

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
Inquiry into exceptions and exemptions in the Equal Opportunity Act

Melbourne — 4 August 2009

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Ms A. Mohummadally, Policy Solicitor, Tenants Union of Victoria.

The CHAIR — The next witness is Alyena Mohummadally from the Tenants Union of Victoria. Thank you for attending the public hearing. The purpose of the hearing is to report to the Parliament on whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act 1995. Anything you say or publish before the committee today is protected by parliamentary privilege. However, once you leave the hearing, anything you say or publish outside the room is not so protected.

I now invite you to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry and we will follow that up with a few questions.

Ms MOHUMMADALLY — Good afternoon, committee. Thank you for the opportunity to give evidence today. My name is Alyena Mohummadally and I work at 55 Johnston Street, Fitzroy, at the Tenants Union of Victoria. We are a specialist community legal centre. We provide assistance, advocacy and advice to over 18 000 Victorians each year. We assist public and private renters, and caravan park and rooming house residents. Our commitment is to improving the status, rights and conditions of all tenants and residents in Victoria.

I am here today because the Tenants Union of Victoria believes that the exceptions and exemptions in the Equal Opportunity Act do not allow equal opportunity in the area of housing for renters. We are aware of examples, and I will be able to give such, where tenants with a protected attribute, or residents with a protected attribute, have been treated less favourably and have been denied rental properties or been illegally evicted. We think it is very timely that the Equal Opportunity Act is being reviewed, and in particular the exceptions and exemptions in light of the current rental climate where there is a housing crisis and many people are in housing stress. Housing stress refers to when more than 30 per cent of your income is spent on rent, which leaves very little for food, clothing, health, transport or anything else.

Housing, as we all know, is a roof over one's head. But the Tenants Union takes the view of the United Nations Committee on Economic, Social and Cultural Rights that housing at a minimum must be affordable, accessible to disadvantaged groups, habitable, culturally appropriate, provide occupants with security of tenure and afford access to appropriate services, materials, facilities and infrastructure, including employment, health care, schools and other social facilities.

We are well aware that discrimination in providing accommodation does exist. Real estate agents modify terms, they deny access to housing and they act as a gatekeeper, which prevents equal opportunity. I am able to tender an unpublished report, if the committee would like, which we commissioned. It looked into discrimination that low-income and disadvantaged people suffer in private rental.

The CHAIR — That would be very useful.

Ms MOHUMMADALLY — Thank you. I also have a position paper on that report, which I am also able to tender. The other thing, if I may mention it, is that homelessness is not covered as an attribute yet, but if it does become a protected attribute this will benefit a substantial number of persons because, as the committee will be well aware, homelessness does include — if you take the census definition of primary, secondary and tertiary homelessness — boarding and rooming house residents. I am happy to answer any questions. Thank you.

The CHAIR — Thank you for that. The first one is about section 53. You are calling for a repeal of section 53. Could you give us a bit of a sense of how that is used against families with children?

Ms MOHUMMADALLY — In the submission I made to the inquiry one of the issues I raised on this particular exception is that it does not sit well against other legislation — namely, the Residential Tenancies Act. I have brought a copy of section 30, the annotated version, and I can hand that up as well. The issue is that section 30 of the Residential Tenancies Act 1997 deals specifically with and is titled 'Tenants with children'. It talks about how it is unlawful to discriminate against a tenant with children unless you make out certain prescribed grounds. For example, if the Office of Housing or a statutory authority built specific housing just for children, then it would be able to say, 'We don't have to have non-adults living in this property because we are exempted'. That is probably the wrong word to use, because the word 'exemption' is not used in the Residential Tenancies Act. If they used section 30 to allow themselves to discriminate, that would be perfectly legit. I am talking about the Residential Tenancies Act. However, section 30 is very rarely used in its proper form, because it was leftover from 1980s legislation and was really not thought through, unfortunately, when it became law in 1997. What has happened now — and I am personally aware, having had a matter on this at VCAT — is that

real estate agents will use this to discriminate against tenants who have children. They will try to deny accommodation purely on the basis that the people in front of them have children. That is not what that section in the RTA intended.

The real estate agent can turn around and look at the Equal Opportunity Act and say, 'Wait a minute; I can use this now and say, "No, it's not suitable for children", and I don't even need to make out a ground as to why it is not suitable'. That is the fundamental flaw that we find with all the exceptions. They need to be repealed or amended, because if you have a blanket limitation on a person's rights or you permit discrimination without the chance to actually put forward why you are doing such, quite a substantial number of people will not be able to secure housing. This particular section has been used by real estate agents to just refuse accommodation, for no other reason but that that tenant has a family.

The CHAIR — Picking up on the issue of exemptions used, you also picked up on section 51, 'Discrimination by refusing to allow alterations'. We did not pick that up in our discussion paper, partly as I think we saw it as a positive exemption. I would like to hear how it has been used to discriminate against people — against tenants with disabilities in that case.

Ms MOHUMMADALLY — That is right. The section refers to impairment. I am aware that there is some movement in government to try to make adjustments for people with disabilities in the area of housing. For many real estate agents, and I must clarify this because when I say 'real estate agents' I am referring to both landlords and real estate agents because the agent acts on behalf of the landlord — whether I say landlord or agent I mean the same for the purposes of today — let us take a person who has a vision impairment and who perhaps requires a certain modification to a ground floor just to let him or her know where the stairs are or where the tactile ground surface indicators are. Let us say she requires this and she asks the agent. As we know, and the Wallis report goes into this, the agent puts it into the too-hard basket. He says it is just too difficult to make alterations because the landlord will have to spend that money and if the landlord spends that money, then the money that the agent gets becomes less, which is true. Therefore, it is easier for the agent just to say, 'I cannot make alterations; it is just not possible'. Unfortunately, if there are exceptions that allow for that, then agents will continue to do it towards tenants and renters.

Mrs PEULICH — Further to that, ostensibly you could have a person move into a three-bedroom house on their own, or into a single-bedroom flat. They have the right to cohabit. Under your recommendations that it be removed, should it be possible therefore for an additional person who subsequently joins the arrangement and who may have a disability to require amendments or alterations at the expense of the landlord?

Ms MOHUMMADALLY — Because this area talks about equal opportunity and being able to provide a benefit, or being able to allow for equal access or the chance for everyone to have a fair go as it were, I think on the face of it I would say yes. However, and even in my submission I was clear to point out the reason that we cannot avoid and we must always use the limitations argument, I think it would be a balancing act. It would be, 'What kind of alterations need to be made? Are they reasonable? Can they be incurred by the landlord or not?'

Thank you, because you have reminded me that I neglected to mention briefly in my opening statement that one of the suggestions I put forward in my submission is that if all the exceptions are repealed, the actual section on accommodation should have the defence provision written into it, so that if an accommodation provider was unable to make alterations they would use the unjustifiable hardship argument that is prevalent in the federal antidiscrimination laws, which say, 'I am meant to provide accommodation for you. However, I cannot do it because to do so would cost too much', or, 'You are one person and I have a million people who do not require that adjustment', and accordingly be able to set out why they will not provide equal opportunity. My argument would be that it is a balancing act. Is it reasonable to make an adjustment? That would be on the basis of what the landlord can or cannot do, what control they have over that particular property, and what the needs of the tenant are. As it stands now that is completely removed from the exceptions. There is no chance for a tenant to say, 'I have a kid. So what?'

You also remind me that the problem with this section and why it also does not sit well against the Residential Tenancies Act section is that in effect it could mean that a person could move into a property and, as you said, cohabit. They could be evicted if they decide to have kids purely because the landlord could turn around and say, 'I am sorry. You are now using the accommodation in a way that I did not confer on you. Therefore, I am going to try to remove you'. That is not as far-fetched as it sounds, because I have had a matter before VCAT

on that very issue. Unfortunately, the member wanted to read it with the strictest and narrowest possible definition and believed that a landlord can regulate how many children a person has in the property.

The CHAIR — There is that exemption?

Ms MOHUMMADALLY — They did not use that exemption. They tried to use the RTA but it was incorrect, because to use that section you need to get an order of the tribunal before you use it. They were trying to circumvent that. The member thought, ‘Why can’t a landlord restrict how many people live in a property?’. The landlord can say, ‘No more kids’.

The CHAIR — Yes.

Mrs PEULICH — I have two questions. Would you say that people are in a position to discriminate by being selective in terms of who they choose for a tenancy or rental because there are not enough properties and too many candidates? Ostensibly, is that the problem? I could not think of a single landlord who would say no if their property was going to be vacant.

Ms MOHUMMADALLY — The issue right now with the housing climate is that there are not enough properties — absolutely. There are no properties in public housing. The waiting lists are something like eight years for quick housing. Unfortunately, for private housing every quarter a report comes out which says things like a vacancy rate of 1.3 per cent, which is absolutely ridiculous. Yes, there is an absolute shortage. But my argument would be that because there is a shortage that should not allow for discrimination.

Mrs PEULICH — I understand that. I am just asking whether that is the — —

Ms MOHUMMADALLY — I understand. On that note I am aware of a real estate agent who showed my tenants a letter from the landlord to the agent saying, ‘I don’t want any Chinese people living here’. When the tenants came to me and told me this I said, ‘Oh my God, let us go to the Equal Opportunity Commission. Let us lodge a complaint and let’s get really, really upset’. They said, ‘By the time we do that — it is going to take three months, and I need that property now. I have already gone to another property’. I said, ‘All right. I will call up the real estate agent and get her name. We will make a big deal and go to the media’. She said, ‘The real estate agent is not going to do that. The fact is that she tried to be nice and to tell me that the landlord is being selective’. That was her view, that the landlord was being selective. In our view the landlord was being discriminatory because of race. But there is a gap between their knowledge as well — landlords and real estate agents — as to what they can or cannot do.

Mrs PEULICH — I have heard the reverse; I have heard of landowners wanting Chinese tenants because they essentially do not party. I am sure there is a different point of view. My difficulty with the framework that you are proposing where exemptions need to be justified is that a lot of self-funded retirees who may have one or two properties on the rental market — that is their retirement income — are often European immigrants whose own literacy is not particularly strong. The prospect of their negotiating a framework like that where they need to justify exemptions rather than having a system that provides clarity, where the real estate agent knows the rules and can help them comply — that is my difficulty. I sympathise with many of the points you have raised, but that is my difficulty — that at the end of the day if they find it too hard, they are going to flog it off and there are going to be even fewer properties available for tenancy. I must say that land tax is killing them any way, because quite often they need to sell off one property in order to be able to pay the land tax of the other two, so the harder we make it, the fewer properties we are going to have in the rental sector, and we know the government is not keeping up with the public housing requirements per head of population.

Ms MOHUMMADALLY — I think the issue that we have is if you were to take any real estate agent and contact them and ask them, ‘Do you know anything about the Equal Opportunity Act?’, they will say, ‘I have heard of it’. They will say, ‘I know the Residential Tenancies Act’, I know about privacy legislation’ — any chance I get I yell loudly about it — but I don’t know anything about the Equal Opportunity Act’.

Mrs PEULICH — They need more education.

Ms MOHUMMADALLY — Absolutely, especially in terms of their duties because landlords do not know. You raise a good point, because if a real estate agent does something, the landlord can be vicariously liable under the EOA. Agents will go on and do discriminatory things and disadvantage people — I should stay with

the word — and discriminate against people and they will believe somehow they are not liable because it is the landlord's issue, even though they are acting as agents of the landlord. In the example you raised I would be very worried if the agent was not protecting the landlord. We find that, yes, you can have agents who might be leading the landlord down the merry path as well. The issue there is that it is a licensed profession but it is not completely regulated. It is a voluntary institute of Victoria. There are 15 000 real estate agencies in Victoria, and only 5000 belong to the Real Estate Institute of Victoria — or something like that. That is also in the report that I will tender, which has all those sources. It is an issue. If these agents do not have education themselves, if they do not have a compulsory system where all the property managers within the agency are actually aware of what they can or cannot do, then you do come up against issues.

I would also like to just quickly make a note on the adjustment thing. One of the reasons I was so keen to author this paper is that in a past life I was an antidiscrimination lawyer. I spent a lot of time in disability and working with employers and working with organisations trying to reach the halfway point. That is probably why this paper, for want of a better expression, is not as leftie perhaps or as radical as a submission could be, because I have gone through thinking about which exceptions should be repealed, which should be amended, and I have suggested amendments to some as well.

The whole concept of the reasonable accommodation as per the Disability Discrimination Act is one of sitting down at a table, having a chat and working out, 'What can you do, what can I do, what is actually possible?'. That is not necessarily a too-hard basket for either party; it is the chance to basically say, 'I do need this adjustment, but maybe I can get it from a different source', or 'I would like to know; what are you able to do? And I can perhaps do something in return'.

The CHAIR — Given your background and your current job, how do you think section 51, 'Discrimination by refusing to allow alterations', could be altered in a real world situation?

Mr O'DONOHUE — If I could add — can you talk about the relationship between the Residential Tenancies Act and those exemptions and whether that would be a better place for some of these issues?

Ms MOHUMMADALLY — They are two different questions. The first one about section 51 — I have to admit I have not looked at the details, so I am going to do that right now.

The CHAIR — Do not try to answer it straightaway.

Ms MOHUMMADALLY — I will, but thank you. The second one — the RTA does not talk about discrimination at all. The only time it does is in that section 30 — tenants with children. That was an issue that I had when I looked at the exception and realised it referred to accommodation unsuitable for children — what does that mean? How do you decide whether accommodation is not suitable for children? On the basis of that very brief section in the Equal Opportunity Act, it does not sit well against the section of the RTA, which I can hand up today. That is an issue when you have conflicting legislation covering the same area or allowing similar or same changes or exceptions. In this situation I have suggested that this section be removed or we follow option 5 with an insertion to refer to tenancy or appropriate legislation.

Mr SMITH — Could I clarify — I might be saying exactly the same thing as you are. Would these exceptions in the Equal Opportunity Act be better removed from this act and highlighted in the Residential Tenancies Act?

Ms MOHUMMADALLY — Why do the exceptions need to remain? If you take the actual section — —

Mr SMITH — I guess what I mean is the issues covered by these exceptions — do they not belong here and rather belong wholly and solely in the Residential Tenancies Act? Because they are both acts of Parliament, so if they are somewhere, rather than being duplicated — —

Ms MOHUMMADALLY — The only one that is duplicated is section 53. But it is a good point you raise. I think the issue that I can see is the RTA is about 500-plus sections long and it does not actually include any specific sections on discrimination. I think it would be a bit hard to pick it up and transfer it across.

I must also say the other issue is that the RTA is dealt with in the residential tenancies list at VCAT and the EOA of course in the antidiscrimination list. They do not talk to each other. Unless you get a member with

cross-jurisdictional powers, if you raise the Equal Opportunity Act, she or he will tell you, 'I don't have jurisdiction'. So I think it would be a bit difficult to do that unless you amended the RTA to state quite clearly 'look at the Equal Opportunity Act' because at the moment it does not. I do not think that probably would be the best way to do it; it would probably be a better way to take the existing section 50 and, as it is 50(a) to (f), make that 50(1)(a) to (f) and then put a '(2)', that '(2)' being that this section can be limited by 'if to provide shared accommodation would result in an unjustifiable hardship on the provider', or take all the exceptions and then put them as a (2), (3), (4) part of the discrimination in providing accommodation.

I think the federal Disability Discrimination Act does it quite well in actually being able to say, 'We want to provide education to every single person with an impairment'. However, there is the unjustifiable hardship argument and there are the reasonable adjustments or reasonable accommodation arguments so that it then becomes obvious that you cannot provide education to every single person with an impairment.

Mr LANGUILLER — One experience that I have had in my area in the west in relation to section 53 is that landlords more than the agents discriminate on the basis of the number of children. Unfortunately that has turned into an issue of race as well because there is a particular community which seems to have 6, 7, 8, 10 children, so much so that the agents have used — and they have told me so privately — Anglo-Saxon names as applicants. They do it on behalf of those families because otherwise they could not get a property. I wonder whether you have come across that.

Ms MOHUMMADALLY — Thank you for that. That is exactly the issue before us today. I am aware of an actual example in which a black tenant could not get a property for him and his family and he asked a white friend to fill out the application for him. You cannot do that; that is fraud. But the white man got the property and I said, 'This is ridiculous'. It is an issue.

Mr LANGUILLER — Just in terms of the role that your organisation plays, it is the Tenants' Union and understandably it predominantly focuses on the rights of tenants. I wonder how much work you do in terms of obligations of tenants, because it is indeed a two-way street.

Ms MOHUMMADALLY — Absolutely.

Mr LANGUILLER — There are tenants who do not look after properties. They damage properties and so they do themselves a great disservice as well by actually not coming to the party with striking that balance of rights and obligations. I wonder how much organisations like yours, in representing tenants, actually say to them, 'It is your obligation also to do X, Y and Z'?

Ms MOHUMMADALLY — That is a good question. It is interesting because the role of community legal centres in Australia is very important in providing access to justice to all people who cannot afford a private lawyer or private organisational help. So that is very important. But our organisation has a very strict policy that rights do come with responsibilities. We do conduct training; we do go out and speak to organisations that are both providers of housing as well as residents themselves as to what they can ask for but also what their duties are.

Ms MOHUMMADALLY — The Residential Tenancies Act is an Act that talks about the duties of both landlords and tenants. It is quite clear that a tenant has a duty to maintain the premises — to keep the premises clean, for example. But the landlord has a duty to maintain the property in good repair. So if your air conditioner stops working, you have the right to call your landlord and say, 'My air conditioner has stopped working'. But if you decide to hang things on your air conditioner or start treating it in a way that goes against how it is supposed to be treated and cause damage, then you are actually liable and the landlord can penalise you for your breach of duty. It is actually quite fair.

If you take the Act and you look at it outside of the current housing climate, it is a very fair Act because it talks about the rights and responsibilities of landlords and the rights and responsibilities of tenants. However, in the current market as such, even though you may have your bad tenants as it were, on the whole you have more people wanting property than there is property available. So it is unfair right now. The Act is not benefiting tenants. We have tenants who have the right to ask for repairs and who say, 'The heating is not working'. That is an urgent repair under the act but they are afraid to say anything because they are afraid they will be given a notice to vacate and be evicted purely for asking for a repair.

The Act says you cannot be evicted if you exercise a right; but day in and day out we have residents who come to us and say, 'I have been given this notice to vacate'. We ask them about their history with the landlord and they say, 'The heater has not been working', or 'I have had a few issues with the communal area and I have asked for repairs', and the landlord has turned around and said, 'You know what, you are a problem. I am going to get rid of you and I am going get 10 people to take your place by tomorrow'. We see that a lot. We will then try to tell the resident they have the right to challenge this notice, they can go to VCAT and we can tell what them what they can do. Most times we have residents and tenants say they are too afraid of being listed on the unregulated tenancy database that exists or we have tenants who just say, 'By the time we do all of this, I am going to be out on the street. Can you help me find a property?'. That is where we cannot help them because we do not provide housing; we only provide assistance to people who are already in housing.

There are problem tenants out there — I do not deny that — but on the whole we are in a climate right now where a tenant is afraid to be anything but an impeccably good tenant.

The CHAIR — We will have to end it there. Alyena, thank you very much for coming in and providing those insights. They have been really helpful.

Ms MOHUMMADALLY — Thank you.

Witness withdrew.