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DISCRIMINATION AGAINST FAMILIES IN THE PROVISION OF RENTED ACCOMMODATION

1. Introduction

In the light of recent Commonwealth and State legislation outlawing discrimination on the grounds of race and sex¹ in employment, the provision of residential accommodation, education, membership of trade unions and access to public places, it might be thought that all socially undesirable discriminatory practices are already illegal. However, in the provision of rented housing it is submitted that the existing anti-discrimination legislation is far from adequate. Although discrimination in this area is illegal if based on race or sex, it can occur in a variety of alternative forms. One type of discrimination is economic; for example, where before granting a lease a landlord or estate agent insists on the payment of a security deposit (sometimes referred to as "bond money") greater than certain groups can afford to pay. Alternatively, discrimination may be focussed on a variety of disadvantaged groups within the community, such as unmarried mothers and one-parent families.²

The purpose of this article is to discuss in detail one particular aspect of discrimination in this area, namely the problem of discrimination against applicants for tenancies and existing tenants on the sole ground that they have children, and to examine whether law reform is appropriate and necessary to solve their problems. Discrimination can arise at two different stages: a prospective tenant may be refused a tenancy on the ground that he or she has one or more children (this can be termed "exclusion discrimination"); or a landlord may seek to evict a childless couple (or single female) already granted a lease who produce a child during the course of their tenancy ("eviction discrimination").

In the course of this analysis, a number of issues will be discussed. First, it is important to ascertain as far as possible the present extent and effects in Australia of exclusion and eviction discrimination practised by landlords. Secondly, the reasons for these forms of discrimination should be examined in order to establish whether landlords and estate agents have a valid concern which they are protecting. Thirdly, the legal remedies presently available will be discussed. As will be seen, it may be possible for the courts partially to solve the problem without the assistance of legislation by using their powers to declare certain conditions in contracts void as contrary to public policy. Finally, existing State legislation designed to prevent exclusion and eviction discrimination will be discussed in order

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1. Discrimination based on race is illegal throughout Australia: Racial Discrimination Act, 1975 (Cth.). Additional anti-race discrimination legislation exists in South Australia and New South Wales: Racial Discrimination Act, 1976 (S.A.); Anti-Discrimination Act, 1977 (N.S.W.). Discrimination based on sex is illegal in only three States: Sex Discrimination Act, 1975 (S.A.); Equal Opportunity Act, 1977 (Vic.); and Anti-Discrimination Act, 1977 (N.S.W.).

2. See generally *Report of the Committee on One-Parent Families* (1974) Cmnd. 5629-1.

to assess its effectiveness and to propose a possible common scheme of legislation for all Australian States.

2. *The Extent and Effects of the Problem*

Numerous studies have highlighted the extent of the problem of exclusion discrimination in Australia. One of the earliest and best documented was a research project of the Brotherhood of St. Laurence undertaken in Melbourne in 1964 which investigated the housing problems of low-income families.³ One passage in its report reads:

“The most often mentioned obstacle to finding accommodation is the reluctance of owners, agents and landlords to accept young children. This was mentioned by both agents and the families interviewed as a constant problem. . . . Among the families interviewed the opposition of landlords to children was a subject of frequent and bitter complaint. ‘They encourage us to populate the country, then you can’t get a house if you do.’ Many of the families interviewed told how they had been refused accommodation because of having too many children. A number mentioned two as the number of children which was generally acceptable, and it was also commented frequently that pre-school age children were the most unwelcome. A family with four children said that when they were hunting for a house ‘four children put people off’. A deserted wife reports that agents ‘won’t hear of five children’ and for parents with even larger families the situation becomes increasingly difficult . . . It was pointed out a number of times that families with a large number of children had little choice of accommodation, being forced to take whatever was available where the children were allowed. . . .”⁴

Another survey by the Brotherhood of St. Laurence of the housing difficulties of 60 low-income families in Melbourne in 1976 also reports cases of exclusion discrimination and confirms that the situation has not improved in recent years.⁵ In addition, a 1977 study, by the Centre for Urban Research and Action, of 236 tenants in the western suburbs of Melbourne revealed that 67 tenants (28.4%) believed that they had suffered from discrimination at the hands of their landlords, and of these 37 tenants (15.7% of the total sample) stated that the discrimination was on the ground that they had one or more children.⁶ In this latter survey, children were the most commonly cited cause of discrimination.

The problem is not limited to Victoria. According to the Australian Council of Social Service, it is widespread in Sydney:

“[Families with] children are frequently rejected as tenants; landlords do not like them, other tenants and neighbours do not like them, particularly if facilities or yards have to be shared.”⁷

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3. Martin, *High Rents and Low Incomes—Housing Problems of Low Income Families* (mimeo., Melbourne, 1964).
 4. *Id.*, 41-42.
 5. Brotherhood of St. Laurence, *The Housing Battle* (mimeo., Melbourne, 1976), 25-26.
 6. Centre for Urban Action and Research, *Tenants in the Western Region* (mimeo., Melbourne, 1977), 3.
 7. Australian Council of Social Services, *Study on Landlord-Tenant Relations* (mimeo., Sydney, 1974), 25.

Discrimination of this kind has also been documented in Hobart. A survey of a sample of tenanted dwellings in the inner Hobart area was undertaken by the Tenants' Union of Tasmania in March 1977 and submitted to the Tasmanian Law Reform Commission. This survey found that 48% of tenants having one or more children believed that they had experienced discrimination in gaining access to rented premises because they had children.⁸

In summary, there seems no reason to doubt that the problem exists in all major Australian cities. Supporting proof for the existence of this type of discrimination can be obtained from analyses of advertisements in the "To Let" columns of daily newspapers. One such study was conducted in 1976 by Dr. Trevor Lee, who examined the advertisements in the Hobart Mercury for two successive Saturdays.⁹ He found that the most favoured tenant is "the business or professional couple—married, sober, quiet, and above all childless and without pets".¹⁰ Although only 6% of the advertisements specifically excluded families with children, many other personal specifications could be seen as euphemisms for "no children".¹¹ A similar analysis conducted by the present writers of the "Flats to Let" and "Houses to Let" columns in the Melbourne Age on two successive Saturdays in October 1977 provided a similar result: 9% of all advertisements specifically or by inference excluded families with children.

In contrast to exclusion discrimination, no studies have yet been undertaken in Australia as to the extent of the problem of eviction discrimination. While none of the standard forms of lease currently in use in Australia specifically allows the landlord a right of re-entry in the event of the tenants bearing a child during the tenancy, it would be wrong to assume that no problem exists. In view of the fact that the maximum duration of a residential lease is normally six months,¹² rather than seek a family's eviction during the course of a tenancy, a simpler and cheaper procedure for a landlord who wishes to rid himself of tenants who bear a child would be to refuse to renew the lease when it expires. No reason for non-renewal needs to be given at law,¹³ and no specific clause is needed in a lease for a landlord to adopt this procedure. In addition, standard forms of lease contain blank spaces for additional clauses to be inserted at the discretion of the parties, and studies undertaken in the United States have shown that advantage is taken of this by some landlords and estate agents to allow for eviction discrimination.¹⁴

8. Tenants Union of Tasmania, *Landlord-Tenant Law Reform Submission* (1977), 21.

9. Lee, *Choice and Constraints in the Housing Market: The Case Of One-Parent Families in Tasmania* (Paper presented to the S.A.A.N.Z. Conference, LaTrobe University, August 1976.).

10. *Id.*, 16.

11. *Ibid.*

12. Until 1975, most residential leases had a duration of twelve months: see Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (A.G.P.S., Canberra, 1975), 135. However, in the past three years, largely as a result of a high rate of inflation, most landlords have insisted on a duration of only six months: information supplied by Mr. M. Salvaris, Co-ordinator, Tenants Union of Victoria.

13. *Halsbury's Laws of England* (3rd ed., 1958) vol. 23, 534. See also *Cobb v. Stokes* (1807) 8 East 358. The only exception is that reasons are required in Victoria and New South Wales, in the cases of premises subject to rent control: Landlord and Tenant Act, 1958 (Vic.), s.82(6); Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.62(5).

14. See Note, "'Adults Only' Provision in Leases", (1947) 56 *Yale L.J.* 1270. Eviction discrimination was provided for in the lease which was the subject of the dispute in *Lamont Building Co. v. Court* 147 Ohio St. 183, 70 N.E.2d 447 (1946), discussed *infra*, text to n.38.

Two further observations should be made about the extent of this type of discrimination. First, the problem is limited to private housing and does not extend to rented accommodation supplied by the public housing authority in each State. Indeed, in South Australia the Housing Trust discriminates positively in favour of one-parent families by their policy of granting half-waiting time priority to this class of applicants.¹⁵ However, it is submitted that this is no answer to the problem. Not only can it be argued that it is wrong in principle that families seeking rented accommodation should be forced into public housing because of the discriminatory behaviour of private landlords, but more significantly, in view of the length of the waiting lists for public housing in each State, it is an unrealistic solution to the housing problems of low-income families.¹⁶

Secondly, even if this form of discrimination were eradicated, it would not necessarily improve the position of many low-income families seeking accommodation in the private housing market. The financial constraints on some of these families are enormous. The demand for privately rented accommodation exceeds supply in most Australian cities today.¹⁷ This is partly due to the fact that the number of households has grown at a faster rate than the total population. Further, much privately rented accommodation has been lost to other land-uses, particularly in the inner suburban areas. Thus rentals have been forced up and the competition for available accommodation is keen. In this situation "the income of different individuals and social groups will affect their ability to gain access to housing resources".¹⁸ The position of the single-parent family is particularly weak. The Commission of Enquiry into Poverty reported that fatherless families constitute the poorest of the various disability groups.¹⁹ However, it is submitted that the presence of financial barriers is no justification for the continued existence of social barriers. The removal of discrimination would at least erase one constraint on the poor family seeking accommodation.

The effects of allowing exclusion or eviction discrimination against families with children are wide-ranging. As emphasized by the Tenants' Union of Tasmania, families subject to these forms of discrimination are

15. Information supplied by Mr. A. Ramsay, General Manager, South Australian Housing Trust. A similar scheme operates in the Federal Republic of Germany, where lone mothers with children are one of the special priority groups for public housing: *Report of the Committee on One-Parent Families* (1974) Cmnd. 5629-1, para. 182.

16. Misgivings have been expressed within the S.A. Housing Trust itself following a comprehensive analysis of 32,500 tenants' and applicants' records in 1973 by the Trust's research officer. This analysis showed that the applications received from female one-parent families increased sharply from 9.6% of the total rental applications in 1972 to 15.1% in 1973, and that some areas and types of accommodation are becoming saturated with one-parent families.

17. The major exception is Melbourne, where a survey undertaken by the Real Estate and Stock Institute of Victoria in February 1978 showed that 4.0% of all residential flats are unoccupied: "The Age", 14th March, 1978..

18. Lee, *op. cit.* (*supra*, n.9), 11.

19. Henderson, *Poverty in Australia: First Main Report* (A.G.P.S., Canberra, 1975), 17-18. In his study of the "To Let" columns in the Hobart Mercury (*supra*, n.9), Lee studied each of the 138 advertisements to see how many properties came within the range of a single mother with two children who was in receipt of the Supporting Mothers' Benefit and supplementary assistance with rent. On the basis that housing should amount to no more than 25% of income and that she would require a two-bedroom dwelling, Lee concluded that it would be impossible for such a mother to obtain accommodation in the private housing sector as the advertisements indicated that two-bedroom accommodation was almost invariably over \$40.00 a week.

either forced into accommodation that is too small for their needs and often substandard, or take up residence in caravan parks. This problem of overcrowding and inadequate facilities adds to the stresses of their living situation. In addition, the frequent inevitable moves are likely to be unsettling for children, especially where a change of school is involved, and may also damage the family's chances of establishing itself and making social contacts in the community.²⁰

The ramifications may be even more serious. It has been suggested in the United States that the acute housing problem caused by housing restrictions against children may exacerbate the incidence of juvenile delinquency and disease, and may lead to a degeneration of the family institution.²¹ Another predictable effect of discrimination is that families unable to afford to purchase their own homes may be deterred from having children, and so the normal development of family life will be impeded.²²

3. An Evaluation of the Need for Reform

In the light of these serious social problems caused by discrimination against families in the provision of rented accommodation, the need for remedial legislation may seem obvious. However, before the need for reform can be assessed, the legitimate interests of a landlord in protecting his reversion in the demised premises must be examined and balanced against the social needs of the tenant.

A variety of reasons have been advanced by landlords to justify exclusion and eviction discrimination. First, it is suggested that the reason that discrimination exists is primarily economic, that children are more likely to cause damage to the premises than adults. Without adequate economic safeguards, it is argued, the enactment of anti-discrimination legislation could well lead to developmental capital being diverted to other investment sources.²³ Secondly, it is argued that there is a social justification for maintaining "segregated" accommodation. In the words of the Ontario Law Reform Commission:

"The social problems, especially in multiple family buildings, which are caused by families with young children being mixed with unmarried people, families with no children and older tenants are considerable. Whatever the sociological literature may have to say about the benefits of having an admixture of the generations, older people feel they are entitled to live in quiet surroundings, which is hardly possible in buildings where children are present. In the case of younger tenants, especially unmarried ones, the possibility of life styles causing conflict is the principal factor dictating separation."²⁴

20. Tenants Union of Tasmania, *op. cit.* (*supra*, n.8), 21-22.

21. Note, *op. cit.* (*supra*, n.14), 1272.

22. *Ibid.* This point was also emphasised by Morgan J. of the Ohio Court of Appeals in *Lamont Building Co. v. Court* 66 N.E.2d 552, 554 (1946), where a landlord sought to recover possession of an apartment on the ground that a child was born to the tenants during the term of the lease. Morgan J. went so far as to raise the spectre of "race suicide" if tenants were deterred from having children.

23. This argument is also commonly used against the introduction of rent control legislation: see, for example, Grebler, "Implications of Rent Control", (1952) 65 *Int. Lab. Rev.* 462.

24. Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968), 47.

Thirdly, certain accommodation is excluded from families with children on the ground that the building is alleged to be unsuitable or unsafe for young children. Fourthly, it may be suggested that a landlord should not be restrained in any way in his choice of tenants when he resides in premises adjoining the demised premises. Finally, the principle of freedom of contract, it may be argued, entitles landlords to lease their premises to whoever they choose.

The Ontario Law Reform Commission is the only law reform agency which has examined in detail the issue of the need for anti-discrimination legislation protecting families. The Commission accepted the validity of the landlord's arguments cited above and recommended that no anti-discrimination legislation should be introduced. Instead the accommodation problems of families with young children could be best treated by making it as attractive for developers to build for families with children as it is for other occupants.²⁵

One obvious objection to the Commission's proposal is that although it may have theoretical merit, it provides no practical solution. The Commission has made no attempt, in its 1968 Report or since, to suggest any ways in which it could be made as attractive for developers to build for families with children as it is for other occupants. Another objection is that the Commission accepted the landlords' arguments in favour of permitting discrimination too readily. It is submitted that three of these five arguments can be dismissed. The economic argument can be countered in the light of differences existing between the law relating to security deposits in Ontario and the current law in all Australian States. Earlier in its report, the Ontario Law Reform Commission recommended that security deposits should be abolished.²⁶ Having rejected the idea of security deposits, it was reasonable for the Commission to argue against anti-discrimination legislation on the ground that the landlord would be at financial risk in the event of damage caused by children. However, security deposits are almost universally used in Australia,²⁷ and should constitute a sufficient security against damage caused to the premises by children. As long as security deposits remain in existence it would not be unfair on a landlord to introduce anti-discrimination legislation. This argument still applies despite the introduction by the Residential Tenancies Act, 1978 (S.A.), of substantial restrictions on the use of security deposits. This legislation limits the amount of money payable as a deposit to a maximum of three weeks' rent,²⁸ and ensures that the deposit is paid to the local Residential Tenancies Tribunal rather than retained by the landlord.²⁹ If there is any dispute as to the repayment of the deposit to the tenant at the termination of the lease, the Tribunal may order that the deposit be paid to the tenant in full, or may order that part or all of the deposit

25. *Id.*, 48.

26. *Id.*, 21-28.

27. For the extent of the use of security deposits in residential tenancies, see Centre for Urban Research and Action, *Tenants in the Western Region* (mimeo., Melbourne, 1972), 15-18. This study showed that 170 out of 236 tenants interviewed (72%) had been obliged to pay a deposit before being granted a lease. The average amount of the deposit was \$120-\$150. See also Bradbrook, *op. cit.* (*supra*, n.12), 41-43; and Women's Liberation Halfway House Collective, *Housing Discrimination—The Role of Real Estate Agents* (mimeo., Melbourne, 1977), 2-6.

28. Residential Tenancies Act, 1978 (S.A.), s.32(1)(b).

29. *Id.*, s.32(2)(b).

be paid to the landlord if the tenant has breached a term of the lease.³⁰ It is submitted that these restrictions do not prevent security deposits acting as a sufficient security against any damage caused by children resident on the premises. Further, as long as security deposits remain lawful, even if they are subject to restrictions as to their use, there is no valid reason to suppose that development capital will be diverted to other investment sources.

The argument that landlords residing in premises adjoining the demised premises should be able to control the type of lifestyle in the adjoining premises appears at first sight to have some justification. This exception has been admitted to the provisions proscribing discrimination against families with children in the Residential Tenancies Act, 1978 (S.A.).³¹ However, it is submitted that there is no sufficient justification for this exception. It has not been advocated in any study of the need for residential landlord-tenant law reform, and it is suggested that in light of the current housing shortage the social need to house families must take precedence over a landlord's desire for an unrestricted choice of neighbours.

The freedom of contract argument can be countered on both social and legal grounds. The social argument has been vehemently stated by the Tenants' Union of Tasmania:

"If a landlord puts his property on the market to rent he is seeking capital gain and therefore should be subject to rules and regulations. . . . They are now able to choose who should and should not be housed. As such they blatantly abuse the right of every human being to decent and secure housing."³²

On a more objective analysis, it is noteworthy that the principle of freedom of contract has been abrogated in many analogous circumstances. In recent years consumer protection legislation has proliferated in all States, and Acts restricting, for example, the operations of door-to-door and secondhand car salesmen all involve substantial restrictions on freedom of contract.³³ If the abrogation of the principle of freedom of contract is acceptable in other consumer-oriented contexts, there would seem to be no valid reason for excluding it from the landlord-tenant relationship.

Thus, the only remaining objections are the social justification for maintaining "segregated" accommodation and the problem of buildings unsuitable or unsafe for children. It is submitted that provided that these two outstanding objections are safeguarded in any future legislation, law reform prohibiting both exclusion and eviction discrimination against families with children is justified.

4. The Role of the Judiciary

The obvious method of achieving the desired reforms is by legislation. However, before examining the various possible forms which new legislation might take, it is instructive to examine the possibility of achieving partial reform, in the absence of legislation, at common law.

30. *Id.*, s.33(3).

31. *Id.*, s.58(5).

32. Tenants Union of Tasmania, *op. cit.* (*supra*, n.8), 21.

33. See, *e.g.*, Consumer Credit Act, 1972-1973 (S.A.); Second-Hand Motor Vehicles Act, 1971 (S.A.); Motor Car Traders Act, 1973 (Vic.); Consumer Affairs Act, 1972 (Vic.).

It is not suggested that all the existing problems could be removed by judicial innovation without the need for statutory reform. Clearly, there is no existing legal principle which a court could adopt on its own initiative to prevent exclusion discrimination. However, eviction discrimination could be proscribed by the courts using their powers to declare certain conditions and covenants in contracts void as against public policy, thus removing the necessity for legislation.

Conditions in contracts which provide that no children may reside on the premises could be declared void as contrary to public policy on the ground that such a condition is a restraint of marriage.³⁴ The courts have developed a number of heads of public policy under which contracts may be declared void, and restraint of marriage is an old and settled one. Although the general view is that new heads of public policy will not be invented by the courts,³⁵ the application of any particular ground of public policy may well vary from time to time. As McCardie J. observed: "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time."³⁶

Thus, the courts could apply the restraint of marriage head to include conditions which tend to discourage persons from having children. A *dictum* of Windeyer J. in *Newcastle Diocese Trustees v. Ebbeck*³⁷ lends support to this view:

"I hope it is not a mere idiosyncrasy of mine to think that planting seeds of discontent and discord between spouses is contrary to the policy of the law. The law provides, it is true, for the dissolution of marriage as a remedy for proved breaches of the obligations of marriage. But provisions enabling divorce merely emphasize that stability of marriage is the general policy of the law. And that stability must depend upon marriages being in general supported by harmony and sustained by happiness. In my view the policy of the law is not merely that marriages should not break up by divorce or separation. It is rather that the consortium of matrimony and all that that means, should not be interfered with, hampered or embarrassed."³⁸

The courts have already under the head of restraint of marriage declared conditions in contracts void which tend to restrain or discourage marriage,³⁹

34. For a general discussion, see Cheshire & Fifoot, *The Law of Contract* (3rd Aust. ed., 1974), 417-421; and *Halsbury's Laws of England* (4th ed., 1974) vol. 9, paras. 410-411.

35. "A court has not a roving commission to declare contracts bad as being against public policy according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State." *Wilkinson v. Osborne* (1915) 21 C.L.R. 89, 96 *per Isaacs J.*

36. *Naylor, Benzon & Co. Ltd. v. Krainische Industrie Gesellschaft* [1918] 1 K.B. 331, 342 *per McCardie J.*

37. (1960) 104 C.L.R. 394. In this case, a testator devised his estate to his three sons in equal shares as tenants in common on condition that each son and his wife professed the Protestant faith at the date his interest fell into possession. The High Court held that this condition was void as contrary to public policy, the policy of the law being to preserve and maintain marriage. Conditions which tend to interfere with "the consortium of matrimony and all that means" (p.415) should be declared void. Presumably, a condition which tends to discourage married couples from having children could also fall within the scope of this decision.

38. *Id.*, 415.

39. *Low v. Peers* (1770) 4 Burr. 2225; 98 E.R. 160.

which encourage the future separation of husband and wife,⁴⁰ which have the effect of separating parents from their children⁴¹ and which require husband and wife to refrain from sexual relations.⁴² It can be argued cogently that a condition in a lease prohibiting tenants from having children residing in the premises should also be void as a restraint of marriage.

This type of condition was the subject of dispute in the Ohio case of *Lamont Building Co. v. Court*.⁴³ The plaintiff let an apartment to the defendant on condition that only adults should occupy the premises although, unknown to the plaintiff, the defendant's wife was pregnant at the time. After the child was born, the plaintiff sought to evict the defendant on the basis that a child was living in the apartment. Under the Emergency Price Control Act, 1942 (U.S.), a landlord could only evict a tenant if he had breached a substantial obligation of the lease. In light of this provision, the trial judge in *Lamont's* case required the jury to answer two questions. First, was there a condition of the lease that had been violated, and secondly, if there was a condition which had been violated, was it a substantial condition. Only if both questions were answered in the affirmative could the decision be in favour of the landlord. The jury held for the defendant, and the landlord appealed.

The Court of Appeals affirmed the decision of the lower court by a two to one majority. The majority found that a substantial obligation of the lease had been violated but that such a condition was void as against public policy when applied to the case of a child born to a tenant and his wife while occupants of the premises. Although unable to justify its decision on the basis of precedent, the majority gave several reasons for its decision. First, such a provision in a lease in the extreme housing shortage which existed could not but act as a deterrent to tenants from having children,⁴⁴ and secondly, a decision against the tenant could induce parents in a similar situation to prevent the birth of a child by unnatural means.⁴⁵ As stated by Morgan J.: "The power and influence of the law should be exerted in the direction of encouraging and not discouraging married couples to have offspring."⁴⁶

Although the Ohio Court of Appeals appeared to be primarily concerned with the dangers of abortion, it has been argued that other cases suggest a stronger basis for the decision.⁴⁷ These cases demonstrate that the courts recognize that there is a fundamental right to a normal marriage relationship which should not be restricted. For example, as stated earlier, contracts requiring husband and wife to refrain from sexual relations will not be enforced.

Unfortunately, the Supreme Court of Ohio disagreed with and reversed the decision of the Court of Appeals. The majority relied on the freedom of contract argument and rejected the proposition that such a condition

40. *Fender v. Mildmay* [1937] 3 All E.R. 402; *Re Morgan, Dowson v. Davey* (1910) 26 T.L.R. 398.

41. *Re Andrews* (1873) L.R. 8 Q.B. 153.

42. *Mirizio v. Mirizio* 242 N.Y. 74; 150 N.E. 605 (1926).

43. 66 N.E. 2d 552 (1946) (Ohio Ct. of Appeals); 70 N.E. 2d 447 (1946) (Ohio Sup. Ct.).

44. 66 N.E. 2d 552, 554 (1946).

45. *Id.*, 554.

46. *Ibid.*

47. Note, (1946) 59 *Harvard L.J.* 1171, 1171-2.

should be declared void as against public policy. They stated that the doctrine of public policy must be kept within narrow bounds: "... judges ... must take care not to infringe on the rights of parties to make contracts which are not clearly opposed to some principle or policy of the law".⁴⁸ Although there were three dissenting judgments, they were not based on agreement with the Court of Appeals, but on the view that there was sufficient evidence before the jury for it to decide for the defendant and that its decision should not be interfered with.⁴⁹

It could be said in favour of the majority's decision in the Supreme Court in *Lamont's* case that the "adults only" provisions are not a direct restraint on marriage or propagation as are other conditions which the courts have held to be void under the restraint of marriage head. The landlord did not compel the tenant to covenant against having children, but only required the tenant not to bring any children he may have in the future to live on the premises. However, the actual effect of such provisions could be that there is an indirect restraint on marriage and propagation.⁵⁰ Thus, it is submitted that the Court of Appeal's decision is the better one. It takes into account the inequality of bargaining power of the parties and demonstrates the ability of the courts to apply public policy to declare void any conditions in leases which prohibit children living in the premises.

Even if the courts refuse to follow the lead of the Ohio Court of Appeals, the effectiveness of "adults only" provisions could be minimized in several other ways by the courts. Where the condition is not included in the contract and is merely oral, the parol evidence rule could be used to avoid termination. The oral statement may form a collateral contract or amount to a variation of the written terms. Where the statement forms a collateral agreement, this agreement must not be inconsistent with the main contract,⁵¹ and presumably an option to terminate in an oral agreement could be inconsistent with the main agreement setting out the grounds for termination. Where the condition providing for forfeiture is a written term of the lease, the doctrines of "changed conditions" and "impossibility of performance" may excuse non-performance. For instance, in *Lamont's* case, evidence was led to show that other children were living in the building: this could be seen as a material change of conditions. In the situation of the tenant's wife not being pregnant at the time of leasing, it could be argued that performance of the "adults only" provision had been rendered impossible by circumstances beyond the tenant's control. However, traditionally the principle of interdependence of covenants has not been applied to the landlord-tenant relationship.⁵² Thus, the Australian courts would have to take a major step before using the doctrines of "changed conditions" and "impossibility of performance" in the context suggested.

In summary, we cannot be optimistic that any of the desired reforms can be achieved through the case law process, and legislative reform would seem to be the only practicable avenue of removing this area of discrimination.

48. 70 N.E. 2d 447, 448 (1946).

49. *Id.*, 450.

50. Note, *loc. cit.* (*supra*, n.14), 1274.

51. *Hoyt's Pty. Ltd. v. Spencer* (1919) 27 C.L.R. 133.

52. *Roberts v. Ghulam Nabie* (1911) 13 W.A.L.R. 156; *In Re De Garis and Rowe's Lease* [1924] V.L.R. 38; *Bishop v. Moy* [1963] N.S.W.R. 468.

5. Legislative Reform

(A) THE PRESENT LEGISLATION

At the outset, existing Australian legislation should be examined in order to determine whether it has any relevance and application to the area of law under discussion.

Recent wide-ranging anti-discrimination legislation in relation to sex and marital status enacted in South Australia, Victoria and New South Wales might be thought to be applicable to exclusion discrimination. For example, s.27 of the Sex Discrimination Act, 1975 (S.A.), makes it unlawful for a person to discriminate against another person on the ground of sex or marital status in the terms on which he offers the other person accommodation, by refusing an application of the other person for accommodation or by deferring an application of the other person, or according him a lower order of precedence on any list of applicants for that accommodation. Further, it is unlawful for a person to discriminate on the ground of sex or marital status against another person for whom accommodation has been provided by denying him access to any benefit connected with the accommodation or by evicting him, or subjecting him to any other detriment.

The Sex Discrimination Act, 1975 (S.A.), sets up a practical, detailed system for settling disputes.⁵³ It provides for the appointment of a Commissioner of Equal Opportunity and a Sex Discrimination Board.⁵⁴ A person who claims that he has been discriminated against lodges a complaint with the Commissioner of Equal Opportunity.⁵⁵ The Commissioner must try to resolve the complaint by conciliation.⁵⁶ If he is unable to resolve it, the matter is referred to the Sex Discrimination Board.⁵⁷ The Board hears and determines the complaint and has the power to make a number of orders. It can order the respondent to pay damages to compensate the complainant for loss or damage suffered because of the discrimination, to refrain from any further act of discrimination and to perform any acts with a view to redressing the loss or damage suffered because of the discrimination.⁵⁸ The respondent may be liable to a penalty not exceeding \$2,000 if he fails to comply with an order of the Board.⁵⁹

The problem for the purposes of this article is whether or not this type of legislation can assist the prospective tenant with children. It is submitted that it cannot. The only conduct prohibited by the legislation is discrimination on the basis of sex or marital status. It does not prohibit discrimination against families. However, if a single mother is able to prove that a landlord has refused her accommodation on the basis of her sex or her marital status, she would succeed in a complaint before the Board. The problem is that the landlord could successfully defend the complaint by arguing that he did not refuse the single mother accommodation because of her sex or marital status but because she had a child.⁶⁰ Thus, the

53. A similar system has recently been established in Victoria under the Equal Opportunity Act, 1977. For a discussion of this legislation, see Fristacky, "Equal Opportunity: the Victorian Bill", (1977) 2 *Legal Services Bull.* 205.

54. Sex Discrimination Act, 1975 (S.A.), ss.6-15.

55. *Id.*, s.39(1)(a). Under s.39(1)(b), application can also be made to the Registrar.

56. *Id.*, s.40(2).

57. *Id.*, s.40(5).

58. *Id.*, s.41(2).

59. *Id.*, s.41(5).

60. See Note, "Equal Opportunity Bill 1976 (Vic.)", (1977) 2 *Legal Services Bull.* 263.

legislation does not specifically prevent discrimination against families by landlords and it appears that it would be very difficult to use the general accommodation provisions to prevent such discrimination.

Exclusion discrimination is, however, directly dealt with in legislation enacted in New South Wales, the Australian Capital Territory and South Australia. The relevant provisions in New South Wales and the Australian Capital Territory are identical and read as follows:⁶¹

- “(1) A person shall not refuse, or procure any person to refuse, to let a dwelling-house to any person on the ground that it is intended that a child shall live in the dwelling-house.
- (2) In any prosecution for an offence arising under the last preceding sub-section, where all the facts and circumstances constituting the contravention, other than the ground of the refusal, are proved, it shall lie upon the defendant to prove that the ground of refusal was not the ground alleged in the charge.
- (3) A person shall not—
 - (a) instruct any other person not to let; or
 - (b) state his intention, whether by advertisement or otherwise, not to let, a dwelling-house to any person if it is intended that a child shall live in the dwelling-house.
- (4) A person shall not, for the purpose of determining whether or not he will let a dwelling-house, inquire from any prospective tenant of the dwelling-house whether—
 - (a) the prospective tenant has any children; or
 - (b) it is intended that a child shall live in the dwelling-house if it is let to that prospective tenant.
- (5) In any prosecution for an offence arising under the last preceding sub-section, where all the facts and circumstances constituting the contravention, other than the purpose of the inquiry, are proved, it shall lie upon the defendant to prove that the purpose of the inquiry was not the purpose alleged in the charge.”

The new Residential Tenancies Act, 1978 (S.A.), is to similar effect, except that the application of the anti-discrimination provision is expressly excluded where the landlord resides in premises adjoining the demised premises.⁶² A further exception is that the burden of proving discrimination rests on the tenant throughout the trial, as the South Australian legislature failed to enact a provision equivalent to subsection (2) of the New South Wales Act.

A number of objections can be made to the scope of the existing Australian legislation cited above. One problem is that the legislation in New South Wales applies only to prescribed premises, which constitute less than 15% of residential premises in that State.⁶³ Another obvious weakness is that the legislation only outlaws exclusion discrimination

61. Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.38; Landlord and Tenant Ordinance, 1949-1973 (A.C.T.), s.38.

62. S.58(5).

63. Information supplied by Mr. J. Morgan, ex-Rent Controller, N.S.W.

and appears to have no application to eviction discrimination.⁶⁴ In this respect, the Australian legislation is inferior to that enacted in six States of the United States.⁶⁵ For example, in addition to outlawing exclusion discrimination in similar terms to the existing Australian provisions, Illinois has enacted the following section:

“It shall be deemed unlawful and opposed to public policy to insert in any lease or agreement for the letting or renting of any dwelling-house, flat or apartment, a condition terminating the said lease if there are or shall be any children . . . in the family of any person holding such lease and occupying such dwelling house . . .”⁶⁶

Alternatively, the New York Penal Law, s.2042, could be used as a model:

“Any person firm or corporation in any city owning or having in charge any apartment house tenement house or other building used for dwelling purposes who shall in any lease of any or part of any such building, have a clause therein providing that during the term thereof the tenants shall remain childless or shall not bear children, shall be guilty of a misdemeanor.”

In contrast, in the area of exclusion discrimination, it can be objected that the scope of the Australian legislation is too broad. It has already been noted in the discussion of the need for reform that exceptions to any all-embracing anti-discrimination legislation would be necessary to exempt buildings which house elderly or infirm persons, or are unsuitable for children. Neither of these exceptions are admitted in the existing Australian legislation. Conversely, the one exception admitted in the South Australian legislation, that the landlord resides in premises adjoining the demised premises would seem unnecessary.⁶⁷

A far stronger criticism of the existing Australian legislation can be made in relation to the problem of enforcement. Although the existing legislation may appear effective at first glance, its total ineffectiveness is shown by the fact that the New South Wales legislation has seldom, if ever, been invoked.⁶⁸ Furthermore, according to studies undertaken by various voluntary organizations and social welfare agencies,⁶⁹ it is clear that the present legislation is breached with impunity.

A number of reasons can be advanced for this lack of enforcement. First, it is a fair inference that the public is unaware of the existence of the legislation. Although no empirical study designed to assess the level of the public's awareness has been undertaken in New South Wales, such

64. It may be argued that the offence “refusal to let” encompasses a refusal to continue to let. However, the legislation is unclear and is thought by the present writers to be unlikely to be construed so as to apply to eviction discrimination.

65. Arizona: Ariz. Rev. Stat. Ann., s.33-1317 (1973); New York: N.Y. Real Prop. Law, ss.236, 237 (McKinney, 1968); New Jersey: N. J. Stat. Ann. 2A: 170-92 (1971); Delaware: Del. Code Ann. tit. 25, s.6503 (1975); Illinois: Ill. Rev. Stat. ch. 80, ss.37, 38 (1973).

66. Ill. Rev. Stat. ch. 80, s.37 (1973).

67. Residential Tenancies Act, 1978 (S.A.), s.58(5). See *supra*, n.31 and text.

68. Information supplied by Mr. J. Morgan, ex-Rent Controller, N.S.W.

69. See, e.g., A.C.O.S.S., *op. cit.* (*supra*, n.7), 25; and Australian Capital Territory Tenants' Action Group, *Tenancy Conditions in the Australian Capital Territory* (1973), 8 (Submission to the Australian Government Commission of Enquiry into Poverty).

a study was made in 1975 in Illinois.⁷⁰ As the Illinois anti-exclusion discrimination legislation is similar to that in New South Wales, and as there has been no attempt by either State Government to publicize the legislation, the study is noteworthy. Fifty apartment dwellers living in the Chicago metropolitan area were selected at random and questioned as to their knowledge of the Act. Thirty-nine (78 per cent) of the tenants questioned were unaware of the existence of the statute.⁷¹

Secondly, evidentiary problems exist if a conviction is to be obtained.⁷² These problems were highlighted in the Illinois case of *People v. Metcoff*,⁷³ the only reported case on anti-exclusion discrimination in any common law jurisdiction. The action against a landlord in this case was dismissed on the ground of insufficient proof. The major difficulty in the case was that the prosecution failed to prove beyond a reasonable doubt that the defendant was the person who had refused to let the premises to the complaining witness. The witness had had no personal contact with the defendant, but had only had telephone conversations with a person who allegedly identified himself as the defendant. Thus, if the refusal to rent is communicated by telephone, the witness must be able to identify the voice on the telephone as the voice of the defendant, a seemingly impossible onus. Even if there is personal contact between the parties, in many cases no independent witness will be present to verify the allegation of discrimination. It has been suggested that the only secure method of obtaining a conviction would be by a "sandwich investigation":

"Using this approach, teams of investigators would seek to rent the apartment by appearing in the following order: (1) a team posing as a married couple without children, (2) a team posing as a married couple with a child or children of an age and number similar to the victim's, and (3) once again, a team posing as a married couple without children."⁷⁴

The most obvious reason for the failure of the legislation, however, is that there is no enforcement agency in New South Wales or the Australian Capital Territory.⁷⁵ Clearly, private prosecutions are effectively impossible as the existing legislation stipulates that no prosecution for an offence can be instituted without the written consent of the Minister.⁷⁶ Complaints of

70. See O'Brien & Fitzgerald, "Apartment for Rent—Children not Allowed: The Illinois Children in Housing Statute—Its Viability and a Proposal for its Comprehensive Amendment", (1975) 25 *DePaul L.R.* 64, 77-78.

71. *Id.*, 77.

72. See *id.*, 70-71 for a further discussion of this point.

73. 392 Ill. 418, 64 N.E. 2d 867 (1946).

74. O'Brien & Fitzgerald, *loc. cit.* (*supra*, n.70), 71 n.35.

75. The form of the enforcement agency and the sanctions imposed are of vital importance in any anti-discrimination legislation. Kelsey suggests that the courts are a wholly inappropriate forum for the settlement of such disputes, and that criminal sanctions tend only to aggravate prejudice and fail to compensate the victim: Kelsey, "A Radical Approach to the Elimination of Racial Discrimination", (1975) 1 *U.N.S.W.L.J.* 56. See also Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada", (1968) 46 *Can. B.R.* 565. However, it is submitted that although the enforcement of any anti-discrimination legislation should have as its starting point a conciliatory process, this process needs an effective enforcement apparatus behind it. Further, special tribunals with expertise in the relevant area of law are best equipped to enforce the legislation. See Partlett, "The Racial Discrimination Act 1975 and the Anti-Discrimination Act 1977: Aspects and Proposals for Change", (1977) 2 *U.N.S.W.L.J.* 152.

76. Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.95(1).

exclusion discrimination are received by the Australian Legal Aid Office and the Rent Controller in Sydney, but prospective tenants are advised in all cases that no action can be taken.⁷⁷

(B) POSSIBLE SYSTEMS OF LEGISLATION

Although a recent article commenting on the Illinois anti-eviction and exclusion discrimination legislation has claimed that the present legislation in force in Illinois, South Australia, New South Wales and the Australian Capital Territory is worthless,⁷⁸ it is submitted that if the problems of enforcement can be solved there is no reason to abandon the existing system. The basic problem is to determine the most effective type of enforcement procedure to adopt.

In its recent report, the Commission of Enquiry into Poverty recommended that a system of Residential Tenancies Boards and Tenancy Investigation Bureaus should be established in each State.⁷⁹ The Residential Tenancies Boards would assume the present court jurisdiction over all landlord-tenant disputes and would act as an arbitration tribunal. It would have such advantages as cheap and speedy proceedings, informal rules of procedure and no necessity for legal representation. The Tenancy Investigation Bureaus, modelled on the present Victorian Rental Investigation Bureau, would have wide investigatory functions, including the power to investigate allegations of excessive rent and failure by the landlord to keep the premises in repair. The proposed Bureaus would have the power to investigate complaints made by tenants, and where appropriate to instigate proceedings on the tenants' behalf before the proposed Boards. If the recommendations of the Poverty Enquiry are acted upon, it is submitted that the Tenancy Investigation Bureaus should be given specific powers to police any new anti-eviction or exclusion discrimination legislation, to attempt to resolve any complaint by conciliation, and in the last resort to prosecute offenders before the Residential Tenancies Boards. The Boards should be given the power to impose a substantial monetary penalty on proven offenders.

This system proposed by the Poverty Enquiry could easily be given the means of handling the two suggested exceptions to the operation of an anti-eviction or exclusion discrimination legislation, *viz.*, the exception of buildings unsafe or unsuitable for children, and the exception where the landlord has already let adjoining premises to elderly or infirm persons. It is suggested that if a landlord wishes to take advantage of either of the two exceptions, it should be necessary for him to apply to the nearest Residential Tenancies Board for a certificate of exemption prior to letting the premises. In light of the inexpensive and speedy means of access to such a Board, the inconvenience caused to the landlord would be minimal.

The recommendations of the Poverty Enquiry have been substantially enacted in South Australia. Under the Residential Tenancies Act, 1978 (S.A.), a system of Residential Tenancies Tribunals has been established with exclusive jurisdiction over residential landlord-tenant disputes (including those involving the anti-discrimination provisions) where the amount claimed does not exceed \$2,500.⁸⁰ The role of the Commissioner for

77. Information supplied by Mr. J. Morgan, ex-Rent Controller, N.S.W.

78. O'Brien and Fitzgerald, *loc. cit.* (*supra*, n.70), 86.

79. See Sackville, *Law and Poverty in Australia* (A.G.P.S., Canberra, 1975), 91-93; Bradbrook, *op. cit.* (*supra*, n.12), 6-10.

80. Residential Tenancies Act, 1978 (S.A.), s.21(1)(2).

Consumer Affairs has been extended into the landlord-tenant context to undertake the role suggested for the proposed Tenancy Investigation Bureaus. The Commissioner is empowered to investigate any complaint by a tenant,⁸¹ and, with the consent of the tenant and the Minister⁸² to assume the conduct of any proceedings before the Residential Tenancies Tribunal on a tenant's behalf.⁸³

There would seem to be no reason to change the major provisions of the South Australian enforcement procedure.⁸⁴ However, two alternative procedures must be considered for the other States and Territories unless they also adopt the recommendations of the Poverty Enquiry. One possibility is to give jurisdiction over any new anti-eviction and exclusion discrimination legislation to an arbitration tribunal already appointed to police other forms of anti-discrimination legislation. A number of tribunals already exist whose role and functions are appropriate for handling complaints relating to eviction and exclusion discrimination. The Anti-Discrimination Board, established under the Anti-Discrimination Act, 1977 (N.S.W.), and the Equal Opportunity Board established under the Equal Opportunity Act, 1977 (Vic.), are two illustrations. In each case, machinery exists for allegations of discrimination to be thoroughly investigated, and both Boards possess adequate powers to handle effectively any proven allegations.⁸⁵ It would be a relatively minor reform to add anti-eviction and exclusion discrimination legislation to these and other Boards' heads of jurisdiction.

A second possibility is to use existing State Government agencies which have some expertise and jurisdiction in the handling of landlord-tenant disputes. For example, the Victorian Rental Investigation Bureau, which receives and investigates complaints by tenants of excessive rent, could be empowered to receive and investigate complaints of discrimination against tenants with children.⁸⁶ When the Bureau receives a complaint of excessive rent it inspects the premises, and if it believes that the complaint is justified it attempts to negotiate a lower rent with the landlord. If the landlord refuses to comply, the Bureau recommends to the Governor-in-Council that the premises be prescribed pursuant to Part V of the Landlord and Tenant Act, 1958 (Vic.), whereupon the tenant may apply formally to the Fair Rents Board to have the rent reduced. If the Bureau were empowered to receive complaints of discrimination, a similar procedure could be used. The Bureau, through its officers, could investigate the complaint, and if it decided the complaint was justified, could attempt to resolve the dispute by negotiating with the landlord, through the Bureau's Secretary. If the negotiations were to fail, the Bureau should have the power to bring an action on the tenant's behalf before the Fair Rents Board. The Fair Rents Board would be given the power to hear such disputes and make appropriate orders.

81. *Id.*, s.11(1)(d).

82. *Id.*, s.11(4).

83. *Id.*, s.11(2).

84. However, it is submitted that the restrictions on the Commissioner that any action must be in the public interest (s.11(2)) and that the written consent of the Minister must first be obtained (s.11(4)) are unnecessary and should be repealed.

85. See Anti-Discrimination Act, 1977 (N.S.W.), ss.96, 112, 113; Equal Opportunity Act, 1977 (Vic.), ss.35, 37, 40.

86. For a discussion of the present operation of the Rental Investigation Bureau, see Bradbrook, *op. cit. (supra)*, n.12, 93-94; and Bradbrook, "An Empirical Study of the Need for Reform of the Victorian Rent Control Legislation", (1975) 2 *Monash U.L.R.* 82, 84-86.

Similarly, in New South Wales, the Rent Controller could be given the task of investigating such disputes.⁸⁷ If, after investigation, he believes the complaint to be justified, the Rent Controller could be given the power to negotiate with the landlord and refer the matter to the Fair Rents Board for a decision if negotiation fails.

(C) RECOMMENDED LEGISLATION

We are now in a position to suggest a draft form of legislation. Exclusion discrimination and eviction discrimination will be discussed separately, as different considerations apply. Each will need to form a separate section in any new legislation.

In relation to exclusion discrimination, the existing legislation in New South Wales, the Australian Capital Territory and South Australia could form the basis for a common scheme of legislation which could be enacted in all States and Territories. However, it is submitted that three major amendments would be necessary. First, the sanction provided for breach of the legislation should be altered. Under the Residential Tenancies Act, 1978 (S.A.), a penalty of \$200 is imposed,⁸⁸ whereas in New South Wales and the Australian Capital Territory the maximum penalty is \$500 and/or six months' gaol.⁸⁹ As a gaol sentence has never been imposed in New South Wales for the breach of this legislation,⁹⁰ and as studies undertaken in the United States have shown that courts are loath to imprison landlords for the breach of any tenancy laws,⁹¹ the retention of a gaol penalty would seem inappropriate. It is submitted that the most appropriate remedy would be a substantial monetary penalty (say \$500). Secondly, as already mentioned,⁹² the clause in the Residential Tenancies Act, 1978 (S.A.), excluding the operation of the anti-discrimination legislation where the landlord resides in adjoining premises should be abandoned. Finally, sub.-s. (1) of the present anti-exclusion discrimination legislation in New South Wales and the Australian Capital Territory cited above needs to be expanded to allow for the exceptions of buildings unsuitable or unsafe for children and buildings already housing elderly or infirm persons.

The following draft form of anti-exclusion discrimination legislation is suggested for each Australian State and Territory:

- "(1) A person shall not refuse, or cause any person to refuse, to grant a tenancy to any person on the ground that it is intended that a child should live on the premises, unless a certificate of exemption has first been obtained from the Residential Tenancies Board.
Penalty: Five hundred dollars.
- (2) A certificate of exemption may be granted on either of the following grounds:

87. See Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), Divs. 2A, 4 and 4A, for the powers currently vested in the Rent Controller.

88. S.58(1).

89. Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.), s.95(3); Landlord and Tenant Ordinance, 1949-1973 (A.C.T.), s.96.

90. Information supplied by Mr. J. Morgan, ex-Rent Controller, N.S.W.

91. See Brietz & Grad, "Housing Code Enforcement: Sanctions and Remedies", (1966) 66 *Columbia L.R.* 1254, 1262-3, 1275-6; Daniels, "Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia", (1971) 59 *Georgetown L.J.* 909, 913-6; Walsh, "Slum Housing: The Legal Remedies of Connecticut Towns and Tenants", (1966) 40 *Connecticut B.J.* 539, 549-50; and Comment, "Rent Withholding and the Improvement of Substandard Housing", (1965) 53 *California L.R.* 304, 318-9.

92. *Supra*, text to n.31.

- (a) that in view of the design or location of the premises, significant hazards may exist to the safety, security or health of any children living on the premises.
 - (b) that the landlord has already let another part of the same building or part or all of an adjoining building to a senior citizen or an infirm person.
- (3) For the purposes of subsection (2), “senior citizen” shall mean a person aged sixty years or over, and “infirm person” shall mean a person who is seriously disabled or suffering from a chronic illness.⁹³
- (4) In any proceedings in respect of an offence against subsection (1) of this section, where it is proved that the defendant refused to grant a tenancy, the burden shall lie upon the defendant to prove that the refusal was not upon the ground that it was intended that a child should live in the premises.
- (5) A person shall not—
- (a) instruct any person not to grant; or
 - (b) state his intention, whether by advertisement or otherwise, not to grant a tenancy to any person if it is intended that a child should live in the premises.
- Penalty: Five hundred dollars.
- (6) A person shall not, for the purpose of determining whether or not he will grant a tenancy to any person, inquire from that person whether—
- (a) that person has any children; or
 - (b) it is intended that a child should live in the premises.
- Penalty: Five hundred dollars.
- (7) In any proceedings in respect of an offence against subsection (6) of this section, where it is proved that the defendant made an inquiry of the kind referred to in that subsection, the burden shall lie upon the defendant to prove that the inquiry was not made for the purpose of determining whether or not to grant a tenancy.”

It will be necessary for a new section to be introduced in the relevant landlord-tenant statute in each State and Territory to outlaw eviction discrimination. The following draft form of legislation is considered appropriate:

- “(1) A person shall not insert, or cause any person to insert, in any lease a condition or covenant purporting to determine a tenancy on the ground that there are or will be any children in the family of the tenant, or that any children are residing in the demised premises.
- Penalty: Five hundred dollars.
- (2) Any such lease containing a covenant or condition purporting to determine a tenancy on the ground that there are or will be any children in the family of the tenant, or that any children are residing in the demised premises, shall be deemed to be void and contrary to public policy.
- (3) A person shall not refuse to renew a tenancy on the ground that there are or will be any children in the family of the

93. This suggested clause is modelled on a similar clause proposed for the State of Illinois: O'Brien and Fitzgerald, *loc. cit.* (*supra*, n.70), 90.

tenant, or that any children are residing in the demised premises.

Penalty: Five hundred dollars.

- (4) In any proceedings in respect of an offence against subsection (3) of this section, where it is proved that at the expiration of a tenancy the defendant refused to renew the tenancy the burden shall lie on the defendant to prove that the refusal to renew the tenancy was not made on the ground that there were or were to be any children in the family of the tenant, or that any children are residing in the demised premises.”

These suggested forms of anti-exclusion and eviction discrimination legislation could be enacted by way of an amendment to the existing landlord-tenant legislation in each State and Territory.⁹⁴ In addition, depending on which of the three suggested forms of enforcement procedure is adopted, either new legislation establishing Residential Tenancies Boards and Tenancy Investigation Bureaus will be necessary, or amendments to the legislation specifying the powers of the existing agency given jurisdiction in this matter will be required.

94. The legislation to be amended would be the Landlord and Tenant Act, 1958 (Vic.); Landlord and Tenant (Amendment) Act, 1948-1969 (N.S.W.); Residential Tenancies Act, 1978 (S.A.); Landlord and Tenant Act, 1935 (Tas.); Residential Tenancies Act, 1975 (Qld.); Property Law Act, 1969-1973 (W.A.); Landlord and Tenant Ordinance, 1949-1973 (A.C.T.).