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Mr Peter Hennessy  
Executive Director  
NSW Law Reform Commission  
GPO Box 5199  
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Dear Mr Hennessy

## **Privacy Law Reform**

The Shopfront Youth Legal Centre welcomes the opportunity to provide a preliminary submission in relation to privacy law reform. We hope our comments are not received too late to be considered for inclusion in your discussion paper.

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Our clients come from a variety of cultural backgrounds and most are based in metropolitan Sydney. A large proportion of our clients have a history of abuse, neglect or family dysfunction. As a result, substance abuse problems are common. Many of our clients also have a mental illness or an intellectual disability. For most of our clients, formal education is very limited and employment is difficult to find. In this context, privacy assumes a particular importance for our clients.

### **1 Our assessment of the state of the law at present**

We welcome the emphasis on the uniformity of privacy protection principles across Australia and a consistent legislative approach to privacy in NSW (in the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Protection Act 2002*).

However, we observe that there are still gaps in the law and some aspects of personal privacy remain unprotected. We are also pleased that the Commission is considering the introduction of a statutory tort of privacy.

### **2 Our experiences of privacy issues in relation to young people**

The Shopfront sees many instances where the law in NSW fails to protect young people from many types of invasions of privacy. These include:

#### **2.1 Police**

The relationship between young people and police in NSW has been the subject of much research and discussion (see, for example, the NSW Ombudsman's "Policing

Public Safety” report in 1999). The Shopfront Youth Legal Centre has written several submissions outlining our concerns about police practices and their impact on young people (see [www.theshopfront.org/25.html](http://www.theshopfront.org/25.html)).

Through our own observations and our discussions with clients and youth workers, we have concerns about police interfering with the privacy of young people in various ways, including:

- (a) Searching, questioning or directing young people to move on without apparent justification.
- (b) Despite a legislative presumption to the contrary, strip searches are used frequently on young people. Strip searches are a deeply humiliating invasion of bodily privacy which, even with the safeguards introduced by the *Law Enforcement (Powers and Responsibilities) Act 2002*, are not subject to proper controls.
- (c) Photographing young people in public places without permission. Youth workers in western Sydney have reported instances of police using a “handycam” device to film young people without consent, and without giving details of their name, local area command or the reason for filming.
- (d) The use of drug detection dogs in public places is an unreasonable incursion on privacy and has a disproportionate impact on young people, who are more likely to use public transport and to frequent public places. In its recent review of the *Police Powers (Drug Detection Dogs) Act 2001*, the NSW Ombudsman identified a number of privacy and civil liberties concerns with the use of drug detection dogs.
- (e) Many of the youth workers with whom we work have expressed concern about the new powers introduced into the *Law Enforcement (Powers and Responsibilities) Act 2002* (especially Part 6A) following the “Cronulla Riots” in December 2005. These include the power to impose road blocks, to demand ID, to search people in a target area without reasonable suspicion, and to confiscate mobile phones.

Although there is ostensibly some legislative protection for the privacy of citizens who come into contact with the police, we are of the view that it is insufficient in most cases. The ability of the NSW Ombudsman to investigate complaints about police misconduct is compromised by lack of resources and by lack of powers to compel police to change their practices.

## **2.2 Criminal records**

The majority of the Shopfront’s clients have been convicted of at least one criminal offence, either as a juvenile or as a young adult. In the case of juvenile offences, a conviction may not have been recorded or may be spent by the time the offender is in their early twenties. However, a large number of our clients also have convictions for adult offences, which take 10 years to become spent.

In our experience, offending by young people is often strongly linked to factors beyond the young person’s control, such as homelessness, physical or sexual abuse, mental illness or intellectual disability.

A criminal record is yet another barrier to employment for young people who often lack adequate literacy, numeracy and vocational skills.

We have observed that some job application forms include inappropriate questions such as “Have you ever been in trouble with the police?”. We support a legislative

prohibition on employers asking such questions, which are unfair and, in most cases, irrelevant. Young people are often “in trouble with the police” through no fault of their own, and it is often the case that charges are not laid or are ultimately dismissed.

### **2.3 Publication of names and other identifying details of children involved in criminal proceedings**

Under s11 of the *Children (Criminal Proceedings) Act*, it is an offence to publish or broadcast the name (or other identifying details) of a child involved in criminal proceedings. In recent times we have observed several breaches of this legislation by media organisations, and an apparent lack of interest in prosecuting these offences. This is the subject of a separate submission recently made by the Shopfront Youth Legal Centre and the Public Interest Advocacy Centre.

### **2.4 Health privacy and access to records for people under 18**

The Shopfront has experienced concerns relating to application of the *Health Records Information Privacy Act 2002* (NSW) as it applies to minors. In one instance, we tried to seek access to a 15-year-old client’s health records on his behalf and with his informed consent. We were told by the health service provider that parental consent was required before the records could be released. It took a further letter from us, explaining the terms of the legislation, to obtain copies of the records.

We are also concerned that there is inappropriate recognition by health services of minors’ right to confidentiality about their medical treatment and their health records. It does not seem to be universally understood that children who have the capacity are legally able to consent to most types of treatment without parental consent or knowledge. Many young people, (especially those in abusive family situations) may have legitimate grounds for not wishing information to be disclosed to their parents. A perceived lack of confidentiality often deters young people from accessing health services.

We note that the Commission is currently working on a reference on minors’ consent to medical treatment, and we refer you to the submission we made to that reference. We hope that this will ultimately lead to legislative reform or public education to ensure better protection of the rights of children and young people in the context health service provision.

### **2.5 Agencies providing youth and welfare services**

In our experience, most youth workers are very conscious of their clients’ right to confidentiality. However, it is common practice for agencies to share information and, in our view, this is sometimes done without adequate regard to confidentiality. It is often a condition of service provision that the client consent to background checks and sharing of information with other agencies. While some information sharing is undoubtedly necessary, we are concerned about unnecessary and unwarranted disclosure of information.

We are gravely concerned about a recent proposal, reported in the Sydney Morning Herald on 27 September 2006 as follows:

“The NSW government has proposed changes to privacy laws that will enable its agencies to share information about young people at risk of falling into a life of crime.

Premier Morris Iemma today said research undertaken by his department had found about 50 per cent of all assaults in public places were committed by people aged under 25 years.

He said privacy laws were hampering information sharing between government agencies about young offenders.

A trial exempting young offenders aged between 16 and 25 from some aspects of privacy laws is underway in the inner-city Sydney Redfern-Waterloo district. Mr Iemma said the government would seek to extend the trial to several other parts of the state.”

### 3 Recommendations

As this is only a preliminary submission, we do not intend to include a list of specific recommendations at this stage. However, we would suggest that the following need to be explored:

- Further protection for the privacy and dignity of individuals dealing with police, particularly in relation to searches and questioning on the street. The *Law Enforcement (Powers and Responsibilities) Act* has introduced some commendable safeguards. However, we would like to see more police accountability (eg. a requirement to document searches) and more effective and enforceable complaints mechanisms.
- Legislation prohibiting discrimination on the basis of irrelevant criminal records and more clearly circumscribing what types of questions that may be asked of applicants for employment.
- Clearer guidance for health and welfare services in protecting the confidentiality of young people.
- Legislation protecting people from certain forms of surveillance, including being photographed and filmed without consent.
- A privacy tort. We note that the Australian courts have deliberated over whether to recognise a common law right to privacy in cases including *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor* (1937) 58 CLR 479 and *ABC v Lenah Game Meats Pty Ltd* (2001) 1985 ALR 1. In obiter dicta, the courts set out some principles borrowed from the United States jurisdiction. We submit that such principles may be a good guide for the development of a tort of privacy, whether statutory or common law based.

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Thank you for considering this submission. Please feel free to contact me at [jane.sanders@freehills.com](mailto:jane.sanders@freehills.com) or on 9360 1847 if you require any further information or wish to discuss any aspect of this submission.

Yours faithfully

**Jane Sanders**  
Principal solicitor