

Submission to the Review of Equal Opportunity Act 1995



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Introduction

The Equal Opportunity Act 1995 needs to be reviewed to assess its practical effectiveness in ensuring that people have adequate protection against discrimination in accommodation. There is also a need to look at whether the current complaints mechanism in the Act offers effective and adequate protection to people who experience discrimination while accessing or while being evicted from their current accommodation.

This submission will focus on the issues concerning tenants and residents covered by the Residential Tenancies Act 1997. They include private and public tenants, rooming house and caravan park residents.

The Tenants Union of Victoria

The Tenants Union of Victoria is a community-based organisation founded in 1975 with the aim of providing direct assistance to individual tenants and to improve the legal and social status of tenants as a whole. The TUV has a membership base made up of both individual tenants, as well as many organisational members from the housing, community and welfare sectors.

The mission of the Tenants Union of Victoria is to achieve a secure and comfortable home for all tenants.

The core of the TUV's activities is the advice and legal service, which provides free information and advice to approximately 30,000 tenants a year. The Tenants Union also provides a range of services and resources to public and private tenants and to other organisations in the community sector including:

- specialist legal advice;
- training to tenancy and housing workers;
- publications dealing with tenancy and tenants' rights in various formats including a range of multilingual booklets in fourteen community languages;
- community education through presentations, workshops and stalls;
- research into selected aspects of tenancy law and the rental sector.

The Tenants Union currently has staff employed across a number of sites in the Western, Inner Urban and Northern regions of metropolitan Melbourne with a central office in Fitzroy.

Discrimination in Accommodation

Discrimination can significantly limit access to accommodation. Discrimination is perpetrated on the basis of imputed characteristics associated with particular groups of people. The Housing and Location Choice Survey undertaken by the National Housing Strategy (1992) found that 11 per cent of respondents indicated that they had been refused rental accommodation for non-financial reasons at some stage in their life. Research by the former Department of Social Security (1997) found that 5.3% of its clients they surveyed reported that at some time they had been refused housing for reasons ranging from unfair market practices to discrimination against individuals on the basis of race, gender etc.

The Industry Commission Report (1993) found that those who are perceived to be different often encounter discrimination in the private rental market. A report by the Human Rights and Equal Opportunity Commission-Racial Discrimination Commissioner (1999) also confirmed that those individuals who were most visibly different were at greatest risk of encountering racism including Muslims and those from black communities. This is supported by the findings of the community

consultations held by the State Inter-Governmental Settlement Planning Committee (1998) where discrimination against migrants accessing private rental was raised as a major issue. A research report on the housing needs of newly arrived communities in Melbourne's Northern region also highlighted the experiences of discrimination faced by newly arrived migrants especially when dealing with real estate agents (Berger 1999).

Other groups of people in the community also face discrimination in the private rental market. A report of the Royal Commission (1991) identified that Aboriginal women and their families often face discrimination in the private rental market. Women's access to housing is constrained due to discrimination on the basis of gender and parental status. The Council of Single Mothers and Their Children (1992) found out that 67% of the sole parents they surveyed faced significant difficulty and discrimination when accessing accommodation.

Previous research also shows that tenants often expect to be treated unfairly or unreasonably by accommodation providers (National Housing Strategy reports 1991; 1992; Barclay et al 1991). For instance, young people without a rental history or appropriate appearance have difficulty in getting accepted for rental accommodation. People with large families often encounter problems in convincing a reluctant accommodation provider about whether a dwelling size is appropriate for the family. Access to housing by people with disability is severely compromised by the unwillingness of landlords or real estate agents to face possible requests for property modification (NHS 1991).

The practices of housing providers limit access to accommodation and at times could lead to outright discrimination. This includes the selection criteria imposed by housing providers to assess suitability of applicants. A recent study by the NSW Department of Fair Trading (1997) reported that interviews with real estate agents revealed they used "intuition as a screening method: they read an applicant's dress, attitude, manner and language as signifiers of risk." Other research into tenant selection processes shows that the fine line between good business practice, unfair market practices and discriminatory practices are often interwoven. Research by the Swinburne Centre for Urban Studies with real estate agents found that young people and single parents were the least preferred tenants. This is due to perceptions about their lesser ability to pay rent on a regular basis, lack of tenancy specific references, perceived irresponsibility of young people and views that these groups are more suited to public housing (Hancock and Burke 1983). Other research into tenant selection methods confirms that landlords' and agents' attitudes towards morality and proper behaviour and negative stereotypes confirms this as one of key barriers to accessing rental accommodation (eg Barclay et al 1991, NHS 1991, NHS 1992, Johnston 1997).

The experiences of some clients accessing the Tenants Union's services give an indication of the complex issues of discrimination faced by tenants:

"My family came to Australia as a refugees. My wife and I have five children and we found it so hard to find a place to live. We applied for so many properties but kept being rejected so we had to share a house with friends. Later on when my wife and I started working, I thought we would be able to rent a place. We were still rejected. We applied and were rejected for 49 properties. Later on, I asked one of our friends who is white to rent a house on our behalf. He was successful. What did I expect? I'm black with a lot of children."

"I applied for a property and was accepted. When the real estate agent found out that I accessed the Bond Loan Scheme by the Office of Housing, they withdrew the offer. The agent said that if I cannot afford to pay the bond with my own money, I would not be able to pay rent regularly..."

"When I was about to pay for the bond and rent in advance, the real estate agent told me that I had to pay three months rent in advance (instead of one) because I don't have rental history in Australia."

Overall, it is arguable whether such criteria represent good business practice or the basis for discrimination. In many cases there is a fine line between assessing the 'risk' of taking on a particular tenant and assumptions about behaviour which are based upon discriminatory and negative stereotypes and lack of cultural awareness.

Discrimination in Accommodation and the Law

Whilst legislation cannot address the structural problem of lack of affordable and appropriate accommodation for people on low income, the issue of discrimination against particular groups of people could be addressed by improving anti-discrimination and residential tenancy legislation.

Both the Equal Opportunity Act 1995 and the Residential Tenancies Act (RTA) 1997 contain provisions against discrimination in accommodation. The RTA defines the rights and duties of tenants, rooming house residents and caravan park residents and providers of residential accommodation in Victoria. The RTA (and its precursor the RTA 1980) includes only one provision (section 30) directly relating to discrimination: A landlord or owner must not refuse to let premises, or instruct or permit their agent to refuse to let premises, because the applicant intends to live the premises with a child. Several exemptions to s.30 are allowed where the rental premises is the property owner's principal place of residence or the premises are by reason of their design or location unsuitable or inappropriate for occupation by a child.

Similarly, the Equal Opportunity Act includes provision that makes it unlawful to discriminate against someone in the area of accommodation. It also has exemptions where the premises are deemed unsuitable or inappropriate for accommodation by a child because of their design or location.

The TUV can not see any justification for these exemptions particularly given that no definitions are provided about what is and what is not suitable or appropriate for children. Furthermore, if someone is renting their usual place of permanent residence, it is unclear why they should be allowed to refuse to let to people with children. If exemptions like these are allowed it is important that the onus be placed upon the person relying upon the exemption to convince the relevant Tribunal that in all circumstances the premises are unsuitable or inappropriate.

It is difficult to prove discrimination under the current system because accommodation providers do not have to provide reasons for their refusal to let premises. Whilst some discrimination is more evident as is the case with migrants, Aboriginal or Torres Strait Islander and people with disabilities, it is often difficult for tenants to prove that they have been discriminated against.

When a person is rejected from an accommodation due to discrimination, it is unclear what is the jurisdiction of the Victorian Civil and Administrative Tribunal (VCAT). It is doubtful whether the Tribunal can hear an application from a prospective tenant who has been denied housing when the applicant does not have a tenancy agreement with the accommodation provider. The person whose application has been rejected may be able to lodge a complaint to the Equal Opportunity Commission and may eventually get an apology and/or compensation but this does not address the fundamental problem of being denied access to accommodation due to discrimination. For most people, being able to access accommodation is more crucial than being compensated for the act of discrimination perpetrated against them.

It is a similar situation for people who are being evicted from their current accommodation. The RTA 1997 allows a landlord to serve a notice to vacate to a tenant for no specific reason. The RTA allows a tenant to challenge these notices if s/he believes the notice was given in response to the tenant exercising a tenancy right under the RTA. However, if a tenant believes the notice is an

act of discrimination as defined by the Equal Opportunity Act, they will have no grounds to challenge the notice before the Residential Tenancies List of the VCAT as it is outside the jurisdiction of that list. Again, the tenant cannot take action to stop being evicted but could take action through the Commission to obtain compensation for the discrimination they have suffered.

The VCAT whilst administratively divided into lists is still one Tribunal yet it is doubtful whether VCAT, under the Anti-Discrimination List, can challenge an order made by or interfere with a hearing in another part of VCAT such as the Residential Tenancies List. The jurisdictional problem was explained by the Deputy President of the Anti-Discrimination List of VCAT, Ms Cate McKenzie in *Etheridge v Alamanas* a decision which she handed down on 21 January 1999:

...the ability to apply for and obtain an order for possession through the Residential Tenancies List would involve really the review of the decision made or proceedings arising in that list and this is not a function expressly conferred in the Equal Opportunity Act and certainly there is nothing expressed in the order making powers in that Act to permit the quashing or reviewing of proceedings or orders made in the Residential Tenancies List.

A decision by another member of the Tribunal indicates that it is possible to hear a case even though it may relate to another List within VCAT. In a hearing within the Residential Tenancies List, Jackie Kefford made an order in 1998 adjourning a case to allow for the tenant to make an application for compensation against the trucking company under the Small Claims List. This is to allow her to then hear both cases of compensation by the landlord against the tenant in the Residential Tenancies List and the tenant's claim against the trucking company. According to the order, Ms. Kefford stated that this could be done as VCAT has jurisdiction over both lists.

Recommendations:

- The TUV believes it would be preferable for the Equal Opportunity Act to be amended to enable discrimination cases to be heard before the Anti-Discrimination List of VCAT where tenants could seek redress to stop discrimination in accommodation from occurring (ie. stop an eviction if it is related to discrimination). Because the members of the Anti-Discrimination List have expertise in the Equal Opportunity Act, we believe it is important that this list has the jurisdiction to permit the quashing or reviewing of proceedings or orders made in the Residential Tenancies List.
- The Equal Opportunity Act should contain a specific provision that where there is a threat of eviction due to discrimination, it should be considered as a special circumstance and a ground for expediting a complaint.
- There should be tighter time limits for resolving expedited complaints. When a matter is referred to the Tribunal without conciliation, it should be deemed as an urgent application and should be heard within 2 business days. Shorter time limits are crucial for people who are facing possible eviction due to discrimination.
- The Equal Opportunity Commission should work with other government bodies including the Office of Consumer and Business Affairs to develop clear standards on what is appropriate or inappropriate accommodation for people with children.
- The Equal Opportunity Act and the Residential Tenancies Act should contain provisions that would compel accommodation providers to give written reasons for refusing accommodation.

Complaints Mechanism

The difficulty of getting into rental accommodation and the lack of quick resolution of discriminatory practices means that many tenants facing discrimination may not pursue action against accommodation providers. A recent report about barriers to private accommodation prepared for the NSW Council of Social Services argued that lack of bargaining and consumer power by tenants in the rental market means that the private rental tenure might be one where “tenants have developed a culture of non-complaint” (Johnston 1999:27).

Despite all the researches that point to the prevalence of discrimination in accommodation against certain groups, there are still a relatively low number of people making official complaints. Between January 1999 to April 2000, the TUV has received 62 complaints relating to a claim of discrimination under the RTA 1997. The legal service statistics of the TUV however, do not record referrals to the Equal Opportunity Commission or complaints about discrimination other than those covered by the provisions of the RTA 1997.

The process for resolving discrimination complaints often poses a barrier to people who experience discrimination in accommodation. Many individuals lack confidence and sufficient knowledge of their rights under the law to seek redress for discrimination. Within the ethnic communities, there are fears that their complaints will not be taken seriously, that they would have difficulties proving their claim and communicating with the Commission (HREOC 1999). The tenancy services funded by the Office of Consumer and Business Affairs Victoria and the Office of Housing may provide tenancy advocacy on behalf of tenants who were discriminated against. For the other complainants who are not necessarily linked with a support or advocacy service, they may encounter difficulties in preparing and conducting their case to the Commission and eventually to the Tribunal. The process for hearing and resolving complaints to the Commission does not necessarily facilitate self-representation.

Case Study 1: Mrs. S. was issued a 90-day Notice to Vacate by her landlord. Thirty days after the notice was issued, her landlord started pressuring her to vacate the property earlier than the 90-day notice. When the tenant refused, the landlord verbally abused Mrs. S. and told her to “go back where you came from.” The landlord also made references to Mrs. S’s ethnicity and cultural background. Mrs. S. applied to VCAT-Residential Tenancies List for a restraining order on the basis that she was being harassed and racially abused. VCAT granted a restraining order but did not accept any evidence on racial harassment and referred it to the Anti-Discrimination List. The tenant found her experience with seeking a restraining order very intimidating and she refused to lodge a complaint to the Commission.

Case Study 2: A hearing impaired tenant requested her landlord to supply visual smoke detector instead of the audible smoke detector. The landlord refused saying that he had complied with the provisions of the RTA about installing a smoke alarm. The tenant is fearful of taking further action against the landlord under the Equal Opportunity Act for fear of eviction or bad reference from her landlord.

Case Study 3: A tenant had a dispute with the real estate agent about repairs. The real estate agent racially abused the tenant and made references to how he should be “grateful” that he and his family was allowed to rent a property. After the tenant vacated the property, he lodged a complaint to the Equal Opportunity Commission. During the first conciliation session, the real estate agent repeated what he said to the tenant. The tenant found the process intimidating and humiliating. He said it was like reliving the abuse but with a third party listening in. He decided to withdraw the complaint.

The lack of effective complaint mechanism discourages people from lodging complaints to the Commission. In most cases tenants are reluctant to have to take matters to the Commission when they know that the outcome will not necessarily allow them access to accommodation or to prevent an eviction being carried out against them. The reason why few complainants follow through their complaint with the Commission may be because the redress available (ie. apology or compensation) is unsuitable to the situation.

Alternative dispute resolution (ADR) processes were developed as alternatives to expensive and time-consuming litigation. In some jurisdictions, ADR processes are separate but complementary to litigation. The aim of ADR is to encourage parties in conflict to arrive at a compromise solution with the assistance of neutral persons. ADR processes include negotiation, mediation, conciliation, expert appraisal and arbitration. One measure of the effectiveness of ADR processes must be how the public and groups most likely to use the services view the ADR processes available to them. For tenants it is clear that ADR processes currently available are not effective as tenants rarely use the Tribunal or follow through discrimination complaints with the Commission. If these are hardly used by members of the community who we know from other avenues do face discrimination from accommodation providers then it is questionable whether current ADR processes are relevant or effective for tenants.

Recommendations:

- The Commission should have the power to investigate and take appropriate action to provide a reasonable and fair resolution for people who have been discriminated by accommodation providers. The TUV believes one possibility worthy of investigation is changing the method of resolution in accommodation complaints. The Commission should have the power to compel the defendant to take particular action such as to provide accommodation or to stop an eviction.
- The Commission should explore models of effective and appropriate assistance to complainants who may not have access to support services or may not be capable of self-representation to the Commission and to the Tribunal.

Community Education and Training

For the law to be effective, the target groups need to be informed of their rights and obligations under the Act.

The recent initiatives by the Equal Opportunity Commission around the issue of discrimination in private rental are to be commended. The partnership project with the Real Estate Institute of Victoria targeting landlords and real estate agents is a positive step towards addressing the problem of discrimination. The Commission has a crucial role in educating and training key industries on non-discriminatory practices and in developing codes of practice that is consistent with the Act.

The Commission also has to play an active role in liaising with communities and groups who are vulnerable to discrimination. The Ethnic Outreach Program is vital in ensuring that the Commission in promoting the role of the Commission and in providing the communities with appropriate information about their rights under the Act.

Recommendations:

- The Commission should allocate adequate resources to education and training. The TUV believes that the Equal Opportunity Commission has a responsibility to inform other government bodies and industries about how anti-discrimination measures could be improved. The Commission should also allocate adequate resources and respond to the diverse needs of the people in the community who are vulnerable to discrimination.
- The Commission should work with relevant agencies including the different accommodation providers, Office of Consumer and Business Affairs Victoria and the Real Estate Licensing Authority to develop regulatory controls to reduce discrimination in accommodation.

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