

Submission to Consumer and Business Services, South Australia

regarding the

Residential Tenancies Review

30 November 2022



Digital Rights Watch is a charity organisation founded in 2016 whose mission is to ensure that people in Australia are equipped, empowered and enabled to uphold their digital rights. We stand for Privacy, Democracy, Fairness & Freedom in a digital age. We believe that digital rights are human rights which see their expression online. We educate, campaign, and advocate for a digital environment where individuals have the power to maintain their human rights.¹

¹ Learn more about our work on our website: <https://digitalrightswatch.org.au/>

General remarks

Digital Rights Watch (DRW) welcomes the opportunity to provide a submission to Consumer and Business Services regarding the review of the Residential Tenancies Act in South Australia.

As a leading Australian organisation protecting digital rights, we are concerned that residential tenancy law across Australia is inadequately protecting renters' right to privacy. As the use of digital technologies in the real estate industry increases, we are also concerned with the digital security of renters' data, and the risk of discrimination and exclusion based on inappropriate use of personal information.

The *Discussion Paper* raises some questions related to the digital rights of renters', namely incentivised rental bidding, standardised application processes, residential tenancy databases, and third party payments applications. We address these issues in turn below.

We wish to highlight that many of the issues related to infringement of renter privacy are not just a matter of legality. There is a distinct power imbalance between landlords/real estate agents and renters. Digital technologies claiming to provide marginal improvements to service delivery are exacerbating this power imbalance.

Even in instances where the law explicitly prohibits the collection of certain forms of personal information—for example, in Victoria, where certain types of information are not allowed to be requested²—renters are still regularly being asked to provide that additional information. Many renters feel they have no choice but to comply with whatever real estate agents ask of them, out of fear of being passed up for another applicant and securing a place to live. This is exacerbated by the current housing crisis, including the expense and competition in the housing market.

Simply changing the law is unlikely to be sufficient on its own with regard to better protecting the rights of renters. While placing clear limits on the collection, use and disclosure of renter personal information is important, those regulations also need to be *enforced* in order to be effective.

Public education and awareness raising could also play a role in shifting the culture of over-collection. For example, having easy to understand, simple and accessible information on the topic would empower renters to say no in instances where their privacy is being infringed upon (without fear of missing out on securing a home or enduring unfair treatment as a renter as consequence) and stigmatise real estate agents who might otherwise turn a blind eye to their obligations and limitations.

² Residential Tenancies Act 1997 (Vic), Section 30C - Residential rental provider must not request prescribed information from applicants, available at

http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rta1997207/s30c.html ;

Regulation 15 - Information which residential rental provider must not require rental applicant to disclose, available at: http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_reg/rtr2021316/s15.html

Rent bidding

Should landlords and land agents be prohibited from advertising a property within a rent range, putting a property up for rent auction and soliciting offers to pay an amount of rent above the advertised price?

We wish to highlight that should this proposal be adopted, it still allows for landlords to accept offers above the advertised price, provided that it is not solicited by the landlord or agent. We urge Consumer and Business Services to consider the ways in which this can still be manipulated to encourage or permit rent bidding, especially through the use of digital technologies.

For example, one of Australia's fastest growing rental application platforms—Snug—uses renter data to “score” their applications, in turn impacting the likelihood of a prospective renter securing a rental. A recent Guardian Australia investigation found that the app gave renters who offered to pay more rent a higher score.³ While Snug denies that it facilitates rent bidding, the reality is that if landlords or agents are using this platform and preferencing prospective renters with a higher score, achieved by offering over the asking rental rate, then this in effect encourages and incentivises rental bidding, and creates a grey area in which rental bidding is in practice, being solicited.

In addition to facilitating rental bidding, automated decision making programs that use renter data to score, rank, or make inferences or predictions about a renter's suitability or risk may facilitate discriminatory practices. This is made worse by a lack of transparency and accountability regarding how decisions or predictions are made, including what types of data were used as inputs.

Renters should not be compelled by landlords or real estate agents to hand over their personal information to a third party application or platform. Especially in circumstances where landlords or real estate agents haven't done appropriate due diligence to ensure that the application is meeting appropriate standards for privacy, digital security, and fairness. If real estate agents are unable to do these kinds of compliance checks, and communicate clearly with renters about the benefits and risks, then they should not be using them.

Recommendation One

Consider ways to prevent rental bidding from being encouraged or incentivised, even where it may not meet the explicit or traditionally held understanding of being “solicited” by landlords or real estate agents. Ensure that protections against rental bidding extend to include digital technologies and practices of third party platforms that facilitate it. Where this

³ 'Imperfect match: Australian renters in the dark over use of data by tech company Snug', *The Guardian*, 17 November 2022. Available at: <https://www.theguardian.com/australia-news/2022/nov/17/imperfect-match-australian-renters-in-the-dark-over-use-of-data-by-tech-company-snug>

is impossible or overly complex, outright ban any rental bidding above the publicly advertised price.

Recommendation Two

Implement robust safeguards regarding the use of any third party platforms, including automated decision making systems, that use renter data to make decisions, predictions or inferences that impact individual access to housing. For example, this should include:

- requirements to conduct risk assessments and compliance checks of any third party system or application,
- requirements regarding transparency and accountability,
- ensuring renters are provided with an appropriate privacy collection notice, as well as communication regarding how the app or platform works, and an explanation of any decision made,
- a requirement to provide an alternative to the app or platform (for rental applications, payments, etc), and,
- ensuring there are appeals mechanisms where decisions or predictions are made by automated means.

Start of tenancy requirements

Standardised application forms

Should the RTA require prospective tenants to use a standardised application form in any application for a rental property that has questions that restrict the amount of personal information a landlord or land agent can gather about a prospective tenant?

Digital Rights Watch strongly supports the introduction of a standardised application form.

There is currently a culture of over-collection of renter personal information in the real estate industry around Australia. Renters are routinely asked for personal information far beyond what would be considered reasonably necessary, and often prompted for increasingly invasive details in order to even be able to submit an application. This is made worse by the rise of online application forms or third-party application platforms which will not permit renters to even submit an application if they have not filled out every section.

Collecting too much personal information from renters not only undermines their right to privacy, it also creates significant additional digital security risk. In October 2022, Harcourts Real Estate in Melbourne had a data breach, and significant amounts of renter personal information was compromised, putting renters at risk of identity theft and scams.⁴ The more

⁴ 'Advocates had warned of the dangers of a real estate data breach. It just happened,' *SBS News*, November 2022. Available at:

<https://www.sbs.com.au/news/article/advocates-had-warned-of-the-dangers-of-a-real-estate-data-breach-it-just-happened/6mlieq0q0>

information real estate agencies collect and hold about renters, the more severe the consequence will be in instances of a data breach.

Minimising and standardising the amount and kinds of personal information that is required to apply for a rental also benefits real estate agents. It would provide additional clarity to real estate agents who may opt for over-collection in the absence of clear rules, and reduce their risk profile with regard to privacy, digital security, and information management.

Recommendation Three

Implement a standardised set of application questions. This should strictly limit the amount of personal information that a real estate agent can request from prospective renters, especially protected attributes as recognised in anti-discrimination law. Consideration for privacy, digital security, discrimination, as well as community expectations should be given when determining the standard application questions.

Recommendation Four

Implement safeguards against the use of third party application platforms, which often have opaque privacy and digital security practices, and can facilitate over-collection of renter personal information. See recommendation two for examples of potential safeguards.

Recommendation Five

In addition to the standardised application form, rules should be implemented that limit the amount of personal information that real estate agents can collect from third party sources, i.e. information that is not collected *directly from* the prospective renter. For example, by instating clear rules or guidelines on acceptable questions to ask when conducting reference checks, and prohibitions on collecting additional information from social media profiles or data brokers.

Tenant blacklists and access to personal information on tenant databases

Should the RTA be amended to prohibit landlords, land agents and database operators from charging a fee to a person who requests a copy of the personal information about themselves that is listed on a residential tenancy database?

DRW supports the prohibition of charging renters a fee to access the personal information that is listed on a residential tenancy database. Renters ought to have the right to access personal information held about them, especially where that information may prevent them from accessing the rental market. Charging a fee makes this right inaccessible for many people.

In addition, renters should have the ability to understand the reason for their inclusion on a residential tenancy database, and request its removal in instances where they believe they have been wrongly or unjustly listed. This is hindered by charging renters a fee to access their information.

Recommendation Six

Prohibit landlords, real estate agents and database operators from charging a fee to a person who requests a copy of their personal information listed on a residential tenancy database.

Recommendation Seven

Implement additional protections regarding circumstances where it would be unjust to list individuals on residential tenancy databases, such as in instances of personal or family violence.⁵

Third party payments

Should the RTA prohibit landlords or land agents charging tenants an additional fee to make rental payments, whether this is directly or indirectly by passing on costs from third parties engaged by the landlord or land agent to facilitate payment?

The most common way that landlords or real estate agents charge renters an additional fee to make rental payments is through the use of digital technologies such as third party platforms or apps.⁶

We wish to draw Consumer and Business Services' attention toward the experience of renters in other states, including Queensland and Victoria, where despite requirements to offer an alternative payment option, in many instances renters have felt coerced by real estate agents to use the apps. For example, by framing the app as the only available payment option or withholding an alternative option until explicitly asked for it, positioning renters expressing concern as difficult, and ultimately offering burdensome no-fee options such as hand-delivered cash payments.⁷ Should Consumer and Business Services consider implementing a similar no-fee option requirement in South Australia, we urge additional consideration of the potential for malicious compliance and methods to safeguard against it. An outright prohibition on charging additional fees to make rental payments is likely to be more effective.

In addition, we urge Consumer and Business Services to consider the additional issues that are raised by the use of third party rental management apps. Aside from charging renters additional fees, many of these apps include terms and conditions that allow for renter data to

⁵ See, for example, sections 439E and 439F of the Victorian residential tenancies act.

<https://www.consumer.vic.gov.au/housing/renting/family-violence-when-renting/removing-names-from-renter-blacklists>

⁶ Some examples include: Kolmeo, Rental Rewards, OurProperty, SimpleRent, MyProperty, Cubbi.

⁷ See, for example, 'Pay the rent, and the rest: tenants hit back at the rise in third-party processing,' The Guardian, June 2021. Available at:

<https://www.theguardian.com/australia-news/2021/jun/19/pay-the-rent-and-the-rest-tenants-hit-back-at-the-rise-in-third-party-processing> and "It starts to add up": renters charged fees to pay rent as real estate agents outsource collection,' *The Guardian*, June 2021. Available at:

<https://www.theguardian.com/australia-news/2021/jun/17/it-starts-to-add-up-renters-charged-fees-to-pay-rent-as-real-estate-agents-outsource-collection>

be used in ways they may not want, such as for marketing purposes, or for it to be shared with or sold to other parties. The privacy and digital security protections of these apps is not always clear, leaving many renters unsure what they are being asked to sign up to, and if it places them at additional risk of misuse of their personal information.

It is not acceptable for real estate agents to increase the privacy or digital security risk of renters by coercing them to sign up to a third-party app as a condition of renting a home.

Recommendation Eight

Prohibit landlords or real estate agents from charging renters an additional fee to make rental payments, whether directly or indirectly.

Recommendation Nine

Ensure that renter use of third party property management or rent payment apps are strictly optional and opt-in only (not opt-out). Landlords and real estate agents should be required to offer a realistic and accessible alternative to such apps, without negating their obligations to see to property repairs etc. Real estate agents should be required to communicate clearly with renters that signing up to any such app is optional, and provide a clear explanation of an alternative should the renter decide not to sign up.

Contact

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