



## WITNESS STATEMENT OF EMILY KATE SANDERS

I, Emily Kate Sanders of [REDACTED], in the State of Victoria, Director Regulation, [REDACTED], do solemnly and sincerely declare that:

- 1 I am authorised by the Victorian Commission for Children and Young People (CCYP) to make this statement on its behalf.
- 2 I make this statement on the basis of my own knowledge, save where otherwise stated. Where I make statements based on information provided by others, I believe such information to be true.

### BACKGROUND AND QUALIFICATIONS

- 3 I have the following qualifications:
  - (a) Bachelor of Arts
  - (b) Bachelor of Laws
  - (c) Executive Masters of Public Administration
  - (d) Admitted to practice as a lawyer in the Supreme Court of Victoria.
- 4 My current role is Director Regulation at the Victorian Commission for Children and Young People, which I have held since December 2017.
- 5 I have a background in law, public policy and regulation.
- 6 My previous roles have relevantly included:
  - (a) Lawyer with the Victorian Government Solicitor's Office
  - (b) Various roles with the Victorian liquor and gambling regulator.
  - (c) Regional Manager with the Environment Protection Authority
  - (d) Director Policy and Strategy, Youth Justice, Department of Justice and Community Safety
- 7 Attached to this statement and marked **ES-1** is a copy of my curriculum vitae.

## REPORTABLE CONDUCT SCHEME

- 8 The implementation of reportable conduct schemes was a key recommendation of the National Royal Commission into Institutional Responses to Child Sexual Abuse. Reportable conduct schemes are critically important as they improve the transparency of the management of child sexual abuse allegations.
- 9 Victoria's reportable conduct scheme (**Scheme**) has been in place since July 2017 and is established under the *Child Wellbeing and Safety Act 2005* (Vic) (**CWAS Act**). The Scheme requires certain organisations that interact with or provide services to children, to provide mandatory notifications of alleged child abuse and certain child related misconduct by their workers or volunteers to the CCYP, including alleged child sexual abuse. We estimate that 12,500 Victorian organisations must participate in the Scheme including out of home care organisations, registered schools and government departments that exercise care, supervision or authority over children.
- 10 Notifications of alleged child abuse and child related misconduct must occur within three days of the head of the organisation learning of a reportable allegation (**allegation**). A failure to notify the CCYP without a reasonable excuse is a criminal offence. This means that, from the start of the investigative process to the outcome of the investigation, the CCYP is aware of the allegation and is able to independently and transparently scrutinise the organisation's investigation into that allegation. The CCYP can also educate and guide the organisation.
- 11 The CWAS Act places a legal obligation on organisations subject to the Scheme as well as the CCYP to report allegations that may involve criminal conduct to Victoria Police. It has been our experience that some organisations do not report all allegations to police as they do not understand the conduct to be potentially criminal. Where this occurs, the CCYP suggests to organisations that reports should be made, and also passes on the allegation itself to Victoria Police. For the period 1 July 2017 to 30 June 2020, the CCYP referred 320 notifications that had not previously been reported by the organisation or others to Victoria Police.

- 12 Under the Scheme, an organisation must investigate allegations of child abuse and child related misconduct, called reportable allegations in the CWAS Act, that involve the conduct of workers and volunteers of the organisation (**subject of allegation**). This includes sexual offences and sexual misconduct. The obligation to investigate remains even if the subject of allegation leaves the organisation. Having an obligation to investigate is incredibly important because it drives ownership and responsibility, and places an important set of obligations on the head of an organisation. It supports organisations to 'own' their child safety systems, including screening methods, and behaviour of their workers and volunteers in a way that would not necessarily be as present if all investigations were managed entirely externally.

#### **CHILD SAFE STANDARDS AND HOW THEY INTERACT WITH THE SCHEME**

- 13 Commencing in 2016, Victoria introduced a series of mandatory 'Child Safe Standards' (**Child Safe Standards**), that prescribe a system of child-centred policies, procedures and practices which organisations that work with children must implement.
- 14 The Child Safe Standards apply to a much broader group of organisations (about 60,000) compared to the organisations who are subject to the Scheme (about 12,500). The CCYP is one of a number of regulators in Victoria who can enforce the Child Safe Standards.
- 15 The CWAS Act lists organisations by sector who must comply unless the do not do any of the following:
- (a) provide any services specifically for children
  - (b) provide any facilities specifically for use by children who are under the organisation's supervision, or
  - (c) engage (whether paid or unpaid) a child as a contractor, employee or volunteer to assist the organisation in providing services or facilities or in producing or providing goods.
- 16 A new version of the Child Safe Standards will commence on 1 July 2022. Changes will support greater national consistency, reflecting the National

Principles for a Child Safe Organisation developed following the Royal Commission into Institutional Responses to Child Sexual Abuse.

- 17 The focus on prevention of abuse and the capability building elements of the Child Safe Standards are key elements. For example, Child Safe Standards require organisations to implement processes to screen prospective workers and volunteers. Amongst other actions, if done properly, organisations would check in with candidates' previous employers or where they have previously volunteered to identify any concerning behaviour with children at previous workplaces or organisations they were involved with.
- 18 The Child Safe Standards are about systems, while the Scheme is about more specific and detailed management of investigations by organisations. They work together as part of the same overall child safety framework. We consider that these are two key aspects of the safeguarding system that seeks to prevent and respond to child sexual abuse.
- 19 There is benefit from the CCYP administering the Scheme as well as being a regulator for the Child Safe Standards. We have the ability to influence future safety for children and young people; the CCYP may recognise systemic problems from overseeing organisations' investigations under the Scheme, and be able to enforce a change in the relevant organisations through Child Safe Standards.
- 20 There is some overlap between Child Safe Standards and the Scheme. For example Child Safe Standard 5 requires organisations to have processes for responding to and reporting suspected child abuse, and under the Scheme the head of the organisation must have a system for enabling any person to notify them of an allegation and a system for investigating and responding to an allegation. Organisations are required by Child Safe Standards and the Scheme to have reporting systems and investigation processes to respond to child abuse, which are monitored by the CCYP under the Scheme to oversee if organisations are doing what they need to do when responding to allegations of child abuse, including child sexual abuse.
- 21 For an organisation to properly respond to child abuse, it assists for them to have an understanding of what drives risk of abuse and what prevents abuse

from happening. The Child Safe Standards help organisations develop this knowledge.

## **THE COMMISSION FOR CHILDREN AND YOUNG PEOPLE**

### *Overview of the CCYP's role under the Scheme*

- 22 The CCYP is the regulator that administers the Scheme in Victoria. This involves overseeing individual cases as well as administering the Scheme at a system-level.
- 23 The CCYP is empowered to scrutinise the investigations performed by organisations into allegations. While the CCYP cannot direct those investigations, we are empowered to request information from organisations and also to provide education and guidance to support investigations to be performed consistent with the principles of the Scheme and the CCYP's functions and objectives. Further, the CCYP is empowered to conduct its own investigation into an allegation in certain circumstances, or into the handling of or response to an allegation by an organisation, if it considers that it is in the public interest to do so.
- 24 The CCYP is empowered to drive change in systems within organisations through enforcing the Child Safe Standards as well as administering the Scheme. When the CCYP identifies issues in an organisation's child safety systems or in the way organisations are conducting investigations — for example, investigations being conducted without the involvement of children and young people — we may start to look more closely at the organisation's processes and identify opportunities for systemic improvement within the organisation. Some organisations simply do not know how to respond to allegations, particularly in the case of smaller organisations with limited caring responsibilities for children or organisations who have not previously dealt with allegations of child sexual abuse. The CCYP may:
- (a) provide advice about how to carry out an appropriate investigation, and

- (b) discuss how the organisation can manage risks to children while the organisation conducts an investigation to protect other children in the organisation.
- 25 The CCYP provides feedback to organisations on an ongoing basis as each case is overseen, and this builds year upon year. The CCYP gives feedback at the end of an investigation about what could be improved for the next investigation the organisation undertakes under the Scheme, building capacity to perform good future investigations. For example, feedback can include comments on whether the investigation has:
- (a) interviewed all relevant witnesses, or adopted good interview practice
  - (b) sufficiently probed relevant issues or examined all allegations
  - (c) properly applied thresholds for conduct, such as whether an investigator has reflected a proper understanding of grooming behaviour
  - (d) appropriately weighted evidence including how children's evidence has been considered
  - (e) made findings that appear to be supported by the evidence gathered. The CCYP may also advise that different findings are open to make on the evidence.
- 26 On occasion, organisations choose to alter their findings after considering the CCYP's feedback and guidance.
- 27 The CCYP's role focuses on regulating organisations so that they prioritise child safety. Other agencies like Child Protection and Victoria Police still retain their role in relation to the safety of individual children and young people. We always keep an eye out for safety concerns and may call Victoria Police or Child Protection ourselves if we believe that there is a threat to a particular child.
- 28 Over the past five years of the Scheme's operation, the CCYP has focused on capacity-building, education and support for organisations dealing with allegations of child abuse and child-related misconduct. We have been careful to avoid assumptions about a particular organisation's capacity to perform investigations, and to instead form our view about organisations in each sector

individually. We find that there is enormous variability in the quality of investigations within sectors.

*Risk based approach*

- 29 The CCYP adopts a risk-based approach to performing its functions under the Scheme.
- 30 The safety of children is always at the forefront of our analysis. The risk factors which guide our decision-making include:
- (a) the risk of child abuse occurring within sectors or an individual organisation
  - (b) the risk of an organisation not properly investigating a reportable allegation, and
  - (c) the risk individual workers or volunteers pose to children.
- 31 To assist it in its decision-making, work prioritisation and resource allocation, the CCYP breaks down its regulated organisations into a risk 'hierarchy'. Those organisations which sit at the top of that hierarchy tend to pose a greater risk to children, and receive greater focus from the CCYP. Factors which contribute to a particular organisation or sector being higher in the hierarchy include the factors identified in the National Royal Commission into Institutional Responses to Child Sexual Abuse. Some examples of relevant factors include:
- (a) 'total' organisations, which control every aspect of a child's life (such as the youth justice sector), are areas of particularly high risk as they leave children particularly isolated and vulnerable to abuse, and
  - (b) an organisation's capacity to carry out investigations.
- 32 Further, some individual cases may be considered to be at the 'riskier' end of the spectrum. Some matters involving grooming or other child sexual abuse, may warrant more dedicated focus from our case officers. We know for example that grooming can be challenging to detect. We also know that there can be a reluctance in some cases of alleged sexual misconduct for organisations to make a substantiated finding where the evidence would otherwise support this due to concerns about the impact on the subject of allegation.

- 33 Of course these are general observations about the kinds of matters which may be relevant to a risk identification. Each circumstance will turn on its own facts.

*General powers under the Scheme*

- 34 Where the CCYP is particularly concerned about an organisation's handling of an investigation or about the outcome of an organisation's investigation, the CCYP has a range of powers to respond.
- 35 At one end of the spectrum, the CCYP may choose to inform the organisation what the CCYP believes should have been done differently and asks that this be considered in the next investigation. This will usually be appropriate where the investigation was able to be improved upon, but the risks to children of the deficiencies in the investigation do not justify a more significant response from the CCYP. However, the CCYP can choose to conduct its own investigation into an allegation where it considers that it is in the public interest, or where an organisation advises that it is unable or unwilling to investigate. The CCYP can also choose to conduct an investigation concerning any inappropriate handling of, or response to, an allegation by an organisation if the CCYP considers that it is in the public interest to do so. These findings and recommendations by the CCYP after the investigation are not able to be made publicly available, but can be provided to the organisation's regulator for them to take action.
- 36 The CCYP has engaged in a small number of these 'own motion' investigations since the Scheme's inception. Some of the circumstances where the CCYP may decide to investigate include:
- (a) allegations about the head of the organisation or senior leaders where the CCYP does not have confidence that the organisation is able to establish an appropriate investigation
  - (b) complex historical sexual abuse and neglect allegations where the organisation is small and without significant resources meaning they do not have appropriate systems to respond or the capability to investigate, and
  - (c) allegations of a concerning nature where the subject of allegation may pose a risk to children and the organisation with responsibility to

investigate may not have the capability to investigate the particular allegation.

- 37 Whether conducted by an organisation or the CCYP, investigations into allegations result in one of five types of findings. An allegation will be substantiated if it is proven to have happened on the balance of probabilities. The four other finding types are: unsubstantiated - insufficient evidence, unsubstantiated - lack of evidence of weight, unfounded and conduct outside the Scheme.
- 38 The way the CCYP holds data on notifications of allegations and investigations means we can look at the types of allegations for particular organisations, or where there are multiple allegations in relation to an individual, to identify if there may be a systemic child safety issue at an organisation. We can share this with certain other regulators, or conduct our own examination under the Child Safe Standards, even if no substantiated finding is made against the subject of allegation. For example, the CCYP may see allegations about multiple staff behaving inappropriately with children. Even if these allegations are not substantiated, this may alert the CCYP that the organisation's code of conduct does not set adequate professional boundaries for the organisation's staff on their engagement with children or that staff have not been appropriately trained. The CCYP could then take action under the Child safe Standards and require the organisation to rectify this systemic issue to better prevent future inappropriate behaviour with children.

#### *Information sharing*

- 39 If an investigation results in a substantiated finding being made, the CCYP may pass that finding to other regulators, such as Working with Children Check Victoria (**WWCC**), the Victorian Institute of Teaching (**VIT**) (the regulator for teachers in Victoria) and the Australian Health Practitioner Regulation Agency.
- 40 The CCYP must provide all substantiated findings that reportable conduct has occurred to WWCC (except in the limited instances where there is some discretion such as the conduct would be better addressed through training or supervision). When the CCYP shares that information with WWCC, we provide the WWCC with a summary of the substantiated conduct and the investigation performed. This referral triggers the WWCC to reassess whether the subject of

allegation should retain their WWCC, taking into account the findings referred by the CCYP.

- 41 In an education context, the CCYP must provide all allegations received about a registered teacher under the Scheme to VIT, as well as any substantiated findings. In practice the CCYP shares all findings with VIT so that there is a complete record of the outcome of the investigation in fairness to the subject of allegation. Like WWCC, VIT also has their own process to examine the alleged behaviour of a subject of allegation and take action, and they may take the investigation under the Scheme into account.
- 42 The CCYP shares all allegations we receive which are potentially criminal in nature with Victoria Police. In 2020-21, 58 percent of notifications received by the CCYP were reported to Victoria Police by either the organisation or the CCYP due to possible criminal conduct. Where Victoria Police investigates a matter which also falls within the Scheme, the CCYP is empowered to request information from Victoria Police's investigation. With Victoria Police's permission, the CCYP can share this information with the organisation, to reduce duplication in evidence gathering.
- 43 On occasion Victoria Police will also identify allegations under the Scheme in the course of their duties that have not been otherwise notified to the Commission. These will usually then be shared by the CCYP with the organisation responsible triggering an obligation for them to be investigated under the Scheme.
- 44 Organisations must investigate reportable conduct allegations, but the investigation is put on hold if there are potentially criminal matters reported to Victoria Police. Once Victoria Police provides clearance, the organisation can proceed with its investigation.
- 45 In complex matters that cross the jurisdiction of multiple regulators, the CCYP often calls together relevant child safety regulators so that we are able to share information as a case is emerging. That way, each regulator is also clear about the actions of others. The regulators will also often share outcomes at the end of an investigation. Sharing in this way assists against matters 'falling through the cracks'.

- 46 Under the CWAS Act, CCYP can request that a co-regulator conduct an investigation under the Scheme into an allegation. This may be of particular use where that co-regulator is already conducting an investigation for example. This has the potential to improve the efficiency of investigations, reduce duplication of investigation including reinterviewing children and young people and reduces the draw an allegation has on the already limited resources of regulators. This power has not yet been exercised by the CCYP in practice, partly because the Scheme has only operated for a relatively short period.
- 47 Sometimes, the CCYP may be concerned about the risk a subject of allegation may pose to children despite the investigation under the Scheme not resulting in a substantiated finding. In such cases, there are some powers for the CCYP to share information with some relevant agencies and regulators. WWCC can also request additional information from CCYP beyond a substantiated finding, but a reassessment of a subject of allegation is only triggered when there is a substantiated finding; this provides some procedural fairness to adults and whilst balancing risks to children.
- 48 Ultimately, different regulators make assessments based on different standards, so the lack of a substantiated finding under the Scheme does not mean that the subject of the allegation will face no consequences (for example, the VIT may still determine that a teacher has breached professional conduct standards). If information sharing occurs properly, the co-regulators in a particular matter should all have access to the relevant information held by others that they need for their role. This is a good example of the ability for information sharing to support child safety. Broad information sharing laws in respect of children in Victoria are still relatively new. Over time, as culture consistently shifts within organisations to one that is supportive of sharing information in order to prioritise child safety, the adequacy of current information sharing will be better understood.

*Responding to subjects of allegations moving across organisations or jurisdictions*

- 49 Where a subject of allegation leaves their role at an organisation which was required to investigate that employee or volunteer, that organisation is required under the Scheme to complete that investigation even though the subject of allegation is no longer an employee or volunteer. This disrupts the idea that organisations will discontinue investigations once a subject of allegation

resigns or retires. If the allegation is substantiated, this can be shared with WWCC. If that subject of allegation has commenced new employment with an organisation subject to the Scheme, the investigating organisation or the CCYP may share that finding with the new employer of that subject of allegation once the investigation is complete.

- 50 In terms of subjects of allegations moving between Australian jurisdictions, some recommendations were made in the National Royal Commission into Institutional Responses to Child Sexual Abuse on ways to support the WWCC to screen nationally. So potentially, any action taken by the WWCC in Victoria in response to a substantiated finding under the Scheme could have national application. In an education context, the CCYP is also aware that VIT has some powers to share information with other organisations nationally as well.
- 51 The CCYP has some powers to share information with the ACT Ombudsman and New South Wales Office of the Children's Guardian who administer Reportable Conduct Schemes. Substantiated findings are not routinely shared with these organisations, with sharing currently focused on cases where obligations to notify or investigations cross multiple jurisdictions. The CCYP does not currently have powers to share information with Tasmanian agencies.

#### *Other roles*

- 52 Organisations such as the CCYP also provide complainants, parents, workers, children and other community members somewhere to go and discuss their concerns other than the institution at which the alleged abuse or misconduct occurred, and which they may have lost trust in.
- 53 While the Scheme is focused on the conduct of adults with children, the Child Safe Standards do pick up behaviour between children in that organisations have an obligation to have strategies to identify and reduce or remove risks of child abuse whether by adults of children. This therefore picks up harmful sexual behaviours by children (that is, peer on peer abuse) and bullying.
- 54 Organisations can find it challenging to respond to harmful sexual behaviours by children, and we do on occasion receive contact from organisations seeking advice on these situations and how to respond. The Victorian Department of Families, Fairness and Housing as well as the Department of Education and

Training provide some guidance on responding to children who display problem sexual behaviour or sexually abusive behaviour.

- 55 There have been a number of cases raised with the CCYP where parents of victim-survivors have raised concerns that the response from an organisation to peer on peer sexual abuse has been too focused on treating or supporting the young person engaging in harmful sexual behaviour, leading to the interests of the victim-survivor to be downplayed or minimised. It is concerning to hear organisations not recognising that proper support for child victim-survivors is critical whether the abuse has been perpetrated by an adult or a child.
- 56 Different jurisdictions will have different arrangements for providing advice and support for organisations responding to harmful sexual behaviours by children depending on their structures.

## **REFLECTING ON THE FIRST FIVE YEARS OF THE SCHEME**

### *Volume of notifications*

- 57 In the 2020-21 financial year, the CCYP received:
- (a) 1006 notifications of allegations from the head of an organisation who must report under the Scheme comprising of 1,877 individual allegations, and
  - (b) 173 public notifications of potential allegations from members of the community (noting public notifications that are in scope of the Scheme are usually disclosed to the head of the organisation who engages the subject of allegation, who subsequently makes a notification to us).
- 58 Persons making a public notification can remain anonymous and have protection under the CWAS Act if disclosures are made in good faith. In the 2020-21 financial year, public notifications came from a range of sources including workers in organisations subject to the Scheme, parents and carers, Victoria Police, other regulators and members of the general public. Most of the public notifications we receive are from adult members of the community – for example, parents and concerned workers or volunteers within organisations.

The number of public notifications we receive has increased every year since the inception of the Scheme.

- 59 A smaller number of public notifications are received from children and young people themselves. I believe that the number of public notifications we receive from children and young people directly may increase over time with improved education for children and young people about their rights and how to report when they are not feeling safe.
- 60 We may receive public notifications for a number of reasons. For example, a reporter may be dissatisfied with an organisation's handling of their child sexual abuse concerns and they may not trust that the organisation has reported it to the CCYP themselves. In other cases, we receive public notifications in circumstances where the relationship between the reporter and the organisation has broken down, and the reporter no longer feels that the organisation is listening to them. We also receive some public notifications in instances where the organisation has not made, and might never make, a report themselves (for example, whistleblowers within an organisation).
- 61 Since the start of the Scheme, 46% of the public notifications we have received have been in the education sector, and 18% in the out of home care sector.

*Key trends in child abuse reporting*

- 62 In the 2020-21 financial year there was an increase in the proportion of allegations that relate to sexual misconduct in the education sector. This has increased from 31 percent of allegations in the 2018-19 to 37 per cent in 2019–20 and 41 per cent in 2020-21. In 2020-21 sexual misconduct constituted the largest category of conduct in the education sector at 41 percent with physical violence at 22 percent, behaviour that causes significant emotional or psychological harm to a child at 22 percent, significant neglect at 9 per cent and sexual offences at 6 percent.
- 63 The substantiation rate for sexual misconduct allegations for all sectors has increased in the last three years from 21 per cent in 2018–19 to 28 per cent in 2019–20 and 30 per cent in 2020–21. The proportion of all substantiated allegations in all sectors that involve sexual misconduct has also been steadily increasing over the last three years, rising from 21 per cent in 2018–19 to 22 per cent in 2020–21.

- 64 While we cannot be certain what has caused this rise, it appears the increased focus on sexual misconduct in Victorian schools has resulted in part from many survivors sharing their experiences in the media and other public forums. The increase in sexual misconduct allegations may well reflect a growing willingness among children and young people to speak out and for organisations to listen and act. Further, there may be increased awareness by children, parents and workers of what inappropriate behaviour by adults looks like in organisations, grooming and how to report concerns.
- 65 While we are unable to demonstrate this, the CCYP has a general impression that the increase in notifications of sexual misconduct is a likely a positive trend in that it reflects an increase in **reporting** about inappropriate behaviour with children. It is unclear whether there is increase in the **occurrence** of the behaviour. There was a similar increase in family violence incidents being reported to Victoria Police following action in recent decades to reform systems in relation to family violence which was noted in the 2015 Victorian Royal Commission into Family Violence.
- 66 In each year since inception of the Scheme, the CCYP's most reported conduct type for all sectors is physical violence. In the 2020-21 financial year physical violence made up 40 percent of allegations received. Sectors which in 2020-21 did not have physical violence as the most reported conduct type were Religious Bodies (24 per cent sexual offences), Education (41 per cent sexual misconduct), Victorian Government Departments (65 per cent sexual offences) and Health (29 per cent sexual offences). Having a single body such as the CCYP to whom reporting must occur means these kind of statistics and insights can be generated to help prevention efforts. Statistics such as these assist the CCYP and other child safety regulators to focus our regulatory efforts with more detailed knowledge of the risks to children in each sector. They also provide sectors a better understanding of areas of risk to target in their prevention efforts.
- 67 While we are starting to see some trends emerge and also starting to see some potential impact in organisations from regimes including the Scheme and Child Safe Standards, it is still early days, and it will take time to see if this is translating to a lasting reduction in the abuse of children in institutions.

*Capacity building and improvements over time*

- 68 With respect to the Scheme, the CWAS Act provides the CCYP with an objective of improving the ability of organisations to identify allegations, report and investigate them, as well as the function of educating and providing advice. Similarly, the CCYP has a function for the Child Safe Standards of educating and providing advice to organisations and an objective of promoting continuous improvement by organisations. We take these roles very seriously and make guidance materials, templates and webinars available to the organisations we regulate.
- 69 In the first five years of the Scheme and the CCYP's regulation of the Child Safe Standards, we have focused significant effort on capacity building for organisations. We see organisations at different stages in terms of compliance with Child Safe Standards. Our experience is that the vast majority of organisations are well-intentioned in wanting to prevent child abuse, and we achieve good gains in compliance through the provision of support for organisations as well as ensuring they are aware that compliance is mandatory and they will be held to account. The process of improving compliance often includes education around how to prevent, detect and report child abuse, and how to respond if an allegation arises. These are important steps in improving safety for children and implementation doesn't have to be financially burdensome.
- 70 There can be particular challenges in making sure that investigations are conducted appropriately in organisations that are small or might have limited resources. The CCYP has released a significant amount of guidance to support investigations including written guidelines, detailed information sheets on various aspects of investigations under the Scheme, templates and webinars. Prior to the pandemic we held one-day in-person forums focussing on the basics of conducting an investigation under the Scheme. We are in the process of re-working our capacity building approach given the pandemic and the progress this brought about in use of technology. Where an organisation clearly needs more support with an investigation, we will offer guidance throughout an investigation including discussions with a CCYP case manager at challenging points in the process.

*Design of the Scheme and implementation*

- 71 When approaching drafting of the legislation to implement a Scheme, consultation is helpful. Given the varying nature of the sectors and organisations regulated by the Scheme as well as the varying work and volunteering arrangements within organisations, carefully considering how the legislation will operate and be interpreted in different settings will assist. It would also assist to have a clear understanding of which kinds of workers and volunteers are intended to be captured including labour hire staff, secondees, interns and other forms of non-traditional work arrangements. Similar care is beneficial in crafting definitions for the sectors of organisations to be captured. Contemplating whether historical allegations and allegations about conduct outside the workplace are intended to be captured by the Scheme will assist providing clarity as well as being clear on how allegations should be dealt with that arise after a worker has left an organisation.
- 72 It is important for the body overseeing the Scheme to have appropriate regulatory and oversight powers to perform its role with clear consequences stipulated in legislation for non-compliance by organisations with obligations. Information sharing powers should also be carefully thought through to best facilitate the flow of information to support investigations and also for information to be shared to prioritise child safety more broadly.
- 73 The CWAS Act has clear legal obligations under the Scheme requiring heads of organisations to have systems in place for reporting, investigations and preventing allegations. The CCYP can request information about these systems. There is also a criminal offence for the head of an organisation failing to report an allegation to the CCYP. Having these obligations placed on the head of the organisation, and supporting powers for the CCYP, has assisted getting the attention of organisations to implementing the Scheme and taking it seriously.
- 74 The independence of the CCYP assists when overseeing Government departments and agencies. We have received numerous public notifications due to complainants who have lost trust in Government or other organisations.
- 75 Learning from other jurisdictions has been vital to our implementation of the Scheme in Victoria. We benefitted significantly from engagement with the NSW Ombudsman who administered the Scheme in NSW for many years before it commenced in Victoria. In the first few years of the Scheme, we also met

regularly with the ACT Ombudsman who commenced administering a Scheme in the ACT at the same time as us. We held regular meetings between the three organisations where we would discuss issues, jointly problem solve and share strategies.

- 76 When the Scheme started in Victoria, senior staff from the NSW Ombudsman were engaged to deliver some information sessions for Victorian organisations to assist in their understanding of the Scheme and how to conduct investigations. This helped organisations to understand some of the more practical aspects to operating under a Scheme.
- 77 Victoria has benefitted from having the ability to receive online notifications supported by a well-designed database and software to manage cases from the start of the Scheme. This has greatly assisted us to operate as case numbers have increased year on year and also resulted in quality data being gathered that meaningfully contributes to improving child safety more broadly.
- 78 The Scheme in Victoria had a staggered commencement with the bulk of organisations brought into the Scheme in three phases over one and a half years. The first phase contained organisations more likely to already be conducting investigations and used to regulatory oversight. This phased approach assisted the CCYP to refine its processes and approach meaning it was better able to support later phases who required greater support.

#### *5-year review of the Scheme*

- 79 In 2022, the Victorian Government is undertaking a five-year review of the Scheme. The review will consider whether the Scheme should be expanded to cover additional organisations amongst other matters.

## **INVESTIGATIONS**

### *Internal vs external investigations*

- 80 The CCYP requires that an independent investigator be used for investigations under the Scheme. An independent investigator means an independent body or person (who can come from within the organisation) with appropriate qualifications, training or experience to investigate reportable allegations.

- 81 Victoria now has good number of external investigators who can conduct quality investigations under the Scheme operating either by themselves or as part of a business. Some law firms and barristers conduct investigations, other investigation businesses do not comprise of lawyers. The CCYP sees a high number of internal investigators within organisations who similarly produce quality investigations.
- 82 It took some time in the beginning for internal and external investigators to adjust to the particular approach to investigations under the Scheme and to having a regulatory body overseeing an investigation. Now investigators seem used to the Scheme and many will contact the CCYP to seek guidance throughout their investigations or to raise challenging issues.
- 83 We do not see internal investigations as necessarily giving rise to a conflict of interest. Indeed, running internal investigations in some cases helps to ensure that organisations remain accountable to their own child safety systems. Further, internal investigations can encourage organisations to bolster their own child safety measures to prevent similar future reportable conduct.
- 84 In some complex cases, internal investigators may not have appropriate expertise, for example some matters involving sexual abuse. There can also be circumstances which can make it challenging for an internal investigation to be perceived as truly 'independent', such as where there is a conflict of interest. Where such factors prevail, the CCYP's position is that organisations should (and often do) opt for investigations under the Scheme to be handled externally. This can assist to retain the independence of the investigation, support the legitimacy of the investigation's outcome or help ensure a complex case is properly investigated. Factors that can mean an external investigation is more appropriate include:
- (a) Where the head of an organisation themselves or another member of the senior leadership team or Board is the subject of an allegation.
  - (b) Where it is challenging for an organisation to turn an independent mind to the undertaking the investigation. For example, in investigations into allegations into an employee engaging in grooming of a child in a close-knit organisation, other employees at the organisation may struggle to accept that their colleague, the subject of

allegation, could be capable of engaging in the alleged behaviour. This may impact on the internal investigator's ability to make a finding based on evidence and without bias.

- (c) Where concerns have arisen around whether the head of an organisation managed a child safety issue appropriately. For example, if it appears the head of an organisation was aware of the risk posed by a particular subject of allegation, failed to take action in respect of this risk, and an allegation then arises that this person went on to abuse children. There could be an allegation that the past failure by the head of the organisation constitutes 'significant neglect' and itself requires investigation. It would likely be appropriate for the organisation to engage an external investigator to assess the conduct of both parties.
- (d) Where there is a lack of a good conflict of interest strategy or policy in an organisation, and it is obvious that an investigation cannot be done in an independent and impartial way.
- (e) Where the circumstances of the organisation are such that it is evident that it cannot cope with performing an internal investigation into an important or risky matter concerning significant risks to the safety of children.
- (f) Where parties to the investigation may not trust the process, investigator or organisation because what they alleged has happened has led to them losing faith in the organisation. Sometimes that mistrust is well placed, but other times an organisation has the capability to conduct a good investigation, but it is difficult for the organisation to generate that trust without using an external investigator. In any case, witness participation is a key element of a good investigation.

#### *Necessary skills of investigators*

85 The CCYP is not prescriptive about qualifications or skillset required of investigators under the Scheme. We suggest that organisations:

- (a) consider the proposed investigator's skills and experience, in particular their experience in conducting investigations involving children
- (b) conduct appropriate screening to make sure the proposed investigator is appropriate to work with children, including checking whether they have a Working With Children Check
- (c) sight the investigator's certificate and/or qualifications; a Certificate IV in Government Investigations is appropriate
- (d) check that their training is up to date and relevant to the investigation.

86 Some of the external investigators that the CCYP deals with are lawyers, however, the CCYP is not of the view that an investigator must be a lawyer, or mandate qualifications. The CCYP has, for instance, engaged with school principals who were methodical and meticulous in their investigative processes.

87 A good investigator must take an evidence-based approach. Throughout the investigation, they should be calm, well-informed, open-minded and process driven. Good investigators plan their approach, gather and sort through evidence methodically and talk to the right witnesses, before reviewing the evidence in full and making a determination as to whether an allegation may be substantiated.

88 In some organisations, the head of the organisation will ask the investigator to make recommendations as to whether an allegation should be substantiated. In other organisations, the head of the organisation will ask the investigator to make this decision on their behalf.

#### *Interviewing children*

89 Some organisations can initially find it difficult to conduct investigations into child abuse because they necessarily involve child witnesses. Myths persist around involving children in investigations including that their evidence is less reliable than adults. Some organisations simply don't know how to approach involving children, and are worried about doing the wrong thing.

90 The CCYP holds the view that excluding children and young people from investigations without good reason can send a damaging message to them that their voice is not valued. It can contribute to them not feeling listened to or

heard. It also potentially deprives investigators of valuable evidence relevant to deciding whether an adult has engaged in child related misconduct or abuse.

- 91 There is a common fear amongst organisations of re-traumatising a child victim-survivor by interviewing them. In some matters that risk is real. The CCYP advises that if an organisation has a good reason not to interview a child or young person, consideration should be given to other ways to include them, such as giving them the chance to provide a written statement or engaging with their parent or carer. Reducing the number of times a child or young person is asked to give their account helps to minimise the risk of exacerbating trauma through an interview. We suggest organisations check if they can gain access to an interview conducted by other investigative agencies such as Victoria Police to reduce multiple interviews.
- 92 There is however a real gradation of matters under the Scheme, and children and young people also respond variably to experiences. At the start of the Scheme, there were numerous organisations who did not appear to even consider interviewing children, including the alleged victim. In some matters the risk of re-traumatisation was low, but became overblown by the organisation. This risk was not balanced against the risk that a child would be traumatised, feeling powerless and excluded, if they could not participate in the investigation. In other cases organisations simply hadn't trained their staff and didn't know how to approach interviewing a child.
- 93 The lack of involvement of children in investigations under the Scheme has been a particular area of concern for the CCYP, and has been a focus of our capacity building for organisations and guidance materials. Since the beginning of the Scheme, we have seen improvements in this space.
- 94 However, we do occasionally (rarely) see investigators go into interviewing a child or young person who has experienced serious trauma in an unthinking way, where they should perhaps have taken a step back and better planned their interview strategy. The CCYP is focused on promoting planning to investigators as a key element of interviewing children.
- 95 The CCYP recommends taking a trauma-informed approach to interviewing children and young people. We have produced indepth guidance on this for organisations. This involves actions such as:

- (e) Understanding the impacts of trauma on children and young people so that vulnerable children and young people can be included in investigations and minimise the likelihood of exacerbating their trauma or further traumatising them.
- (f) Speaking with the child or young person's parent, carer, case manager, teachers or other professionals and gathering information about the individual circumstances of the child or young person
- (g) Ensuring the investigation and interview process is safe – culturally, psychologically, and physically. This involves giving careful thought to planning safety before, during and after an interview with the child or young person. It also involves being mindful of ways the investigator can assist a child or young person to remain inside their 'window of tolerance'.

96 Investigators benefit significantly from being trained and practising interviewing children. Some investigators erroneously assume that the process is the same as for an adult. For example, I have seen unfortunate examples of investigators who interpret very young children mixing up details such as dates and times as lacking credibility; this demonstrates a real lack of understanding about how children view and speak about the world, and what children of different stages of development are capable of. Trained investigators with some experience are more likely to interview a child successfully, but it is also important that organisations select people to interview children who can build a good rapport with them. Training, and learning about children and trauma, is critical to correctly interpreting what a child says, to minimise the expectation of a child's evidence-giving style to mirror that of an adult, and to understand how children communicate. Such training and developing the skills and knowledge of staff can build capacity for organisations to perform internal investigations involving children.

97 Finally, I have seen some evidence of investigators attributing reduced weight to a child's evidence compared to an adult's evidence. Again, such interviewers would benefit from training because that understanding is likely to be informed by an incorrect view about the credibility of a child's evidence. This practice has reduced in prevalence as investigators perform more investigations under the Scheme with feedback from the CCYP.

*Supporting full participation in investigations*

- 98 Ensuring the full diversity of children are able to participate in investigations about conduct involving them, or where they have been a witness, requires planning and forethought. Each interview with a child should be planned individually with an understanding of each child's circumstances and needs, and what is required to create safety and place their wellbeing at the forefront of preparations.
- 99 If every relevant witness is able to participate in the investigation, and the process followed provides them the best opportunity to tell the truth as they see it, this will help the investigator to gather the best possible evidence. Ultimately, this contributes to fairness for the subject of allegation and supports an organisation to make a legitimate and defensible finding.
- 100 A common way to assist children and young people participate in an interview is to allow a familiar support person to attend the interview with them, provided this does not negatively impact the giving of evidence.
- 101 Creating a culturally safe investigation process and interview is important to supporting the participation of Aboriginal and Torres Strait Islander children and young people and also children and young people from culturally and linguistically diverse backgrounds. Some ways investigators can facilitate cultural safety include:
- (a) being respectful and flexible in their attitudes towards people from cultures other than their own, and recognising their own, often unconscious, cultural bias
  - (b) working to develop trust and rapport with the witness
  - (c) recognising and avoiding stereotypes.
- 102 For Aboriginal and Torres Strait Islander children, it may be helpful to have another Aboriginal and Torres Strait Islander person in the room with them when interviewing, ensuring that the background of the person who is asking them questions is appropriate, and ensuring that the interviewer has good understanding of the child's cultural context. We also advise that non-Aboriginal interviewers consult with an appropriate Aboriginal person throughout the investigation and ensure they have not misunderstood or

misinterpreted any cultural aspects of the interview with the child or young person.

- 103 We advise that investigators should consider whether a child or young person might require or benefit from some additional support or help to participate. The CCYP sees cases where children with communication difficulties or disability are excluded from investigations with inadequate thought given to how they might be assisted to tell their story as best they can. In the case of a child or young person with disability, they might need to use an assisted communication device or require an individualised communication approach. We also advise that an investigator should also seek the views of the child or young person's carer, guardian or advocate (when they have one) about how to establish an environment where they can participate.

*Challenges in investigating professional boundary breaches and grooming behaviours*

- 104 In Victoria, the Scheme has a category of conduct called sexual misconduct which picks up conduct that is a departure from the accepted standards of the role performed by the worker or volunteer and is of a sexual nature. This category of conduct captures grooming that is not criminal in nature. Grooming behaviours can fall into the sexual offence category of conduct as well as sexual misconduct. Sexual misconduct also picks up behaviour that is overly personal and intimate, but not necessarily involving potential or actual sexual arousal or gratification.
- 105 The CCYP has observed that it can be a challenge for some organisations to confront and investigate these professional boundary breaches and grooming allegedly perpetrated by a member of that organisation. We have seen in some investigations, organisations declining to make substantiated findings even where the evidence supported such a finding due to concern about the impact on the subject of allegation. It can be a challenge to break through people's loyalty and pre-conceived ideas about a subject of allegation in grooming cases. Colleagues who have worked with a subject of allegation and have gotten to know them cannot imagine that person acting in a way that might be harmful to children. This loyalty can affect children and young people too, who may not understand the behaviours as grooming, or seek to protect the subject of allegation. In some matters, we see a lack of understanding of what

constitutes grooming behaviour or outdated views about what behaviour is appropriate with children.

- 106 Organisations' responses to sexual misconduct allegations are improving over time. The substantiation rate for sexual misconduct allegations across all sectors has increased in the last three years from 21 per cent in the 2018–19 financial year to 28 per cent in 2019–20 and to 30 per cent in 2020–21.
- 107 Child Safe Standards require organisations to have a code of conduct where what is appropriate and inappropriate behaviour by workers and volunteers with children is set out. This provides the organisation with a way to communicate professional boundaries. The stronger an organisation's code of conduct is in setting behavioural standards, the more effective it is in supporting an organisation in an investigation to determine whether a worker or volunteer has engaged in sexual misconduct.

*Taking a trauma informed approach and procedural fairness considerations*

- 108 The CWAS Act provides that subjects of allegation in an investigation under the Scheme are entitled to receive natural justice in investigations into their alleged conduct. The CCYP guidance is that this will usually include ensuring that, before any findings are made, the subject of allegation:
- (a) is provided with a letter of allegation prior to any interview being undertaken
  - (b) is put on notice of the nature and scope of the allegation
  - (c) is provided with an opportunity to have a support person present with them
  - (d) is provided with an opportunity to respond to the allegations and any relevant evidence that has been obtained during the course of an investigation
  - (e) is made aware of the consequences of the investigation in the event that any adverse findings are made
  - (f) has a reasonable opportunity to respond to the relevant evidence
  - (g) has a reasonable opportunity to give their side of the story, and

(h) the responses provided by the subject of an allegation are considered by the investigator, organisation or head of the organisation before any final decision is made.

109 I have seen some investigations under the Scheme where the investigator insisted on conducting a style of questioning of adult alleged victims of historical allegations of child abuse akin to a court-based setting. The justification for this was that it was necessary to afford the subject of allegation procedural fairness for evidence of the alleged victim to be tested. This is not our view of the requirements of procedural fairness, and we consider this approach involves substantial risk to alleged victims. This approach demonstrated a lack of understanding of how to take a trauma-informed approach to investigations under the Scheme while still affording procedural fairness.

110 In some cases, the evidence available to an investigation will be limited for various reasons; for example, the alleged victim or other witnesses might be too traumatised or choose not to provide further evidence. It is not always possible for a child to participate in an interview process. In those cases, we recommend that the investigator compile the available evidence to the best of their ability and provide the subject of allegation with an understanding of the available evidence and an opportunity to respond to the allegations. The investigator will need to take the limitations in evidence into account in reaching a finding. While such an investigation may be less likely to result in a substantiated finding, the CCYP believes it is nonetheless important that an investigation proceed to ensure allegations are enquired into and child safety is prioritised.

111 The CCYP has different gradations of 'unsubstantiated' to reflect the realities of these investigations:

(a) **Unsubstantiated - insufficient evidence.** This finding should be used when there was some evidence of weight to support the allegation, but not enough for the decision maker to make a substantiated finding. The evidence does not suggest that it is more likely than not that the reportable conduct happened.

- (b) **Unsubstantiated - lack of evidence of weight.** This finding should be used when there is not enough evidence to properly investigate the allegation, or the small amount of evidence available is contradictory or confusing. There is not enough evidence to establish whether the reportable conduct did, or did not happen.

*Standard of proof and the Briginshaw test*

- 112 If Victoria Police does not lay charges in a potentially criminal matter, or a case is not successfully prosecuted in court, it may still constitute substantiated reportable conduct. This is because the categories of reportable conduct are wider than conduct that would meet the definition of a criminal offence and also because the standard of proof in the Scheme is the lower civil standard of the balance of probabilities, not the criminal standard of beyond reasonable doubt.
- 113 This has been challenging for some organisations to understand; they may question why the subject of an allegation who has just been through a criminal process is being investigated again. The CCYP explains the different purposes of the different investigations and that the Scheme is concerned with children's safety and the appropriateness of a subject of allegation's behaviour with children, not whether the conduct is criminal.
- 114 Given the serious nature of allegations under the Scheme, the CCYP asks organisations to apply the 'Briginshaw test' (from the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336). In short, the CCYP advises that this requires that the following be taken into account:
- (a) the seriousness of the allegation
  - (b) the inherent likelihood of the conduct occurring based on the evidence, and
  - (c) the gravity of the consequences flowing from a particular finding.
- 115 We advise that the 'Briginshaw test' requires that the more serious the allegation and gravity of a substantiated finding, the more comfortably satisfied on the evidence the decision-maker must be before making any substantiated finding.
- 116 Conceptually, the *Briginshaw* test helps to ensure procedural fairness for subjects of allegations, particularly where serious allegations with potentially

career-ruining ramifications are made against subjects of allegations. Importantly, the legislative principles for the Scheme in the CWAS Act include that the protection of children is the *paramount* consideration in the context of child abuse or employee misconduct involving a child. The CCYP has seen investigators mis-apply the *Briginshaw* principle, using it to justify an unsubstantiated finding on the basis of evidence which should easily support a substantiated finding.

- 117 The CCYP seeks to educate organisations and investigators to connect them in a plain-English way with standard of proof concepts, such as the ‘Briginshaw test’. It can be challenging for some organisations to immediately understand nuances around standards of proof, for example where they are not used to conducting formal investigations. We do find that over time, as an organisation has more experience with the Scheme, they come to better understand these concepts.

#### *Investigation timeframes*

- 118 In addition to the three days given to a head of an organisation to report an allegation under the Scheme to the CCYP, the legislation underlying the Scheme also requires the organisation to provide the CCYP an update regarding the investigation at 30 days. The organisation must provide information including who the investigator is, what has been done to date in the investigation and, if there is an outcome, what that outcome was.
- 119 There is no prescribed timeframe for investigations. The CWAS Act provides that an investigation must be conducted as soon as practicable and there is a legislative principle that the CCYP and others involved in the Scheme should collaborate to ensure timely investigations. The total timeframe of an investigation is highly dependent on the individual circumstances of the case.
- 120 In cases of child sexual abuse, an investigation by Victoria Police will usually first need to be concluded, and the case may need to go through the criminal justice system, before it can be investigated under the Scheme. In such cases, it is appropriate for the organisation to delay the investigation so as to not disrupt any criminal investigation. The CWAS Act provides that an investigation under the Scheme must not commence until Victoria Police advises that the

police investigation has been completed, or agrees that the investigation under the Scheme may proceed in consultation with Victoria Police.

- 121 We do see some instances of organisations not proceeding with investigations in a timely fashion which causes the CCYP concern. Delays can negatively impact the alleged victim, subject of allegation, the quality of evidence able to be gathered in an investigation and ultimately delay action being taken to support children's safety. For substantiated allegations, having the investigation not conducted in a timely fashion can delay notifications being made to WWCC and other regulators about the subject of allegation's behaviour. Delays are not specific to any one sector, and are more usually based on circumstances in individual organisations.

*Managing risk during investigations*

- 122 The CCYP ask that organisations manage risk to children and young people while an investigation is underway. Managing risks involves assessing the safety of all children (not just the alleged victim) and other affected people, and deciding what actions should be taken to ensure their safety and wellbeing. Some factors that we suggest be considered in any risk assessment include: the nature and seriousness of the reportable allegation, the vulnerability of the children affected, the position of the subject of allegation within the organisation and the nature of the work they do and whether the subject of allegation has unsupervised access to children. A risk assessment involves deciding what action (if any) should be taken with respect to the subject of allegation while the investigation is being carried out to keep children and other staff safe. This could include supervising the subject of allegation, stopping them from having direct contact with children, or in very serious cases, suspending them or taking other similar action to remove them from the workplace.
- 123 Children raising allegations should be treated with sensitivity and given support, and we advise that organisations connect children and their families with services that can support them to manage difficult or traumatic experiences. The CCYP advises that, while the safety and wellbeing of children is the most important consideration in the context of investigations under the Scheme, organisations should consider the welfare of the subject of allegation and other witnesses as far as appropriate in the circumstances.

124 The CCYP may provide guidance to an organisation undertaking an investigation if needed and make recommendations about the kinds of risk management strategies the organisation could implement. If CCYP has concerns that risk management by an organisation is insufficient, we may raise these with the head of the organisation or other regulators for the organisation.

I make this solemn declaration under the *Oaths Act 2001* (Tas).

Declared at   
on 5 May 2022



Emily Sanders

Before me

