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Photographing and Filming Tenants' Possessions for Advertising Purposes CONSULTATION PAPER JUNE 2014

The Tenants Union of Victoria (TUV) welcomes the opportunity to comment on this important issue.

The TUV was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 16,000 private and public renters in Victoria each year. Our mission is to inform and educate tenants and residents about their rights, and to improve the conditions in which they live.

Background

The TUV has a strong interest in the subject of photographing tenant possessions and the legal and ethical issues associated with this practice.

The TUV regularly receives queries and complaints about this issue through our advice line and legal service; however this is generally only from tenants who have concerns and are aware of the TUV's existence. Consequently the number of cases that present to the TUV is likely to be far smaller than the number of times tenants actually have concerns about this issue.

In addition, there is consistent evidence that tenants who do question or object to their possessions being photographed are often told they have no choice in the matter. Given the power imbalance between the parties involved these assertions often go unchallenged.

In many cases tenants' possessions are photographed without their knowledge and in some instances they may never realise this has occurred.

In the three years from 2011 to 2013 (inclusive) the TUV has identified approximately 90 cases where people sought advice or assistance from the TUV regarding their possessions being photographed for advertising purposes. This would equate to approximately one case every week and a half. Unfortunately, it is not possible to ascertain the outcome in many of these cases given that tenants seek advice from the TUV; however we usually have no visibility of what subsequently occurs. We note that there has been an increase in people contacting the TUV about these types of issues since the VLRC inquiry commenced.

The TUV's position is outlined below followed by some brief responses to the questions posed in the discussion paper. The TUV cannot discuss specific cases due to client confidentiality; however general comment is made wherever possible and anonymous case studies have been provided on a confidential basis in a separate submission.

Discussion

Section 1 of the Residential Tenancies Act (the RTA) states that:

The main purposes of this Act are—

- (a) to define the rights and duties of landlords and tenants of rented premises; and*
- (b) to define the rights and duties of rooming house owners and residents of rooming houses; and*
- (c) to define the rights and duties of caravan park owners, caravan owners and residents of caravan parks; and*
- (d) to provide for the inexpensive and quick resolution of disputes under this Act;”*

The TUV submits that the RTA currently fails in relation to photographing of tenant possessions as it does not clearly “define the rights and duties of landlords and tenants”. This ambiguity has created an environment where the default assumption is that tenant possessions can be photographed unless there are compelling reasons or circumstances against.

We believe this is the complete opposite of what can, and should, be the case. Evidence and statute from other jurisdictions clearly shows an alternative approach is possible and will not have any noticeable impact on residential sales or leasing.

Who ‘owns’ the space?

The fundamental purpose of a tenancy agreement is to grant a tenant exclusive possession of the rented premises. When a landlord signs a lease they agree to this and they are compensated by the payment of rent at a level which they set.

Exclusive possession means that a tenant can deny access to others. This is a common sense and necessary condition for anybody to establish ‘a place called home’. This may seem like a clichéd observation; however it is often lost (or forgotten) in the narrative regarding the rights of landlords, particularly when it comes to rights of entry.

The RTA creates specific conditions under which the landlord is entitled to access the rented premises by notice of entry. These conditions can, and should, be narrowly understood and interpreted to protect the tenant’s right to exclusive possession and their subsequent right to quiet enjoyment of the rented premises. As far as possible a tenant should have the same control over their home environment as an owner occupier.

Renting should be a legitimate, appropriate and long term housing option for those who choose it. The notion that somebody’s personal space can be photographed against their will and even without their knowledge is unacceptable and should not be implied or facilitated by ambiguities in the law.

The RTA provides for landlords to access the tenant’s home, provided that certain conditions are satisfied. This must include a legitimate purpose and a legitimate notice; however this only authorises entry that is consistent with these requirements and only for a period of time necessary to fulfil the purpose of entry. The TUV does not believe the entry provisions of the RTA automatically entitle landlords to take photographs unless they relate directly to the purpose of entry, such as evidence of a breach by the tenants.

The current law is unclear, which has created difficulties for tenants, landlords, estate agents, tenant advocates and regulators in knowing how to respond when this issue arises. This has resulted in unnecessary concerns and disputes. VCAT has no precedent to provide clear guidance to the parties involved when an agent or landlord is proposing to take photographs.

The issues regarding the taking of photographs are part of a broader ambiguity about a tenant's right to privacy, over and above, a narrowly interpreted right under the RTA to quiet enjoyment. It should be noted that nothing prevents a landlord from taking photographs of the rented premises between tenancies which can be easily used if they decide to sell while the property is being rented or for reletting. This approach would involve neither a breach of privacy nor of quiet enjoyment.

The TUV notes that legislative provisions already adopted in Queensland and soon to commence in Tasmania specifically refer to a right to privacy and accordingly require a tenant's consent to take photographs during a tenancy agreement. These provisions provide a simple and appropriate legislative framework that could be adopted in Victoria.

A requirement for written consent from the tenant makes it very clear when photographs containing tenants' possessions can be used and would provide ample clarity to all parties involved. It has not prevented houses from being marketed and sold in Queensland and there is no reason to expect it will have any adverse effect on real estate sales in Tasmania. Similar provisions can, and should, be introduced in Victoria.

If the Victorian RTA is to fulfil its core purpose, to provide certainty about the rights of landlords and tenants, then this issue must be clarified.

TUV Recommendation:

- 1. Introduce a provision into the RTA requiring tenants written consent before any photographs containing their possessions can be used for advertising purposes.***

Specific answers to questions posed by the VLRC in the discussion paper are outlined below.

1. Are you aware of an instance in which a landlord or agent failed to adequately notify a tenant that advertising photographs or videos containing their possessions would be taken inside their home? If so, describe the incident and outcome.

Yes, the TUV is aware of numerous instances where no notice was given that photographs would be taken. In some instances tenants have been aware that the property was for sale and then discover photographs of their possessions online despite no notice ever being given.

The RTA provides no provision, or warning process to address specific conduct beyond the description required for a valid notice of entry. Section 87 states that the landlord's right of entry must be exercised in a "reasonable" manner. It is unclear how the word reasonable in this context should be interpreted.

2. Do you know of an instance in which a tenant was concerned that their possessions could be seen in advertising photographs or videos? If so, why was the tenant concerned?

Yes, the TUV is aware of cases where tenants have had their possessions included in advertising photographs that were displayed online, in print and on advertising boards at the front of the property. Tenants are often concerned about the invasion of privacy and the potential security risks to their property. In some cases there have been serious concerns regarding physical security where tenants have been fleeing domestic violence situations.

In the experience of TUV, many tenants are concerned around the taking of photographs, but they have a limited understanding of their rights.

We believe this is due to a number of factors such as:

- Tenants' perception that they have no right to object or negotiate regarding the taking of photographs and a general lack of awareness of the legislative framework;
- Real Estate Agents being unaware of their obligations and the requirements around the right of entry provisions and consequently misinforming tenants;
- Limited penalties when breaches have occurred which does not result in greater compliance or awareness of the issues.

Generally, tenants are concerned with the fact that the law is unclear, but also that the entry right is not more tightly regulated.

Landlords or real estate agents often prefer tenants to be absent during the taking of photographs given they may want to rearrange furniture and the tenant's personal possessions to improve the photograph. Even though the landlord or real estate agent are not allowed to do this without the tenants agreement we have reports of this occurring. Although a tenant is able to seek compensation from their landlord if their possessions are damaged during an inspection, it is difficult to prove that this has occurred.

3. 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.

Typically, proving the nexus between the taking of photographs specifically and goods stolen from premises is an almost impossible task, as usually this requires police investigation and a successful prosecution. The TUV is aware of correlations between photographs being published and harm occurring but not proven causation. However it should be noted that Victoria Police has "advised people against placing virtual tours online, as doing so allows would-be-offenders to see what valuables are in the home and to familiarise themselves with entry points without even going to the property."¹

4. The Commission's preliminary investigation revealed that tenants are concerned about privacy, risk of theft and risk of personal harm. Do you know of other concerns tenants might have in relation to advertising photographs or videos that contain their possessions?

No, in our experience concerns about privacy, theft and potential physical harm are the main issues for tenants. In relation to the taking of photos, it is often the uncertainty of how the information may be used that gives rise to these concerns.

In addition, the use of photographs against a tenant's will undermines the basic sanctity of the home and causes anxiety. It exemplifies tenant's worst fears about loss of control of their private space.

Tenants with poor mental health, including paranoia, can be agitated by this invasion of privacy and lack of accountability for obtaining photos. Other concerns raised may include the protection of important documents such as work documents or family law orders.

¹ *Photographing and Filming Tenants' Possessions for Advertising Purposes*, Page 10: VLRC, June 2014.

5. Do you know of an instance in which a tenant has refused to have photographs or videos of their possessions used in an advertising campaign? If so, what was the outcome of the dispute, and did it impact negatively on the landlord?

In one case known to the TUV the tenant proposed to cover their belongings if photographs were going to be taken. The real estate agent then agreed to use pre-existing photos rather than have photos taken in that state.

Including the tenant's possessions in photographs would make the property more attractive to potential buyers by having a "lived in" appearance. In this regard tenant's possessions are being used for free for marketing purposes with no consideration due to an absence of clear legislative protection.

TUV submits with modern technologies affordable and accessible, the industry is easily able to adapt as has been done in other states that require consent for the taking of photographs. The landlord should consider obtaining photos or a virtual tour to use in a future sale or reletting when preparing to rent a property.

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?

The TUV doesn't believe there can be any 'standard practice' in relation to taking photographs for advertising that is consistent with the current legislation.

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?

The law does need clarification. It should be restricted to visits in person unless the tenant consents to photographs being taken. Technology easily allows the creation of virtual tours when the property is vacant. This would be good for real estate industries and easy for landlords. It would reduce infringements of privacy and potentially reduce the number of inspections needed.

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. Privacy should be distinguished from quiet enjoyment.

There is no statutory definition of privacy in Australia. However, the Australian Law Reform Commission (ALRC) concluded:

... that privacy can be divided into a number of separate, but related, concepts:

Information privacy, which involves the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records. It is also known as 'data protection';

Bodily privacy, which concerns the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches;

Privacy of communications, which covers the security and privacy of mail, telephones, e-mail and other forms of communication; and

Territorial privacy, which concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks.

A number of these concepts may be offended by the process of taking photographs of tenant's possessions without their consent for public display.

It is also worth noting that the *Victorian Charter of Human Rights and Responsibilities 2006* has the following relevant right:

Your right to privacy and reputation (section 13)

Everyone has the right to keep their lives private. Your family, home or personal information cannot be interfered with, unless the law allows it.

The RTA should be amended to ensure that it is clear that taking photographs of a tenant's possessions and public display of photographs without a tenant's explicit and informed consent is unlawful.

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

Introduce a provision into the RTA requiring tenants written consent before any photographs containing their possessions can be used for advertising purposes.

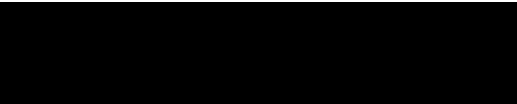
10. Should Victorian law require tenant consent before photographs or videos of tenants' possessions are used for advertising purposes?

Yes.

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?

No. The tenant has a right to quiet enjoyment – if they do not wish for photographs to be taken for advertising purposes then it should not occur. The removal of possessions and furniture can be inconvenient and expensive.

Yours sincerely


James Bennett
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15 August 2014