

Submission to the Victorian Law Reform Commission

Photographing and Filming Tenants'
Possessions for Advertising Purposes

Date: 11 August 2014



Peninsula Community
Legal Centre INC

Introduction

Peninsula Community Legal Centre (PCLC) is pleased to be given the opportunity to contribute to the review by the Victorian Law Reform Commission into the rights of tenants, landlords and real estate agents in regard to filming¹ tenants' possessions for advertising purposes, whether a property is for sale or lease.

About Peninsula Community Legal Centre

PCLC is an independent, not-for-profit organisation that has been providing free legal services to Melbourne's south-eastern communities since 1977. Our centre is one of the largest community legal centres in Australia, spanning a catchment of over 2,600 square kilometres, six local government areas and almost one million people.

PCLC provides free legal advice on a wide range of issues, with ongoing assistance targeted to assist clients experiencing disadvantage. In addition to its general services and programs, PCLC delivers a Tenant Advice and Advocacy Program with funding from Consumer Affairs Victoria. This enables the Centre's advocates to provide advice, casework, negotiation and representation at the Victorian Civil and Administrative Tribunal to vulnerable and disadvantaged clients.

We commonly help with a wide range of tenancy matters including possession, rent arrears, repairs, compensation, bond claims, lease breaks, tenancy agreements and rent increases.

Summary

We welcome the Commission's approach to consult with the community on the important issues in this review. Tenancy issues were in the top 10 problem types addressed by our Centre in the last financial year.

We note that the scope of the review is to investigate tenants' concerns relating to privacy, risk of theft and risk of personal harm and to establish whether there are any other concerns tenants might have in relation to advertising photographs or videos in which their possessions can be seen. We also note that the lack of legal certainty around what landlords and tenants can and cannot do in this situation may cause disadvantage.

The purpose of this submission is to highlight what we perceive to be gaps in the current practice, which falls short of protecting the privacy and potentially the safety of tenants when their possessions are filmed for advertising purposes. It is our submission to the Committee that Part 2 Division 8 of *The Residential Tenancies Act 1997* (Vic) ('the Act'), which sets out the circumstances in which a landlord or agent may enter a rental property in Victoria, needs to include reference to filming tenants' possessions for advertising purposes and detailed clarification as to how this right will be exercised.

It is also our recommendation to the Committee that reform is required to strike a balance between the landlord's right to show the property to a prospective tenant or buyer and tenant's right to quiet enjoyment as set out on section 67 of the Act, as well as the tenant's right to

¹ Note the terms 'photographing' and 'filming' are used interchangeably throughout this submission

privacy, given that the right to information privacy² and a right to privacy and reputation³ that Victorians enjoy are, as the Commission has pointed out in page 26 of its consultation paper, applicable to photographs and videos of tenants' possessions in certain circumstances only.

The Issues

This submission is based on the concerns raised by clients with our tenancy team which enabled us to identify some common issues. We are aware that there are currently practices amongst some landlords and agents of photographing tenants' possessions without adequately consulting with or taking into account the tenant's wishes, which has the potential to result in some of the outcomes raised below.

Pictures of Children and Safety Issues

A number of clients have expressed concern about photos being used in advertising which expose their personal furniture, complete with family photos in the living room. One of our clients was specifically concerned that photographs showing pictures hanging on the wall of her and her children would enable her ex partner to locate them. She had recently left an abusive relationship.

Other clients have indicated concerns about having photos of their children placed in the public domain with the widespread use of online advertising and given that digital images can be enlarged and/or manipulated. With modern day technology, they believe this exposure provides a risk to their children. In one instance, an agent insisted the photos remain online, leaving the tenant distressed and feeling powerless to do anything about it.

Breach of Privacy and Quiet Enjoyment

Our tenancy team has received comments from a few clients in recent months regarding agents taking photos, supposedly as part of a routine inspection. The tenants' belongings were captured on these photos. They were then advised that the photos were for the agent's purposes only and would remain on file and not be published. The clients were uncomfortable with this apparent lack of privacy and lack of certainty as to whether the photos would be used or not.

Some clients have indicated that they feel 'violated' when their private or personal space is put into the public domain, particularly when they feel they have not been well informed about this.

There is also the potential for the privacy and security of the tenant to be breached if the prospective buyers or tenants are permitted to film the existing tenant's possessions.

Missing Belongings

Our Centre has come across an instance when an 'open for inspection' resulted in the tenant's property being stolen and the tenant having to bear the loss. This matter proceeded to VCAT. Our client made every effort to conceal her personal items of value, also when the photos were taken. As there was no supervision of prospective buyers who wandered around

² *Information Privacy Act 2000* (Vic) sch 1

³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

the property, valuable items went missing. Although our client had contents insurance, because the property was open and anyone was allowed through, the insurance company refused to cover the stolen items. The landlord refused to take any responsibility. Our client lodged a compensation application to VCAT. She was not successful.

We have concerns that tenants appear to have no recourse in this type of situation, especially if the loss of the items was attributable to the publishing of photographs, which could be a possibility, but would be difficult to prove.

Insufficient Options for Dispute Resolution

The above matter illustrates that the current avenues of dispute resolution available to tenants may be inadequate if disputes with a landlord regarding the loss of personal possessions of the tenant arise in these particular circumstances.

Inadequate Notice Period

Some tenants were not given the opportunity to negotiate a reasonable time to prepare for the photo sessions. The 24 hour notice period in section 85(b) of the Act, which is the only provision relating to the required notice period allowing the landlord or agent entry to the premises, could be inadequate and unfair in some circumstances, for example if a tenant wishes to remove furniture and personal effects and requires assistance to do so, or if a tenant is in hospital or unwell.

Lack of Certainty

Based on our experience, there appears to be a lack of certainty around what tenants can agree to and what they can refuse to do, particularly where those tenants are vulnerable and disadvantaged. They may also be unaware of how to access assistance or advice regarding the filming of their possessions. Many tenants therefore do not, or cannot, take the matter further.

Who Owns the Photographs?

We have concerns that photos have on occasion not been removed from the real estate websites even though the tenant has vacated the property. While tenants have little or no choice regarding the photographing of their possessions, once the photos are online, it appears to be difficult to have the photos removed. Our further concern with this is that some tenants may not understand, or may not be made aware of, the consequences of the photos and videos appearing online, especially given that they could stay online indefinitely.

There also appear to be inconsistent industry practices regarding the removal of photos and videos, with some real estate agents removing the photos and some not.

Recommendations

PCLC recommends:

1. That The Act be amended to include new provisions which will ensure the tenant's rights are entrenched in legislation should it become necessary to film or take photos of the property. We propose the following provisions be included in the Act:

- a. That upon signing a lease, the landlord or agent has the responsibility to make the tenant aware of the fact that the property may be filmed;
 - b. That the landlord or agent be required to obtain consent from the tenant for this;
 - c. That the landlord or agent be required to provide assurances that the privacy of the tenant will at all times be respected;
 - d. That the landlord or agent be required to discuss with the tenant how the photos will be displayed, for example, on a board, online, in brochures and how long the photos or videos may stay in the public domain and when they will be removed;
 - e. That the tenant be given the right to view the photos or videos and a chance to object to publication of the photos or the videos if they unreasonably breach the tenant's privacy or cause the tenant or family member to be identified where there is a history of family violence and/or a risk of personal harm to the tenant or family member;
 - f. That the tenant be given the right to provide to the landlord specific instances when they will not approve of the filming;
 - g. That it is the landlord's or agent's responsibility to remove the photos and videos as soon as the tenant has vacated the property;
 - h. That the landlord or agent ensure that any person inspecting the property does not take photos nor film the property unless otherwise agreed with the tenant;
 - i. That the landlord or agent be held liable for any theft of the tenant's personal belongings during viewing of the property and be required to reimburse the tenant.
2. That section 66 of The Act, which sets out what information the landlord must give to the tenant on or before occupation date, be amended accordingly to include the above provisions relating to the photographing and filming of the property.
 3. That the grounds for entry of rented premises in section 86 of The Act be broadened to include a provision to allow the landlord or his agent to film the property for the purpose of showing the premises to prospective tenants or buyers, with the proviso that this is done at a reasonable time and on a reasonable occasion during an agreed period preceding the termination of the lease agreement and the tenant has the right to view and approve of the photos prior to publication. Accordingly, the relevant 24 hour notice period as set out in section 85 of the Act would not apply when the entry is for photographing purposes. An extended time period to a 72 hour notice period, or such other period as is reasonable in the circumstance, would be more appropriate to enable the tenant to prepare adequately, especially if safety is a concern.
 4. That section 90 of The Act be amended to include loss (theft) of the tenant's possessions while the landlord or agent is exercising their rights of entry, which includes, but is not limited to 'open for inspections' and showing the property to prospective buyers or tenants.

Conclusion

Prospective tenants experiencing disadvantage may not be in position to negotiate terms. We believe the proposed amendments will go a long way in addressing the needs of these vulnerable tenants, as well as empowering all tenants to have some control in the process should it become necessary to photograph or film their possessions.

PCLC congratulates the Commission on their comprehensive consultation paper and we welcome the opportunity to provide further input in the future stages of the review into filming tenants' possession for advertising purposes.