

Submission to New South Wales Law Reform Committee on Privacy

About Kingsford Legal Centre

Kingsford Legal Centre (“KLC”) was established by the University of New South Wales Law School in 1981. KLC is a community legal centre which provides free advice, referral and ongoing assistance in relation to legal problems for people in the local community. The Centre also has a state-wide discrimination law practice. KLC also undertakes education and policy work in order to promote equality of access to the legal system in Australia. In 2006, of the 116 new cases 78 were in relation to discrimination and civil matters. Many of these cases had privacy issues that raised the inadequacy of the current legal system in addressing such concerns.

Kingsford Legal Centre conducts a clinical legal education program in conjunction with the University of New South Wales whereby law students can gain first hand experience of working in a public interest law context.

Overview

Kingsford Legal Centre encounters a number of issues relating to privacy. Clients whose private information is passed on to third parties, for instance, often have no effective legal remedy.

In this submission we will address privacy issues that have arisen in relation to two case studies. We support creating a direct cause of action for breach of privacy through a statutory scheme. We also support the proposal for any judicial office to have powers to make discretionary orders.

PRIVACY ISSUES THAT ARISE IN THE CONTEXT OF A COMMUNITY LEGAL CENTRE

Private information and the legal recourse for its misuse

Privacy issues arising in the context of community legal centres (“CLCs”) often revolve around the misuse of personal information. Where a client’s personal information has been misused, there is often no effective remedy to address the breach of privacy. In certain situations – where clients come from a non-English-speaking background or have an intellectual disability, they are unaware of their rights – they may be more vulnerable to abuse or misuse of their personal information.

Case Study #1:

One client approached KLC with an issue relating to his employment. The client had been employed ‘off the books’ at a car wash facility, and received cash in hand. The client washed a taxi, which was subsequently stolen from the business premises and involved in an accident. Approximately a week later, the client received a letter from an insurance company, claiming money for the stolen taxi; the taxi-owner had already paid the insurance excess.

In the circumstances, the client was blamed for the theft of the taxi. The client’s personal information was passed on to an insurance company by the employer. The

client was then asked by the insurance party to pay for the replacement of the taxi, despite the vicarious liability of an employer for theft on a business premises.

Circumstances where there is a Reasonable Expectation of Privacy

In the case study above, we believe that a person should be able to claim a reasonable expectation of privacy in relation to relevant information. In determining what is reasonable, these factors are relevant:

- The nature of the relationship between the parties, eg: employment
- The relative status of the parties
- The cultural and linguistic background of the parties
- The effect that a breach of privacy may have on a party's employment, health, welfare, social or financial position
- The type and context of the material deemed to be in breach of privacy

The general position is that the more trust or reliance exists in a relationship, the higher the expectation that private information should not be disseminated.

In this situation our client would have benefited from having a cause of action for breach of privacy.

Case Study #2

A Medical Receptionist working at a group practice sought medical treatment from a GP who worked at that practice. In the course of treatment, workers compensation and discrimination issues arose which related to the receptionist's employment. The receptionist was referred to a specialist, who sent a letter back to the treating GP.

The administrators at the group practice intercepted the letter from the specialist to the GP, which contained medical records. The administrators then intervened and wrote directly to the specialist, disagreeing with the specialist's opinion.

Support for a General Cause of Action for Breach of Privacy

In both the case studies, the clients did not have a direct cause of action even though there was a clear breach of their privacy. Hence, KLC supports a statutory cause of action for breach of privacy. This may offer victims and disadvantaged people, in particular, a wider and more effective legal remedy than the privacy principles currently in force in New South Wales.

Even though New South Wales currently does not have a Bill of Rights like that of New Zealand, New Zealand's statutory cause of action for breach of privacy is of relevance and consistent with the current proposal.

This general cause of action has a number of advantages:

- a broad cause of action would be flexible enough to cater to a variety of groups and situations, and help to insure that particular sets of people did not "slip through the gaps" in the current fabric of privacy provisions;
- it would reduce the reliance on distorted actions, such as defamation or breach of confidence, among the pool of clients likely to turn to CLCs;
- adaptability and inclusiveness, reliant on the context and the facts of the case as opposed to a strict and distinct legislation outlining specific causes of action;

- it would allow actions for the protection of privacy to develop independently of related notions such as trust and confidence; and
- it would be consistent with the rights outlined in the International Covenant on Civil and Political Rights, to which Australia is a signatory.

Support for Proposal #1

KLC supports the first proposal for structuring a cause of action for breach of privacy. We believe that a non-exhaustive list would help to give structure to the concepts of privacy, and clearly set out circumstances which would fall within the ambit of the Act, but not restrict the types of breach of privacy which may develop in the future. Furthermore, KLC also contends that a general cause of action will be the most appropriate statutory model that will adequately address the variety of privacy cases that arise in NSW.

Support for Proposal #2

KLC supports the proposal for discretionary orders as set out in the NSWLRC's second proposal. In particular, KLC believes that a mandatory order of correction/retraction or apology requiring the defendant to apologise is a crucially important element in addressing plaintiff's "sense of justice". These remedies are critically missing in current causes of action, and require clients to rely on much more heavily contested and expensive actions with the potential to cause further harm (eg: to reputation) such as defamation suits. A large sense of grievance was evident in the two case studies and the victims had a deep desire to seek an apology from the defendants.

KLC also supports the award of damages for breach of privacy independent of the tortious requirement to show injury, as it recognises the difficulties in demonstrating injury in certain circumstances. A potential award of damages also lends force to an action for breach of privacy, and may act as a deterrent.

Conclusion

From the clients that KLC has helped recently, we are advocating changes and amendments to the current New South Wales legislation in relation to breach of privacy matters. A general cause of action is the preferred model that we have adopted in order to address the broad variety of breach of privacy cases.

In addition, we submit that the current remedies afforded to those whose privacy has been invaded are inadequate. From the case studies, the most prevalent and significant remedy that was desired by the clients was an apology from the defendant. Therefore we are proposing that courts and/or tribunals could make an order of correction/retraction or apology as a remedy in addition to damages.