



Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to
Victorian Law Reform Commission

on its

***Consultation Paper: Photographing Tenants'
Possessions***

August 2014

The Acting Privacy Commissioner wishes to acknowledge the work of Julie Ngai and Emily Minter in preparing this submission.

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Questions

Current practice

- 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.**

Privacy Victoria regularly receives enquiries relating to photographing of tenants' possessions from members of the public. Such enquiries are typically outside our jurisdiction, which does not extend to private sector organisations. We usually advise enquirers to seek independent legal advice, or, if a real estate agency is involved, to enquire with the Office of the Australian Information Commissioner (OAIC).

During the 2012/2013 reporting period, Privacy Victoria received approximately 14 enquiries relating to photographing of tenants' possessions. Of these enquiries, two related to photographing for advertising purposes, seven, related to photographing for inspection or maintenance purposes, and five did not state the purpose for which the photographs were taken.

Interestingly, the number of enquiries received in relation to photographing tenants' possessions more than tripled in the 2013/2014 reporting period. As at 30 June 2014, Privacy Victoria had received approximately 50 enquiries in relation to this issue. Of these enquiries, 20 related to photographing for advertising purposes, 11 related to photographing for inspection or maintenance purposes, and 19 did not state the purpose for which the photographs were taken. The increasing number of enquiries received by Privacy Victoria relating to photographing tenants' possessions indicates that it is a growing concern for members of the public. It is not possible to determine exactly why there has been such a drastic increase in the number of enquiries relating to this matter, the likelihood being that real estate agencies photographing rental properties as a common practice for maintenance, inspection and/or advertising purposes has grown in line with the proliferation of on-line real estate services.

Privacy Victoria has no records of enquiries relating to filming of tenants' possessions.

- 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?**

Privacy Victoria has received a number of enquiries from people who were concerned about having their furniture photographed. Some enquirers were also concerned about family portraits, including portraits of children, being photographed. One enquirer stated that her children were captured in photographs taken inside her home and that these photographs were

later posted on a billboard for advertising purposes. Another enquirer stated that photographs capturing the enquirers' children and family were published online for advertising purposes. Tenants seem to feel that where they have not given consent for their possessions to be photographed, it amounts to a breach of their privacy.

- 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.**

Privacy Victoria has not received any enquiries of this nature.

- 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?**

In addition to the enquiries outlined in response to Question 1 above, Privacy Victoria has also received enquiries relating to real estate agencies or landlords re-using photographs belonging to the previous landlords to advertise properties for sale or for lease. Previous tenants or home owners were concerned that they paid a professional fee for the photographs to be taken and they did not provide the agency or landlord permission to re-use the photographs.

- 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?**

Privacy Victoria is not aware of any such case.

- 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?**

Please see Question 10 below.

Right to enter

- 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?**

Please see Question 10 below.

Privacy

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?

Privacy Victoria is of the view that it is an invasion of a person's privacy to take or use images of his or her possessions – particularly inside a home – without the person's consent being first provided or appropriate notice being given.

Privacy, though notoriously difficult to define, has been described at its most fundamental level as 'the right to be left alone'. Numerous separate but interrelated aspects of privacy are recognised within international, federal and state jurisprudence, and are relevant to this discussion. These are outlined below.

Privacy as a human right

Privacy is a fundamental human right provided for in numerous international and national human rights covenants. It is well recognised that the sphere of privacy that an individual may seek to protect extends beyond his or her bodily space to incorporate other aspects of his or her being, including, but not limited to, his or her home. This is acknowledged in the Universal Declaration of Human Rights, which states that 'no one should be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.'¹ Numerous other international human rights covenants give specific reference to privacy as a right extending beyond an individual's bodily space, including the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.

This accords with community expectations. It is widely accepted that people have a different level of expectation about the privacy that should be afforded to their home, compared with, for example, the front of their house. An example may be that it is acceptable for a stranger to approach a front door, uninvited for a specific purpose, however it would be unacceptable for him or her to enter into a home uninvited. Likewise, most people would feel very differently about a person taking a covert photograph of the front of their house, than they would about a covert photograph being taken through their front window or into their back garden.

The community expectation that an individual's privacy extends to his or her home is evidenced by Google in their privacy policy concerning Street View. Google's policy states that 'Street View contains imagery from public roads that is no different from what you might see driving or walking down the street.'² Community expectations would not tolerate Google publishing photographs that included images of the inside of a person's home, even should the law allow it.

Privacy at statute and at common law

¹ Universal Declaration of Human Rights, Article 12.

² Google Maps *Privacy and Security* <www.google.com.au/maps/about/behind-the-scenes/streetview/privacy/#streetview>

There are many facets to the notion of 'privacy', including, relevantly, the separate but related concepts of 'information privacy' and 'territorial privacy'. An uninvited intrusion by a landlord or a real estate agent into a tenant's home and the subsequent photographing or filming of the tenant's possessions may potentially breach both information and territorial privacy.

Information privacy

Information privacy relates to the handling of 'personal information' and is regulated by federal and state privacy legislation. The *Information Privacy Act 2000* (Vic) (IPA) applies only to Victorian government agencies, councils and contracted service providers and as such applies to the Office of Housing but does not apply to private landlords or real estate agents. In some instances, real estate agents may fall within the jurisdiction of the *Privacy Act 1998* (Cth) which applies to certain private organisations.

Although the IPA will not apply in most instances, judicial consideration of its provisions can provide guidance on the interpretation of whether photographs constitute 'personal information' in a legislative context. Personal information is defined in the IPA to be any information that can make a person's identity reasonably ascertainable³. Personal information in the form of images has been judicially considered in the cases of *Smith v Victoria Police*⁴ and *Caripis v Victoria Police*.⁵

In *Smith*, the complainant's name and address appeared with his 'mug shot'. In that case, there was no contention that the mug shot itself constituted personal information. In *Caripis*, the complainant's image appeared in less than 20 seconds of CCTV footage and her face was only clearly recognisable for a few seconds. No other information was collected about the complainant. In that case, VCAT noted that it was 'common ground' that the images of the complainant were personal information as defined in the IPA. To our knowledge, whether a photo containing personal possessions amounts to personal information under the IPA has not been judicially considered.

Territorial privacy

The ALRC has defined territorial privacy as concerning 'the setting of limits on intrusion into the domestic and other environments such as the workplace or public space'.⁶ Neither federal nor state legislation regulates territorial privacy. At common law, an action of trespass to land provides protection to some extent against unauthorised intrusion into property. The tort of trespass to the land is actionable where there is a direct, unjustifiable interference with the plaintiff's land without the plaintiff's consent. The tort of trespass has an ancient origin which recognised one's right to 'defend the boundary of the land and privacy'.⁷ However, an action in

³ *Information Privacy Act 2000* (Vic) s3.

⁴ [2012] VSC 374 (30 August 2012).

⁵ [2012] VCAT 1472 (27 September 2012).

⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice: Volume 1: Final Report 108* (2008) 1.31.

⁷ Fleming's *The Law of Torts* (Lawbook Co, 10th ed, 2011) Chapter 3.

the tort of trespass can only be brought by a person who holds title to land. This means that while a landlord may bring an action in trespass, a tenant may not.

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

Please see Question 10 below.

Consent and notification requirements

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

Privacy Victoria proposes both notice and consent requirements be introduced to the *Residential Tenancy Act 1997* (Vic) in relation to the taking of photographs and videos of tenants' possessions for advertising purposes.

The tenant's interest in protecting their privacy must be balanced with the landlord's interest in being able to take photographs of their property for advertising purposes. Should a requirement for consent only be introduced, a landlord or agent may encounter difficulties and delay in advertising the property if it is refused. On the other hand, should notice only be required, in some cases the tenant may not have a reasonable opportunity to remove possessions and may be forcibly be required to have their possessions photographed or filmed by law.

As such, Privacy Victoria proposes that tenants should be given reasonable opportunity to consent to the photographing or filming of their possessions. Where consent is not given, the landlord or agent should be required to provide a minimum of (say) 14 days notice to the tenant to provide an opportunity to remove possessions. After such time, the landlord or agent may proceed to photograph or film the property for advertising purposes.

No need to prove harm

Because of the nature of the right to privacy, the harm suffered as a result of a perceived breach of privacy can be difficult to ascertain or assess. Such recognition, to a certain extent, is reflected by the tort of trespass to land. Trespass is actionable *per se*. Similarly, under the IPA, proof of loss or damage is not a prerequisite for a complaint to be lodged. The IPA also recognises that loss or damage suffered by a complainant may include injury to the complainant's feelings or humiliation suffered by the complainant, and provides that orders can be made to compensate for such injury.

Our view is that a contravention of the proposed requirements should attract a penalty, with no need to prove harm, and should include compensation to the tenants for the inconvenience and injury to emotions and feelings.

- 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?**

Please see Question 10 above.

- 12. Can you suggest any other reforms that might strike the right balance between the desire of landlords to advertise their properties and the concerns of tenants in relation to photographs and videos that contain their possessions?**

Please see Question 10 above.

Remedies

- 13. If you have been involved in a dispute about advertising photographs or videos that contained tenants' possessions, how did you resolve the situation? Did you contact an organisation to ask for help and, if so, what happened?**

Please see Question 1 above.