



ALRC PRIVACY REVIEW

Privacy and Young People Youthlaw Submission

1. Youthlaw

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.

2. The human rights framework

The core international standards for children and young people are explicitly set out in the United Nations *Convention on the Rights of the Child* ("CROC"), which is the cornerstone of Youthlaw's work. Of particular relevance is Article 16 of CROC which states that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy" and "[t]he child has the right to the protection of the law against such interference ..."

The right to privacy is *interdependent* and *indivisible* from all other rights to which children are entitled. Viewed from this perspective, promoting and understanding the right to privacy (art 16) involves considering the:

- right not to be discriminated against (article 2)
- right of a child to have their best interests considered (article 3)
- right and duty of parents and guardians to direct and guide their children in a manner that is consistent with the evolving capacity of that child (article 5)
- right of a child to form and express their own view in accordance with their age and maturity (article 12)
- right of a child to receive and have access to information (article 13)

Together, these principles recognise that the rights and responsibilities of parents and carers to provide direction and guidance for the children in their care need to be balanced against the evolving capacity of children and young people to express their views and develop their own sense of autonomy (including privacy) and exercise their rights in respect to privacy issues.

This right to privacy is also found in the Charter of Human Rights and Responsibilities (Vic 2006) in section 13(a) "*A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with...*"

CROC and the *Charter* both provide a rights-based framework for addressing the needs of children with respect to privacy laws. In this regard we endorse comments found in the submission from the National Children's and Youth Law Centre that a rights-based approach to the issue of children and privacy is, on the whole, consistent with the current privacy framework in Australia.

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Many young people may not be aware of their right to privacy. They require guidance to be made aware of, and access their rights and if necessary complaints processes offered by State Privacy Commissioners. Resources need to be made available to ensure children and young people are made aware of their rights via independent state statutory offices, youth agencies, schools, media outlets and other appropriate forums.

3. Specific Issues

3.1 Child Welfare (paragraph 9.29)

Youthlaw is concerned about the potential watering-down of privacy principles in the new collection, handling and disclosure of information provisions contained in new *Children, Youth and Families Act 2005 (CYFA)* (to come into effect in April 2007). We believe that there needs to be clearer guidance in the legislation about the necessity of adhering to the *Health Records Act 2001* and *Information Privacy Act 2000*. Section 72 of CYFA states that the *Information Privacy Act 2000 (IPA)* applies to a registered community service (CSO). However this section of itself may be insufficient to provide protection to persons whose information is being shared. For example, a CSO that is not a contracted service provider to the Department of Human Services will not be covered State privacy legislation and if the agency has a turnover of less than \$3 million it will be exempted from the federal *Privacy Act*.

It is vital that the Government and *all* registered CSOs adhere to established privacy principles. We are particularly concerned about the relaxation of privacy laws, as they relate to CSOs, as young people, children and families may be wary about seeking help and providing information to these agencies if they believe this information could be shared with child protection and lead to protective intervention.

Additionally the IPA gives way to the CYFA if there is any inconsistency, and CYFA contains a number of confidentiality provisions. These provisions may have an adverse impact on the complaint handling and investigation powers of the Privacy Commissioners.

Youthlaw submits that there is a need for clear policy guidance consistent with child's best interests (CYFA section. 10) and Information Privacy Act 2000 (especially Information Privacy Principle 2). All CSOs should be required to adhere to privacy principles without exception

For there to be confidence in the new information sharing arrangement it is important the Privacy Commissioner will be able to fulfil his/her functions and powers without impediment.

Additionally departments, organisations and individuals that regularly come into contact with children would benefit from education and training about the Privacy Act, , the National Privacy Principles, the Guidelines to the Information Privacy Principles and associated guidelines and mandatory reporting requirements when dealing with children.

3.2 Juvenile Justice (paragraph 9.32)

(a) Identification of young offenders

Under Victorian law there are restrictions on identifying a child charged with a criminal offence, and publication of proceedings. Such laws realise Australia's international obligations to protect the privacy of children in the criminal justice system and promote young offenders rehabilitation and reintegration into society as found in the United Nation's *Convention on the Rights of the Child*.

The *Children, Youth and Families Act 2005 (CYFA)* provides that publicity of young offenders, under the age of 18 years is prohibited without court permission. Section 534 states that a person must not publish a report of a proceeding in the court that contains any particulars likely to lead to identification of a child.

However this protection against publicity does not extend to alleged young offenders being investigated by police. In Victoria there have been cases where young offenders have been identified prior to their matter proceeding to court, and this has severely breached their right to privacy.

Under Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”) the young person’s right to privacy is to be respected *at all stages* in order to avoid harm being caused to him or her by undue publicity or the process of labelling. In principle no information that may lead to identification of a juvenile offender may be published.

- 8.1 *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.*
- 8.2 *in principle, no information that may lead to the identification of a juvenile offender shall be published.*

Rule 8 stresses the importance of protecting the young person from the adverse effects that may result from publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).

(b) Spent convictions

Unlike most other Australian States, Victoria has no legislation prescribing what information the Police must release through a criminal history check. Nor does Victoria have a spent convictions scheme under which certain convictions are ‘spent’ after a lapse of time, and no longer appear on a criminal history. In Victoria, the Police refer to their own guidelines when deciding what information should be released through a criminal history check.

It is inadequate that the release of information with such significant potential to affect the social rights of individuals and frustrate their ability to participate in the community should be determined solely by police policy. In many cases the release of information about findings of guilt without conviction contradicts the carefully considered decisions of Magistrates and the principles behind the CYFA (2005) and Sentencing Act (1991).

Youthlaw submits that the definition of “proceedings” in the CYFA be expanded to cover alleged young offenders under police investigation.

Youthlaw is firmly of the view that the areas of criminal history checks and spent convictions are in need of urgent legislative reform in Victoria. There should be a clear legislative framework for the release of criminal histories and a scheme by which certain criminal matters become spent.

3.3 Schools

We receive a number of queries from both young people and their parents regarding the release of personal student information collected by schools. It is our observation that schools have inconsistent practices relating to the collection and disclosure of personal student information.

Youthlaw submits that all schools must develop and adhere to privacy policies reflecting the privacy principles. Such policies would articulate what is to happen with student information from the day of their enrolment. Parents and carers would be informed about what their children’s right to privacy entails. Youthlaw support NCYLC’s submission that school staff need to be further educated and trained about privacy laws and their role in ensuring compliance. Another possibility would be to strengthen the sanction attached to schools failing to adhere to privacy laws.