



YouthLaw

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30 November 2023

Office of the Privacy Commissioner
Children's Privacy Project
PO Box 10094
The Terrace
Wellington 6143

Sent by email: children@privacy.org.nz

Dear Commissioner

Thank you for the opportunity to provide input to the Children and Young People's Privacy Project. We were alerted to this opportunity at a time when we were undergoing some changes in our organisation. We have only just been able to attend to this. We have not been able to do a comprehensive workshop. However, we did have a discussion which brought up several topics we wanted to share with you.

We believe we have a unique perspective on this topic. If you want to hear more about our views we welcome further discussion with you.

Background Questions - Our Unique Perspective

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa.

We are a specialist law centre focussing on the legal needs and interests of children and young people under 25 years of age. We work from a children's rights framework.

The legal services we provide to children and young people are regulated by the Lawyers and Conveyancers Act (including its client care rules). We are subject to the same ethical rules all lawyers must comply with, including privacy related duties (such as confidentiality and mandatory disclosure). There are very few professionals and NGOs who face the same privacy and professional duties we face. This provides a unique perspective to your inquiry.

We also provide information and legal education to professionals and NGOs who work with children and young people. We frequently discuss privacy law and regulation with these sectors. This gives us insights into how several different sectors deal with privacy issues and regulation.

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YouthLaw also has a long history of speaking about and making submissions on law reform and policy issues. We have knowledge and insight into the development of effective policy, including regulation and enforcement.

Privacy In New Zealand (Qn 2-9)

Our internal discussion focussed on systemic issues that young people face when dealing with professional bodies and NGOs. Our observations are informed by both the legal issues our young clients ask us about and the education work we do with professionals/NGOs.

Overall, our view is that the system is working well in relation to simple privacy issues. However, it is confusing, complex and not fit for dealing with more complex or sensitive issues.

Incomplete and splintered information

In general, we find most service providers (including ourselves) know where to find basic privacy information and have internal privacy policies. However, the information is often held in several locations (both internal or external), scattered across several policies, or is incomplete.

Competing rules

Services providers are often subject to multiple enactments or regulations at any given time. These enactments place different obligations on providers. At times, those obligations are in tension with each other.

For example, within family law, issues relating to a child's education sit within the responsibility of guardians. The family court can remove the guardianship of a parent, thereby removing responsibility for the child's education. However, the Education and Training Act leaves open the possibility of a school sending information about a student's performance to a parent who is no longer a guardian (see Section 165 of the Act).

Lack of consistency across the community

There are different obligations on different sectors. From the young person's perspective, this means the system treats them in contradictory and inconsistent ways. This creates risks for young people.

For example, in one case a young person made a disclosure to an organisation that provided pastoral-care services on the condition the parents were not informed. The service used its escalation policy and made a disclosure to the school. The school's policy was to inform the parents. This led to the young person being assaulted at home.

As this example shows, lack of consistency is a major worry when different organisations interact with one another. Centralised guidelines or an overarching code which deals with this situation would be helpful. They could ensure escalation policies manage risks of unauthorised disclosure or misuse by third-party recipients of information. We support the development of a definitive set of privacy principles which manages these risks for the benefit of young people.

Lack of specialist knowledge and sophistication

Privacy issues involving young people can be very complex. It is not always clear who privacy duties are owed to (the parent or the child) or when duties of disclosure arise. They often involve the application of subtle legal tests.

In our experience, there is a lack of specialist knowledge within organisations for dealing with complex issues. In practice, many privacy officers within organisations are not equipped to discharge their duties in relation to complex matters.

This criticism is true of our sector too. Community Law Centres regularly consider situations about mandatory disclosure, for example, when clients threaten self-harm. There is an occasional need to engage private lawyers for independent advice (typically paid for by insurers). One of the key drivers of concern for lawyers is the serious sanctions they can face when getting these things wrong.

Our Worries (qn10-11)

We hold all of the concerns you provide as examples in questions 10 and 11.

Protecting child's information (Qn12-13)

We strongly support steps to empower young people in relation to the removal and deletion of information held by social media and other digital platforms. We support greater transparency and clarity in relation to how digital platforms use personal data.

We support moves to remove inconsistencies across different legislative jurisdictions. Such moves reduce risk faced by children and young people.

We strongly support maintaining the mana, tapu and integrity of a child/young person's information. This aligns with a children's rights framework.

We do not support a blanket right of access for family, whanau, hapu, iwi or wider groups. While we recognise that usually these groups will act to uphold the mana of the child/young person, we know this is not always the case. We refer you to our comments in the following section (*the role of parents and families*). We also recognise Māori may have a different perspective on this and welcome your undertaking to consult with Māori.

The role of parents and families (Qn14-23)

We believe the privacy framework in relation to children and young people should be a children's rights framework. The starting point should be that a child or young person is treated in the same way as all other people. Personal information about a child or young person belongs to that person and they should enjoy the same protections and rights under the legislation.

Questions about access or use by third parties (including parents, guardians, hapu etc) could be managed through a new child and young person test or principle. One option would be to develop a "best interests of the child" type test. Similar tests are already used in the family law context.

Family law recognises the legal rights of parents (for example, to make guardianship decisions about the child) but requires parents to exercise those rights within appropriate boundaries. The enforcement mechanism is the Court - parental decisions that are not in the best interests of the child or young person can be set aside by a Court.

If a third party wanted access to personal information about a young person, the agency holding the information would need to be satisfied that disclosure was in the best interests of the child or young person.

A test of this nature would also deal with situations where a child or young person wanted access to information that could be harmful. Family law recognises that the wishes of children and young people are not always aligned with their best interests.

It could also cover situations where a child or young person jointly request access or amendments to personal information.

Thank you again for the opportunity to provide comment. Please let us know if you would like to discuss this further.

Ngā mihi,

A handwritten signature in black ink, appearing to read 'Darryn Aitchison', with a long horizontal flourish extending to the right.

Darryn Aitchison (he/him)
General Manager
YouthLaw Aotearoa