

**DRAFT PRESENTATION
PRIVACY CONFERENCE MAY 2010**

Privacy: an elusive right for young people

It's all well and good having these laws to protect an individual's rights, but are they working in practice?"¹

Introduction

Youthlaw is Victoria's state-wide community legal centre for young people under 25 years of age. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

The right to privacy is particularly relevant to young people who live in out of home care, who use health or other social services, who are having difficulties securing housing or have been charged with and/or convicted of criminal offences.

Youthlaw has identified through our legal casework, law reform work, and workshops with workers and young people (especially as part of the National Human Rights Consultation in 2009), a significant number of areas where children and young people have failed to have their right to privacy protected in Victoria.

Drawing from the experience of our legal information and advice service, I highlight several areas, where young people have difficulty accessing their right to privacy, namely:

1. Criminal records for findings of guilt without conviction
2. Surveillance: use of CCTV footage by security guards and police
3. Confidential information given to counsellors and health practitioners

I conclude with some comments on a young person's access of complaint processes when they believe their right to privacy has been violated.

The right to Privacy

Before examining these areas, I will examine the content and scope of the right to privacy of children and young people.

Children and young people's right to privacy is embedded in the United Nations Convention on the Rights of the Child² ("CROC") and also the Charter of Human Rights and Responsibilities (2006) Vic ("the Charter").

The right to privacy as articulated in section 13 of the Charter closely reflects Article 16 of CROC which specifically relates to children under 18 years.

A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have his or her reputation unlawfully attacked.

There are a number of important aspects to consider in connection with this right.

- a. It must apply to all children without discrimination
- b. The child's privacy is to be protected in all situations including within the family, alternative

¹ Young person participating in a focus group at Whitelion, held as part of the preparation for Youthlaw's submission to the National Human Rights Consultation in May 2009.

² Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

care and all institutions, facilities and services.

- c. While it is difficult to define privacy with precision, it is often categorised in the following terms: bodily privacy, territorial privacy, communications privacy and information privacy. These categories will often overlap.
- d. The term 'family' should be given a broad interpretation to include all those comprising the family as understood in society and is not confined by marriage.
- e. The term 'home' includes not only the place where a person resides, but also where they carry out their ordinary occupation.
- f. The right prohibits *arbitrary* and *unlawful* interferences with privacy. This means that any interference with privacy must be both authorised by law and reasonable, necessary and proportionate in the particular circumstances.

Unlawful disclosure of personal health information about someone is an obvious breach of that person's right to privacy. Other examples of where the right to privacy may be violated is where a child or young person's possessions are searched for drugs or other items, preventing someone from accessing their home, and evicting someone from their home, taking blood samples, searching people or their homes or other premises, and intercepting mail or phone calls.

The right also creates positive obligations on public authorities to protect individuals and their families from interference with privacy and to ensure an obligation on the part of public authorities to ensure that any personal information they collect is necessary, secure and accurate.³

The right to privacy places limits on the extent to which the state can do things which invade a person's privacy. It requires an assessment of the reasonableness of the powers of the state to intrude into the lives of members of the community. For example, in *R (Stevens) v Plymouth City Council and C*, the UK Court of Appeal held that a County Council could disclose confidential information about an adult medical patient to his mother as it was necessary for her to be involved in his care.⁴

It is intended that the right to privacy be interpreted consistently and co-exist with the existing information privacy and health records framework in Victoria⁵. Privacy legislation that currently exists at a state and federal level predominantly relates to personal information only. The right to privacy as just described in the Charter and CROC is broader than other privacy legislation in Victoria as it relates not just to personal information, but other areas such as bodily privacy and privacy of the home.

1. Handling of criminal records and convictions

In addition to the right to privacy, CROC also requires in the case of children accused of having infringed the law to have their privacy respected at all stages of the proceedings. Rule 8.1 the United Nation's Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules):

"The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling."

CROC and the Charter also recognise that all children (persons aged under 18 years of age) are entitled to special protection. This means that all decisions concerning children and young people, including those in the criminal justice system, must be made with regard to the child's welfare and best interests. This right is, to an extent, already reflected in other Victorian laws that provide special procedures for young people and the criminal justice system.

Young people who are found guilty of an offence must be treated in a manner that it is appropriate to

³ *Norman Baker MP v Secretary of State for the Home Department* [2001] UKHRR 1275; *Gunn-Russo v Nugent Care Society and Secretary of State for Health* [2002] 1 FLR 1.

⁴ [2002] 1 FLR 1177.

⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 13.

their age, including when making decisions about sentencing, where the young person should serve any custodial sentence that is imposed, and opportunities should be provided to the young person to enable them to aid in their rehabilitation, and divert them from the criminal justice system.⁶

This standard is reflected in the discretionary power of judges under the *Sentencing Act 1991 (Vic)* not to record a conviction following a finding of guilt. The exercise of this discretion may take into account the impact of a conviction on the offender's economic or social well being or on his or her employment prospects.

These principles underlie the Children's Court approach to dealing with young offenders between 10 and 17 years. i.e. the least possible intervention in a young person's life.

Criminal justice diversion (CJD) is a court based intervention in the Magistrates Court that provides first time adult offenders (including young people) with an opportunity to avoid a criminal record. A Magistrate can order diversion where the police informant has agreed. CJD is a particularly important "sentencing" option for young people because currently it is the only way to avoid a criminal record in Victoria.

Currently the Victoria Police Records Information Release Policy (2005) permits release of criminal history information on the basis of findings of guilt, including non-conviction. Contrary to popular belief, Victoria Police do not apply a distinction between convictions and non-convictions when releasing criminal records for example to a potential employer. Generally a criminal record will be released for a period of ten years; five years where the person was sentenced is a child.

So when a Magistrate sentences an offender but does not record a conviction, this still becomes a permanent criminal record in Victoria. Although CJD do not become part of a public criminal record, they may attract the "stigma" of criminal behaviour.

The information released on standard criminal record checks in Victoria includes minor offences (often where no conviction or other penalty was imposed by the Court) and provide little context to the nature or circumstances of offending, nor reflect the principle of privacy, special protection and reintegration of young people in the criminal justice system.

Criminological research into labelling processes has provided evidence of the detrimental effects resulting from permanent identification of young persons a "criminal". The resultant release of information and confusion about the meaning of "convictions" and "criminal records" has had a dramatic impact on young people's lives and their livelihoods. Their life prospects are severely hampered by a criminal record even where the offences are minor. Young people have lost their jobs, refused employment and discriminated and stigmatised on the basis of trivial criminal matters.

In Victoria an employer can lawfully refuse to hire or sack a worker for a criminal record that has nothing to do with the particular job e.g. a supermarket can lawfully refuse to hire a young shelf stacker because of a drunk and disorderly offence committed three years ago.

Recommendation

Unlike most other Australian states, Victoria has no legislation prescribing what information the police must release through a criminal history check. It is our view there should be a clear legislative framework which regulates criminal record management and the release of criminal histories. This should cover both federal agencies, organisations and individuals including those with law enforcement or administration of justice function, and state public sector agencies until such time as uniform state and territory legislation is enacted. We recommend that this legislation should attach various privacy practice protections to the handling of criminal history records information and include a right on the part of the record subject to see and correct the record.

⁶ See Article 40 CROC and section 23 of the Charter.

Inappropriate use and disclosure of other personal information collected by police

At Youthlaw we regularly hear from young people have little confidence that their privacy rights will be protected in the way police disclose information pertaining to them.

Victoria Police is required to comply with the Information Privacy Principles (IPPs), however section 13 (a) and (d) of the Information Privacy Act 2000 (Vic) creates exemptions for Victoria Police whereby it is not necessary to comply with some IPPs if it believes on reasonable grounds that non-compliance is necessary for its law enforcement or community policing functions.

Case-study

A broad application of this exemption may lead to incidents such as one we heard of which involved police sharing information with Department of Immigration and Citizenship (DIAC) regarding a client who had had dealings with police, which involved him being cautioned, but where no formal charges or conviction were recorded. DIMA relied on this information in assessing if the individual is of "good character" under the *Australian Citizenship Act 2007* to become Australian citizen. The young person was refused citizenship on these grounds.

2. Surveillance: Improper use of CCTV footage

At a forum on public surveillance in July 2009, lead by the Victorian Law Reform Commission (VLRC) as part of their consultation in relation to Surveillance in Public Places, young participants raised the issue of the improper use and control of closed circuit television cameras (CCTV) footage by police and security guards.⁷

Case-study

Westfield Shopping Centre 'Red Card' policy

A national Westfield Shopping Centre 'Red Card' policy was been introduced in 2009 to curb anti-social behaviour by young people in shopping complexes. The cards rolled out across the country list prohibited activities, including running, swearing, yelling, blocking entrances and "mucking around". The back of the card includes the consequences for bad behaviour, which may involve young people being banned from Westfield shopping centres for 24 hours to 6 months.

In our view the whole strategy could easily lead to an array of intrusions of young people's privacy Westfield's actions raised concerns in WA last July. It was reported that security guards were carrying photos of young people who had been excluded under this policy. Indeed written notices can be issued to those who had been banned and their images printed from the centre's closed-circuit televisions and carried by security guards so they can ask other young people for their names and easily recognise them if they return before permitted.

Propelled by this concerns Youthlaw referred the matter to the Office of the Privacy Commissioner to conduct an own motion investigation into a practice that may be an interference with a person's privacy and an improper collection of personal information.

⁷ Shopping centre red cards for antisocial teenagers, Stephanie Painter
<http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=153042>, 6th July 2009, 6:00 WST

Police release of CCTV footage

What young people have told us

The group at the VLRC forum also discussed police control of CCTV footage. Some participants expressed concern about police accessing footage when they need it but denying it to others. This is a complaint we commonly hear at Youthlaw.

One participant noted that police only use footage for their own purposes or advantage and they can't access footage, say for a police complaint, even if they appear in the footage themselves.

One participant told a story about being present when a friend was involved in a violent incident with police at Flinders St Station. He asked for the footage so a complaint could be made against police. He was refused.

Others stated there should be another way to make sure police are doing the right thing with footage. It was suggested that there should be another body you can go to for access to footage, and that there should be better police protocols and more information and education for the public about surveillance and freedom of information.

Surveillance must be proportionate and reasonable

The Charter requires that any limitation on the right of privacy must meet the requirements set out in the 'general limitations clause' (section 7(2)), namely proportionality between the surveillance practice and the purpose it seeks to achieve. This means that a user of surveillance ought to use the least privacy-intrusive means of achieving the purpose, and excessively intrusive forms of surveillance may only be justifiable when designed to protect individuals from grave physical harm.

Recommendations

Youthlaw endorses a number of requirements for video surveillance by public authorities and private users of public surveillance⁸ aimed at ensuring that surveillance is a proportionate response to potential harm:

- People should be notified if they are being watched in public places, or else the surveillance system should be obvious;
- People subject to surveillance should have an effective remedy if they believe their rights have been infringed; they must also be informed of the remedy and how to use it;
- Personal data resulting from the surveillance should be obtained and processed fairly and lawfully;
- Personal data should be collected for a specified and legitimate purpose and relevant and not excessive in relation to the purpose;
- Personal data should not be used in ways incompatible with the purpose for which it was collected;
- Personal data should be accurate and, where necessary, kept up to date;
- Personal data should be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which it is stored; and
- Personal data should be available for access by the individuals to which it relates, subject to restrictions which balance their rights against the need to restrict access for the purpose of prevention and prosecution of crime, and the privacy interests of third parties.

⁸ As identified in the Venice Commission comments on: *Video surveillance in public places by public authorities and the protection of human rights* (2007), [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.asp)

3. Confidential information given to counsellors and health practitioners

In order to promote the health and development of adolescents, authorities are encouraged to strictly respect their right to privacy and confidentiality, especially with respect to advice and counselling on health and other personal matters.

Most students seeking counselling assume that what they divulge in counselling will be kept in confidence by their counsellor. And yet the school counsellor is not bound by the same laws of confidentiality as social workers or other health professionals, rather they are employees of a school and accountable to the school management. The most frequently mentioned reason for dissatisfaction with the counselling process is confidentiality i.e. the counsellor had breached confidentiality by telling parents, teachers or other members of the school without the student's permission.

Recommendations

Youthlaw hopes that strengthened school privacy policies will translate into schools adhering to policies in a way that is empowering to both students and counsellors and provides clear guidelines to principals and administration staff. Further the policy will need to spell out the parameters of confidentiality and its limits in respect of their duty of care, legal obligations and mandatory reporting requirements.

Health care providers have an obligation to keep confidential medical information concerning adolescents. A medical practitioner should assess whether a young person possesses sufficient maturity to understand a medical procedure and to decide whether the information be disclosed to his or her parents or guardian. Young people deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment.⁹

Case study

A young woman came to Youthlaw because she felt like her counsellor breached her privacy by divulging sensitive information to her family.

When she attended counselling she disclosed information about her first experience of sexual intercourse when she was 17 years old.

Without her consent the counsellor (working for an organisation providing services for the State) told the young woman's family she was sexually active.

This caused the young woman considerable embarrassment and derision from by her family

When she complained about this she was told it was "*in her best interests*" for her family to be told especially as she was under 18 years of age.

She complained to the Victorian Health Services Commissioner and a confidential settlement was reached.

⁹ *Adolescent health and development in the context of the Convention on the Rights of the Child* : . 01/07/2003. CRC/GC/2003/4. (General Comments) 2003, para 11, [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.4.En)

What young people have told us...

- Young people living in country towns are fearful that local medical practitioners will breach their privacy. Some young people reported feeling they cannot access assistance anonymously because their family is known to the local GP.
- A worker from Goulbourn Valley Primary Care Partnership in Shepparton shared that young people are hesitant to ask for assistance when it comes to contraceptive health matters such as buying condoms. Another worker from Seymour mentioned that young women who suspect they are pregnant are afraid to go to the local doctor.

4. Complaint processes when they believe their right to privacy has been violated...

Young people should have equitable access to the mechanisms in place for making a complaint. Young people are welcome to complain to the Privacy Commissioner about alleged breaches of privacy by public sector agencies and try to settle them through conciliation. However we know that young people do not easily make complaints or seek redress.

What young people say

This may be because:

- they do not have adequate information about their rights, options and legal assistance available.¹⁰
- They are reluctant to speak out against magistrate, police, social workers, foster carers etc. because of the obvious power imbalance and they do not believe the system will support them;
- If they lodge complaints they feel they must carry them and take responsibility for them
- Complaint processes can be complicated, long, frustrating and unappealing
- Although there is no need for a lawyer during complaint resolution some report feeling disadvantaged if they do not use a lawyer.
- The remedies available are limited and often not binding

Recommendations

Youthlaw endorses a number of initiatives and new approaches that could be taken to assist in making complaints mechanisms more user friendly for young people, including:

- setting up a specific contact or advice point for young people to access if they believe their rights to privacy may have been breached. This would not only encourage young people to contact the Privacy Victoria, but would also allow for expertise to be developed in supporting young people in making a complaint or participating in a resolution process.
- better resourcing and funding of youth specific legal services to assist young people to utilise existing complaints mechanisms including Privacy Victoria, the Health Services Commissioner and the federal Office of the Privacy Commission.
- training to youth workers regarding privacy and assisting young people to protect their privacy or provide outreach workers from the Privacy Victoria to deliver information to youth services or schools.¹¹

¹⁰ *Seen & Heard: Priority for children in the legal process* ALRC Report no 84. 1997 [2.153], [4.16]

¹¹ See YACVic's submission to the ALRC Privacy review (February 2007) pp 7 - 8).