Victorian Law Reform Commission
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Photographing and Filming Tenants' Possessions for Advertising Purposes

This submission responds to the Victorian Law Reform Commission's invitation for public comment on the Commission's June 2014 *Photographing and Filming Tenants' Possessions for Advertising Purposes* consultation paper.

In summary, there are substantive concerns among consumers, civil society advocates and legal scholars in Victoria and elsewhere regarding the image-making and image-publication in the absence of meaningful consent by tenants. Those concerns reflect questions of principle, inappropriate practice by real estate agents/landlords and other parties such as contracted photographers, and the weakness of remedies involving bodies such as the Office of the Australian Information Commissioner. Statute law in other Australian jurisdictions noted by the Commission in the consultation paper illustrates that it is possible to establish a regime that provides an appropriate balance between the needs of property owners, tenants and third parties such as real estate agents. Commercial self-regulation in a fragmented real estate sector (with a shift to online presentation of still/moving images) is demonstrably ineffective and is inconsistent with community expectations about the protection of the private sphere. It is thus both desirable and feasible for the Commission to recommend statute law reform, accompanied a commitment to best practice on the part of real estate agents, and for the Victorian Parliament to embrace that recommendation.

Basis

This submission is made by Assistant Professor Bruce Baer Arnold.

I teach privacy and consumer protection law at Canberra Law School, ie the University of Canberra. My work has appeared in Australian and overseas law journals and practitioner publications over the past decade, for example *Privacy Law Bulletin* and *Melbourne University Law Review*. I have made invited submissions and testimony to a range of law inquiries at the national and state/territory levels during that time.

The following comments do not necessarily represent the views of the University of Canberra. They do not present what would be reasonably construed as a conflict of interest.

This submission initially offers general comments in response to the consultation paper and then addresses specific questions that appear at the end of the consultation paper.

A principles-based regime

Freedom from arbitrary and disproportionate interference is a human right that is identified in a range of international agreements such as the Universal Declaration of Human Rights, that is enshrined in several centuries of English and Australian

common law such as *Entick v Carrington* [1765] EWHC KB J98 and in statute law such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and that is more broadly embodied in the traditional aphorism that 'a man's home is his castle' ... a space from which the uninvited can and should be excluded, a space that should be inviolate irrespective of whether the individual is at home or not.

That freedom can be characterised as a matter of 'quiet enjoyment' or as 'privacy', protected under a broad range of civil and criminal law at the national and state levels rather than addressed solely in terms of information privacy under the *Privacy Act 1988* (Cth) and corresponding state/territory statutes.

The freedom is dear to the hearts of most Australians and should be respected.

Unwanted image-making and publication of a person's private space – particularly publication that is accessible long-term by local and global audiences across the world – is contrary to that respect.

In considering community comments in response to the consultation paper I suggest that the Commission acknowledges two concerns, which are often conflated and should be addressed by a change to Victorian law.

The first is image-making without the consent of tenants. It is appropriate for landlords or agents to visit residential properties in order to ascertain whether those properties are being treated with care. Victorian law, along with similar statutes in other jurisdictions, allows for such inspection. That law does not allow inspection on an *ad hoc* non-consensual basis. There is an expectation that tenants will receive appropriate notice.

We should require both notice to tenants and consent by tenants to image-making by agents or third parties, for example the photographer noted in the paper who was 'simply given a key'.

Just as importantly, we should recognise that the advertising of real estate has shifted from ephemeral shopfront photos or flyers to publication online of still images (often high resolution) or video. That publication is problematical because, as the Law Reform Commission has noted in past work regarding privacy, online content may be readily copied, transferred and seen by people across the globe. It is qualitatively different to past limited-distribution publicity regarding properties for sale/lease.

Some of those people may be interested in renting. Some may be viewing or collecting images for scholarly or entertainment purposes – with for example surfing real-estate sites serving as a 'virtual' form of the traditional open house visits by bored people on a wet Melbourne weekend. Some may be seeking to identify opportunities for theft and other offences (eg property occupied by a young single female rather than a couple of burly footballers) or to find someone who is escaping domestic violence or another environment that means anonymity is important.

In finding an appropriate balance between the interests of property owners, real-estate agents, tenants and other parties we should acknowledge concerns regarding *publication* rather than merely a visit, unannounced or otherwise, by someone with a still/video camera.

A consequence of that acknowledgment is that where a property owner, manager or sales/leasing agent is intent on image-making and image-publishing the tenant must receive sufficient notice to allow that tenant to engage in self-help as a minimum, eg

to remove or cloak items that the tenant reasonably believes will potentially identify the tenant and place that person in danger.

As with an inspection of a leased residential property, that notice must be in writing, rather than for example by phone or SMS. It must be provided on a timely basis, ie not announcing that image-making will be undertaken the next day or that night.

That notice must take a standard form, reducing potential dispute and uncertainty on the part of all actors.

There is a danger that consent to image-making and publication will be induced through a standard clause in leasing agreements, with the expectation that a condition of entering into a lease will be agreement on the part of potential tenants that some/all of the leased property can imaged towards the end of the tenancy or indeed at any time during the tenancy. Such a clause potentially vitiates consent, given that some tenants will believe – and may indeed be led to believe – that waiving their right to privacy is a condition for securing the lease.

Some tenants may well believe that a reluctance to agree will result in blacklisting that will affect their chances of gaining a tenancy in future. Concerns articulated by civil society advocates, parliamentary committees, regulators and other bodies regarding tenancy database operators over the past two decades indicate that such a belief is not farfetched and fanciful.

On a principled basis tenants should be able to restrict image-making and publication, whether on a 'whole-of-residence' or 'room-by-room' basis (for example restrict images that deal with a child's bedroom or that feature assets in a particular room (for example a painting or electronic equipment). That restriction would respect the tenant's circumstances (an individual, for example should not have to disclose to the photographer or agent that she is a victim of domestic violence). It would free the tenant from the need to cloak (or even arrange offsite storage) particular items.

There is no reason why tenants should not be able to restrict dissemination of images, for example specify that they not be placed online. Such a restriction is consistent with established practice in copyright law and could be accommodated through a standard form that does not result in uncertainty or onerous administrative costs.

Any restriction will presumably by opposed by some commercial interests as inconvenient. Public policy should not enshrine the convenience of real-estate agents ahead of the right of tenants to enjoy 'quiet possession' and a enjoy a private sphere, a quiet that involves a freedom from unwanted physical visitation and virtual visitation (ie the image-making and the publication).

If the balance is in favour of tenants their landlords and the landlords' agents can of course offer inducements to image-making and publication.

Some tenants are likely to agree because they are asked politely, or because they are flattered, or because the agent offers something in return for consent, or simply – and this may true in many instances – because the tenant is unfussed about having their private space captured and distributed via a shopfront display, a printed catalogue or cyberspace.

The regime must feature sanctions that are sufficient to firstly signal the seriousness of breaches and secondly to deter misbehaviour. A model for those sanctions is provided by the legislation highlighted in the consultation paper.

The paper refers to the potential for complaints to the Office of the Australian Information Commissioner (OAIC). Regrettably, the OAIC does not currently provide an effective remedy. The agency emphasises 'industry practice' in construing what is reasonable. It has acknowledged on several occasions that resourcing problems are resulting in delays in dealing with complaints. The national Government appears committed to abolishing the OAIC and current indications are that the Privacy Commissioner, when transferred to the Human Rights Commission, will not get significant extra resources. A complaint to the OAIC/PC is thus likely to go unheard or to be poorly addressed.

The suggestion that tenants apply to VCAT for a restraining order is unduly onerous. In the absence of hard data I suspect that few tenants would be aware of this mechanism and fewer still would be in a position to use it. It should be unnecessary for tenants – irrespective of wealth or personal history – to apply to the Tribunal to gain protection for personal space. The need for an application should be obviated by recognising the tenant as having the right to deny image-making and publication.

Empirical basis

One reason for an emphasis on principle is that neither Victoria nor the other Australian jurisdictions have a comprehensive empirical basis that consistently identifies bad practice on the part of landlords/agents or that articulates tenant concerns and values (eg the disquiet that many tenants appear to feel about imaging *per se* and about lack of consent in imaging).

That lack of data can be offset in two ways.

The first is through reference to work by the Commission, by the Australian Law Reform Commission, NSW Law Reform Commission and the Commonwealth/state privacy commissioners regarding consumer attitudes in relation to private life and a freedom from interference.

It is clear that most Australians value their own privacy (and in particular that of minors), with perceptions being influenced by context and consent. It is also clear that the strength and shape of consumer concerns is shifting, with for example substantial numbers of people expressing concern about what they consider to be inappropriate behaviour by public/private sector entities. Those concerns are consistent with consumer attitudes overseas and with evolving jurisprudence in for example the European Union, where there is growing emphasis through work by the Article 29 Working Party on consent and on protection of the private sphere.

The second is an acknowledgement that although many tenants may be unhappy – and indeed deeply resentful or angry at egregious misbehaviour such as that highlighted in the consultation paper – in the absence of a clear legal framework and readily accessible remedies encompassing complaint, deterrence and compensation they are unlikely to provide data. In essence, because they perceive that they have no rights and because they cannot readily identify where complaints should go we do not see comprehensive statistics. Having your private space imaged, displayed to the world at large, is just one of those things that you hate but can do nothing about.

In practice law reform can do something about an erosion of the private sphere. An example is indeed the existing tenancies legislation, which for example restricts 'open houses' even though visits without notice and without the tenant's consent might be convenient for the agent/landlord.

Changing the law would empower consumers, something that is consistent with the policies of both the Coalition and the ALP. The legislation outside Victoria demonstrates that restrictions are feasible: they have not brought residential property advertising to halt and there is no indication that they substantially crimping the lifestyle of real estate agents. As noted above, convenience for agents should not override Victoria's respect for an uninterfered private sphere.

Q3. Do you know of an instance in which a tenant has been robbed or physically harmed following the publication of advertising photographs or videos that contained their possessions? If so, describe the incident.

We are unlikely to find substantial concrete data, ie most accounts will be anecdotal. My understanding is that the crime statistics in Victoria and other jurisdictions do not seek to identify whether burglaries and assaults are attributable to offenders sighting images in catalogues, flyers, shopfronts and websites. In essence we are not asking the questions and an emphasis on respect for the private sphere means that although answers are of interest for criminologists we do not need those answers in making policy that addresses the concerns of many Australians.

6. Can you suggest a workable, standard practice that could be adopted by landlords and agents advising tenants that advertising photographs and videos will be taken inside their homes?

As per above, a minimum requirement is that tenants be formally advised – in a standard way, underpinned by sanctions for misbehaviour on the part of landlords/agents – that there is an intention to visit the premises and make images for advertising purposes, either during a 'standard' inspection of the home or during a visit that is specific to the image-making. That advice should be on a timely basis, consistent with the regime for inspections. In particular it should allow the tenant sufficient time to deal with the placement of items and to alert the visitor that particular objects or rooms not be imaged.

Given the emphasis on respect for the private sphere the tenant should be able to restrict imaging of the overall home or of a particular room or aspect of the home.

As a corollary, the tenant should be able to restrict the dissemination of images. For example, that restriction might specify that only thumbnail images be used in print/online media, or that images only be used in print formats and for a specified period (eg not recycled over several years while/after the tenant is in residence).

These restrictions could be given effect through a standard form, for example featuring tickboxes, and that is independent of approval of a tenancy application (ie not used as a 'filter' to sort potential tenants).

For effectiveness the restrictions must be underpinned by monetary sanctions and by criminal sanctions on an exemplary basis for egregious abuse.

7. Does the law in relation to the right to enter to show the property to a prospective tenant or buyer need clarification? Should landlords and agents have a right to enter to take photographs and videos for

advertising purposes, or should the right be restricted to visits in person?

As indicated in the consultation paper there is uncertainty among agents, landlords, tenants and other entities regarding imaging, with some apparently believing that authorisation is implied or is merely irrelevant.

Clarification through statute law reform is readily achievable (illustrated by development outside Victoria) and should be strongly supported by the real estate leasing sector as a matter that minimises confusion and reflects the commitment of agents/landlords to best practice. It also reflects the Government's respect for the dignity of all Victorians in terms of their private space.

8. Do you consider that it is an invasion of the tenant's privacy to take or use advertising photographs or videos of tenants' possessions without their consent?

Yes. A point of reference here is unauthorised photography generally. As a society and legal system we take a dour view of imaging of private spaces – privacy that is signalled by the absence of an invitation to walk through the door or climb through the curtains into someone's bedroom – that lacks the consent of the people who normally occupy that room. As the Commission notes in the consultation paper, law has quite appropriately come to recognise that people have a right to quiet enjoyment. Most readers of this submission would be disquieted by the notion that a stranger can enter your dwelling, take photographs and share those images without your permission, even if none of the images feature yourself or your loved ones or any item that is 'special'.

More broadly, there is increasing recognition across the Australian community that privacy is more than physical integrity and more than images of an individual. Privacy encompasses an individual's personal space. That privacy should not lightly be disregarded, irrespective of whether the individual is at risk of assault by a disgruntled former partner or is at risk of losing assets because a thief has used images to identify a target.

9. How should the law protect tenants' privacy in relation to photographs or videos that contain tenants' possessions?

As per above

10. Should Victorian law require tenant consent before photographs or videos of tenants' possessions are used for advertising purposes?

Yes, as per above.

Law could be introduced on a sunset basis, with scrutiny by the Commission and a committee of the Victorian Parliament. I note however that restrictions under the Tasmanian and Queensland statutes do not seem have caused fundamental problems for businesses in those states; advocacy statements by realtors and online services should be treated with caution rather than accepted at face value.

11. Should Victorian law allow landlords and agents to take photographs and videos containing tenants' possessions for advertising purposes provided that they first inform the tenant in writing that they will be taking the images and give tenants the opportunity to remove any items from view?

Tenants should be able to restrict imaging as such rather than having to cloak items or to take items offsite for the duration of image-making. On the basis of principle the 'you don't get a choice, but you can hide your items' approach disrespects privacy and assumes that tenants are readily able to take items out of the picture. A more coherent approach – consistent with the overall tenor of Australian privacy law – is for tenants to be able to say NO, with restriction of the overall home of particular rooms/aspects.

In practice this may not be a problem. Some tenants – perhaps a majority of tenants – may be unfussed about imaging or have such a relationship with landlords/agents that any concerns are allayed. Importantly, however, in making law the Parliament should look to principle rather than necessarily adopting a majoritarian approach. Clearly there are Victorians who do not want their private spaces to be captured by a camera. Their wishes should be respected, in the same way that we allow people to shut the door, pull down the blinds and have a life that is free of observation and other interference.