitution. It is also a matter that is part of the governance of the school in that it concerns the safety, health and welfare of the children and students at the school. Although, by reason of Regulation 42(1), the principal is responsible for the management of the day to day operations of the school, the sending of a letter stating that a member of the staff of the OSHC service of the school has been convicted of a sexual offence falls quite outside the kind of matters that constitute the day to day operations of the school. Far from being a day to day matter, it is a rare event.

651. However, if the requirement that the governing council and the principal are jointly responsible for the governance of the school means that they must both act in conjunction, the governing council has no power to send the letter unless the principal consents. The fact that the governing council and the principal are required to act jointly in the governance of the school might, therefore, have the consequence that the principal is in a position to veto the decision of governing council. If there were a dispute between the governing council and the principal as to whether such a letter should be sent, it would be the decision of the principal as directed by the Department that would prevail.

652. The question whether a governing council has power to send a letter to all parents informing them that a member of the staff of the OSHC service has been charged with a sexual offence against a child at the school is more difficult to determine. It is arguable by a like process of reasoning that the governing council has that power. Although the offending occurred in the OSHC service, the offender might have assaulted other children at the school. It is, therefore, a matter that relates to the governance of the school and concerns the safety, health and welfare of children at the school. However, one practical difficulty is the fact that the principal controls access to any list of the names and addresses of parents of children at the school who do not use the OSHC service. It is neither appropriate nor necessary in this report to determine whether in fact the governing council has these powers. It is sufficient to note the fact that real questions exist as to the extent of the powers of a governing council and to state that it is highly undesirable that this uncertainty should continue. It is another indication of the need to review the powers of governing councils.

653. Should a teacher be charged with a sexual offence, there are real doubts whether the governing council has power to send a letter to parents. That is because a teacher is employed by the Department and section 26 of the *Education Act* commits matters relating to the discipline of teachers to the Chief Executive of the Department. This report recommends that the Department should inform parents when a teacher is charged with an offence. Yet, a question remains as to what the position would be if the Department did not inform parents and the governing council believed it should.

Resolution of Disputes

654. It seems that clause 24 of the model constitution is intended to provide a mechanism for the resolution of disputes. It provides that a school must participate in a scheme for the resolution of disputes between the governing council and the principal as prescribed in administrative instructions. However, the Administrative Instructions and Guidelines contain no prescribed mechanism for resolution of disputes. There does not appear to be any other administrative instruction regulating the resolution of disputes. In the absence of such an administrative instruction, it would seem, therefore, that if there were a dispute between the governing council and the principal of a school, the dispute could ultimately be resolved pursuant to an administrative instruction from the Minister. I do not think that is a satisfactory situation. It gives the Minister power to override what might be a very valid position on the part of the governing council. It is clearly necessary for an administrative instruction to be drafted to provide a suitable means of resolving disputes. The Inquiry heard evidence that on some occasions, disputes between the principal and the governing council have been resolved by mediation. That would be an appropriate dispute resolution process provided that the mediator is a person entirely independent of the Department.

Obtaining Legal Advice

655. Should a dispute exist between a governing council and the Department, the governing council may wish to obtain legal advice. On occasions, a governing council has sought advice on a matter where there is no dispute with the Department. The Department has then arranged for the governing council to be advised by the Crown Solicitor's Office. That is a commendable process. However, should a dispute exist between a governing council and the Department, it might be necessary for the governing council to obtain independent legal advice elsewhere. The funds of a governing council are, generally speaking, very limited. In many cases, a governing council would not have sufficient funds to pay for the cost of legal advice. One witness gave evidence that at one school the members of the governing council themselves paid for independent legal advice. There will be many governing councils who would not be able to act in that way.

656. Had the Governing Council of Largs Bay Primary School been able to obtain access to independent legal advice, it would have quickly learned that there was no legal impediment to the sending of the letter to parents informing them of Harvey's conviction. The Governing Council could then have handed the legal opinion to the Department and in all likelihood, the Department would have sought advice whether the advice given to the Governing Council was correct. Had it done so, it would have quickly learned that there was no reason in law why a letter could not have been sent to parents. The matter might have then resolved more quickly and more satisfactorily.

657. It is desirable that governing councils are in a position to obtain independent legal advice on those occasions when there is a dispute with the Department. Consideration needs to be given to the question on how such advice should be funded. It is a difficult question but one that must be addressed.

Recommendations

658. For the reasons already given, I recommend that the Department establish a process for the resolution of disputes between the Department and a governing council. That process should be mediation. The process should provide for the appointment of a mediator who is a person entirely independent of the Minister, the Department and the governing council. The Law Society of South Australia has a list of lawyers willing to act as mediators. The Department should be responsible for the fees of the mediator.

659. I also recommend that provision be made to establish a fund on which a governing council can draw when it is in dispute with the Department and needs to obtain independent legal advice. It is necessary to establish a process to determine whether it is necessary or appropriate for the governing council to obtain independent advice. The funds should not be wasted by requests for advice on trivial or unimportant matters or on matters that do not require legal advice. It is, therefore, recommended that the decision whether it is necessary or appropriate for a governing council to obtain funds for the legal advice be made by the person who holds the office of the Crown Solicitor. I acknowledge that there might be a perception that the Crown Solicitor is not entirely independent of Government. However, by virtue of his office, the Crown Solicitor is obliged to act as a model litigant. That obligation is well recognised and is of long standing.⁷ The obligation has been formally recorded in a bulletin published by the Crown Solicitor on 10 June 2011.⁸ The principles expressed in that bulletin have been endorsed by the Attorney-General.⁹ When making a determination whether it is necessary or appropriate for a governing council to obtain legal advice, the Crown Solicitor would not be acting as a litigant. Nevertheless, the same principles do, I think, apply with equal force. To remove doubt, it could be stated that, when exercising the function to determine whether it is necessary or appropriate for a governing council to obtain legal advice, the Crown Solicitor is exercising an independent discretion and is not acting on the instructions of any other person or body. In any event, the Crown Solicitor has to do no more than determine whether the questions are fit for legal advice. He is not being called upon to give the advice.

Conclusion

660. A sound working partnership between the governing council and principal has a real potential to benefit a school. Governing councils have the capacity to provide a useful voice for the parent community in relation to the governance of a school. They are in a position to

⁷ *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ); *Deane v Attorney-General* (1835) 160 ER 80, 85.

⁸ Legal Bulletin No. 2, *The Duties of the Crown as a Model Litigant*.

⁹ *Ibid.*

assist the principal on such matters as the formulation of policies for the school, the setting of the broad direction and vision of the school, and the strategic planning of the school, all of which are part of the functions of a governing council as prescribed in the constitution. They are a very worthwhile link between parents with children at the school and the principal.

661. However, it is readily apparent from this review of the powers and functions of a governing council that those powers and functions are quite restricted. A governing council has no power to require the principal to put its recommendations into effect. Should a difference of opinion exist between the governing council and the principal of a school, the principal will have to act as directed by the Chief Executive of the Department. The reality is that the principal does not have to comply with the wishes of the governing council. As one officer of the Department acknowledged, most members of governing councils to whom he had spoken believe that they had more authority than they actually have in fact and in law. The evidence suggests that the governing councils of some schools chafe under the restrictions on their powers and functions. At the same time, it must be recognised that the Government would wish to place some limits on the powers of governing councils since it is the Government that through the Department for Education provides the funds and staff for schools.

662. Throughout this Inquiry, I have been struck by the uncertainty that exists as to the extent of the powers and functions of governing councils. The position of the governing council was described by one witness as “a cosmetic instrument” and its functions as “glorified fundraising”. It is unnecessary to decide whether they are fair descriptions. My sole purpose in drawing attention to these questions is to recommend that it is necessary to clarify the true position of governing councils. Having reviewed the powers and functions of governing councils, I cannot avoid coming to the conclusion that such a review is necessary in order that those parents who voluntarily serve on governing councils are clearly aware of the true position. It is desirable that the powers of a governing council are expressed in more transparent terms. It is misleading for the constitution of the governing council to state that the governing council is jointly responsible with the principal for the governance of the school if, in truth, it is the principal who has the final word and who will act in accordance with directions from the Chief Executive. In my view, it is necessary for the powers and functions of governing councils to be reviewed with the intent of determining whether a governing council should have wider powers of governance or whether it is in truth only an advisory body. If, after that review, it is decided that the function is essentially advisory, it will be desirable to consider changing the name of the governing council by deleting the adjective “governing” and substituting another adjective such as “consultative” or “advisory”. Such an adjective that would more accurately describe the true function of the council.

REVIEWING MANDATORY NOTIFICATION

663. The events at the Largs Bay Primary School draw attention to the question whether it is necessary for a teacher to notify CARL in circumstances where the teacher’s only knowledge of the allegations of abuse or neglect comes from police and police have arrested and charged the member of the staff of the school against whom the allegations have been made. In the case of the Largs Bay Primary School, the principal of the school first learned of the allegations against Harvey when police were, in fact, investigating the allegations. The investigating police officer had informed the principal on the evening of 1 December when the matter was first reported to police. That night, one of the investigating officers had

notified CARL. On 2 December, Harvey was arrested. Notwithstanding the arrest, the principal had a duty to notify CARL. The principal was aware of that duty but did not promptly notify CARL. On 7 December 2010, she was warned by police that, if she did not inform CARL, she would be guilty of an offence. The principal, in fact, informed CARL late in the afternoon of 7 December. That principal knew no more than what the investigating officers had told her. She could do no more than report to CARL what the police had told her and police had already given that information to CARL. No useful purpose could have been served by her notifying CARL especially as Harvey had been arrested.

664. The *Children's Protection Act* is the statutory expression of the intention of the Parliament to provide for the care and protection of children. It gives statutory expression to the public policy that every child has a right to be safe from harm. That right is one of the fundamental principles of the Act. Two of the objects of the Act are:

- (a) to ensure that all children are safe from harm; and
- (b) to ensure as far as practicable that all children are cared for in a way that allows them to reach their full potential.¹⁰

One of the measures established by the Act to seek to ensure the safety of children is to establish a system of mandatory reporting of a reasonable suspicion of abuse or neglect of a child. It is a fundamental step in providing protection for children who are being abused or neglected. The Layton Report described mandatory reporting as one of the central pillars of the child protection system in South Australia.¹¹

665. Mandatory notification of a reasonable suspicion that a child has been or is being abused or neglected is required by section 11 of the *Children's Protection Act*. Section 11 imposes a duty on a list of persons to notify the Department if they suspect on reasonable grounds that a child has been or is being abused or neglected.¹² One consequence of the Layton Report was that the obligation to report was extended to ministers of religion, a person who is an employee of, or volunteer in, an organisation formed for religious or spiritual purposes and those working with children in sporting or recreational services.¹³ Section 11(1) states the duty to make a notification in these terms:

- (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,

¹⁰ Section 3 of *Children's Protection Act*.

¹¹ Ms Robyn Layton QC, *Our Best Investment - A State Plan to Protect and Advance the Interests of Children* (2003) para. 10.2.

¹² The Department to which Section 11 refers is now the Department for Education because on 21 October 2011, the *Children's Protection Act 1993* was committed to the Minister for Education and Child Development. The *Children's Protection Regulations 2010* does not reflect this commission in the definition of "Department".

¹³ The *Children's Protection Act* was amended by section 10 of the Schedule to the *Children's Protection (Miscellaneous) Amendment Act 2005* to include persons in those categories.

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

Maximum penalty: \$10,000.

In practical terms, that obligation is to notify the Child Abuse Report Line ("CARL"). The list of persons in section 11 includes teachers at schools and police officers. For that reason, when a principal or a teacher at a school suspects on reasonable grounds that a child has been or is being abused or neglected, that principal or teacher has a duty to notify CARL of that suspicion. The principal or teacher must give that notification to CARL as soon as practicable after he or she forms that suspicion. The maximum penalty for failure to comply with this statutory duty is \$10,000.

666. The fact that a police officer may notify or has already notified CARL does not relieve the principal or teacher of the obligation to make a notification. The principal or teacher must always notify CARL in addition to any notification by the police.

667. CARL is the central point for all notifications. CARL is operated by Families SA which, in turn, is a unit of the Department for Education and Child Development. It is an extremely busy service. It is a call centre for a number of services, one of which receives reports of child abuse. It often receives more than 100 calls a day. In business hours, there are 12 to 15 operators at the call centre. On ringing the number 131 478, a caller must identify the particular service they seek. Depending on how busy the service is, the caller will then be transferred to that service or join the queue for that service. The number of operators on duty depends on how busy the service is at any particular time. Between 7am and 8.45am and between 5pm and 11pm, the number of operators reduces to eight. Between 11pm and 7am, there are two operators. The operators are trained social workers.

668. The evidence at this Inquiry established that it is a frequent experience for a caller to have to wait for long periods of time for the call to be answered. The records of Families SA produced at the Inquiry show that a caller could quite frequently wait as long as one half hour or even longer. In one case, a caller had to wait for over one and half hours. Families SA also records not only the number of calls that are answered but also records the number of callers who terminate the call before an operator answers it. A number of calls were terminated after the caller had waited for 25 minutes or more. Although SA Police has its own dedicated line, it is not unusual for officers of SA Police to have to wait for one half hour. The delays in answering a call would appear to be a consequence of the need for operators to record what the caller is reporting about the suspected neglect or abuse of a child and the grounds on which the suspicion is based. Families SA acknowledges that delays exist.

669. Long delays in answering calls will discourage those willing to report a suspicion of neglect or abuse of a child from persisting with the call. That has the obvious capacity to bring CARL into disrepute. One obvious means of remedying this situation would be to allow reports of child neglect or abuse to be made electronically. At present there are some 260 providers who are permitted to make electronic notifications.

670. As the provisions of section 11(1) of the *Children's Protection Act* now stand, they require a person to whom the section applies to notify CARL even if the suspicion of neglect or abuse is based only on information supplied by police. Section 11(3) of the *Children's Protection Act* requires the notification to CARL to be accompanied by a statement of the

observations, information and opinion on which the suspicion is based. When a police officer informs the principal of a school that he is investigating allegations of sexual abuse of a child, the principal will know no more than what the police officer has said about those allegations. Nevertheless, the principal will then have reasonable grounds for a suspicion that a child has been abused and will, therefore, be subject to the duty imposed by section 11 to notify CARL. When the principal or teacher notifies CARL on the basis of information supplied by police, the principal or teacher can do no more than state that the information given by police is the information on which the notification is being made. That will be their only knowledge that gives rise to the suspicion. It is apparent that no purpose is achieved by the principal notifying CARL. The obligation to report is quite otiose.

671. If the duty imposed by section 11 is taken to an extreme, the duty to notify CARL will also exist whenever a group of teachers is informed by the principal of the fact of allegations of sexual misconduct. Assume, say, that a principal informs the staff of a school that one of their number is alleged to have sexually abused a child who is a student at the school. Strictly speaking, each and every member of the staff of that school who received that information would then be bound by section 11 to notify CARL. It is unlikely that that is the intention of section 11.

672. The primary purpose of the *Children's Protection Act* is to protect children from abuse or neglect. The purpose of section 11 in obliging certain groups of people to notify CARL is to identify those children who are at risk. Police can then be informed of the suspicion and begin to make inquiries. The very fact that police are investigating an allegation of child abuse or neglect demonstrates that a child has already been identified as being at risk. That is the very purpose of the police investigation. There can be no useful purpose, therefore, in requiring, say, a teacher or principal who has been informed by police of allegations to notify CARL so that CARL can inform police of what police already know. There is an element of circularity, if not absurdity, in imposing an obligation on a teacher or any other person to whom section 11 applies to notify CARL in circumstances where that person has learned of the allegations of abuse or neglect from police in the course of a police investigation of child abuse or neglect and can only tell CARL what police have told that person, particularly if that person has already been arrested. The obligation upon the principal to report what the principal has learned from police serves no useful purpose. There is an obvious circularity in the process and it becomes a pointless and unnecessary obligation. One consequence of that circularity is that it adds an unnecessary caller to a service that is already busy.

673. Two recent instances provide illustrations of how pointless the obligation to notify can become. On 11 January 2013, police rang an officer of the Department for Education seeking information about an alleged offender who police were intending to arrest. A brief outline of the allegations was given to the officer of the Department. On 15 January, the alleged offender was arrested. Assume the Departmental officer was a teacher. No useful purpose could have been served by the Departmental officer notifying CARL. In another case in 2013, police had arrested and charged the alleged offender before the Department for Education even knew of the allegations. In that case, the arrested teacher informed the school principal, who was the first person other than police to know of the allegations. Again, no useful purpose could have been served by requiring the principal to notify CARL.

674. These considerations draw attention to the question whether section 11 of the *Children's Protection Act* should be amended. The consequences for a teacher who fails to

make the mandatory notification are serious. The teacher will be liable to a fine of \$10,000. Teachers should not be subject to the risk of a substantial penalty if they fail to make a mandatory notification in circumstances where they are doing no more than passing on to CARL what police already know. There are sound reasons why it is desirable to amend section 11 to relieve a person from the duty to notify CARL where that person learns of allegations of abuse or neglect from police in the course of a police investigation and that person knows that police have already notified CARL or that the alleged offender has been arrested and charged. Such an amendment would have the consequence that police would remain subject to the existing obligation to notify CARL. I recommend, therefore, that section 11 be amended by adding a new subsection 4(a) to read as follows:

It shall be a defence to a charge under subsection (1) to prove that the knowledge of facts that gave rise to the suspicion was gained only from a police officer acting in the course of his duty.

The obligation upon police to notify CARL should continue to exist.

675. Consideration should also be given to the question whether it is appropriate to relieve a teacher of the obligation to notify CARL when the only knowledge that that teacher has of possible abuse or neglect of a child has been obtained from another teacher who has already notified CARL. An amendment could be made along the lines of the following:

This section does not require a teacher in an educational institution (including a kindergarten) to make a notification where that teacher's knowledge of the fact that gave rise to the suspicion was gained from another teacher in that educational institution and that other teacher had already made a notification under this section.

676. Another important consideration is that teachers can be a very valuable source of information on the question whether a child is suffering abuse or neglect. Their capacity to observe a child throughout a school day or over a period of school weeks enables them to detect evidence of abuse or neglect. They are in a position to gain additional information that might not be known to police. It is appropriate that information of that kind should be reported to CARL so that consideration can be given to other courses of action should police not proceed to charge the person suspected of the abuse or neglect. In this respect, teachers would be subject to the continuing obligation to notify CARL that is expressed in section 11(5) of the *Children's Protection Act*. Another question is whether it is appropriate for teachers to be the only class of persons who might be exempt from notifying CARL in circumstances where a fellow employee passes on information. However, it is a question that should be addressed given the substantial penalty that might be imposed on any person who fails to notify CARL.

677. In any event, whether or not the proposal to amend section 11 is adopted, Families SA should extend the existing process of electronic notification. Families SA has already begun to refine its system of electronic notification to enable more accurate reporting. It will implement an online registration process and an online training process as part of the registration process. It aims to increase the number of persons registered to make electronic notification and those persons will include some principals of schools. That would be a very effective reform and might assist in reducing delays on what is already a very busy, if not overloaded, service.

STUDENT ON STUDENT BEHAVIOUR

678. Sexual offending at schools is not limited to offending by adults against children. There have been occasions when one child has sexually assaulted another. The Inquiry obtained evidence of three incidents that occurred at three separate schools where there had been a sexual assault by one child upon another. Since it involved allegations of sexual assault, I ordered that the evidence be confidential. The evidence indicated that each assault was of a serious nature. However, for the reasons that follow, I did not inquire further into the question of sexual offending by one student against another.

679. The question of sexual misconduct by one child against another has been addressed in a document entitled *Responding to Sexual Behaviour in Children and Young People - Guidelines for Staff in Education and Care Settings* ("the Guidelines document"). The document was jointly prepared by the Department, Catholic Education SA and the Association of Independent Schools. It was published in 2010. The preparation of the document included consultation with the Department of Health, SA Police, and the Department for Families and Communities. The guidelines are quite comprehensive. They grade the sexual behaviour which children might engage into three classes. They are age appropriate sexual behaviour, concerning sexual behaviour, and serious sexual behaviour. The Guidelines set out the kinds of responses that should be made to each of those forms of behaviour.

680. The Terms of Reference of this Inquiry concern a failure to disclose to parents the fact that the Director of an Out of School Hours Care service had committed a serious sexual offence upon a child at the Largs Bay Primary School. The Terms of Reference limit the scope of this Inquiry to the events that happened at that school and to recommendations as to the management of allegations of sexual misconduct by any adult person employed in a school. Given the limits of the Terms of Reference and the existence of the Guidelines document, I did not investigate sexual misconduct by one student against another. However, some general observations must be made.

681. Although the Guidelines document is very useful, it fails to address two important matters. The first concerns the question of the criminal responsibility of children. In South Australia, a child under the age of 10 years is presumed not to be capable of forming an intent to commit a criminal offence. That is prescribed by section 5 of the *Young Offenders Act*. A child under the age of 10 years might engage in forms of sexual behaviour that would constitute a sexual offence if the child was over the age of 10 years. Because of the legal presumption that a child under 10 years cannot form an intent to commit a criminal offence, that child cannot be prosecuted. Offending by children under the age of 10 years has the potential to be a very difficult matter to manage. It is desirable that those who have to manage such matters are aware of this fact and that the Guidelines document should state how such matters should be managed.

682. A second issue that should be addressed is the fact that the *Young Offenders Act* prohibits the publication of anything that might identify both the offender and the victim where each is under the age of 18 years. The relevant provisions of the *Young Offenders Act* have been mentioned in Chapter 2 of this report. Those provisions operate in a different manner from section 71A of the *Evidence Act*. It is desirable that the Guidelines document explains the operation of these provisions so that a person managing an incidence of sexual offending by one child against another is aware of them and does not offend against them.

683. Another matter that should be added to the Guidelines document relates to the management of students after the offending has occurred. It is likely that both students will remain at the school. There is a risk that the aggressor might continue to harass the victim. The management of the students in this situation might present a number of difficulties. It is important that all members of the school staff should be aware of allegations of conduct of this kind so that they are in a position to deal appropriately with any further harassment of the victim should they see it, for example, when on yard duty at the school. All members of staff should be informed of the issues between offender and victim and be ready to take appropriate action. These are matters that might require extensive management as well as sensitive management of the victim. It is important to manage the matter so as to avoid the victim having to leave the school. It is desirable, therefore, that the management of such matters are addressed in some detail in the Guidelines document. The evidence of this Inquiry demonstrated that the Guidelines document is not widely known among teachers. Many were entirely unaware that the document even existed. It is essential that the Department takes steps to ensure that teachers are aware of it and are familiar with its contents. The matter is addressed in greater detail in paragraph 688 below.

684. The Guidelines document refers at page 24 to the desirability of providing proper counselling to victims of sexual assaults by another student. It states that it should be provided by professional therapists. The evidence to this Inquiry indicates that the Department does not consistently provide proper counselling in these situations. It is essential that it adheres to the practices recommended in the Guidelines document, a document that itself has prepared in consultation with others. The Department should not fall short of the standards it has propounded.

THIRD PARTIES USING DECD SITES

685. The Department permits third parties to use its land or premises for educational or recreational purposes. For example, some sporting organisations might use ovals and other facilities on sites owned by the Department. In other instances, Departmental buildings are used by organisations providing different kinds of educational services. The Department has no involvement with any of those activities other than the fact that it permits its land or premises to be used by those other organisations. In this discussion, I will refer to the Department's land or premises as the "Department site". I will refer to the organisations who use the Department sites as "a third party" or "third parties".

686. On occasions, allegations have been made of a sexual misconduct by an adult who is either a volunteer with or an employee of the third party using the Department site. For example, in one instance, a former teacher employed as a lecturer by an educational institution which used DECD premises was charged with serious sexual offences. In its submission to the Inquiry, the Department referred to the fact that there might be an expectation in some parts of the community that it should notify parents of children participating in the activity that is provided by the third party using the Department site.

687. Although a third party is using a Department site, the fact that sexual misconduct might have occurred on that site does not give rise to any legal obligation on the Department to inform parents of the children using the service provided by the third party of that misconduct. The obligation to inform parents falls upon the third party using the Department

site. Any moral obligation of the Department can be discharged by requiring the third party to give notice to parents should a member of the third party be, for example, arrested and charged with a sexual offence. The Department could achieve that purpose by imposing a contractual obligation upon the third party to give notice to parents of children using the service provided by the third party, should a member of that organisation be arrested and charged with a sexual offence. The obligation would be included in the lease or other contractual arrangement by which the Department permits the third party to use or occupy its site. The contract could also state that, if the third party fails to give appropriate information to parents, the Department will do so at the cost of the third party. It is not appropriate for this Inquiry to draft the relevant provisions. They will vary according to the particular circumstances of each case. Provisions of this kind have already been included in contractual arrangements with at least one participant in the FLO program referred to in Chapter 10. The Department should obtain advice from the Crown Solicitor's Office as to the appropriate form of contractual obligation to be used in each case.

INFORMING TEACHERS AND PRINCIPALS

688. The Department conducts programs of professional development with the intent of instructing teachers and principals on new issues or developments that affect education. It is mandatory for teachers and principals to attend those programs. In addition, when an important new policy is introduced, the Department will meet school principals and pre-school directors to instruct them in relation to that new policy. However, it is apparent that important policies are not always adequately drawn to the attention of all teachers. One example is the document entitled *Responding to Problem Sexual Behaviour in Children and Young People: Guidelines for Staff in Education and Care Settings*, the Guidelines document referred to earlier in this chapter. That is an important document that was designed to assist staff at schools, pre-schools and child care centres, out of school hours care services and family day care services in responding effectively to instances of problem sexual behaviour between children and young people. The Guidelines document was sent to Departmental sites under cover of a letter dated 9 July 2010 from Ms Andrews, who was then the Deputy Chief Executive, Schools and Children's Services. Despite the fact that it was a set of guidelines for all staff in education and child care settings, the letter was addressed only to site leaders. The letter was addressed in these terms:

To: Regional Directors, Assistant Regional Directors, Pre-School Directors, School Principals, OSHC Directors, Family Day Care Leaders, Child Care Centre Managers.

The letter did not contain any request that site leaders inform other staff about the existence of these important guidelines. The evidence in this Inquiry indicates that the Department did nothing to draw the guidelines to the attention of teachers and other staff. None of the teachers who gave evidence were entirely familiar with the guidelines and some did not know of their existence. It is reasonable to infer that they are not alone. While it might be observed that a responsible principal should take steps to draw the document to the attention of teachers at his school, it is ultimately the Department's responsibility to ensure that all teachers are aware and become familiar with an important document of that kind. In this electronic age, it is not difficult to give notice to all teachers of the existence of important documents and ask that they be read and assimilated.

689. Another issue in relation to the instruction of principals and teachers relates to the large number of policies, protocols and other documents that have been published by the Department. These policies, protocols and instructions deal with a wide range of issues including matters relating to the proper administration of a site, policies to protect children's health, crisis management and policies relating to teachers. For example, the policies relate to such matters as attendance, hot weather, bullying, data management, healthy eating, and overseas travel by teachers. The Department's website enables access to these policies in an alphabetical listing A-Z. There are 241 entries. Some policies have more than one entry. The website could be improved by an index that groups topics together to enable a ready access to all policies on any particular issue. In some cases there is a degree of repetition and overlap in some policies. A review to rationalise the policies is also desirable. It is to be noted also that the Guidelines document referred to in paragraph 688 is not listed with these policies. Given the importance of the document that is a curious omission. It is possible to locate the document on the Department's website by using the search function. However, the success of such a search might depend on providing the correct words to the search engine. It is a document that should be displayed more prominently and certainly in the A-Z list of policies.

690. However, the matter of greatest importance is ensuring that new policies and new guidelines are in fact drawn to the attention of all principals and teachers. That can readily be addressed by ensuring that any letter or email or other communication to principals and teachers emphasises the importance of the matter, the need for it to be drawn to the attention of all teachers and other staff, and the need for it to be read and assimilated.

RECRUITING INVESTIGATORS

691. In 2010, the Department instructed KPMG to report on its structures and processes for investigating employee misconduct. KPMG reported in November 2010. One of the recommendations in that report is that the Investigation Unit should recruit staff with suitable qualifications and experience. The recommendation reads:

It is recommended that staff within the Investigation Unit have qualifications and significant experience in undertaking investigations. Staff with a law enforcement or other relevant investigative background would be desirable.¹⁴

I thoroughly endorse that recommendation. Some of the failings that occurred in December 2010 might have been avoided had qualified and experienced investigators been on the staff of the then Special Investigations Unit. The Department has implemented this recommendation. It is essential that it continues to adhere to it.

COUNSELLING FOR VICTIMS AND VICTIM'S PARENTS

692. The evidence of this Inquiry established that, although the Department had offered counselling to the victim of Harvey's offending and to her parents, it did so in an unsatisfactory manner. When allegations of sexual misconduct have been made, the

¹⁴ KPMG, *A Review of Employee Conduct Investigations in DECS*, (2010) page 6 para. 4.

Department has an obligation to provide appropriate counselling for both the victim and the victim's parents. It is fair to state that the Department is aware of that obligation. However, attention should be given to the manner in which an offer of counselling should be made.

693. It is very likely that, when a victim's parents first learn of the offending, they will be extremely emotional and agitated. That is a perfectly natural and understandable response. There might be a number of issues that have to be addressed by the parents. Many questions might be crowding upon their minds. They might not, therefore, be in a position to agree readily to an offer to provide counselling. They might initially reject the offer but later wish to reconsider their position. The manner in which an offer of counselling is made will vary according to the circumstances of each case. There is much to be said for making the offer orally. It is a more sympathetic approach than a mere letter. However, any offer that is made should be confirmed in writing. If parents should initially reject the offer, the fact of the letter with its statement that the offer might be accepted later will provide them with an opportunity to reconsider the position. It goes without saying that the Department should offer counselling as quickly as possible, if not immediately, after it learns of the allegations.

INCREASING THE RESOURCES OF THE SCREENING UNIT

694. The Minister for Education has announced that the Government intends to require teachers and student teachers to undergo an assessment as to their suitability to work with children, a process that she called "child protection history assessment". That assessment will be in addition to the current criminal history check that teachers now must undergo. As is apparent from the evidence of Mr Laity, that screening process will be effective only if the screening unit at Families SA is suitably resourced and, in particular, is sufficiently staffed. If it is not, it is likely that there will be substantial delays in obtaining the results of the screening process. It is recommended that the complement of staff at the screening unit be appropriately increased.

NOTE TAKING

695. Memories fade and recollections of events will be difficult at a later date when principals or other members of staff are required to recall events. It is essential, therefore, that principals and other members of staff keep a written record of all conversations that occur in the course of managing allegations of sexual misconduct. This is particularly necessary in the case of conversations with the alleged offender and with the victim and the victim's parents. Principals and teachers may later be required to give evidence in court often more than a year after a conversation occurred. The memory of that conversation will either have faded or even vanished from the memory of that principal or teacher. Evidence of the conversation will be the more persuasive if the principal or teacher has made notes of the conversation either during or immediately after the conversation. Principals and teachers should also keep a record of any actions they have taken. The notes can be made on forms supplied by the Department. The notes should be placed in a file marked "Confidential" and held in a secure cabinet. The only person with access to the cabinet should be the principal or the principal's delegate. In addition, all documents should be lodged on to the IRMS system. The desirability of keeping notes cannot be over emphasised.

MANAGING CRITICAL INCIDENTS

696. IRMS, the Department's system for managing critical incidents has been described in Chapter 5. IRMS has been subject to a number of reviews, the last in October 2012. The recommendations of that review are contained in the *Critical Incident Review Report* published in January 2013.

697. The document called *Critical Incident Reporting* was amended on 5 November 2012. The procedures have been changed in some respects. One alteration was to change the definition of "critical incidents". It now reads:

A critical incident is defined as any significant or threatening event, which could be contentious or dangerous and may include:

- a major disruption to the site's routine
- intervention or action by police or other agencies
- violence
- intruders
- weapons
- disaster eg. fire or flood
- drug incidents
- assaults
- death or serious injury to a student or staff member.

School principals are required to report critical incidents to IRMS within 24 hours of the incident occurring. They are to be reported electronically on a form called "Critical Incident Report". Principals must also report the critical incident to the Regional Director or the Assistant Regional Director of the region in which the site is situated. The Assistant Regional Director must then in turn immediately notify the Director, Programs and Regional Management or the Manager of the School Care Unit to inform them of the incident.

698. Another alteration was to state that the Director, Programs and Regional Management is then responsible for:

- contacting the Minister for Education and the Chief Executive of the Department to inform them of the critical incident;
- determining in consultation with the Minister and the Chief Executive, the course of action to be undertaken in response of the incident;
- co-ordinating all requests for further information from the Minister or the Chief Executive and other units in the central office and ensuring that all other actions occur in a timely manner.

The Director, Programs and Regional Management also has responsibility for determining how the Department will respond to the incident in the media and will do so in consultation with the Department's Media Unit.

699. One matter that quickly became apparent in the course of this Inquiry is the fact that there was a failure by the Department to have one person responsible for the oversight of management of serious critical incidents. That was especially so in the events associated with the arrest and later conviction of Harvey. That issue has been in part addressed by Recommendation 16 of the Critical Incidents Review Report. That recommendation reads:

That a new unit/division is established bringing together the Investigations Unit (including HR support), parents complaint unit and school care with dedicated resources for the management of critical incidents.

That recommendation will be more effective if it also required that a person be appointed to have the responsibility for the oversight and management of the critical incident until all aspects of that incident have been resolved.

700. One difficulty that has been experienced with IRMS is that schools report incidents of all kinds, many of which are not “critical”. This has caused IRMS to be overloaded with so called critical incidents. The total number of critical incidents in 2010, 2011 and 2012 were:

Year	Total Critical Incidents
2010	1,974
2011	2,529
2012	2,622

The recommendations in the *Critical Incident Review Report* included a recommendation for a rating system to enable better management of critical incidents. Critical incidents are graded according to the level of seriousness of each incident so as to enable a triage process for the better management of the incidents. The Critical Incident Co-ordinator has responsibility for grading the seriousness of the incident. One advantage of the rating system is that it assists in the identification of critical incidents of which the Minister should be informed. The evidence at the Inquiry made it abundantly clear that a process of grading critical incidents was long overdue.

CHILD SEX OFFENDERS REGISTRATION ACT

701. The submission of SA Police drew attention to a desirable amendment to section 66 of the *Child Sex Offenders Registration Act*. Section 66(1) of that Act requires that a person who has been charged with a sexual offence must disclose that fact to his employer within seven days after the charge has been filed. Section 66(1) is in these terms:

- (1) A person engaged in child-related work (including work under a contract for services) who is charged with a class 1 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.

One weakness in the Act is that it does not impose any obligation on the person who has been arrested and charged to disclose the name of his employer. A person who has been apprehended by police has the right to silence. Section 79A(1)(b)(iii) of the *Summary Offences Act* recognises that right. It provides:

- 79A (1) Subject to this section, where a person is apprehended by a police officer (whether with or without a warrant) - ...
 - (iii) the person is, while in custody, entitled to refrain from answering any question (unless required to answer the question under this or any other Act or law).

That right enables a person who has been charged to refuse to tell police the name of his employer. One consequence is that police cannot enquire whether the person charged has, in fact, complied with the obligation to inform his employer of the charges required by section 66(1).

702. In my view, this is an instance where the public interest in the protection of children referred to in Chapter 1 should override the right to silence. Furthermore, by its very terms, section 79A recognises that there might be exceptions to the right to refrain from answering questions. A person who a police officer reasonably suspects has committed a sexual offence against children should, therefore, be required to disclose the name and address of his employer. The obligation to disclose the name and address of the employer should apply also where the alleged offender works either as an independent contractor, the employee of an independent contractor, a volunteer or in any other capacity. In addition, there are sound reasons why the police should have the ability to inform the employer or organisation at which the alleged offender works of the fact that the alleged offender has been charged with a sexual offence. It is a more certain means of ensuring that the interests of children are protected.

703. The submission of SA Police states that police are working with the Attorney-General's Department to develop amendments to address these issues. I recommend that consideration be given to amending section 66 of the *Child Sex Registration Offenders Act*

- (a) to require a person charged with a sexual offence involving a child or children to disclose to a police officer the name and address of the organisation where that person works with children either as an employee, contractor, volunteer or in any other capacity; and
- (b) to authorise a police officer to inform the person for whom that person works that the person has been charged with a sexual offence involving children.

Section 74A of the *Summary Offences Act* authorises police officers in the circumstances stated in section 74A to require persons to give personal details of the kind listed in subsection (5) of section 74A. In order that police officers may obtain the information in subparagraph (a) above, I recommend that it is also desirable to amend section 74A of the *Summary Offences Act* by adding a new paragraph (f) to subsection (5) to read as follows:

where the police officer has reasonable cause to suspect that a person has committed, is committing, or is about to commit a sexual offence involving a child or children, the name and address of the organisation where that person works either as an employee, an independent contractor, as a volunteer or in any other capacity.

Amendments in these or similar terms should address these legitimate concerns of SA Police.

LIAISON WITH POLICE

704. The events of 1 and 2 December 2010 draw attention to the fact that on some occasions it might be necessary for the Department and SA Police to act together to avoid a

risk of harm to children.¹⁵ There might be occasions when the principal of a school is informed by police of allegations against a member of staff at night and it is necessary to prevent that staff member from having contact with students the next day. A number of questions have to be addressed. The police will not want anything to be done that might impede the investigation. The police will not want to alert the alleged offender lest he destroy evidence. At the same time, it might be difficult for the principal to take effective action to prevent the member of staff from having contact with students without some kind of assistance from police. There might be occasions when it is not sufficient for police to say to a principal that he should take steps to prevent a member of staff from having contact with children the next day. When those occasions do occur, it is recommended that police and the Department should liaise and decide upon an appropriate course of action to prevent any risk of harm to children.

705. SA Police has implemented the highly desirable practice of informing the Investigations Unit of the Department when it has arrested and charged a member of the staff of a school with a sexual offence. The practice should continue since it enables the Department to commence the process of informing the school community of that fact and implement whatever new staffing arrangements are necessary at the school. However, while SA Police always provides the Department with the name of the person who has been charged and the offence with which he has been charged, neither SA Police nor the Department have established a practice that is consistently observed as to the items of information that SA Police should provide to the Department. The discussion in this report and in particular in Chapters 11 and 12 indicates that it is desirable that the information provided by SA Police to the Investigations Unit at the Department should always include the following:

- the name of the accused person;
- details of the charge and a short summary of the nature of the offending;
- the conditions of bail;
- the date of the first court appearance of the accused person and the location of the court at which the person has to appear;
- whether there is a reasonable suspicion of other victims;
- whether the offence is a major indictable offence, a minor indictable offence or a summary offence; and
- contact details of the investigating police officer.

In addition, as noted in paragraph 552 above, SA Police should inform the Investigations Unit whether there is any particular issue that might require no letter to be sent to parents for the time being or that, if a letter is to be sent, it should have regard to any particular issue. It is recommended that these practices be put in place. It is further recommended that the Inter-Agency Code of Practice and Information Sharing Guidelines be amended to reflect the above recommendations.

¹⁵ See paras 269-271 above.

INFORMATION ON PROSECUTIONS

706. One difficulty for the Department, Catholic Education SA and the Association of Independent Schools is following each step in the course of a criminal prosecution. That task would be assisted by an administrative arrangement. Pursuant to the obligation imposed by section 51 of the Act, the Director of Public Prosecutions has made arrangements with the Teachers Registration Board to report to the Board at several stages during the course of the prosecution of a teacher charged with an offence that raises serious concerns about the teacher's fitness to be or to continue to be a registered teacher. The occasions on which the Director reports include

1. when the person is charged with an offence;
2. when the person is committed for trial or sentenced in a District Court or Supreme Court;
3. when the person is convicted of an offence;
4. when there is an acquittal or the Director presents a *nolle prosequi*;
5. where the Director decides not to present an information; and
6. where the jury is discharged because of a mistrial or because the jury is unable to agree upon a verdict.

The Teachers Registration Board could assist each of the above employers of teachers if it in turn passed on to them the information received from the Director of Public Prosecutions. It would not be a difficult task. The Board could enter into an administrative arrangement with the Department, Catholic Education SA and the Association of Independent Schools to pass on to those organisations the information it receives from the Director of Public Prosecutions at each stage of a prosecution. If this cannot be achieved by an administrative arrangement, consideration should be given to the question whether an appropriate amendment to achieve that result could be made to the *Teachers Registration and Standards Act*.

CHAPTER 14 – GUIDELINES PROPOSED

707. This report recommends that the Department for Education and Child Development adopt guidelines to assist the management of allegations of sexual misconduct. It is essential that the purpose of the guidelines is not misunderstood. They are intended to provide guidance in the difficult task of the management of sexual allegations. They will inform and assist teachers and school administrators as to the steps to be followed. The guidelines cannot be prescriptive. Such is the variety of circumstances in which allegations are made and such is the variety of the nature of sexual misconduct that it will be necessary in every case to exercise judgment as to how best to proceed. That will require careful consideration of the facts and circumstances of each individual case. Nevertheless, the steps recommended in these guidelines should be capable of providing guidance in most cases.

708. Much of what will be contained in the guidelines is straightforward. They will reflect the legislation that imposes mandatory duties and other obligations on teachers. The guidelines will also reflect understandings between police and other agencies who have a role in the protection of children. The stages at which parents, staff and members of the governing council of the school will be informed will reflect the discussion of those issues in this report.

709. In the following sections of the report, the need for and the purpose of the guidelines will be considered.

The Need for Guidelines

710. The evidence at this Inquiry clearly demonstrated a need for guidelines of the kind proposed. One consistent theme of teachers, school administrators and the officers from the Department who appeared before the Inquiry has been the need for such guidelines. Aside from the assertions of the need for guidelines, there are reasons in principle for recommending them.

711. First, the management of sexual allegations can by its very nature be a difficult, complex and stressful task. On occasions it might be necessary to manage allegations which involve either complex issues of fact or of law. Furthermore, there is the ever present and difficult task of weighing the separate interests that must be considered. In particular, the need to protect the alleged victim and other potential victims must be weighed against the legitimate interests of the alleged offender and the presumption of innocence. In addition to those considerations, not all teachers and school administrators have, for understandable reasons, a sufficient familiarity with either the criminal justice system or relevant legislation to know what steps can lawfully be taken. Misunderstandings by the officers of the Department for Education of what constituted a suppression order was one of the reasons why in the case of Largs Bay Primary School information was not given in a timely manner to parents.

712. Next, if the principal of a school is required to manage allegations that a teacher or other member of staff has been guilty of sexual misconduct, it is likely that it will occur only once in the course of that principal's career. The principal will not have the benefit of prior experience that is generally available when dealing with other incidents in the school. The

guidelines will provide clarity, enable the school to act promptly, and relieve the principal of doubt and uncertainty.

713. Thirdly, in the case of the Department for Education, it is desirable that, to the extent that circumstances permit, the Department should act in a consistent manner. The Department's management of allegations of sexual misconduct over the past three years shows an undesirable degree of inconsistency in its management of such allegations.

714. Finally, the introduction of guidelines will bring a degree of transparency to what has hitherto been a fairly opaque process. Parents who have children at a school where allegations have been made that a member of staff has engaged in sexual misconduct have a natural and justified concern for the safety and welfare of their own children. The existence of guidelines will be a document to which parents of children at the school will be able to refer should allegations of sexual misconduct be made against a teacher or other member of the staff of that school. A concerned parent can, if necessary and at an appropriate time, be referred to the guidelines and so be satisfied that an established procedure is in train. An understanding that the school is following an established procedure and that events must take a certain course may encourage parents to permit the process to continue to its end. The knowledge that there is a process that is being followed might provide a degree of reassurance to them. It is the absence of knowledge that often causes people to express concern or act precipitately.

715. As has already been mentioned, schools have a legal as well as a moral duty to protect the students in their care. The proper discharge of that duty requires schools not only to teach those students but also to take other steps to protect them. The proper management of allegations of sexual misconduct is but one aspect of the duty and obligation to protect children. In addition, a school has a duty to accord procedural fairness to its staff. The guidelines will assist the proper management of allegations of sexual misconduct in discharge of both the duty to students and the duty to staff.

Application to All Schools

716. It is self-evident that the essential elements of the guidelines should apply both in government and non-government schools. All schools have the same duty to protect children regardless of race, religion, culture or ethnic background. In recent times the Department for Education, Catholic Education SA and the Association of Independent Schools have joined in publishing guidelines dealing with other aspects of child protection that must be addressed in all schools. Those joint publications are consistent with the spirit of the recommendations made in 2003 in the Layton Report. It is relevant to note, in particular, that Recommendation 145 in the Layton Report recommended guidelines stating minimum standards to be applied in all schools for the management of child sexual abuse by employees or volunteers in schools. Catholic Education SA and the Association of Independent Schools agree that guidelines of the kind proposed in this report, but suitably adapted, should be applied in non-government schools. The guidelines are capable of being adapted to all places where children's services operate.

Purpose of Guidelines

717. The intent and purpose of the guidelines is to guide and assist principals and school administrators in managing what will be a difficult and stressful matter. The issues are usually more clearly defined when an alleged offender has been arrested and charged. It is likely that the management of the matter will be more difficult at the time before arrest, when no more is known than what is contained in the allegations. The guidelines will assist by setting out steps to be followed and identifying factors to be considered. A subsidiary, but no less important, purpose is to seek to achieve a consistency in the manner in which allegations of sexual misconduct are managed. This is especially important with the Department for Education which might have to deal with a number of allegations of sexual misconduct in any one year. The guidelines aim to clarify the role and duties of schools. Finally, they will provide information to parents and others concerned to know how allegations of sexual misconduct are managed in schools. That knowledge may lead to a greater understanding of the difficulties in managing such allegations and thereby lead to a greater sympathy for and understanding of the task that schools face when allegations are made.

What the Guidelines Will Cover

718. The guidelines will contain a brief summary of the legislation that imposes mandatory duties on teachers as well as legislation that regulates disclosure of the names of persons accused of committing a sexual offence. The guidelines will then discuss management of allegations, first at the time of when the allegations are first made and, secondly, when the alleged offender has been arrested and charged, and finally after the alleged offender has been committed for trial and sentence. There will be appendices to the guidelines. The appendices will include check lists that will provide a reminder to principals and the Department of the steps that must be followed, as well as a description of the steps leading from the arrest to the conviction or acquittal of the alleged offender. The appendices will also include sample letters. These more detailed descriptions are placed in the appendices so that the body of the guidelines is a straightforward document that can be quickly and readily understood. A busy principal does not have the time to read detailed and lengthy descriptions. Instead, the principal needs to be directed with clear and concise instructions.

719. While the guidelines will assist in most situations, they cannot be prescriptive. At the risk of repetition, it must be stressed that it is necessary to examine the particular facts and circumstances of each allegation. In some cases, the first knowledge received by a school will be that a member of staff has been arrested and charged. In others, it may be a report to the principal of a suspicion that a member of the staff is sexually abusing a student. The school will need to exercise judgment how to proceed. The action taken by the school will need to be tailored to the circumstances of each case. A good guide will not blindly follow a path regardless of the hazards or obstacles that might be encountered. Instead, a good guide will direct a course that recognises and adapts to those hazards and obstacles. So, when using these guidelines, a school will, if necessary, tailor the guidelines to the circumstances of each individual case. In some cases it might be necessary to obtain legal advice.

CHAPTER 15

Guidelines for Managing Allegations of Sexual Misconduct at DECD Sites



**Government
of South Australia**

Table of Contents

SECTION 1: INTRODUCTION	1
1.1 Purpose	1
1.2 Definitions	1
1.3 Scope	2
1.4 Sexual Misconduct	2
SECTION 2: LEGISLATIVE FRAMEWORK	3
2.1 Underlying Principles	3
2.2 Mandatory Notification	3
2.3 Prohibitions on Disclosure of Identity	3
2.3.1 Restrictions on Publication of Identity	3
2.3.2 Suppression Orders	4
2.3.3 Avoid Defamation	5
SECTION 3: MANAGING ALLEGATIONS OF SEXUAL MISCONDUCT	6
3.1 Importance of Note Taking	6
3.2 Immediate Action	7
3.2.1 Actions of Site Leader	7
3.2.2 Actions of DECD	9
3.3 Further Action	10
3.3.1 Future Employment of Accused Person	10
3.3.2 Counselling and Support	10
3.3.3 Risk Assessment	11
3.3.4 Informing Responsibly	11
3.3.5 Monitoring Court Proceedings	18
3.3.6 Responding to the Media	18
3.3.7 Reporting the Outcome	18
APPENDICES	
Appendix 1: Check List for Site Leaders	20
Appendix 2: Check List for DECD	21
Appendix 3: Sample Record of Allegation	23
Appendix 4: Sample record of meeting	24
Appendix 5: Sample Letters to Parents	25
Appendix 6: Course of a Criminal Prosecution	29
Appendix 7: Important Contacts	32
Appendix 8: Relevant Legislation	34

SECTION 1: INTRODUCTION

1.1 PURPOSE

- To inform site leaders, teachers, regional directors and all who are employed by the Department for Education and Child Development (DECD) of the procedures for managing and reporting allegations of sexual misconduct at a site.
- To ensure that parents are informed at the appropriate time of allegations of sexual misconduct by an adult against a student or child at a DECD site.
- To assist parents to understand the process that is followed in managing allegations of sexual abuse at DECD sites.
- To state the respective duties of site leaders and DECD in managing allegations of sexual misconduct at a site.
- To provide a transparent policy which enables early intervention, effective management and provision of the support required in these complex and serious matters.

1.2 DEFINITIONS

“accused person” means a staff member employed by DECD or any other adult who has a connection to a site against whom allegations of sexual misconduct have been made.

“an adult who has a connection to a site” means and includes members of staff, independent contractors, volunteers and any adult who engages with children or young people enrolled at the site.

“CARL” means Child Abuse Report Line.

“child or young person” means persons up to the age of 18 years and includes young adults with developmental disabilities attending education settings.

“DECD” means Department for Education and Child Development.

“parent” means and includes natural parents, step parents, foster parents, guardians, grandparents and any other relative or other person caring for a child.

“relevant date” means relevant date as defined in section 71A(5) of the *Evidence Act 1929*. That definition appears in section 2.3.1 below.

“site” means schools, preschools and junior primary, primary, secondary and senior secondary schools and also includes Out of School Hours Care services.

“site leader” means the principal and any other person who has ultimate responsibility for the welfare of children and young people on that site.

“**staff**” means all adults who have a duty of care to children and young people at the site and includes volunteers.

1.3 SCOPE

The procedures in these Guidelines apply to allegations of sexual misconduct made against any adult who has a connection with the site where the allegations affect the suitability of that adult to work with children.

These procedures apply to allegations of sexual misconduct where the allegation is

- (a) disclosed at the site;
- (b) occurs on the site;
- (c) occurs on the way to or from the site;
- (d) while a student is otherwise in care, including any school camp or the like; or
- (e) occurs off the premises of the site.

These Guidelines only apply to allegations of sexual misconduct by an adult against a student or child. For incidents involving child on child sexual behaviour, please refer to the *Responding to Problem Sexual Behaviour in Children and Young People* guidelines located on the DECD website at <http://www.schools.sa.gov.au/speced2/default.asp?id=25656&navgrp=2305>.

The reasoning underlying these Guidelines can be found in Chapters 11 and 12 of the Report of the Independent Education Inquiry.

1.4 SEXUAL MISCONDUCT

Sexual misconduct may take many forms. It includes sexual assaults of all kinds as well as other forms of inappropriate sexual behaviour. The latter includes such offences as being in possession of child pornography, sexual harassment and inappropriate filming of children in various states of undress. It includes acts of gross indecency.

A sexual assault means any form of unwanted sexual behaviour. It ranges from indecent assault through a number of offences to rape.

SECTION 2: LEGISLATIVE FRAMEWORK

2.1 UNDERLYING PRINCIPLES

Teachers and site leaders owe to the children in their care a duty to take reasonable care to protect them from a reasonably foreseeable risk of injury. That duty is not necessarily confined to events on site premises or during site hours. In addition to observing departmental policy, teachers and site leaders must comply with a number of statutory duties or obligations.

2.2 MANDATORY NOTIFICATION

Section 11 of the *Children's Protection Act 1993* imposes a duty on teachers in schools to notify the Department (Families SA) if, in the course of their work, they suspect on reasonable grounds that a child has been or is being abused or neglected. Abuse or neglect includes sexual abuse of a child or physical or emotional abuse of a child or neglect of a child. In practical terms, the duty to notify Families SA is a duty to notify the Child Abuse Report Line (CARL) on 131 478.

If an allegation of sexual misconduct is made to the teacher or site leader or if the teacher or site leader has a suspicion on reasonable grounds that a child has been or is being abused or neglected, he or she must notify CARL as soon as practicable after he or she forms that suspicion or learns of the allegation. It is an offence to fail to do so.

The fact that a police officer may have already notified CARL does not relieve the site leader or teacher of the obligation to notify.

For more details on what mandatory notification involves, refer to the *Guidance in Responding to Children and Young People* policy, the *Concerns Checklist*, the *Notification Checklist* and the *Documenting Notifications* policy located on the DECD website at:
<http://www.decd.sa.gov.au/speced2/pages/childprotection/mandatoryNotification/>

2.3 PROHIBITIONS ON DISCLOSURE OF IDENTITY

2.3.1 Restrictions on Publication of Identity

When a person has been, or is about to be, charged with a sexual offence, it is necessary to comply with the legal obligations imposed by section 71A of the *Evidence Act 1929*. Section 71A restricts publication of the identity of the alleged victim and of the alleged offender, who in these guidelines will be called “the accused person”.

Where the alleged victim is a child, the name of the alleged victim or anything that might identify the victim can never be published. Care must, therefore, be taken to ensure that nothing is said that might identify the alleged victim.

The name of the accused person can be published but only after certain events have occurred. Those events are identified in section 71A(5) of the *Evidence Act*. They are called “the relevant date”. The definition of “relevant date” in the *Evidence Act* is as follows:

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) in relation to a charge of any other minor indictable offence or a charge of a summary offence - the date on which a plea of guilty is entered by the accused person or the date on which the accused person is found guilty following trial; or
- (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.

The relevant dates are listed below according to the kind of offence with which the accused person has been charged.

The Investigations Unit should ascertain from SA Police the kind of offence with which the accused person has been charged, that is to say, whether it is a major indictable offence or other kind of offence. The Investigations Unit should provide that information to the School Care Unit and the site.

It is lawful to publish the name of the accused person after any of the following relevant dates.

Major indictable offences

- 1. The date on which the accused person is committed for trial or to be sentenced.
- 2. The date on which the charge is dismissed or that proceedings lapse by reason of the death of the accused person or for want of prosecution or for any other reason.

These dates are also applicable to minor indictable offences for which the accused person has elected to be tried in the District Court.

Minor indictable offences and summary offences

- 1. The date on which the accused person pleads guilty.
- 2. The date on which the accused person is found guilty following a trial.
- 3. The date on which the charge is dismissed or that proceedings lapse by reason of the death of the accused person or for want of prosecution or for any other reason.

Appendix 6 to these Guidelines gives a brief outline of the steps in a criminal prosecution. That outline will assist an understanding of the relevant dates.

2.3.2 Suppression Orders

Suppression orders are made by a court pursuant to section 69A of the *Evidence Act*. A suppression order is an order forbidding publication of whatever is the subject matter of the order. The order will state that it forbids publication of the subject matter of the order. For example, the order might read:

The name or anything tending to identify the accused be suppressed from publication in the interests of justice until further order.

A suppression order is not a statement made by a judge or magistrate that he or she does not intend to name a person or a school in order to protect the victim.

Before sending a letter to parents, DECD should inquire of the Registrar of the relevant court whether a suppression order exists. If an order exists, DECD should examine the terms of the order and consider whether the order forbids the kind of letter under consideration. If there is any uncertainty about what is prohibited, DECD should obtain legal advice.

It is still possible to give some information to staff, the governing council and parents while complying with these restrictions. See section 3 of these Guidelines for advice as to how and when that information is to be provided.

2.3.3 Avoid Defamation

When allegations of sexual misconduct have been made, care must be taken to avoid stating anything that might defame the person against whom the allegations have been made. If a site wishes to send a letter before a person has been arrested and charged with an offence, it is desirable to obtain legal advice as to the terms of the letter to ensure that nothing is said that defames that person. If that person has been arrested and charged, it is lawful to state that fact but nothing should be said which would suggest that the person is in fact guilty of the alleged misconduct.

SECTION 3: MANAGING ALLEGATIONS OF SEXUAL MISCONDUCT

Allegations might be made against a member of the teaching staff, administration or other support staff, employees of the governing council such as OSHC staff or against volunteers at a site. In most cases the steps to be taken by the site leader will essentially be the same.

It must be emphasised that these are guidelines only. The manner in which a site will learn of allegations will vary. It is not possible to draft guidelines that will address every possible variation of fact. The fundamental steps that should always be observed are to notify immediately

- police,
- parents of the victim, unless a parent is the accused person,
- the School Care Unit or other relevant unit of DECD, and
- CARL.

3.1 IMPORTANCE OF NOTE TAKING

Memories fade and recollections of events will be difficult at a later date when site leaders or members of staff are asked to recall events or conversations.

It is essential that site leaders and all other members of staff involved keep a written record of all conversations relating to the allegations. The notes should, if possible, be made in the course of the conversation or immediately after. In addition, site leaders and other members of staff should complete the “Record of Allegation” and ‘Record of Meeting” forms contained in Appendices 3 and 4. Those forms can also be downloaded from **[DECD to insert Link]**. These forms should be completed in addition to the site leader’s own notes of conversations.

Site leaders and members of staff should be aware that they may be called to give evidence in court proceedings. Contemporaneous notes will then be very helpful to assist the recollection of events and conversations. It is also important to be aware that notes may be subpoenaed for court proceedings and, therefore, should be completed in a legible and professional manner.

The notes and departmental forms should be placed in a file marked “Confidential” and held in a secure cabinet. The only person with access to the cabinet should be the site leader or the site leader’s delegate. In addition, all documents should be logged on to the IRMS system.

3.2 IMMEDIATE ACTION

Allegations of sexual misconduct might be made either to the Department or directly to a member of staff at the site or to the site leader. On other occasions, the first knowledge that either DECD or anyone at the site has of the allegations is when police state that they have arrested a person and charged him with a sexual offence.

The following is a list of the steps which should be taken by the site leader when allegations of sexual misconduct have been made. If the first knowledge of the allegation is when a staff member is arrested and charged, the site leader should proceed from Step 4.

All the steps are important and need to be attended to immediately. The site leader has responsibility to undertake or, if tasks are delegated, oversee the execution of all the steps. Some steps can be taken simultaneously.

3.2.1 Actions of Site Leader

Step 1: Obtain medical assistance for child if required

The site leader should immediately attend to any medical treatment that the victim might require.

Step 2: Receive Report of Allegation

If an allegation of sexual misconduct is made to a member of staff at the site, it should be reported to the site leader immediately. The member of staff to whom the allegation is reported should record the allegations on the form in Appendix 3.

If the allegation involves the site leader, the report should be made to the School Care Unit and the regional director.

Step 3: Report to Police

When the allegations of sexual misconduct are disclosed at the site, the site leader must immediately report the allegations to police on **131 444**.

Police should not interview students (be they the victim or the alleged offender) at a site except as a matter of urgency or immediate necessity. In the ordinary course, students should be interviewed at a place nominated by police that is off the site.

Step 4: Preservation of Evidence (if applicable)

The site leader should immediately take basic steps to secure the place where the alleged offending occurred, if that is on the site, until police arrive. An example is locking the computer room if the allegation is possessing child pornography. The police will properly secure the crime scene on arrival. If uncertain what to do, the site leader should contact police.

Step 5: Preventing Access to Children

When it is necessary to prevent the accused person from having any further contact with children at the site, the site leader should, in consultation with the School Care Unit and police take steps to prevent the accused person from attending the site.

Step 6: Inform Parents of Victim

Unless a parent is the accused person, the site leader should immediately inform the parents of the victim of the allegations. This should be done in a sensitive manner, taking into consideration the victim's wishes.

Step 7: Inform School Care Unit

The site leader should immediately contact the School Care Unit at DECD on **8463 6568**

Step 8: Place accused person on special leave

The site leader should immediately place the accused person on special leave with pay and direct him or her not to attend the site, pending a decision by the Chief Executive of DECD whether the accused person should be suspended. If guidance is required, consult the School Care Unit.

Step 9: Notify CARL

The site leader should, as soon as practicable, notify CARL on **131 478**.

NB. The obligation on the site leader to notify CARL exists even if police have made an arrest and have notified CARL.

Step 10: Complete DECD critical incident report

The site leader should log a critical incident report on IRMS.

Step 11: Inform Regional Director

The site leader should inform the relevant regional director of the incident.

3.2.2 Actions of DECD

Step 1: Investigations Unit liaise with SA Police

The Investigations Unit should ascertain the following from SA Police.

- Details of the charge.
- Short summary of nature of offending. This will be brief and can be, effectively, the first paragraph of the police apprehension report.
- Bail conditions.
- Date of first court appearance and location of the court.
- Whether there is a reasonable suspicion of other victims.
- Whether there are any complicating factors that would affect disclosure to parents.
- Contact details of the investigating police officer.
- Whether the offence is a major indictable offence, a minor indictable offence or a summary offence.

Step 2: Create Central File and Appoint a Manager

DECD should create a central file and should appoint a person to supervise and manage the matter to its conclusion.

Step 3: Place accused person on special leave

Assist the site leader to place the accused person on special leave with pay, pending the decision of the Chief Executive whether to suspend the accused person. Ensure that the accused person is directed not to attend the site.

Step 4: Alert Minister and Chief Executive

The Director, Programs and Regional Management must inform both the Chief Executive of DECD and the Minister's Office of the allegations via email or phone. If the information is given by phone, it should be confirmed by email.

Step 5: Alert Media Unit

Investigations Unit to inform Media Unit of information obtained from SA Police.

Step 6: Check that Site Leader has notified CARL

DECD should ensure that the site leader and other site staff if applicable have fulfilled their mandatory reporting obligations to report the allegations to CARL.

Step 7: Collate Notes

The School Care Unit should ensure that the site leader and other staff have made notes of any relevant events and conversations and ensure copies are placed on the central file.

3.3 FURTHER ACTION

As soon as DECD has attended to the steps listed as immediate action, it should then turn its attention to deal with the following four matters.

1. The future employment of the accused person.
2. Providing counselling and support.
3. Making a risk assessment.
4. Responsibly giving appropriate information.

3.3.1 Future Employment of Accused Person

Where the accused person is a member of site staff, the site leader should consult with the School Care Unit and the Human Resources Unit to ascertain whether the accused person will be suspended from duty pending the outcome of the investigations.

If the accused person is suspended, the Chief Executive of DECD should send that person a formal letter of suspension.

If the accused person is a member of the staff of the OSHC service, the site leader and the governing council should consult the Human Resources Unit at DECD to obtain advice on suspending that person.

If the accused person is a contractor, legal advice should be obtained whether the contract can be terminated.

If the accused person is a volunteer, the services of that person should immediately be terminated.

In the event of the charges being withdrawn or in the event of an acquittal, the site leader should contact the School Care Unit to ascertain what is to occur in relation to the future employment of the accused person.

3.3.2 Counselling and Support

DECD should offer appropriate support as required to

- the victim and victim's parents,
- other children or parents of the school community, and
- staff.

Generally speaking, that support will be in the form of counselling.

The site leader should meet with the parents of the victim to discuss continuing support for the victim. This may include educational support such as curriculum modifications or counselling services. After the meeting, the site leader should complete the form in Appendix 4 and have it signed by the parents.

The offer of counselling and other support for the victim and the victim's family should be made orally and as soon as possible after the DECD learns that the accused person has been charged. It

should be followed by a letter confirming the offer of counselling. Details of other available services can be listed for their later reference.

A safety and support plan should also be developed for the victim in consultation with their parents.

Contact details for support services should be provided to parents. See Appendix 7 for those details.

3.3.3 Risk Assessment

A risk assessment will be made by the School Care Unit or, if necessary, by the Incident Management Unit. The risk assessment will consider whether there is a reasonable suspicion that there might be other victims. The unit that makes the assessment should consult with the site leader who might be able to provide relevant information from the site. Where necessary, the unit should consult experts.

When making the risk assessment regard should be had to the following factors:

- the nature of the offending,
- the circumstances in which the alleged offending occurred,
- the place or places where the alleged offending occurred,
- the age and gender of the victim,
- the age and gender of the accused person,
- whether the accused person had regular and frequent contact with other children or a group or groups of children and the nature and circumstances of that contact, and
- the opportunities that were available to the accused person on which to offend against other children.

On occasions it might be relatively easy to identify a group that might include possible victims. The following are some examples.

- If the alleged offending is by a member of the staff of an OSHC service, it might be reasonable to suspect that other children in the OSHC service might be victims.
- If the accused person is a school bus driver, it might be reasonable to suspect that other victims might be other children who used the school bus.
- If the accused person is a class teacher and the alleged victim is in that person's class, it might be reasonable to suspect that other children in the class might be victims.
- If the accused person is a class teacher who also takes a physical education class, it might be reasonable to suspect that children in the class as well as children in the physical education class might be possible victims.

The other alternative is that it is not possible to identify any particular group of children because the accused person might have had regular and frequent contact with all of the children at the site.

3.3.4 Informing Responsibly

Although a suppression order and section 71A of the *Evidence Act* forbid publication of the name of the accused person generally to the public, it is proper for those with a legitimate interest in the matter to be informed of the alleged offending. Those who have a legitimate interest in the offending

are the staff at the site, the members of the governing council of the site, and parents of children who are likely to have been in contact with the accused person.

As considerable care must be taken when informing staff, the governing council and parents of the incident, site leaders and DECD should follow these guidelines.

It is necessary to consider the question of providing information at three points in time. (These points of time are called “stages” in this section.) They are

1. when no more is known than what is contained in the allegations,
2. after the accused person has been charged, and
3. after the committal or other appropriate relevant date.

Stage 1 - When Allegations Only

Informing Staff

It might be necessary for the site leader to make arrangements to replace the accused person who has been placed on special leave and to make other consequential administrative arrangements. The site leader is at liberty to inform the staff involved in the administrative arrangements of the allegations but should not inform other staff at that stage. Those staff members who are informed of the allegations should be asked to keep the information confidential. Other staff members should be told that the member of staff is on special leave.

Once the decision of the Chief Executive whether to suspend the accused person is known, the site leader should call a staff meeting and inform all staff that the accused person has been suspended on full pay.

It might be necessary to state that the accused person has been suspended because his or her conduct is being investigated but nothing should be said that might indicate that allegations of sexual misconduct had been made against the accused person.

Staff should be informed that the accused person is not allowed at the site and if the accused person is seen at the site to report it to the site leader. Staff should be asked to keep the information confidential and to refer any parents with questions to the site leader.

Staff should be instructed that, if they have any information that will assist the police investigation, they should contact police and provide that information.

If the identity of the victim is known and **consent is obtained from the victim or the victim’s parents**, specific staff members such as the alleged victim’s class teacher or school counsellor may be told who the victim is on a confidential basis in order to provide appropriate support for the victim.

Informing Governing Council

The members of the governing council should be informed. They should be given the same information as staff, namely, that the accused person has been suspended on full pay until further notice and that the accused person has been directed not to attend the site. They should be asked to keep the information confidential and to refer any questions from parents to the site leader.

Informing Parents

Generally speaking, while allegations are being investigated, it is not appropriate to inform parents of those allegations. The allegations might prove to be false, may not be substantiated, or there may be insufficient evidence to warrant criminal proceedings. A letter that named the accused person and

reports what are no more than allegations has a real potential to be defamatory. As a general rule, the site should not, therefore, inform parents of allegations.

If there is an occasion when it is necessary to send a letter to parents referring to allegations, that letter should not name the staff member against whom the allegations have been made. Legal advice should be obtained before sending such a letter. It will be necessary also to consult SA Police.

If a parent should ask a teacher why the suspended person is no longer at the school, the teacher should refer the inquirer to the principal. The principal should give the inquirer an answer that is as neutral as possible and does not disclose the nature of the alleged offending. One example of an appropriate answer is

“The teacher has been suspended. I am sorry I cannot give you any further information at this stage. As soon as I am in a position to do so, I will let you have more information.”

If the inquirer persists, the principal should do no more than state that the teacher has been suspended because his or her conduct is being investigated by police and the principal will give more information when the outcome of the police investigation is known.

Stage 2 - After Accused Person Has Been Charged

Informing Staff

Following the arrest of a member of staff, the site leader should convene a meeting of staff for the purpose of

- informing them that a member of staff has been arrested and to name that person and the offence,
- informing them of changes to staff required by the absence of the accused person,
- informing them that the accused person is not permitted on the site grounds,
- asking staff to inform the site leader if the accused person is seen at or near site grounds so that the site leader may take appropriate action, and
- informing them that, if they have any information that will assist the police investigation, to report that information to police.

Staff should also be instructed to keep the matter confidential in order to protect the confidentiality of the victim and also instructed that it is an offence to publish any material identifying the accused person at this stage of the criminal proceedings.

If new staff join the site, the site leader should give the same information to those new members of staff. Information should only be given to a relieving teacher if that teacher will be teaching the alleged victim.

If the identity of the victim is known and **consent is obtained from the victim or the victim's parents**, specific staff members such as the alleged victim's class teacher or school counsellor may be told who the victim is on a confidential basis in order to provide appropriate support for the victim.

Informing Governing Council

The most suitable means by which to inform governing council is at an extraordinary general meeting called for that purpose. The site leader is at liberty to inform members of governing council of the same facts as staff.

Informing Parents

The manner in which information is given to parents and the kind of information given to parents will depend on the result of the risk assessment.

Particular care must be taken when informing parents of the fact that a staff member has been arrested and charged with an offence. Parents will be advised either by letter or at a meeting, as described below.

Letters

As a general rule, the accused person should not be named in the letter to parents.

The letter should be sent as soon as reasonably practicable.

There is no one letter that will be suitable for all occasions. With the assistance of the School Care Unit of DECD, the site leader will have to prepare a letter suitable to the occasion in question.

Before finalising the contents of the letter with the site leader, DECD must consult with police as to the timing and content of the letter.

When drafting a letter to be sent to parents, regard should be had to the following five factors:

- the presumption of innocence;
- the fact that section 71A of the *Evidence Act* restricts publication of the name of the alleged offender until committal or “relevant date” pursuant to section 71A of the *Evidence Act*. If, contrary to the recommendation in these Guidelines, it is decided to name the accused person and if the letter is to be sent to a large number of parents, advice should be taken whether the letter is permitted by section 71A;
- the fact that a person who receives the letter might post it on Facebook;
- the fact that the name of the person alleged to have committed the offence can lawfully be published once that person has been committed for trial or sentence or after the “relevant date”; and
- whether a suppression order has been made by a court.

The purpose of a letter is twofold, to inform parents of the fact that a staff member has been charged with a sexual offence and to state whether there is any concern for the safety and welfare of children other than the victim.

The letter should be sent by post or by email. It should **not** be sent home with the child or student. It should **not** be posted on the site notice board or in a newsletter.

No other victims

If the result of the risk assessment is that there is no suspicion that there might be other victims, a letter should be sent to all parents at the site stating that fact. The letter should state that a member of staff has been arrested and charged with an offence, naming the offence but not naming that person.

An example of this type of letter and a list of the topics the letter should contain are set out in Example 1 of Appendix 5.

When a group is identified

If the result of the risk assessment is that there is a group of children who might include victims, two letters should be sent to parents. Neither letter should name the accused person.

The **first letter** should be sent to the parents of those children in the group in which it is suspected that there might be other victims. It will inform parents of the fact that a member of staff has been arrested and charged with committing an offence, naming the offence but not naming that person. It would inform those parents that a meeting is being called to give information to parents. At the same time, it would endeavour not to suggest that the children of those parents who received the letter are in fact victims.

An example of this type of letter and a list of the topics the letter should contain are set out in Example 2 of Appendix 5. It is the first letter in Example 2.

The **second letter** should be addressed to all other parents at the school. It will contain essentially the same information as the first letter save for the fact that it will state that, while there is no evidence that any child at the school is involved, a meeting is being called of parents whose children have been in regular and frequent contact with the accused person and state that the recipient may attend the meeting if he or she wishes to do so.

An example of this type of letter and a list of the topics the letter should contain are set out in Example 2 of Appendix 5. It is the second letter in Example 2.

When a particular group cannot be identified

In those cases where there is a reasonable suspicion of other victims but it is not possible to narrow down the group of children as the accused person has had regular and frequent contact with most of the children at the site, a meeting should be held with all parents.

It will be necessary for only one letter to be sent to all parents. An example of this type of letter is the letter in Example 3 of Appendix 5.

A Meeting of Parents

Where, as a result of the risk assessment, there is a reasonable suspicion that there might be other victims, a meeting should be held for the parents of those children who are in the group of possible victims. At that meeting those parents should be given information and instruction that cannot be given in a letter.

The information and instruction provided at the meeting should deal with such matters as informing parents of the kind of behaviour that is indicative of a child having been the victim of abuse, the appropriate way to provide opportunities for the child to talk about what has been a traumatic experience and how to support the child and manage the situation. The information and instruction should be directed to the type of offending that had been alleged. It should include a strong message to be available to the child but not to interrogate the child.

The information should be given by a qualified and experienced expert such as a psychologist with experience in assisting children who have been victims of child abuse, who would be able to answer any questions parents might have.

The meeting should also make sure that parents receive appropriate advice on how to deal with any disclosures made by their child. Parents should be provided with the contact details for the relevant support services.

The site leader may name the accused person and answer any questions parents might have.

The site leader should ask parents to treat the information as confidential. They can be told that publication of the name of the accused person would be in breach of section 71A of the *Evidence Act*. It might be preferable to encourage parents to treat that information as confidential by stating that it is in the interests of the victim and the parents of the victim to keep the matter confidential.

It should be stressed at the meeting that nothing should be said or done that might identify the victim.

Following the meeting, parents should be provided with an information sheet containing information about good parenting practice when dealing with a victim or possible victim of sexual abuse. That document should also include guidance as to how best to respond to disclosure by a child who has been abused.

The information sheet should also be made available to those parents who cannot attend the meeting.

Stage 3 - After Committal (or other relevant date)

After the accused person has been committed to stand trial or be sentenced or after any other relevant date, there are no restrictions on informing either staff, members of the governing council or parents of the fact that the accused person has been charged with a sexual offence. Any information given to persons in those groups can name the accused person and state the offence with which the accused person has been charged. At this stage, there is no need for confidentiality about any of those facts. However, if a suppression order has been made, legal advice should be obtained on the question whether it is possible to give information to staff, members of the governing council or parents.

Informing Parents of Previous Students

In consultation with the School Care Unit, a site leader should ascertain the names of children who in previous years would have been in contact with the accused person. Having done so, the site leader should send a letter to the parents of those children whose addresses are known. A letter must, in any event be sent to parents of children who left within the previous year.

This information should be given to those parents after committal or other relevant date, unless their child is identified during the risk assessment as being at risk of having been abused. They should then be informed in accordance with the procedure in paragraph 3.3.4.

Informing Other Schools

Where the accused person has been employed at other schools, the Department will notify those other schools so that they can consider whether it is necessary to inform parents in the same way as stated above.

The Department should also give notice that the accused person has been charged to Catholic Education SA and the Association of Independent Schools of SA Inc.

Informing the Minister

The Minister should be informed of allegations of sexual misconduct at a site as soon as reasonably practicable after DECD becomes aware of the allegations.

When a staff member has been arrested and charged, the Minister should be told the name of the site, the name of the accused person, the charges and the nature of the offending. This should preferably be in writing.

The initial briefing should be followed by a more detailed briefing in writing, when DECD has more information. If it is proposed that the site will send a letter to parents, a copy of the letter should be included in the briefing.

There will be occasions when it will be necessary for DECD to give the Minister further briefings as events unfold so that the Minister is in a position to respond quickly and appropriately to any issue that might arise in the course of the management of the allegations.

3.3.5 Monitoring Court Proceedings

The Investigations Unit of DECD should monitor the court proceedings and inform the site leader of the stage the prosecution has reached.

Unless a suppression order has been made, the site leader may inform parents by letter of the fact that the prosecution has reached any of the following stages:

- when a plea of guilty has been made;
- at the end of a trial, to inform whether the accused person has been acquitted or convicted;
- after the accused person has been sentenced; and
- after any appeal.

Any letters should be drafted in consultation with the School Care Unit of DECD and must be sent by post. Before sending any letters, it is necessary to check whether a suppression order has been made.

3.3.6 Responding to the Media

If the media inquire about the allegations, the site leader should consult the School Care Unit of DECD who will obtain advice whether to respond and, if so, how to respond.

3.3.7 Reporting the Outcome

It is desirable to inform the staff, members of the governing council and parents of the outcome of the criminal proceedings.

If the accused person is acquitted or if the charges against him or her are withdrawn or if the proceedings lapse for any reason, it is essential to inform staff, members of governing council and parents of the fact. The letter should be drafted by the School Care Unit and should be signed by a senior officer in DECD.

Should the accused person be acquitted or if the charges against him or her are withdrawn or if the proceedings lapse for any other reason, DECD will have to make a number of decisions in relation to the future employment of the accused person. They include

- whether the accused person will be subject to any disciplinary proceedings under section 26 of the *Education Act*;
- whether the accused person will return to the site where he or she had been employed; and
- whether the accused person should be employed at another site.

APPENDICES

Appendix 1: Check List for Site Leaders

1. Attend to welfare of victim.
2. Receive report of allegation and make notes of complaint.
3. Call police on 131 444 to report allegations. Also obtain appropriate police contact number for parents to use.
4. If police approve, take steps to preserve evidence.
5. Consult School Care Unit and police, if necessary, to prevent accused person from having access to children.
6. Contact parents of victim.
7. Call DECD (School Care Unit and Regional Director), if either has not been already advised.
8. Place accused person on special leave. If guidance required consult School Care Unit.
9. Notify CARL.
10. Complete Critical Incident Report on IRMS.
11. Ascertain from Human Resources Unit whether accused person has been suspended.
12. Inform victim and victim's parents of counselling and support options.
13. Inform staff and governing council in accordance with guidelines.
14. Write letters to parents in consultation with School Care Unit and SA Police in accordance with guidelines.
15. Hold meeting of parents as outlined in section 3.3.4 of the guidelines
16. Inform site community, staff and governing council of progress of the prosecution. **This is especially important if there is an acquittal.**
17. Ensure all documentation is stored in a locked, confidential file.

Appendix 2: Check List for DECD

If the person notified is an officer of the Investigations Unit, that officer should notify School Care Unit who will then arrange steps to be followed by site leader. Thereafter, the following steps should be taken:

1. Create file.
2. Appoint a person to supervise and manage the matter to its conclusion.
3. The Investigations Unit should ascertain the following from SA Police:
 - Details of charge.
 - Short summary of nature of offending. This will be brief and can be, effectively, the first paragraph of the police apprehension report.
 - Bail conditions.
 - Date of first court appearance and location of court.
 - Whether there is a reasonable suspicion of other victims.
 - Whether there are any complicating factors that would affect disclosure of information to parents.
 - Contact details of the investigating police officer.
 - Whether the offence is a major indictable offence, a minor indictable offence or a summary offence and pass that information on to the School Care Unit and to the site leader.

The above requests should be made orally and confirmed by email or may simply be an email request.

4. Assist site leader to place accused person on special leave with pay.
5. Alert Minister and Chief Executive (if done orally, confirm in writing).
6. Inform Media Unit.
7. Conduct risk assessment, utilising the expert panel in complex matters.
8. Human Resources Unit to advise Chief Executive whether it is necessary to suspend accused person.
9. Check that site leader has notified CARL.
10. Offer counselling to victim and parents of victim. The offer should be made orally and be confirmed in writing.

11. Consider whether letter should be sent to parents in accordance with guidelines.
12. Draft letter to parents.
13. Consult SA Police as to content and timing of letter, sending it to SA Police for comment.
14. Consider whether advice from Crown Solicitor is needed on letter, especially if the matter is complex.
15. Once letter has been approved, send to site for posting to parents.
16. Collate notes of site leader and other staff and place copies on central file.
17. Assist site leader to arrange meeting with parents.
18. Provide written briefing to Minister with proposed letter to parents attached. The briefing should be sent within two to three days of the arrest and be followed by such further briefings as are necessary.
19. Notify parents of past students and other schools.
20. Notify other school sectors:
 - a. Association of Independent Schools of SA Inc.
 - b. Catholic Education SA.
21. Investigations Unit to monitor court proceedings.
22. Inform site leader and parents of progress of the prosecution.
23. Provide further written briefings to Minister as necessary on key stages in the prosecution.

23

Appendix 4: Sample record of meeting

This document should be completed after all meetings or conversations relating to the management of allegations of sexual misconduct. It will assist you to recall events and conversations should you be required to give evidence.

If it records a meeting with parents or carers, one copy should be handed to parents and one copy should be kept by the site.

To download this document, go to [\[DECD to Insert Link\]](#)

Date/Time of Meeting							
Location of Meeting							
Attendees	<p>Include full names and titles of attendees.</p> <ul style="list-style-type: none"> Example: Site leader – John Citizen, Mother – Mary Jones, Father – Mark Jones, School Counsellor – Jane Doe. 						
Purpose of Meeting	<p>Why is the meeting being held?</p> <ul style="list-style-type: none"> Example: To inform Mr and Mrs Jones that their daughter Catherine has disclosed an allegation of sexual assault. Example: To discuss long term support for Catherine Jones and to develop a safety and support plan for her. 						
Actions Taken to Date	<p>Include details of actions taken to date.</p> <ul style="list-style-type: none"> Example: police have been contacted 						
Contact names and contact details	<p>Include all relevant contact details</p> <ul style="list-style-type: none"> Example: contact details of site leader, counselling service 						
Future Actions	<p>List all future actions to be taken by the site leader, other staff members, parents/carers, the student or any other persons/organisations involved.</p> <ul style="list-style-type: none"> Example: Site leader will inform class teacher of safety and support plan. Example: Parents will make counselling appointment for Catherine with CAMHS. Example: The school counsellor will contact Mr and Mrs Jones in three weeks to update them about Catherine's progress in class. 						
Signature of Site leader:	<p>Name:</p> <p>Signature:</p>						
Signatures of other attendees:	<table border="0"> <tr> <td>Name:</td> <td>Name:</td> <td>Name:</td> </tr> <tr> <td>Signature:</td> <td>Signature:</td> <td>Signature:</td> </tr> </table>	Name:	Name:	Name:	Signature:	Signature:	Signature:
Name:	Name:	Name:					
Signature:	Signature:	Signature:					

Appendix 5: Sample Letters to Parents

Example 1 – Where No Other Victims

Letter to all parents when there is no suspicion that there might be other victims.

The letter would deal with the following topics:

1. a statement that the accused person has been arrested and charged but not naming the accused person;
2. a statement of the offence with which the accused person has been charged;
3. a statement indicating that the school does not suspect that there are other victims;
4. an assurance that the Department will keep parents informed;
5. a request to keep the matter confidential in order to protect the victim and the victim's family;
6. contact numbers of support services for concerned parents;
7. a statement that those who have questions or concerns may contact the principal of the school;
8. a statement that the accused staff member has been removed from the site;
9. an assurance that the school is managing the issue without impairing the provision of education at the school; and
10. a request that parents with information that may assist the police investigation to contact police and a contact number.

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

The information available to the school suggests that there is no need for any concern for any other children at the school.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

A relief teacher has been appointed and the classes will proceed as normal.

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

Example 2 – When a Group Identified

Where the risk assessment has determined that there is a reasonable suspicion that there might be other victims among a group of children who have had regular and frequent contact with the accused person, two letters will be sent.

One letter will be sent to parents of children in the group identified as being the group of children who had regular and frequent contact with the accused person.

The other letter will be sent to all other parents at the school.

Both letters will refer to the meetings to be held to give information and instruction to parents.

Both letters would deal with the following topics:

1. a statement that the accused person has been arrested and charged but not naming the accused person;
2. a statement of the offence with which the accused person has been charged;
3. a statement that the accused person has been suspended from duty and directed not to attend the site;
4. a statement that a meeting is being called for parents whose children had regular and frequent contact with the accused person including the purpose of the meeting;
5. a statement that there is no evidence at this stage that any other child at the school is involved;
6. a statement that any parent with information that may assist the investigation should contact police (provide contact details of investigating officer);
7. a statement that the school is managing the issue without impairing the provision of education at the school;
8. a request to keep the matter confidential in order to protect the victim and the victim's family;
9. contact numbers of support services for concerned parents; and
10. a statement that parents who have a concern, should contact the principal of the school or, if the school has one, the school counsellor.

The **first** letter (to parents of the identified group) can be in the following or similar terms.

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of those children who have had regular and frequent contact with the teacher. Your child might have had regular and frequent contact with the teacher. I invite you to attend a meeting. The meeting will be held at 6.00pm on the [insert date] in the School Hall.

I appreciate that this is short notice but I urge you to attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform you of behavioural signs and possible effects of child abuse and will answer any questions you might have.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

A relief teacher has been appointed and classes will proceed as normal.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

The **second** letter (the letter to all other parents at the school) can be in the following or similar terms.

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of those children who have had regular and frequent contact with the teacher and am writing separately to their parents and invite them to attend a meeting. The meeting will be held at 6.00pm on in the School Hall. If you wish, you may also attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform parents of behavioural signs and possible effects of child abuse and will answer any questions parents might have.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or on any other internet site.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

A relief teacher has been appointed and the classes will proceed as normal.

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully
Principal

Obviously, it might be necessary to adapt each of these letters to the particular circumstances of each case.

Example 3 – Letter to the Parents When a Particular Group Not Identified

When a risk assessment determines that there is a reasonable suspicion of other victims but it is not possible to identify a specific group because all children at the school might have had regular and frequent contact with the accused person, the letter to parents should be in the following or similar terms:

Dear Parent / Caregiver

I regret to inform you that a teacher from our school has been arrested by police and charged with

Police are investigating the matter. The teacher has been suspended from duty pending the outcome of the police investigation and prosecution. The teacher has been instructed not to attend the school. I will keep you informed of the progress of the prosecution.

There is no evidence at this stage that any child at the school other than the victim is involved. However, I am concerned about the welfare of all children at the school because they have all been in contact with the teacher at one time or another. For that reason, I invite you to attend a meeting to be held at 6.00 pm on the [insert date] in the School Hall.

I appreciate that this is short notice but I urge you to attend the meeting.

The meeting will be addressed by a psychologist who has experience working with victims of child abuse. The psychologist will inform you of behavioural signs and possible effects of child abuse and will answer any questions you might have.

For the sake of the victim and the victim's family and especially to protect the identity of the victim, would you please keep this information confidential. I ask you not to post this letter on Facebook or any other internet site.

A relief teacher has been appointed and classes will proceed as normal.

If you have any information that may assist the police investigation, please contact [name and telephone number of investigating officer].

If you have concerns about the safety and welfare of your child, please feel free to contact me directly at the school. Alternatively, you may seek advice from one of the services below:

- Child and Adolescent Mental Health Services (CAMHS) on 8161 7198.
- Kids Helpline on 1800 55 1800.

If you have any questions or concerns, please do not hesitate to contact me.

Yours faithfully

Principal

Appendix 6: Course of a Criminal Prosecution

This is a brief overview only of the steps involved in prosecuting a person accused of a criminal offence. A more detailed account can be found in Chapter 3 of the Report of the Independent Education Inquiry. The accused person is called “the defendant”.

1. Police Investigation

Police will investigate alleged crimes which have been reported to them. In the ordinary course of an investigation police will take statements from the victim(s) involved and other witnesses and will interview the defendant. Police need sufficient evidence before the defendant can be prosecuted.

2. Defendant is Charged

When the police have reached the stage that they have reasonable cause to suspect that the crime has been committed, they will either arrest and charge the defendant or summons the defendant to appear in the Magistrates Court on a date stated in the summons.

When the defendant has been arrested and charged, he or she will be either remanded in custody or bailed to a date to appear in the Magistrates Court.

3. Classification of the Charge

Criminal offences can be classified as summary offences, minor indictable offences and major indictable offences. Generally, summary and minor indictable offences are tried in the Magistrates Court, unless joined with a major indictable offence. Major indictable offences are tried in the District Court and in the Supreme Court.

Summary and Minor Indictable Offences.

4. Magistrates Court

The defendant may either plead guilty or not guilty. If he or she pleads guilty, the magistrate will then determine the appropriate penalty.

If the defendant pleads not guilty, the matter will be adjourned for a pre-trial conference. At the pre-trial conference the magistrate will endeavour to clarify and limit the matters in dispute between the prosecution and the defendant and list the matter for trial on another date. The court may grant such adjournments as are necessary prior to the trial.

A magistrate will conduct the trial and decide whether the defendant is guilty or not guilty. If the magistrate finds the defendant guilty, the magistrate will then determine the appropriate penalty.

The prosecution has a right to appeal against acquittal where the magistrate has made an error of law or fact. A defendant has a right to appeal against his or her conviction, sentence or both. Appeals against a decision made by a magistrate will be heard by a judge of the Supreme Court.

Major Indictable Offences

5. First Appearance in Magistrates Court

Although trials for major indictable offences are heard in either the District Court or the Supreme Court, the first step in the prosecution of a person charged with a major indictable offence is the preliminary examination which is conducted in the Magistrates Court. The purpose of a preliminary examination (or committal hearing) is to determine whether there is sufficient evidence to put the defendant on trial for a major indictable offence.

6. Declarations Date

This is the date, usually within ten weeks from the first appearance of the defendant in the Magistrates Court, set for the prosecution to file in court and serve on the defendant the statements of all the witnesses on whom the prosecution relies to establish the guilt of the defendant. Those statements are called “declarations”.

The court may grant the prosecution more time to obtain declarations. When all the declarations have been filed, the magistrate will set a date, four weeks after the declarations date, for the defendant to answer the charge(s). That date is referred to as the “answer charge date”.

7. Answer the Charge

On the answer charge date, the defendant will be asked to enter a plea. If the plea is guilty, the defendant will be sentenced by the magistrate* or be committed for sentence to the District Court or the Supreme Court.

If the defendant pleads not guilty and the magistrate finds that the prosecution has established a case to answer, the defendant will be committed for trial in the District or Supreme Court.

If the magistrate is not satisfied that the evidence is sufficient to put the defendant on trial, the magistrate will reject the information and discharge the defendant.

8. Arraignment

The first appearance of the defendant in the District Court or the Supreme Court is called the arraignment. That is when the defendant is formally charged. The charge stated on the information is read out and the defendant will be asked to plead guilty or not guilty. The arraignment will be fixed four weeks after the committal.

If the defendant pleads guilty, the matter will usually be adjourned to a later date for submissions to be made as to the appropriate sentence to be ordered against the defendant.

If the defendant pleads not guilty, the matter will be adjourned to a directions hearing which is held four to six weeks after the date of the arraignment.

9. Directions Hearing

Directions hearings are held for the purpose of resolving all the procedural matters that must be attended to before the trial begins. Directions hearings also give the judge the opportunity to explore with the prosecution and the defendant whether the matter can be resolved without having to go to trial. If it cannot be resolved, a trial date will be set. The judge will also hear any preliminary applications, for example, an application by the defendant to be tried by a judge alone. Directions hearings only involve the judge, legal counsel and the defendant. It is not uncommon for a number of directions hearings to take place before the trial.

10. Trial

The prosecutor has to present sufficient admissible evidence to the jury (or judge in a “judge alone” trial) to prove beyond reasonable doubt that the defendant committed the offences with which he or she has been charged. If not, the defendant will be found not guilty.

If the defendant is found guilty the judge will hear sentencing submissions from both the prosecutor and the defence lawyer and will then sentence the defendant.

When the jury is not able to agree on a verdict (“hung jury”), there will be a re-trial.

Occasionally a trial may result in a mistrial because some prejudicial event has occurred during the trial. The trial will then start again with a new jury.

11. Appeals

The rights of appeal from a conviction or sentence are a little complicated. Broadly speaking, a defendant has to apply for permission to appeal against the conviction and the sentence. The appeal is heard by the Court of Criminal Appeal (“CCA”), which comprises three judges of the Supreme Court.

The Director of Public Prosecutions (“DPP”) has no right to appeal against a jury verdict of acquittal. The DPP may in certain circumstances apply for permission to appeal against the decision of a judge acquitting a defendant. The DPP may apply for permission to appeal against a sentence which is manifestly inadequate.

Where the CCA allows an appeal against conviction, the conviction will be quashed and the court will either order an acquittal or that the defendant be tried again.

In exceptional circumstances, the High Court of Australia will grant permission to appeal from a decision of the CAA.

**The relevant parts of the Statute Amendment (Courts Efficiency Reforms) Act 2012, which makes provision for the defendant to be sentenced by a magistrate in certain circumstances will commence on 1 July 2013.*

Appendix 7: Important Contacts

24 Hour Services

South Australia Police

Emergency assistance 000

Emergency call from mobile phone 112

Non-urgent 131 444

Child Abuse Report Line 131 478

Families SA After Hours Crisis Care 131 611

Government Contacts

DECD Investigations Unit 8226 1604

DECD School Care Unit 8463 6568

DECD Parent Complaint Line 1800 677 435

DECD Human Resources 8226 1068

Families SA (Adelaide metro office) 8304 0120

Support Services

Aboriginal Services Division – Dept of Health 8226 6023

Assessment, Crisis & Intervention Services (ACIS) 13 14 65

1800 182 232 (free call)

Centacare 8210 8200

Child & Adolescent Mental Health Service (CAMHS) 8161 7389 (North)

8204 5142 (South)

Child Protection Services

Women's and Children's Hospital 8161 7000

Flinders Medical Centre 8204 5485

Children, Youth and Women's Health Services 8161 6003

Commissioner for Victim's Rights 8204 9635

Kids Helpline	1800 55 1800 (free call)
Migrant Resource Centre of SA	8217 9500
Nunkuwarrin Yunti	8406 1600
Parent Help Line	1300 364 100
Shine SA	8300 5300 (East / West)
	8256 0700 (North)
	8186 8600 (South)
The Second Story Youth Health Services (12-25)	8232 0233
	1800 131 719
Uniting Communities	8202 5190
Victim Support Service	8231 5626
Yarrow Place Rape and Sexual Assault Service	8226 8777
	8226 8787 (after hours)
	1800 817 451
Youth Health Line	1300 131 719

Appendix 8: Relevant Legislation

All legislation can be found at www.legislation.sa.gov.au

Children's Protection Act 1993

<http://www.legislation.sa.gov.au/LZ/C/A/CHILDRENS%20PROTECTION%20ACT%201993.aspx>

Criminal Law Consolidation Act 1935

<http://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935.aspx>

Education Act 1972

<http://www.legislation.sa.gov.au/LZ/C/A/EDUCATION%20ACT%201972.aspx>

Education Regulations 2012

<http://www.legislation.sa.gov.au/LZ/C/R/EDUCATION%20REGULATIONS%202012.aspx>

Evidence Act 1929

<http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx>

Summary Offences Act 1953

<http://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20OFFENCES%20ACT%201953.aspx>

Summary Procedure Act 1921

<http://www.legislation.sa.gov.au/LZ/C/A/SUMMARY%20PROCEDURE%20ACT%201921.aspx>

CHAPTER 16 – RECOMMENDATIONS

The Terms of Reference require, among other things, that I make recommendations relating to the procedures and processes that should be in place when allegations of sexual misconduct are made against members of staff at schools. In large part the Guidelines set out in Chapter 15 contain the recommendations as to the processes that should be adopted and implemented by the Department. It is pointless to repeat what is contained in the Guidelines and a recommendation to adopt and implement them follows. The report also contains recommendations on other matters. Those recommendations are also listed in this chapter. The recommendations are grouped by subject matter. The paragraph and chapter numbers at the end of each recommendation are references to the paragraphs or chapters in this report where the particular recommendation is discussed.

In these recommendations:

- (a) the “Guidelines” means the Guidelines in Chapter 15 of the report,
- (b) “school community” means and includes the staff of a school, the members of the governing council of that school, and parents with children at that school, and
- (c) “the report” means the Report of the Independent Education Inquiry published in June 2013.

Informing a School Community

1. It is recommended that the Department establish a policy to inform a school community at the appropriate time whenever allegations of sexual misconduct are made against any person employed in any capacity at that school and those allegations raise concerns as to the suitability of that person to work with children: para 477 and Chapters 11 and 12.
2. It is recommended that the Department inform a school community responsibly and with due regard to the following factors:
 - (a) The need to protect the alleged victim and not state anything that might identify the alleged victim.
 - (b) The need to safeguard the safety, health and well-being of other children at the school.
 - (c) The presumption of innocence of the alleged offender.
 - (d) The need to remove the alleged offender from the school.
 - (e) The hardship that might be inflicted on members of the family of the alleged offender.
 - (f) That fact that allegations of sexual misconduct have the capacity to leave a stigma that cannot be removed.
 - (g) The fact that others might engage in unlawful conduct such as retribution against the alleged offender.
 - (h) The need to correct misinformation.

- (i) The need to maintain confidence in the school.
- (j) The need to have regard to the provisions of both section 69A and section 71A of the *Evidence Act 1929* and to the law of defamation.
- (k) The need to consult SA Police as to the timing and the content of any letter to parents.

When considering the above factors, the Department should refer to the commentary on those factors in Chapter 11 of the report and, in relation to suppression orders, see paras 105-111.

3. It is recommended that the Department adopt and implement the Guidelines in Chapter 15 of the report.
4. It is recommended that, where a person employed in any capacity at a school is arrested and charged with a sexual offence, the Department conduct a risk assessment for the purpose of determining whether there is a reasonable suspicion that at that school there might be children other than the alleged victim who might also be victims: paras 588 to 594.
5. It is recommended that, where a risk assessment determines that there is a reasonable suspicion that there might be other children other than the alleged victim who might also be victims, that the Department
 - (a) arrange a meeting of parents of children at the school for the purpose of instructing and informing those parents on the matters described in the Guidelines and on such other matters as are relevant and necessary; and
 - (b) appoint a qualified and experienced expert such as a psychologist, who is knowledgeable on issues in relation to the management and assistance of children who have been victims of child abuse, to address the meeting of parents and provide the instruction and information as stated in the Guidelines and such other information and instruction as is relevant or necessary: paras 601-609.
6. It is recommended that site leaders and all members of the staff of a school involved in the management of sexual allegations should make notes of all conversations and events that occur in relation to the management of the allegations. The notes should be made in the course of the conversation or immediately after and those notes should be placed in a file marked "Confidential" and held in a secure cabinet. The notes should be made in the manner stated in paragraph 3.1 of the Guidelines: para 695.

Informing the Minister

7. It is recommended that the Department establish and implement a policy that it will inform the Minister for Education whenever allegations of sexual misconduct are made against any person employed in any capacity at a school and those allegations raise concerns as to the suitability of that person to work with children and that the policy be as follows:

- (a) That the Minister be informed of allegations of sexual misconduct at a school as soon as reasonably practicable after the Department becomes aware of the allegations.
- (b) That, when a person employed in any capacity at a school is arrested and charged with sexual misconduct, the Minister be told the name of the school, the name of the accused person, the charges and the nature of the offending. This information should be given as soon as reasonably practicable after the Department becomes aware of the fact. It may be given orally or in writing and, if orally, confirmed immediately in writing.
- (c) That the initial briefing be followed by a more detailed briefing in writing when the Department has more information to give to the Minister.
- (d) That the Department keep the Minister informed with further written briefings as events unfold so that the Minister is in a position to respond quickly and appropriately to any issue that might arise in the course of the management of the allegations.
- (e) That, soon after a new Minister has been appointed, the Department deliver to the new Minister a written briefing listing all matters current at the date of the Minister's appointment where allegations of sexual misconduct have been made against a person employed in any capacity at a school and stating the events in that matter to the date of the briefing and that, thereafter, the Department informs the new Minister with further written briefings as events unfold so that the Minister is in a position to respond quickly and appropriately to any issues that might arise in the course of the management of the allegations.

See paras 584 to 587 and for sub-para (e) see paras 483 and 484.

Improving Departmental Practices

- 8. It is recommended that, when allegations of sexual misconduct are made against any person employed in any capacity at a school, the Department
 - (a) appoint one person to supervise and co-ordinate the Department's management of the matter until all aspects of that matter have been resolved, and
 - (b) create a central file for that matter in which all documents relating to the matter and a copy of all relevant correspondence including emails are kept for future reference.

See paras 463 to 467 and 699.

- 9. It is recommended that the Department introduce procedures to ensure that information is accurately recorded by Departmental officers and correctly stated in all documents created by the Department, including ministerial briefings, reports and other internal Departmental correspondence including emails: para 469.

10. It is recommended that the Department introduce systems which ensure that the flow of information within the Department occurs in an accurate and timely manner to all relevant officers: para 462.
11. It is recommended that the Chief Executive of the Department consider the necessity for and take advice upon the lawfulness of a direction to a teacher not to communicate with other members of the staff at a school: paras 222-226.
12. It is recommended that, where a child at a school is the victim of sexual misconduct by any person employed in any capacity at a school, the Department provide counselling to the victim and to the parents of the victim and that the offer should be made orally and confirmed in writing: paras 692-693.
13. It is recommended that, where a person employed in any capacity at a school has been charged with sexual misconduct, the Department provide adequate counselling to children, parents and members of staff and that the Department establish a procedure to provide such counselling: para 610.
14. It is recommended that the list of policies on the Department's website be reviewed
 - (a) to include an index that groups topics together to enable ready access to all policies on any particular issue, and
 - (b) to rationalise and consolidate the policies: para 689.
15. It is recommended that the document entitled *Responding to Problem Sexual Behaviour in Children and Young People: Guidelines for Staff in Education and Care Settings* be amended
 - (a) to state that a child under the age of ten years is presumed not to be capable of forming an intent to commit a criminal offence as prescribed by section 5 of the *Young Offenders Act 1993*;
 - (b) to state that the *Young Offenders Act* prohibits the publication of anything that might identify both the offender and the victim where each is under the age of 18 years. It is desirable that that document explain the operation of these provisions so that a person managing an incident of sexual offending by one child against another is aware of those provisions and does not offend against them; and
 - (c) to include more information on managing the continuing education of the offending student(s) and the victim after the offending has occurred and, in particular, the safety and perceived safety of the victim: paras 681 to 684.
16. It is recommended that the Department take active steps to ensure that all regional directors, principals and teachers are aware of and become familiar with the document entitled *Responding to Problem Sexual Behaviour in Children and Young People: Guidelines for Staff in Education and Care Settings*: para 688.
17. It is recommended that the Department take active steps to ensure that all regional directors, principals and teachers are aware of and become more familiar with all Departmental policies and guidelines: paras 688-690.

18. It is recommended that the Department impose a contractual obligation upon third parties using a site of the Department to give notice to parents of children using services provided by the third party should a member or employee or volunteer of that organisation be arrested and charged with a sexual offence: paras 685-687.
19. It is recommended that the Department obtain legal advice from the Crown Solicitor on the question of appropriate clauses to include in a contract with a person who will be working with children at a school in relation to the suspension or termination of the contract should allegations of sexual misconduct be made against that person or employees of that person: para 221.
20. It is recommended that the Department adhere to and implement the recommendations made in the KPMG report to appoint trained and experienced investigators to the Investigations Unit: para 691.
21. It is recommended that the Department take active steps to ensure that all regional directors, principals and teachers are aware of and are trained to implement the procedures in the Guidelines.

Governing Councils

22. It is recommended that the Department establish a process of mediation for the resolution of disputes between the Department and the governing council of a school: para 658.
23. It is recommended that provision be made to establish a fund from which governing councils can draw funding to enable a governing council to obtain independent legal advice when that governing council is in dispute with the Department and that the decision whether it is necessary or appropriate for a governing council to obtain such funding be made by the person who holds the office of the Crown Solicitor: para 659.
24. It is recommended that a review be conducted of the powers and functions of governing councils with the intent of determining whether governing councils should have wider powers of governance or whether it is in truth an advisory body: paras 660-662.
25. It is recommended that Families SA extend its existing processes of electronic notification to enable more persons to make an electronic notification when discharging the obligation to make a notification under section 11 of the *Children's Protection Act 1993*: para 677.

Law Reform

26. It is recommended that section 11 of the *Children's Protection Act 1993* be amended by adding a new subsection 4(a) to read as follows:

It shall be a defence to a charge under subsection (1) to prove that the knowledge of the facts that gave rise to the suspicion was gained only from a police officer acting in the course of his duty.

See para 674.

27. It is recommended that consideration be given to the question whether it is appropriate to relieve a teacher of the obligation to notify the Child Abuse Report Line pursuant to section 11 of the *Children's Protection Act* when the only knowledge that that teacher has of possible abuse or neglect of a child has been obtained from another teacher who has already notified the Child Abuse Report Line. That recommendation could be effected by an amendment to section 11 of the *Children's Protection Act* along the lines of the following:

This section does not require a teacher in an educational institution (including a kindergarten) to make a notification where that teacher's knowledge of the fact that gave rise to the suspicion was gained from another teacher in that educational institution and that other teacher had already made a notification under this section.

See para 675.

28. It is recommended that section 66 of the *Child Sex Offenders Registration Act 2006* be amended
- (a) to require a person charged with a sexual offence involving a child or children to disclose to a police officer the name and address of the organisation where that person works with children either as an employee, contractor, volunteer or in any other capacity; and
 - (b) to authorise a police officer to inform the person for whom the accused person works of the fact that the person has been charged with a sexual offence involving children.

See para 701 to 703.

29. It is recommended that section 74(A) of the *Summary Offences Act 1943* be amended by adding a new paragraph (f) to section (5) to read as follows:

where the police officer has reasonable cause to suspect that a person has committed, is committing, or is about to commit a sexual offence involving a child or children, the name and place where that person works either as an employee, an independent contractor, a volunteer, or in any other capacity.

See para 703.

Amending Interagency Practices and Documents

30. It is recommended that SA Police continues its existing practice of promptly informing the Department whenever it has arrested and charged a person who is known to work in any capacity at a school under the aegis of the Department and, without limiting the effect of that recommendation, it is also recommended that SA Police provide officers of the Investigations Unit of the Department with the following information:
- (a) the name of the person who has been charged;
 - (b) details of the charge;
 - (c) the conditions upon which the accused person has been bailed;

- (d) the date of the first appearance of the accused person in court and the location of that court;
- (e) whether there is a reasonable suspicion that there might be other victims;
- (f) whether there are any complicating factors that would affect disclosure to parents;
- (g) the contact details of the investigating officer; and
- (h) whether the offence is a major indictable offence, a minor indictable offence or a summary offence.

See para 705.

31. It is recommended that both the Interagency Code of Practice and the Information Sharing Guidelines be amended so that the recommendations in paragraph 30 can be effected: para 705.
32. It is recommended that, when either SA Police or a principal of a school or the Department is aware of allegations of sexual misconduct against a member of the staff of a school and it is necessary to prevent that member of staff from having contact with students at the school, that the Department and SA Police liaise and implement such co-ordinated action as is necessary to prevent that member of staff from attending the school or from having contact with students: para 704.
33. It is recommended that clause 4(10) of the Information Privacy Principles Instruction be amended by deleting paragraph (b) and substituting in its place the following:
 - (b) the person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of the record-subject or of some other person.

See para 184.

34. It is recommended that Part 6 of Chapter 3 of the Information Sharing Guidelines be amended by deleting the words

Generally speaking, sufficient reason will exist if the provider believes that a child or young person or a group of young people is at risk in facing an immediate or anticipated serious threat to their wellbeing and/or safety.

and that those words be replaced by the following:

Generally speaking, sufficient reason will exist if the person disclosing the information (“the provider”) believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious threat to the life, health or safety of any person or group of persons or that the provider reasonably believes that a child or young person or a group of children or young people are at risk.

See para 184.

35. It is recommended that the Code of Practice of governing councils be amended to include an obligation to comply with the Information Privacy Principles Instruction or, alternatively, that the Minister for Education issue an administrative instruction

pursuant to section 96 of the *Education Act 1972* to require governing councils to comply with the Information Privacy Principles Instruction: para 190.

36. It is recommended that the Interagency Code of Practice be amended as follows:
- (a) to state at the end of the first paragraph of section 14.2 that police should ensure that a support person is available for the child and that the support person be a parent (unless the parent is the alleged offender), a relative or friend chosen by or acceptable to the child;
 - (b) to delete the word “responsibility” in the fourth paragraph of section 14.2 and replace it with the word “duty”;
 - (c) to delete the expression “Department of Education and Children’s Services” wherever it appears and replace it with the expression “Department for Education and Child Development”;
 - (d) to delete the abbreviation “DECS” wherever it is used and to replace it with the abbreviation “DECD”; and
 - (e) to delete the expression “Special Investigations Unit” wherever it is used and to replace it with the expression “Investigations Unit”.

See para 191.

37. It is recommended that the complement of staff at the Screening Unit at the Department for Communities and Social Inclusion be appropriately increased to manage the extra volume of work required for the purpose of screening teachers and students intending to be teachers: para 694.
38. It is recommended that the Teachers Registration Board enter into an administrative arrangement with the Department for Education, Catholic Education SA and the Association of Independent Schools of SA Inc to share information on the progress of court proceedings: para 706.
39. It is recommended that the Department, in consultation with Catholic Education SA and with the Association of Independent Schools of SA Inc, adapt the Guidelines so that they apply both in government schools and non-government schools in South Australia: para 716.

General

40. It is recommended that the edited version of this Report be made available to the public as soon as reasonably practicable after it has been delivered to His Excellency the Governor.
41. I have ordered that the unedited version of this report be a confidential document until the legal event I have identified to the Attorney-General has occurred. I recommend that, once that legal event has occurred, the unedited version of this report be made available to the public.

42. I have ordered that the transcript of the evidence of this Inquiry be a confidential document until the legal event I have identified to the Attorney-General has occurred. I have recommended that, when the unedited version of the report is released to the public, the transcript of the evidence of this Inquiry be made available to the public except those parts of the transcript that have been ordered to be and to remain confidential: para 37.
43. I have ordered that the exhibits that became evidence at this Inquiry be confidential until the legal event I have identified to the Attorney-General has occurred. I recommend that when the unedited version of the report is released to the public, the exhibits be available to the public except those exhibits that have been ordered to be and to remain confidential.

APPENDICES

- A.** Letter from Mr Keith Bartley to employees of the Department for Education.
- B.** Letter from Mr Debelle AO, QC to Minister for Education.
- C.** Letter from Mr Debelle AO, QC to Attorney-General.
- D.** Letters Patent granting Mr Debelle AO, QC powers of a Royal Commissioner.
- E.** List of organisations to whom the Issues Paper was sent.
- F.** Notice published in *The Advertiser* and *The Australian* newspapers.
- G.** List of written submissions.
- H.** List of witnesses.
- I.** Letter to Ms Jacqui Larkin.
- J.** Department for Education Organisational Chart for 2011.
- K.** Department for Education Organisational Chart for 2012.

APPENDIX A

Letter from Mr Keith Bartley to employees of the Department for Education

Dear

Re: Inquiry into events relating to the Largs Bay Primary School

The Hon Bruce DeBelle AO QC, a former judge of the Supreme Court, has been appointed by the Minister for Education and Child Development to undertake an independent review in accordance with the terms of reference set out below. The purpose of the review is to enable the Minister to inform the Cabinet and Parliament about the issues referred to in the terms of reference.

The terms of reference are:

To undertake an independent review in relation to the events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at Largs Bay Primary 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.

As instructed by the Minister, I have arranged for the Department to make all relevant documents and information available to Mr DeBelle.

Mr DeBelle has decided that it is necessary for him to interview some public servants and members of the teaching service. The interviews will be a very important part of the inquiry. They will ensure that staff are accorded procedural fairness and provide them with the opportunity to clarify matters that may not be apparent from the documents. Mr DeBelle will take into account the information provided by staff when preparing his report to the Minister.

You are one of the persons that Mr DeBelle wishes to interview. I therefore direct you to attend Level 10, 45 Pirie Street, Adelaide at **insert time for each person**. Further information is supplied in the Information Sheet provided with this letter. You must truthfully and fully answer any questions asked by Mr DeBelle save to the extent that an answer may tend to incriminate you or expose you to the possibility of disciplinary action.

I have been advised that Mr DeBelle intends that the interviews be tape-recorded and transcribed. You will be handed a copy of the transcript of your interview for the purpose only of making any corrections you think necessary. Once you have satisfied yourself that the transcript is accurate, you will sign a statutory declaration verifying the truthfulness of your answers. I direct that you must make the statutory declaration.

If you are asked by Mr Debelle to attend for an interview you may, if you wish, bring another person to provide support. That person may be a friend or relative, a union official or a lawyer. The Department cannot provide assistance with lawyer's fees.

Because you will be acting in the performance of your duties in answering Mr Debelle's questions, you will be immune from civil liability under section 74 of the *Public Sector Act 2009* provided that you have acted in good faith in answering his questions. In other words, because of my direction that you answer Mr Debelle's questions, you could not be sued because of the information you provide to him if you have acted in good faith.

You will be advised by Mr Debelle in the near future of the time and place for your interview.

Yours sincerely

Keith Bartley
Chief Executive
Director-General of Education

APPENDIX B

Bruce M DeBelle AO, QC



**Government
of South Australia**

**Independent
Education
Inquiry**

Level 10
45 Pirie Street
ADELAIDE SA 5000

GPO Box 464
ADELAIDE SA 5001

Tel 08 8207 1572
Fax 08 8207 2520

4 December 2012

The Hon Grace Portolesi MP
Minister for Education & Child Development
31 Flinders Street
ADELAIDE SA 5000

Dear Minister

Independent Education Inquiry

Please find enclosed a copy of a letter I have today delivered to the Attorney-General.

Yours faithfully

A handwritten signature in black ink, appearing to read "Bruce M DeBelle", with a long, sweeping flourish extending to the right.

Bruce M DeBelle

APPENDIX C

Bruce DeBelle AO, QC



Government
of South Australia

**Independent
Education
Inquiry**

Level 10
45 Pirie Street
ADELAIDE SA 5000

GPO Box 464
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Tel 08 8207 1572
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4 December 2012

The Hon John Rau MP
Deputy Premier
Level 11
45 Pirie Street
ADELAIDE SA 5000

Dear Mr. Attorney,

Independent Education Inquiry

I report that the inquiry, has so far, proceeded well. I have received a vast amount of documents from the Department for Education and Child Development ("DECD"). I have interviewed a number of police officers of DECD who all co-operated when giving evidence. However, they have been directed to give evidence to me.

I interview witnesses in a boardroom. The evidence is recorded. The only persons present other than myself are the witness, a friend or support person if required by the witness, my legal officer and the person who operates the recording equipment. The recorded evidence is transcribed.

I have limited powers when conducting this inquiry. I cannot require a witness to give evidence on oath or to make an affirmation as to the truth of the evidence. I have no powers to compel a witness to appear before me nor any power to compel the production of documents. I do not have the powers of a Royal Commissioner. I do not even have the same powers as the Ombudsman, notwithstanding the fact that the inquiry I am undertaking is of wider ambit than any inquiry by the Ombudsman. To date, the limitations on my powers have not been any obstacle to the proper conduct of the inquiry.

However, I have now reached the stage in the inquiry where I find that the limits upon my powers are becoming a real burden or will have the capacity to be a real burden. When answering a question in the House of Assembly on 15 November 2012, you stated that, if I did not have adequate tools to conduct this inquiry, I could ask for whatever assistance I required. I write to ask Cabinet to extend my powers. I set out my reasons.

I now have to interview persons from at least three groups in the community. I have no powers to compel any of them to appear before me. Unlike officers of DECD or SAPOL, no one can direct them to give evidence. I have real concerns that some of them will refuse to cooperate. In fact, there is one person from whom I have requested information who has refused to provide information.

I therefore seek the powers of a Royal Commissioner for the purpose of conducting the rest of this inquiry. I firmly believe that without those powers the inquiry will not be successful and I may have to refer to that in my report.

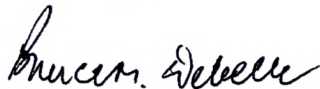
If the powers of a Royal Commissioner are granted to me, I will not be changing the manner in which I will continue to conduct this inquiry. It will proceed in the same way that I have already described.

Section 6 of the *Royal Commissions Act 1917* authorises me to conduct the inquiry in public or in private. Shortly put, Section 7 of the Act authorises me to inform myself in any manner that I think fit. I attach a copy of both Section 6 and 7 of the *Royal Commissions Act* and other relevant sections of the Act. In short, proceeding as I have done so far is authorised by the *Royal Commissions Act*.

Members of one of the groups of witnesses I seek to interview will plainly require that the evidence they give be confidential. In addition, I wish to interview parents with an interest in the assault at the Largs Bay Primary School. Some of these parents have already asked whether I can ensure that their evidence remains confidential. There is a real question whether my present powers allow me to do so. I do not think they do. However, as a Royal Commissioner, the powers of Section 16A (1) will authorise me to keep the evidence confidential. In addition, they have the same protections and immunities as a witness in the Supreme Court. That assurance can be given to them by reason of the provisions of Section 16B of the *Royal Commissions Act*.

I have witnesses from the DECD and SAPOL who I will be interviewing this week. However, I am now approaching the stage when I must interview members of the public. I therefore would be grateful if you could let me have an early response to this request.

Your faithfully

A handwritten signature in black ink, appearing to read 'Bruce M. DeBelle', written in a cursive style.

Bruce M DeBelle

Royal Commissions Act 1917

Extracts

6—Evidence may be taken in public or in private

The commission may, in connection with the exercise of their functions, take evidence in public or in private.

7—Commission not to be bound by rules as to procedure or evidence

The commission, in the exercise of any of their functions or powers, shall not be bound by the rules or practice of any court or tribunal as to procedure or evidence, but may conduct their proceedings and inform their minds on any matter in such manner as they think proper; and, without limiting in any way the operation of this section, the commission may refer any technical matter to an expert and may accept his report as evidence.

16—Statements made by witness not admissible in evidence against him

A statement or disclosure made by any witness in answer to any question put to him by the commission or any of the commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal proceedings in any court.

16A—Orders in relation to evidence etc

- (1) Where the Commission considers it desirable to exercise powers conferred by this section in the public interest, or in order to prevent undue prejudice or undue hardship to any person, it may, by order—
 - (a) direct that any persons specified (by name or otherwise) absent themselves from the place in which the commission is conducting its inquiry during the whole or a specified part of the proceedings; or
 - (b) forbid the publication of specified evidence, or of any account or report of specified evidence, either absolutely or subject to conditions determined by the commission; or
 - (c) forbid the publication of the name of—
 - (i) a witness before the commission; or
 - (ii) a person alluded to in the course of the inquiry,and of any other material tending to identify any such witness or person.
- (2) The commission may vary or revoke an order under this section.
- (3) A person who contravenes, or fails to comply with, an order under this section shall be guilty of an offence and liable to a penalty not exceeding two thousand dollars or imprisonment for six months.

16B—Protection to commissioners and witnesses

- (1) A commissioner has, in relation to the exercise of his functions as commissioner, the same protection and immunities as a judge of the Supreme Court.
- (2) Subject to this Act, a witness before the commission has the same protection and immunities as a witness in proceedings before the Supreme Court.
- (3) Counsel appearing before the commission has the same protection and immunities as counsel appearing in proceedings before the Supreme Court.

APPENDIX D



South



Australia

(TO WIT)

HIS EXCELLENCY REAR ADMIRAL KEVIN JOHN SCARCE, Companion in the Order of Australia, Conspicuous Service Cross, Governor in and over the State of South Australia:

TO

BRUCE DEBELLE AO, QC

Greeting:

Whereas

1. On 31 October 2012, the Minister for Education and Child Development announced the establishment of an independent review into the discrepancy between the accounts of South Australia Police and the Department for Education and Child Development relating to the non-disclosure to the school community of the allegation of child sexual abuse by a staff member in the Out of School Hours Care service, Largs Bay Primary School.
2. It is necessary and desirable that such review be conducted in a manner that enables the relevant evidence to be obtained and the appropriate safeguards and protections to be available to that review.

I, the Governor, with the advice and consent of the Executive Council and under the Royal Commissions Act 1917, DO HEREBY APPOINT YOU to be a Commissioner to inquire into and report on the following matter:

1. The events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at Largs Bay Primary 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.

You are required to report as soon as practicable.

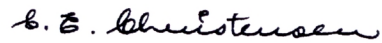
GIVEN under my hand and the Public Seal of South Australia, at Adelaide, this 10th day of December 2012.

By command,



Deputy Premier

Recorded in Register of Commissions,
Letters Patent, Etc., Vol. XXVII



Clerk of Executive Council

GOD SAVE THE QUEEN!

APPENDIX E

Organisations and Persons Who Received the Issues Paper

1. The Hon Grace Portolesi MP, former Minister for Education and Child Development now Minister for Employment, Higher Education and Skills and other ministries
2. Association of Independent Schools of SA Inc
3. Attorney-General's Department
4. Australian Centre for Child Protection
5. Australian Education Union (SA Branch)
6. Catholic Education SA
7. Child Protection Services, Adelaide Women's and Children's Hospital
8. Criminal Law Committee, Law Society of South Australia
9. Crown Solicitor's Office
10. Department for Communities and Social Inclusion
11. Department for Education and Child Development
12. Director of Public Prosecutions
13. Emeritus Professor Freda Briggs AO
14. Guardian for Children and Young People
15. Human Rights Committee, Law Society of South Australia
16. Independent Education Union of South Australia
17. Largs Bay Primary School Parents
18. Largs Bay School Governing Council Members
19. Law Society of South Australia
20. Legal Services Commission of South Australia
21. Office of the Commissioner for Victim's Rights
22. Office of the Public Advocate
23. Ombudsman, South Australia

24. SA Association of School Parents Clubs Inc
25. SA Association of State School Organisations Inc
26. SA Health
27. Small Schools Association of South Australia
28. South Australia Police
29. South Australian Bar Association
30. South Australian Catholic Primary Principals Association
31. South Australian Primary Principals Association Inc
32. South Australian Secondary Principals Association

APPENDIX F



Government of
South Australia

INDEPENDENT EDUCATION INQUIRY

The Hon. B M DeBelle AO, QC has been appointed to inquire into the events and circumstances surrounding the arrest and later conviction on charges of sexual assault by the Director of the Out of School Hours Care Service at a school in metropolitan Adelaide in 2010.

The Terms of Reference are as follows:

To undertake an independent review in relation to the events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care Service at a school in metropolitan Adelaide 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.

An Issues Paper has been prepared. It deals with the issues in the second paragraph of the Terms of Reference. Mr DeBelle is **calling for submissions** on the issues raised in that paper and other issues relevant to the second paragraph.

The Issues Paper is available by calling (08) 8207 1953 or emailing independenteducationinquiry@agd.sa.gov.au

APPENDIX G

List of Written Submissions

(Listed by time received)

No.	Document Title
1.	Director of Public Prosecutions
2.	South Australia Police
3.	Australian Education Union (SA Branch)
4.	Department for Education and Child Development
5.	Catholic Education SA
6.	Association of Independent Schools of SA Inc
7.	Mr Michael O'Connell, Commissioner for Victims' Rights
8.	Ms Pam Simmons, Guardian for Children and Young People
9.	SA Association of School Parents Clubs Inc
10.	Independent Education Union of South Australia
11.	Mr John White, Law Society of SA – Children and the Law Committee
12.	Ms Melissa John, Women's and Children's Health Network (WCHN)
13.	Professor Freda Briggs AO
14.	Ms Sharon Semler and Mr James Hanlon
15.	Mr Simon Bohm
16.	Ms Tanya Oshinsky
17.	Ms Tina Dolgopol, Flinders Law School
18.	Ms Natalie Wade
19.	Mr Adrian Nippress
20.	Ms Jill Francis
21.	Mr John Collins
22.	Mr Joseph Williams
23.	Mrs Faye Towill

APPENDIX H

List of Witnesses

(Note: names of confidential witnesses are not included to protect identity of children)

1. Peter **Adams**, Manager, Media Unit, Department for Education.
2. Roger Neil **Anderson**, Deputy Chief Executive, Association for Independent Schools of SA Inc.
3. Janice Catherine **Andrews**, Chief Executive, Office of Non-Government Schools and Services, Department for Education.
4. Christine Anne **Ashton**, Complaints Investigation Officer, Registration and Standards Board of SA, Department for Education.
5. Noel Graeme **Bamford**, Superintendent, SA Police.
6. Mardi Colleen **Barry**, Assistant Director, HR Policy and Specialist Services, Department for Education.
7. Keith James **Bartley**, Chief Executive, Department for Education.
8. Marylen **Bechara**, Senior Project Officer, Legislation, Department for Education.
9. Geoffrey Barham **Black**, Partner, Wallmans Lawyers.
10. Simon **Blewett**, Chief of Staff, Premier's Office.
11. Barry Desmond **Blundell**, Detective Senior Sergeant, SA Police.
12. Tracy Theresia Robinson **Bohm**, Parent, Largs Bay Primary School.
13. Marc David **Bowden**, Ministerial Liaison Officer, Department for Education.
14. Freda **Briggs**, Emeritus Professor, University of South Australia.
15. Gaye Louise **Brimacombe**, Policy Adviser, Department for Education.
16. Linda Jane **Byrne**, Acting Manager, Screening Unit, Department for Communities and Social Inclusion.
17. Robert James **Clark**, Detective Sergeant, SA Police.
18. Mark Anthony **Colley**, Governing Council Member, Rose Park Primary School.
19. Garry Brendan **Costello**, Head of Schools, Office for Schools, Department for Education.
20. Philip Grant **Crossing**, Teacher, Largs Bay Primary School.

21. Luigi Salvatore (Gino) **DeGennaro**, Deputy Chief Executive and Chief Operating Officer, Department for Education.
22. Paul McKinlay **Dickson**, Assistant Commissioner, SA Police.
23. Jennifer Margaret **Emery**, Director, Office of the Chief Executive, Department for Education.
24. Julie **Gale**, Literacy Manager, Literacy and Numeracy National Partnerships, Department for Education.
25. Katrina **Georgiou**, Teacher, Largs Bay Primary School.
26. Ian Albert **Gibbons**, Detective Senior Sergeant, SA Police.
27. Rodney Wayne **Gracey**, Principal Policy Adviser to the Deputy Chief Executive in 2010, Department for Education.
28. Jondaren **Grayshon**, Detective Senior Constable-First Class, SA Police.
29. Julie Jane **Gunn**, Director, Assets, Facilities and Screening, Department for Communities and Social Inclusion.
30. Lynne **Hare**, Media Manager, Department for Environment, Water & Natural Resources.
31. Jadyne Maurice John **Harvey**, Chief of Staff, Minister Portolesi's Office.
32. Mandy **Hay**, Senior Media and Communications Adviser, Department for Further Education, Employment, Science and Technology.
33. James William **Hignett**, Coordinator of the Organisers Group, Australian Education Union (SA Branch).
34. Ruth Linda **Hill**, Deputy Principal, Largs Bay Primary School.
35. Rachel **Holman**, Parent, Largs Bay Primary School.
36. Bronwyn Denise **Hurrell**, Media Adviser, Premier's Office.
37. Patricia Elizabeth **Jarrett**, Project Officer, Department for Communities and Social Inclusion.
38. Samantha Jane **Jones**, Manager, Investigations Unit, Department for Education.
39. Kathryn Anne **Jordan**, Acting Executive Director, Early Childhood Services, Department for Education.
40. Jonathan Norman **Jureidini**, Professor, Women's and Children's Hospital.
41. Megan Anne **Kelly**, Detective Brevet Sergeant, SA Police.
42. William James Bruce **Kelsey**, Manager, Intelligence and Investigations, Department for Correctional Services.

43. Anne Louise **Kibble**, Director, Programs and Regional Management, Department for Education.
44. Ian Edward **Kilpatrick**, Detective Brevet Sergeant, SA Police.
45. Nigel **Laity**, Manager, Screening Unit, Department for Communities and Social Inclusion.
46. Ian Stuart **Lamb**, Senior Policy Officer, OSHC, Department for Education.
47. Jacqueline Elizabeth **Larkin**, Chairperson, Governing Council, Largs Bay Primary School.
48. Tina **Lehman**, Governing Council Member, Largs Bay Primary School.
49. Tara Lee **Lemmons**, Youth Worker and Team Leader, non-government organisation.
50. Jane Diane **Lomax-Smith**, former Member of Parliament and former Minister for Education.
51. Lucille **Lord**, Critical Incident Coordinator, Department for Education.
52. Robert Ivan **Lucas**, Member of the Legislative Council.
53. Donald Wayne **Mackie**, Manager, Legislation and Legal Services Unit, Department for Education.
54. Donna Louise **Mayhew**, SA Principal Adviser, Information Sharing, Office of the Guardian for Children and Young People.
55. Angus Hugh **McFarlane**, Detective Senior Constable-First Class, SA Police.
56. Jocelyn Irene **Milne**, Legal Counsel, Catholic Education SA.
57. Adrian David **Nippres**, Project Manager, University of South Australia.
58. Phillip John **O'Loughlin**, Executive Director, HR and Workforce Development, Department for Education.
59. Tanya **Oshinsky**, Principal, Largs Bay Primary School.
60. Lynley Anne **Page**, Program Leader, Disability Support, Department for Education.
61. Juliet Alison **Parkes**, Governing Council Member, Largs Bay Primary School.
62. Janet Claire **Paterson**, President, South Australian Secondary Principals Association.
63. Gregory **Petherick**, Assistant Regional Director, Department for Education.
64. David Gregory **Pisoni**, Member of Parliament.
65. Stephen Gregory **Portlock**, President, South Australian Primary Principals Association.
66. Grace **Portolesi**, former Minister for Education now Minister for Employment, Higher Education and Skills and other ministries.

67. Damian Kenneth **Powell**, Superintendent, SA Police.
68. Trevor John **Radloff**, Executive Director, Preschool and School Improvement, Department for Education.
69. Hugo Manuel Da Silva **Rainho**, IT Support, Department for Education.
70. Isobel **Redmond**, Member of Parliament.
71. Kim Elizabeth **Reynolds**, Legislative Reform Officer, Department for Education.
72. Julieann **Riedstra**, Executive Director, Finance and Infrastructure, Department for Education.
73. Mark Andrew **Rowe**, Detective Sergeant, SA Police.
74. Popi **Samaras**, Teacher, Largs Bay Primary School.
75. Michela **Schirru**, Ministerial Adviser, Minister Portolesi's Office.
76. Gwen **Secomb**, Project Officer, South Australian Association of School Parent Clubs.
77. Kerrie Lee **Sellen**, Manager, non-government organisation.
78. Brendyn David **Semmens**, Regional Director, Department for Education.
79. Paul Vincent **Sharkey**, Director, Catholic Education SA.
80. Danyse **Soester**, Governing Council Member, Largs Bay Primary School.
81. Jennifer Mary **Stanley**, Principal Policy Adviser to Head of Schools, Department for Education.
82. Oggi **Stojanovich**, Senior Case Manager, Department for Education.
83. Benjamin John Stanley **Temperly**, Head, Executive Team, Policy and Communications, Department for Education.
84. Andrew Nicol **Thredgold**, Investigations Officer, Crown Solicitor's Officer, Attorney-General's Department.
85. Janne McDonald **Todd**, Policy Adviser, Quality Reform Team, Department for Education.
86. Anne Patricia **Walker**, Legal and Information Officer, Australian Education Union (SA Branch).
87. David **Waterford**, Deputy Chief Executive, Child Safety, Department for Education.
88. Carmel Mary **Watson**, Teacher, Largs Bay Primary School.
89. Jay Wilson **Weatherill**, Premier, Member of Parliament.
90. Anne Jennifer **Weinert**, Administration Officer, Largs Bay Primary School.
91. Terrie Anne **Wilson**, Governing Council Member, Largs Bay Primary School.

92. Danielle Ruth **Windsor**, School Counsellor, Largs Bay Primary School, Department for Education.
93. Jenice Elena **Zerna**, President, South Australian Association of School Parent Clubs.
94. Anita Maria **Zocchi**, Principal, Adelaide High School.

APPENDIX I

Bruce M DeBelle AO, QC



Government
of South Australia

16 November 2012

**Independent
Education
Inquiry**

Level 10
45 Pirie Street
ADELAIDE SA 5000

GPO Box 464
ADELAIDE SA 5001

Tel 08 8207 1572
Fax 08 8207 2520

Ms Jacqui Larkin
Chairperson
Largs Bay Primary School
215 Fletcher Road
LARGS BAY SA 5016

Dear Ms Larkin

As you know doubt know, I have been appointed by the Minister of Education to inquire into the events surrounding the arrest and alter conviction of Mr Mark Harvey for sexual assault committed on a child at Largs Bay Primary School on 1 December 2010.

My terms of reference are:

To undertake an independent review in relation to the events and circumstances surrounding the non-disclosure to the school community of allegations of sexual assault committed by the Director of the Out of School Hours Care service at Largs Bay Primary School against a child 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.

You will note that, not only must I inquire into what occurred in relation to the arrest and conviction, but I must also make recommendations as to procedures that should be put in place should such an event occur again.

You have and extensive involvement in this matter. It is for that reason I wish to interview you and those other members of the Governing Council who wish to make submissions. I will also be asking Ms Soester if she wishes to be interviewed. These interview will occur at a later date and I will give you ample notice of that date.

In addition, you may be aware of parents who wish to make submissions. You may wish to alert parents to the fact that they may make submissions.

I am preparing a brief Issues Paper that I wish you and others to receive before submissions are made. The paper is being prepared and will be available shortly. As soon as it is available, I will send it to you.

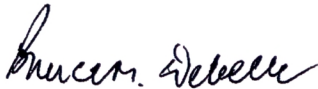
In the meantime, would you please contact my legal officer Ms Amanda Pienaar and let her know how we may quickly contact you. Ms Pienaar can be contacted by ringing her on 8207 2369 or by emailing her at this address pienaar.amanda@agd.sa.gov.au.

- 2 -

Would you please also give Ms Pienaar the names, addresses and telephone numbers of any members of the Governing Council or any parents who wish to make submissions to the inquiry. Would you please give her that information as quickly as possible, preferably by no later than 22 November 2012.

I look forward to meeting you and hearing your submissions.

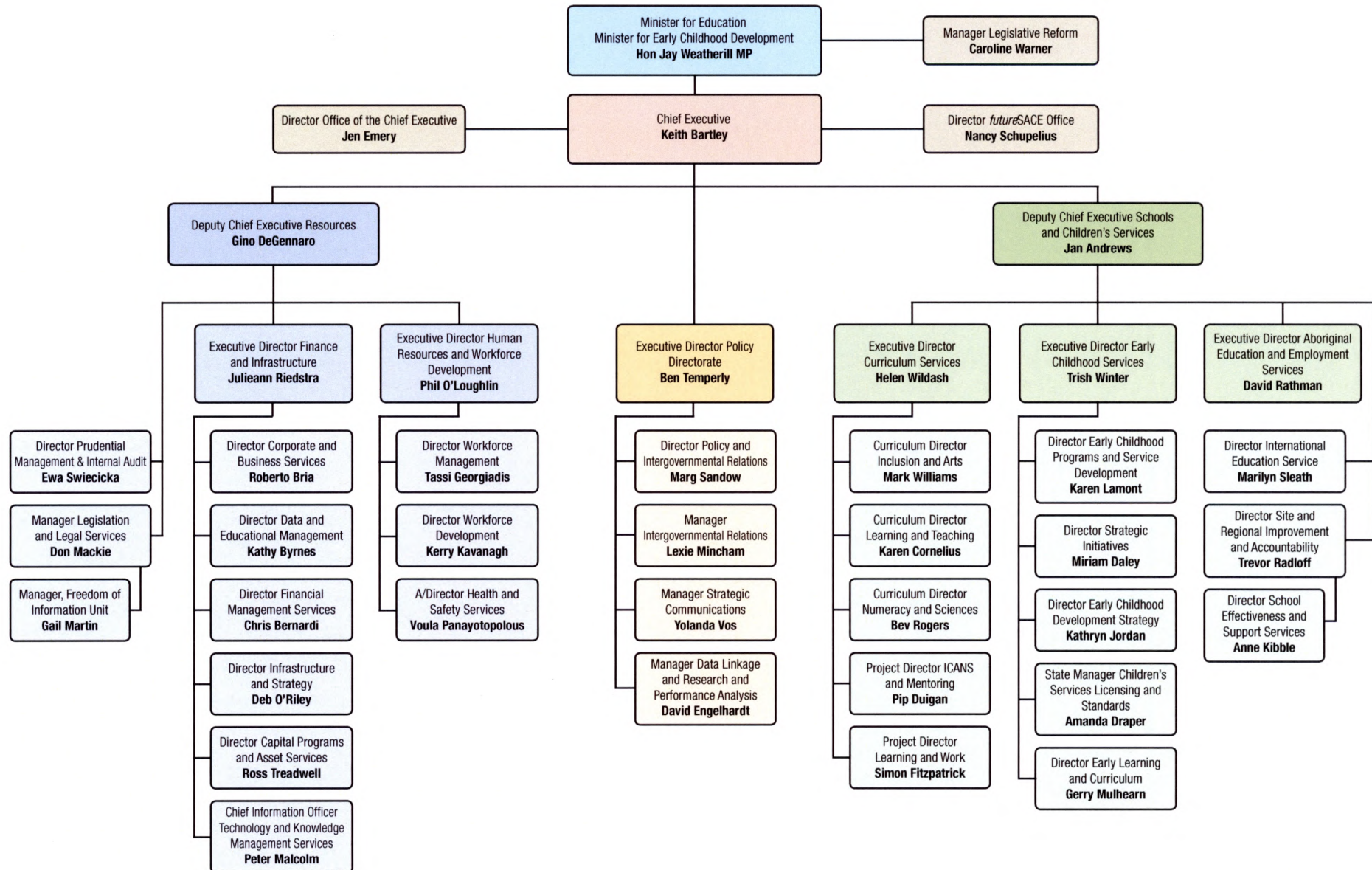
Yours faithfully

A handwritten signature in black ink, appearing to read "Bruce M DeBelle". The signature is written in a cursive, flowing style.

Bruce M DeBelle AO, QC

Department for Education and Child Development

Organisational Chart - 2011



Department for Education and Child Development Organisational Chart - 2012

