THE RIGHTS AND DUTIES OF LANDLORDS AND TENANTS UNDER THE VICTORIAN RESIDENTIAL TENANCIES ACT

BY A. J. BRADBROOK*

[*On Monday, November 9, 1981 the Residential Tenancies Act 1981 was proclaimed. It is the end product of a process of legislative reform which was begun in 1976, and which yielded three successive draft Bills. In this article Dr Bradbrook analyses the provisions of the Act which concern the rights and duties of the parties during the term of the tenancy. He examines the significance of the changes introduced by the Act and highlights a number of serious deficiencies in the drafting, concluding with a summary of desirable amendments to the existing legislation.*]

A. INTRODUCTION

The Residential Tenancies Act 1980 was the final enactment passed during the 1980 spring session of the Victorian Parliament. The legislation was passed by both Houses on December 17, 1980 and received Royal assent on December 23, 1980.

This legislation represents the final product of a comprehensive revision of the law relating to residential tenancies which had originally been advocated for every Australian State by the Commonwealth Commission of Enquiry into Poverty as early as 1974.[1] Following the publication of this Report, an active political campaign was waged in Victoria by the Tenants' Union and various social welfare organizations to secure the enactment of the suggested reforms. A complete revision of the existing landlord and tenant law was first promised by the Premier in March 1976 as part of the election platform of the State Liberal government. Following the election, an Inter-Departmental Working Party was established by the Government to investigate the need for reforms in this area of law. In a further interesting development, following a public meeting convened by the Attorney-General and the Victorian Council of Social Service in December 1976, a Community Committee on Tenancy Law Reform consisting of 16 people and one independent, non-voting chairperson was established to review the existing landlord and tenant law and to liaise with the Attorney-General and his staff concerning the work of the Working Party. Both the Working Party and the Community Committee recommended numerous

* M.A. (Cantab.), LL.M. (Osgoode Hall), Ph.D. (Melb.); Barrister and Solicitor of the Supreme Courts of Victoria and Nova Scotia; Reader in Law, University of Melbourne.

[1] See A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship*, A.G.P.S., Canberra, 1975; R. Sackville, *Law and Poverty in Australia*, A.G.P.S., Canberra, 1975 ch. 3.

changes to the law and substantially endorsed the findings of the Poverty Enquiry.[2] These reports led eventually to the tabling of the Residential Tenancies Bill 1978 in Parliament to allow time for public scrutiny and comment. During the early part of 1979, some 523 public submissions were received by the Government, plus 77 further submissions of a confidential nature. The 1978 Bill was much criticized by landlords as being allegedly biased in favour of tenants. As a consequence the Bill was substantially redrafted and reintroduced into Parliament in December 1979 to provide opportunity for further comment. A further flood of comment was received on this subject, most of the complaints being that the 1979 Bill was biased in favour of landlords. The Residential Tenancies Act 1980 represents the third version of the Bill, which is generally conceded to be a compromise between the alleged biases of the two earlier Bills.

The extraordinarily long period of time taken in Victoria by the political processes of achieving reform led to the legislative initiative in this area being wrested by the Dunstan Government in South Australia, which enacted the Residential Tenancies Act 1978-1981. This Act was followed shortly by the Tenancy Act 1979 (N.T.), which largely reproduces the terms of the South Australian legislation.[3] Victoria is the third Australian jurisdiction to revise its residential landlord-tenant laws. Its Act is loosely modelled on the earlier South Australian Act, although in many significant respects the two pieces of legislation differ, as will be shown below.

The new legislation in Victoria, South Australia and the Northern Territory is particularly noteworthy in that it represents a legislative acknowledgment of the fact that a tenant is a consumer[4] and needs analogous forms of legislative protection to those given by numerous State enactments to other types of consumers.[5]

In light of this fundamental change of philosophy it is considered that detailed discussion of the new Victorian legislation is warranted. This discussion will hopefully have two major benefits. First, areas of weakness in the legislation will be identified with a view to recommending further reforms which should be made in a later legislative amendment. Secondly, the discussion should prove useful to members of Parliament and parlia-

[2] See Community Committee on Tenancy Law Reform, *Reforming Victoria's Tenancy Laws*, Melbourne, 1978. This report was discussed in Wallace, 'A New Kind of Legal Change' (1978) 3 *Legal Services Bulletin* 245. The report of the Inter-Departmental Working Party to the Cabinet was confidential.

[3] In some respects the N.T. legislation is broader in scope. By s. 4(1), the Act extends to caravans and demountable buildings. A 'demountable building' is defined as 'a building, other than a caravan, designed to be moved from site to site and not permanently attached to the land'.

[4] On this point, see Schoshinski, 'Remedies of the Indigent Tenant: Proposal for Change' (1966) 54 *Georgetown L.J.* 519, 536; Comment, 'Housing the Poor: A Study of the Landlord-Tenant Relationship' (1969) 41 *U. Colorado L. Rev.* 541, 557; Bradbrook, 'The Role of the Judiciary in Reforming Landlord and Tenant Law' (1976) 10 *M.U.L.R.* 459, 461-463, 478-480.

[5] See, e.g., Consumer Affairs Act 1972, Small Claims Tribunals Act 1973, Motor Car Traders Act 1973.

mentary counsel in New South Wales and Tasmania, where similar legislation is actively under consideration.

The Act can be conveniently divided into three separate areas for the purpose of analysis: the scope of the legislation; the rights and duties of the parties during the term of the tenancy; and the laws relating to the determination of tenancies. This article will concentrate on the second of these three areas. It will examine the significance of the changes introduced by the Act and will test the validity of the claim made by the Victorian Attorney-General, the Hon. Haddon Storey that the Act 'represents a highly polished and carefully balanced piece of legislation'.

B. LEGISLATIVE REFORMS

1. *Repairs and Cleanliness*

The pre-1980 laws relating to repairs were based on common law and were generally conceded to be anachronistic, obscure, inadequate and biased in favour of landlords. Prior to the new legislation, the landlord was under no basic duty to repair at common law[6] except in two situations. First, a warranty of fitness was implied where a lease was entered into before the building of the premises was complete.[7] Secondly, there was the anomalous implied condition, established in *Smith v. Marrable*,[8] that in the case of furnished premises the premises were fit for human habitation at the commencement of the lease. Even here, however, there was no implied condition that the premises remained fit for human habitation; thus, if the defect rendering the premises unfit occurred during the term of the lease the tenant had no remedy.[9] Similarly, there was no remedy if the premises became defective after the commencement of the tenancy.[10] The landlord only assumed a duty to repair if his lease contained a covenant to that effect, and none of the printed forms of lease in use in Victoria contained such a covenant.

The common law rules specifying the obligations of the tenant were equally unsatisfactory, resting on the doctrine of waste[11] and the implied

[6] See *Gott v. Gandy* (1853) 2 El. and Bl. 845, 118 E.R. 984; *Chappell v. Gregory* (1864) 34 Beav. 250, 55 E.R. 631; *Colebeck v. Girdlers Co.* [1896] 1 Q.B. 234; *Collins v. Winter* [1924] N.Z.L.R. 449; *Cruse v. Mount* [1933] Ch. 278; *Mint v. Good* [1951] 1 K.B. 517; *Liverpool City Council v. Irwin* [1977] A.C. 239.

[7] *Miller v. Cannon Hill Estates Ltd* [1931] 2 K.B. 113.

[8] (1843) 11 M. and W. 5; 152 E.R. 693. Cf. *Hart v. Windsor* (1843) 12 M. and W. 68; 152 E.R. 1114, which held that the doctrine did not extend to unfurnished premises.

[9] *Sarson v. Roberts* [1895] 2 Q.B. 395; *Pampris v. Thanos* [1968] 1 N.S.W.R. 56.

[10] *Collins v. Hopkins* [1923] 2 K.B. 617; *Wilson v. Finch Hatton* (1877) 2 Ex.D. 336.

[11] Under this doctrine all tenants were liable for voluntary waste if they committed a positive act occasioning injury to the premises. Their liability for permissive waste depended on whether they were tenants for a term of years or periodic tenants, and within this latter category whether they fell under the sub-category of weekly, monthly or yearly tenants. It was settled law that monthly or weekly periodic tenants were not liable for permissive waste, but unclear from the authorities whether a tenant for a term of years or a tenant from year to year was also liable. See Bradbrook, 'The Repair

covenant to use the premises in a tenant-like manner.[12] Both these doctrines were vague and uncertain in their application, and it seems certain that without legal assistance a typical landlord or tenant would have had no knowledge or understanding of them.

The remedies available for each party were similarly inadequate, being an action for damages and/or an injunction. No specific remedies peculiar to the law of repairs were provided for by statute or case law.

Section 97 of the new Act imposes for the first time a basic duty on the landlord to repair the premises. It states:

> A landlord under a tenancy agreement shall ensure that the rented premises are maintained in good repair.

"Rented premises" is defined in s. 2 as "the premises let under the tenancy agreement", and thus excludes all facilities outside the premises. Thus, under s. 97 there is no liability on the landlord to maintain in good repair any external facilities provided for the tenant, such as communal laundries, external hot water services, lifts and staircases.[13] This matter is of particular concern to tenants of multi-unit dwellings. In this regard, s. 97 is inconsistent with s. 63, which allows a reduction or withdrawal of facilities by the landlord to be taken into consideration if the tenant complains that his rent is excessive. It would be a simple matter to amend s. 97 to include "facilities" within the scope of the landlord's duty.

The landlord's obligation in s. 97 is subject to s. 102(b), which imposes a duty on the tenant to ensure that care is taken to avoid damaging the rented premises. Thus, the tenant will be liable for any damage caused intentionally, recklessly or negligently by the tenant or his invitees. The landlord's duty to repair is also subject to s. 90, which places an obligation on the tenant to give notice of any damage to the landlord. As the landlord may be unaware of any damage to the premises because of the fact that the tenant has exclusive possession of the premises during the tenancy, presumably the tenant cannot exercise any of the remedies available for a breach of s. 97 until he has complied with s. 90.

Section 98 must be read together with s. 97. It states in part:

> (1) Where rented premises under a tenancy agreement are, or are part of, a house in respect of which a declaration under section 56 of the Housing Act 1958 is in force, the landlord is in breach of section 97.

The intention of the legislature was seemingly to simplify the problems of proof in cases of extreme disrepair. Thus, if the premises are in such bad

Obligations of Landlords and Tenants: A Plea for Reform' (1976) 12 *U.W.A.L. Rev.* 437, 440-441.

[12] *Leach v. Thomas* (1835) 7 Car. & P. 327; 173 E.R. 145; *Wedd v. Porter* [1916] 2 K.B. 91; *Gregory v. Mighell* (1811) 18 Ves. Jun. 328, 331; 34 E.R. 341, 342; *Warren v. Keen* [1954] 1 Q.B. 15, 20, *per* Denning L.J.

[13] In light of the limited scope of s. 97, it is likely that an implied covenant to repair the common parts of a multi-unit dwelling would be held to exist in respect of residential premises in Victoria (see *Liverpool City Council v. Irwin* [1977] A.C. 239).

repair as to attract the imposition of a repairs order by the Housing Commission under s. 56 of the Housing Act 1958, the tenant would not have to prove the lack of repair before the Residential Tenancies Tribunal.[14] Unfortunately, the wording of the subsection is sufficiently ambiguous to make another more restrictive interpretation possible. Thus, it could be argued that s. 98(1) provides an exclusive definition of the circumstances in which premises may breach s. 97. In other words, it is at least arguable that s. 98 is intended to define exhaustively the circumstances of lack of good repair.

In contrast to the law on repairs, the primary duty relating to cleanliness is imposed on the tenant. Section 102(a) states:

> A tenant under a tenancy agreement shall keep the rented premises in a reasonably clean condition, except in so far as under the tenancy agreement the landlord is responsible for keeping the premises in that condition.

However, although the tenant is under a duty to *keep* the premises in a reasonably clean condition, he is not under a duty to *put* it in such a condition at the commencement of the lease. Under s. 91, this falls within the duties of the landlord:

> The landlord under a tenancy agreement shall ensure that on the day on which it is agreed that the tenant shall enter into occupation of the rented premises, the premises are vacant and are in a reasonably clean condition.

Prior to the 1980 legislation the duty to keep the premises clean fell within the tenant's covenant to use the premises in a tenant-like manner. No liability extended to the landlord to put the premises into a clean condition at the commencement of the lease, as this fell within the doctrine of *caveat emptor*.

The new law on cleanliness was not criticized by any of the tenants' or landlords' political pressure groups, and would seem to be universally acceptable. Of course, the meaning of 'reasonably clean' will always be arguable on the facts, but this is seemingly inevitable.

The remedies provided by the Act for a tenant whose landlord breaches his duty to repair under s. 97 are contained in ss. 99 and 100. In this regard the new legislation is interesting and unusual in that it draws a distinction between the remedies available for urgent and non-urgent repairs.[15] The enactment of s. 99, which provides a speedy method of proceedings in cases of urgent repairs, is legislative recognition of the fact that unless urgent repairs can be quickly rectified tenants may be effectively forced to quit the premises if the conditions become intolerable.

Section 99 reads in part:

[14] For a discussion of s. 56 of the Housing Act 1958, see Bradbrook, 'The Role of State Government Agencies in Securing Repairs to Rented Housing' (1977) 11 *M.U.L.R.* 145. Cf. Housing Improvement Act 1940-1978 (S.A.), ss. 23, 25.

[15] Unlike other changes introduced by this legislation, this reform was not recommended by either the Poverty Enquiry or the Community Committee on Tenancy Law Reform. There is no equivalent provision in the Residential Tenancies Act 1978-1981 (S.A.) or the Tenancy Act 1979 (N.T.).

(1) Where the tenant under a tenancy agreement is unable, after taking reasonable steps, to make arrangements for the carrying out forthwith by the landlord or by an agent of the landlord of urgent repairs to the rented premises—
  (a) the tenant may carry out the repairs; and
  (b) subject to sub-section (2), the landlord is liable to reimburse the tenant for the reasonable costs of the repairs or $200, whichever is the less.

(3) In this section 'urgent repairs' means any work necessary to repair or remedy—
  (a) any burst water service;
  (b) any sewerage blockage;
  (c) any broken sewerage fittings;
  (d) any serious roof leak;
  (e) any gas leak;
  (f) any electrical fault likely to cause damage to property or to endanger human life;
  (g) flooding;
  (h) any fault in a lift in the rented premises;
  (i) any substantial damage caused by flooding, storm or fire; or
  (j) any damage of a prescribed class.

There are three problems in relation to the effectiveness of the remedy provided by this section. First, there is no definition of the 'reasonable steps' which the tenant has to take before he can invoke the remedy. This requirement makes the remedy less attractive for the tenant in that it allows the landlord to attempt to avoid the operation of the section by arguing on the facts that the steps taken by the tenant were not reasonable. Thus, if the tenant takes steps which he thinks are reasonable, but which are later challenged by the landlord as being unreasonable, and the landlord's contention is upheld by the Residential Tenancies Tribunal, then the landlord is under no liability to reimburse the tenant. The onus is on the tenant to predict successfully the attitude of the Tribunal.

Secondly, the maximum level of reimbursement permitted by s. 99(1)(b) is very low. The rationale behind the limitation is to protect the landlord from having large sums of his money committed by the tenant to repairs. Unfortunately, the maximum level of reimbursement is set so low that the vast majority of urgently needed repairs will fall outside the scope of s. 99. It is difficult to conceive of any structural repairs which would cost less than $200, even though the legislation in s. 99(3) envisages that the urgent repairs will cover, for example, damage caused by flooding and serious roof leaks. The section will probably be limited in its effective operation to minor plumbing repairs of an urgent nature, such as a sewerage blockage.

Thirdly, although s. 99(3) attempts to avoid disputes as to what are 'urgent repairs' by providing an exhaustive definition of that term, the loose wording of some of the individual heads of the definition will inevitably lead to disputes. Thus, for example, a landlord may well contest a tenant's assessment that a roof leak is 'serious', or that damage caused by flooding, storm or fire is 'substantial'.

The likely ineffectiveness of the remedy in s. 99 should lead to increased reliance being placed by tenants on s. 100, which provides for a remedy in respect of non-urgent repairs. Section 100(1) provides that if a landlord

has not carried out any repairs to the premises within fourteen days after being notified of the need for repair by the tenant, the tenant may request the Director of Consumer Affairs (hereafter referred to as 'the Director') to investigate the matter with a view to ascertaining whether the landlord is in breach of his duty to repair under s. 97. Under s. 100(2) the Director shall endeavour to negotiate arrangements with the landlord for the carrying out of the repairs, if the repairs are found to be necessary, and shall report to the tenant. Under s. 100(3) the tenant may apply to the Tribunal for an order requiring the landlord to carry out specified repairs once the tenant has received the Director's report. This subsection applies regardless of the findings of the Director. Section 100(4) states that the Tribunal may make an order for repairs if it is satisfied that the landlord is in breach of his duty to maintain the premises in good repair.

The major problem with the procedure laid down in s. 100 is that it is very time-consuming. There is a minimum delay of two weeks provided for in s. 100(1) to allow the landlord to carry out the repairs before the tenant can request the Director to investigate the complaint. Bearing in mind the overall work-load of the investigating officers of the Ministry of Consumer Affairs, a likely delay of three weeks can be anticipated to allow the officer time to investigate and report to the tenant. Finally, there will be another likely delay of two weeks before the case is set down for a hearing before the Tribunal.[16] The delay could be partially alleviated if the tenant were permitted to apply immediately to the Tribunal for a repairs order after the expiration of the fourteen-day period of grace allowed to landlords under s. 100(1). From the tenant's standpoint, he will be far more likely to succeed in his application for a repairs order under s. 100(4) if he is in possession of a favourable report from the Director, but this advantage may be outweighed by the delays caused by the procedure for obtaining the report.

Another major reform introduced by the legislation is that a form of rent withholding is authorized as a sanction against landlords failing to carry out necessary repairs. Section 101 reads:

> (1) Where the tenant under a tenancy agreement has given notice to the landlord requiring the landlord to carry out repairs to the rented premises, the tenant may make application to the Tribunal for an order authorizing the tenant to pay the rent under the tenancy agreement into the Rent Special Account in the Fund.
> (2) Where an application is made under sub-section (1) by a tenant under a tenancy agreement and the Tribunal is satisfied that a notice has been given to the landlord in accordance with this Act requiring him to carry out repairs and that the landlord has failed to comply with his obligation to carry out repairs, it may make an order authorizing the tenant to pay the rent under

[16] Cf. the delays experienced in applications for a rental determination under the now-repealed s. 44 of the Landlord and Tenant Act 1958. On this issue, see Bradbrook, 'An Empirical Study of the Need for Reform of the Victorian Rent Control Legislation' (1975) 2 *Monash U.L. Rev.* 82. The greater the delay, the less likely it is that tenants will use the remedy.

> the tenancy agreement into the Rent Special Account in the Fund during such period as the Tribunal specifies.
> (3) Where an order is made under sub-section (2) for the payment of rent under a tenancy agreement into the Rent Special Account during a specified period —
> (a) the amount of that rent held in the Rent Special Account at the expiration of that period shall be paid to the landlord; and
> (b) the Tribunal may, on the application of the landlord before the expiration of that period, if it is satisfied that the landlord has fulfilled or is fulfilling his obligation to carry out repairs to the rented premises, order that the whole or such part as it determines of that rent held in the Rent Special Account be paid to the landlord.

This reform, which was strongly objected to by landlords' pressure groups, was chosen in preference to various other possible sanctions for failure to repair canvassed by the Poverty Enquiry, such as allowing a tenant to quit the lease legally, allowing him to deduct a portion of the rent without court order according to the extent of the disrepair, allowing him to apply to the court for an order compelling other tenants of the same landlord to withhold rents, and allowing government agencies to apply sanctions against the landlord.[17]

Section 101 is noteworthy in that the procedure enables the tenant to apply for the order without any requirement that the Director investigate the tenant's complaint to determine its validity. There would seem to be no logical reason for distinguishing between ss. 100 and 101 in this regard. Possibly the discrepancy between the procedures under the two sections was an oversight by the legislature. The absence of the requirement for an investigation makes s. 101 more effective for tenants than would otherwise have been the case. In other respects, however, the legislature has taken steps to protect the interests of the landlords by including various safeguards into the section. The cumulative effect of the safeguards is to provide a significantly weaker system of rent withholding than operates in many overseas jurisdictions.[18] The first safeguard is that the section can only be invoked by order of the Residential Tenancies Tribunal. Secondly, the rent cannot be legally kept by the tenant but must be paid into the Rent Special Account. If the law were otherwise, it could be argued that tenants would invoke the remedy as a convenient excuse for keeping the rent rather than as a genuine desire to see the repairs effected. Thirdly, under s. 101(3)(b) the rent will always be eventually given to the landlord either at the end of the fixed period or at any time if the Tribunal is satisfied that the landlord has fulfilled or is fulfilling his obligation to carry out the repairs. This later requirement was inserted out of recognition of the landlord's argument that

[17] See Bradbrook, *op. cit. supra* n. 1, 22-26; Sackville, *op. cit. supra* n. 1, 64-65.

[18] Cf. the following legislation in the United States and Canada authorizing rent withholding: Mass. Gen. Law, Ch. 111, s. 127F (1971); Mich. Comp. Laws Ann., s. 125, 530-534 (Supp. 1969); N.Y. Real Prop. Actions and Proceedings Law, s. 755 (McKinney Supp. 1971); Pa. Stat. Ann., tit. 35, s. 1700-1 (Purdon Supp. 1971); Residential Tenancies Act, Stats. N.S. 1970, c. 13, s. 11(3); Landlord and Tenant (Residential Tenancies) Act, Stats. Nfld. 1973, c. 54, s. 20(7); Residential Tenancy Act, Stats. B.C. 1977, c. 61, s. 27.

a landlord may not be able to afford the repairs if he is not in receipt of the rent.

There are two remedies available to a landlord where the tenant has breached his obligations under s. 102, both of which are contained in s. 103. If the landlord requires the tenant to repair the damage at the tenant's expense, the relevant remedy is in s. 103(1)(a) and (b). These paragraphs read as follows:

> (a) the landlord, where he requires the tenant to repair the damage at the tenant's expense, may give a notice in writing to the tenant stating —
> (i) the nature of the damage;
> (ii) that the damage was caused by the failure of the tenant to ensure that care is taken to avoid damaging the rented premises;
> (iii) that the landlord requires the tenant to repair the damage at the tenant's expense within fourteen days after the giving of the notice; and
> (iv) that if the tenant has not within that period repaired the damage in a tradesman like manner the landlord may at the tenant's expense cause the damage to be repaired;
> (b) where he has given notice to the tenant under paragraph (a) and the tenant has not within fourteen days after the giving of the notice repaired the damage in a proper and tradesman like manner, may repair the damage at the tenant's expense;

Alternatively the landlord may invoke s. 103(1)(c) if he prefers to repair the damage himself at the tenant's expense. This paragraph reads:

> (c) [the landlord] may repair the damage at the tenant's expense forthwith after giving to the tenant notice in writing stating —
> (i) the nature of the damage;
> (ii) that the damage was caused by the failure of the tenant to ensure that care is taken to avoid damaging the rented premises; and
> (iii) that the tenant is liable for the reasonable cost of the repairs and that the landlord is undertaking the repairs.

Section 103 is not sufficiently broad to cover any possible action brought by a landlord to enforce the tenant's obligation to keep the premises reasonably clean. The only remedy available in this situation is an application to the Tribunal for an order for compensation under s. 105(1)(a), which states:

> (1) Subject to this Act, a party to a tenancy agreement may make application to the Tribunal for an order for the payment to the applicant by the other party to the tenancy agreement of compensation for loss or damage suffered by the applicant because —
> (a) the other party has failed to comply with the tenancy agreement or any of his obligations under this Act relating to the tenancy agreement.

The above-mentioned sections contain the basic remedies available for both parties in the case of repairs and cleanliness. However, there are other possible statutory remedies available. First, it should be noted that an action for compensation under s. 105(1)(a) is available to tenants as an alternative to or in addition to the other remedies provided in ss. 99, 100 and 101. Secondly, it is still possible for tenants to complain about the state of disrepair of the premises to the Housing Commission with a view to the Commission issuing a repairs order under s. 56 of the Housing Act 1958. Thirdly, it is again still possible for tenants to complain to the relevant local government authority where the condition of the premises

amounts to a health hazard and infringes the terms of s. 43 of the Health Act 1958.

In addition to these statutory remedies, consideration should be given to the possible availability of the common law tortious remedy of breach of statutory duty. A detailed study of this tort is outside the scope of this article.[19] In brief, the question of liability turns on statutory interpretation, taking into account the subject matter dealt with and the circumstances under which the Act was passed.[20] Certain guidelines relevant in this context can be deduced from the authorities:[21]

(1) The plaintiff is more likely to succeed if he can establish that the statute was intended to protect a particular class of persons of which he is a member rather than the public as a whole;[22]

(2) If another civil remedy (e.g. negligence) exists, or if the statute prescribes a criminal penalty, there is a presumption that the legislature intended no further civil action to lie;[23]

[19] For a recent detailed discussion and analysis of the scope of the tort of breach of statutory duty, see Luntz, H., Hambly, D. and Hayes, R., *Torts: Cases and Commentary*, Butterworths, Sydney, 1980, ch. 10. Fleming, J. G. discusses this area of law under the heading of 'statutory negligence' (see *The Law of Torts* (5th ed., 1977) 131-3). However, as pointed out by Luntz, Hambly and Hayes (*op. cit.*, 533), two fundamental objections can be made against Fleming's analysis: first, some statutory duties are cast in absolute terms, and it is no answer for a defendant to show that a breach was due to no fault of his; and secondly, the action on the statute is firmly established in English and Australian law as an action separate from negligence.

[20] Lord Simonds stated in *Cutler v. Wandsworth Stadium Ltd* [1949] A.C. 398, 407:

> The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted.

[21] Note the following dictum of Fisher J. in *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, 236-7:

> (1) The question is one of the interpretation of the statute in the light of the previous law. (2) Does it exist for the benefit of the public at large or for a category of persons to which the plaintiff belongs? (3) If the former, and a specific remedy is provided for its enforcement (for example, criminal proceedings), no action for breach of statutory duty lies. (4) If the latter, then (a) if no specific remedy is provided there is a right of action for breach of statutory duty; (b) even if there is a specific remedy, there may be a concurrent right of action, especially if the specific remedy is not effective to ensure that the duty is performed.

Cf. *McCall v. Abelesz* [1976] Q.B. 585, 600, *per* Shaw L.J.

Some judges doubt the relevance of guidelines at all. For example, Dixon J. commented in *O'Connor v. S.P. Bray Ltd* (1937) 56 C.L.R. 464, 478:

> An intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule or law or the application of any definite rule of construction.

[22] See e.g. *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832; *Coote v. Stone* [1971] 1 All E.R. 657; *Edwards v. Blue Mountains City Council* (1961) 78 W.N. (N.S.W.) 864.

[23] See e.g. *Coote v. Stone* [1971] 1 All E.R. 657; cf. *Meade v. London Borough of Haringey* [1979] 2 All E.R. 1016. Note, however, that this guideline appears to be weak. Numerous exceptions exist in the area of industrial safety legislation.

(3) The damage suffered must be of the kind intended to be prevented by the statute.[24]

The basic duties imposed on both parties under ss. 97 and 102 are imposed in mandatory terms. In addition, requirements (1) and (3) above would appear to be satisfied. However, the application of this tort would appear to be precluded by virtue of the fact that several other remedies are provided for in the legislation. Thus, this remedy is unlikely to be available.

A final matter worthy of note is that as the legislation does not expressly repeal the existing common law remedies in the area of repairs and cleanliness, it is at least arguable that the doctrine in *Smith v. Marrable,* waste and the implied covenant to use the premises in a tenant-like manner are still applicable. Although this matter cannot be considered finally settled in the absence of judicial determination, in the opinion of the writer these remedies should be treated as having been impliedly repealed in Victoria by the Residential Tenancies Act.

2. *Excessive Rents*

The pre-1980 laws relating to the control of excessive rents are contained in Part V of the Landlord and Tenant Act 1958. This Part restricts the application of rent control provisions to prescribed premises, and provides for two separate classes of premises to fall within this category.

First, there is the residual group of premises that fall within the definition of 'prescribed premises' under s. 43. Under this section, the legislative protection and rent control provisions extend to all premises (with certain exceptions) leased between December 31 1940 and February 1 1954 which have not been re-let to the same tenant by a lease in writing for three years or over, nor have been re-let at any time to another tenant, nor have become vacant, nor have been excluded from the protection of Part V by an Order of the Governor-in-Council published in the Government *Gazette.*

Secondly, there is a group consisting of premises declared subject to Part V of the Act by s. 44(1). This section states:

> The Governor-in-Council may, by Order published in the Government Gazette, declare that the application of this Part shall extend to any particular premises specified in the Order and those premises shall thereupon become prescribed premises.

The first group is gradually decreasing in number through the passage of time as premises are vacated, re-let to a third party, or as the tenant dies. It is currently estimated by the Tenants Union of Victoria that there are between 5,000-10,000 premises remaining within this class, and most tenants of these premises are now pensioners. The second group of premises has almost disappeared as a result of the fact that no premises have been

[24] See e.g. *Gorrie v. Scott* (1874) 9 L.R. Ex. 125; *Grant v. National Coal Board* [1956] A.C. 649.

prescribed by the Governor-in-Council under the procedure established in s. 44(1) since 1974.

The policy of the Government is to phase out the existing stock of prescribed premises and to remove the privileged rules relating to rents and security of tenure which are currently enjoyed by the tenants of these premises. This policy is given effect to in Part VII of the Residential Tenancies Act 1980. Section 44(1) of the Landlord and Tenant Act 1958 is repealed by s. 153(2) of the Residential Tenancies Act 1980. In respect of the first group of premises, s. 153(1) provides that either the landlord or tenant of existing prescribed premises may apply within six months after the commencement of the new legislation to the Director of Consumer Affairs for registration of the premises in the Register of Prescribed Premises, which will be kept by the Director. If application for registration is made within the six-month period, the premises will cease to be prescribed premises one year after the commencement of the legislation. If application for registration is not made within the six-month period, the premises will cease to be prescribed premises two years after the commencement of the legislation. Under s. 157(1) of the Residential Tenancies Act 1980, on the second anniversary of the commencement of the new legislation Part V of the Landlord and Tenant Act 1958 will be repealed.

The removal from rent control of the existing prescribed premises will lead to massive rent increases if the rents of these premises are to rise to current market levels. These increases will be borne by a segment of the community which can least afford it. This problem has been recognized by the Government in the *Green Paper on Housing in Victoria* (1980). Its proposal is to initiate a five-year programme for rapidly augmenting the public housing stock to relieve pressures on the rental market. If this policy fails to alleviate the problem, the *Green Paper* proposes the introduction of a programme of temporary rental assistance, by means of a housing allowance approach, over the short term taken for the market to adjust and for the public rental stock to become more adequate. It is envisaged that the Ministry of Housing will closely monitor the effect of new legislation on protected tenancies and initiate assistance programmes wherever they are seen to be appropriate.[25]

During the two-year period prior to the abolition of the controls relating to prescribed premises, two additional changes made to the Landlord and Tenant Act 1958 by the 1980 legislation will significantly improve the position of landlords. First, s. 156 of the Residential Tenancies Act 1980 states that for the word 'income' in s. 107A of the Landlord and Tenant Act there shall be substituted the words 'income, assets and liabilities'. Section 107A, which was added by a 1971 amendment, provides that premises may be de-prescribed by an order of the Residential Tenancies

[25] See *Green Paper on Housing in Victoria*, Ministry of Housing, Victoria, 1980, 53-57.

Tribunal[26] on an application by a landlord who is of the opinion that the total earnings and income of the tenant and members of his family ordinarily residing with him is such that no hardship would be caused to a tenant if the premises ceased to be prescribed premises. The addition of the word 'assets' should have the effect of increasing the number of successful applications by landlords.

Secondly, s. 155 of the Residential Tenancies Act 1980 introduces a new s. 67A into the Landlord and Tenant Act 1958 by which on giving 30 days' notice a landlord can automatically increase the fair rent of the premises at six-monthly intervals in line with movements in the Housing Group number in the Consumer Price Index for Melbourne. Previously, any rent increases had to be argued for before the Fair Rents Board.[27]

In place of the existing system of rent control, the new Act has substituted a new system of controlling excessive rents. This system has been modelled on the Residential Tenancies Act 1978-1981 (S.A.), which in turn was based on the recommendations contained in the Poverty Enquiry report.[28] This new system abolishes the notion of prescribed premises, and enables any tenant of residential premises to complain to the Residential Tenancies Tribunal that his current rent is excessive. The new system is established in ss. 63 and 64 of the Residential Tenancies Act 1980. These sections read in part:

> 63. (1) A tenant under a tenancy agreement —
> (a) who considers that the rent payable under the tenancy agreement is excessive having regard to the fact that the landlord has reduced or withdrawn any goods, services or facilities provided with the rented premises; or
> (b) who has received notice from the landlord of an increase of the rent payable under the tenancy agreement and who considers that the increase is excessive —
>
> may in writing request the Director to investigate and report on the matter.
> (2) For the purposes of this section, rent under a tenancy agreement shall be regarded as excessive if it is significantly more than the rent payable for comparable rented premises let under a tenancy agreement by a landlord, other than a public statutory authority, in the locality of the first-mentioned rented premises and the following factors shall also be taken into account:
> (a) The cost of goods, services and facilities provided with the rented premises;
> (b) Any charges in respect of the rented premises for which the landlord is or may be liable by or under this or any other Act or the tenancy agreement;
> (c) The state of repair and general condition of the rented premises;
> (d) Any goods, services or facilities provided by the tenant under the tenancy agreement or any charges payable by the tenant under this or any other Act or the tenancy agreement;
> (e) Any work which the tenant has, with the landlord's consent, done or has agreed with the landlord to do in relation to the premises; and
> (f) Any valuation of the rented premises.
>
> 64. (1) If, after receiving a report from the Director in relation to the investigation of rent under a tenancy agreement, the tenant is of the view that the rent, or

[26] Section 154(c) of the Residential Tenancies Act 1980 transfers jurisdiction in this matter from the Fair Rents Board to the Residential Tenancies Tribunal.
[27] See Landlord and Tenant Act 1958 ss. 56(3), 57.
[28] Bradbrook, *op. cit. supra* n. 1, 80-83; Sackville, *op. cit. supra* n. 1, 87-89.

proposed rent, is excessive, he may apply to the Tribunal for an order declaring that the rent, or proposed rent, is excessive.

(2) An application under sub-section (1) shall include particulars of the Director's report.

(3) The Tribunal, upon receiving an application under sub-section (1), may, if it is of the opinion that having regard to the Director's report and to the matters mentioned in section 63(2), make an order declaring the rent or proposed rent to be excessive and determining the maximum amount of rent payable in respect of the premises.

Under s. 64(5), any order made by the Tribunal continues in effect for twelve months after the day on which the order comes into operation.

The favourable aspects of this new system of control are as follows. First, the notion of prescribed premises is avoided and the Act can be employed by all tenants, not only a selected few who happen to qualify on arbitrary grounds, such as by having occupied their premises since before 1954, as under Part V of the Landlord and Tenant Act 1958. Secondly, rent control is only extended to cover those premises where the landlord is proved to have been charging an excessive rent. Provided that a landlord is not seeking to exploit his tenant economically, he has no reason to fear the imposition of rent control under the Residential Tenancies Act. Thirdly, once a rent determination has been made under the 1980 Act, it enures for the benefit of any new tenant in the event of a change of tenant.[29] Thus, unless he intends to withdraw his premises from the rental market, there is no incentive for a landlord to harass a tenant who has obtained an order fixing the rent into voluntarily quitting the premises. Finally, the fact that the Tribunal will receive the Director's report into evidence, and presumably will adhere to the Director's findings, simplifies the task of the tenant of proving that the rent is excessive. As a consequence of this procedure there is no need for the tenant to order a valuation or to call witnesses as to the current level of market rents.[30]

There appear to be two major weaknesses with the new system. First, under s. 63(1) a tenant is not entitled to challenge the rent before the Residential Tenancies Tribunal if the rent charged at the outset of the tenancy is excessive, but only if any later increase is excessive or if the landlord withdraws any goods, services or facilities.[31] Clause 80 of the

[29] See Residential Tenancies Act 1980 s. 64(5). Cf. the wording of the Residential Tenancies Act 1978-1981 (S.A.) s. 36(4). Under Part V of the Landlord and Tenant Act 1958 (Vic.) the premises were automatically released from control when the incumbent tenant vacated the premises. This position was reached by s. 7 of the Landlord and Tenant (Amendment) Act 1971, which repealed s. 47(2)(c) of the 1958 Act.

[30] This was necessary under the system of controlling excessive rents established by the Excessive Rents Act 1962-1966 (S.A.). It was at least partially responsible for the failure of that legislation: see Bradbrook, *op. cit. supra* n. 1, 105-106; Sackville, *op. cit. supra* n. 1, 87-88.

[31] Note, however, that the exercise of the remedy in s. 64(1) is not confined to situations covered by s. 63. It is possible to read s. 64(1) together with s. 11(1)(a)(iii) to reach the conclusion that the Tribunal may determine a complaint whenever the tenant feels that the rent is excessive. Although this matter remains open to judicial interpretation, it is submitted that the argument is unlikely to be successful. Not only is this interpretation contrary to Parliament's intention but it may also have the effect of rendering s. 63 redundant.

1978 Residential Tenancies Bill would have allowed the tenant to challenge the rent as excessive in all cases. It seems that the Government accepted the argument of various landlords' pressure groups that the original cl. 80 amounted to sanctioning outright deceit.[32] As stated by the Attorney-General:

> [I]f a tenant enters into occupation of premises as a result of an agreement he cannot then turn around and repudiate that agreement or the rent he has agreed to pay. It is not reasonable that the tenant should be allowed to complain about terms to which he has clearly agreed.[33]

Unfortunately, this attitude does not take account of the continuing shortage of rental accommodation in Victoria or that a tenancy is a contract of adhesion,[34] where the notion that a prospective residential tenant can freely negotiate with a landlord over the terms of the tenancy is in reality a myth.

Even though a tenant cannot challenge the original rent as excessive before the Tribunal, s. 11, which details the functions and powers of the Director, is worded in such a way to enable the Director to investigate all allegations of excessive rent, including those relating to the rent charged at the commencement of the tenancy. Under s. 11(1)(a)(iii) the Director is empowered 'to investigate any complaint made to him by a tenant under a tenancy agreement that the rent under the tenancy agreement is excessive'. Thus, the Director is able to negotiate with a landlord who is thought to be charging an excessive rent from the commencement of the tenancy with a view to securing a reduction in rent. It is doubtful whether this power of negotiation will be effective in the absence of a power to apply to the Tribunal for a rent reduction. Under the procedure involved in declaring premises subject to rent control under s. 44(1) of the Landlord and Tenant Act 1958, the Rental Investigation Bureau regularly conducted negotiations with landlords with a view to securing rent reductions, but the published statistics of the Bureau's activities showed that its rate of success was low.[35] There is no reason to believe that the Director will achieve a better rate of success.

The second weakness relates to the factors in s. 63(2) which the Director and the Tribunal must take into account when determining whether the rent is excessive. Many of the considerations are worded vaguely and are either undefined or inadequately defined. For example, the Act requires that the rent for *comparable* rented premises and for rents in the *locality* must be considered. No definition or explanation is provided in the legis-

[32] See, for example, the comments of the Hon. J. V. C. Guest in *Victorian Parliamentary Debates* 1980, 5439.

[33] *Victorian Parliamentary Debates* 1980, 5439.

[34] See, for example, Arbittier, 'The Form 50 Lease: Judicial Treatment of an Adhesion Contract' (1963) 111 *U. Pennsylvania L. Rev.* 1197.

[35] See Bradbrook, 'An Empirical Study of the Need for Reform of the Victorian Rent Control Legislation' (1975) 2 *Monash U.L. Rev.* 82, 83.

lation as to the meaning of 'comparable'[36] and 'locality', and the meaning of these words will doubtless be a fruitful source of litigation. The word 'locality' was similarly included without definition in the Rent Act 1968 (U.K.) s. 46(2) and was the subject of much controversy.[37] The word 'facilities' in s. 63(2)(a) and (d) of the Residential Tenancies Act 1980 will also cause difficulties of interpretation. Although this word is defined in s. 2, the definition is not exhaustive and many items not listed may arguably be regarded as 'facilities'.

3. *Rent Increases*

The previous law relating to rent increases was based largely on common law contractual principles. Based on the concept of freedom of contract, the landlord was entitled to demand a rent increase without notice by an indeterminate amount at the end of a fixed term tenancy. In the case of periodic tenancies, the landlord was entitled to demand a rent increase at the end of any week on two weeks' notice if the tenancy was weekly,[38] and at the end of any month on one month's notice if the tenancy was monthly.[39]

The Poverty Enquiry recommended that legislation was needed to restrict the frequency of any rent increase and to provide for a minimum period of notice, but that no maximum amount of rent increases should be prescribed by legislation.[40] In this latter regard, it was recommended that a better approach would be to control increases indirectly by allowing the tenant to argue that the maximum rent of the premises should be fixed under the excessive rent provisions.

These recommendations have been adopted in s. 62 of the Residential Tenancies Act 1980. This section states:

> (1) A provision in a tenancy agreement under which the landlord may exercise a right to review, or to increase, the rent at intervals of less than six months is void.[41]
> (2) Where a tenancy agreement contains a provision under which a landlord may exercise a right to review, or to increase, the rent at intervals of not less than six months, a landlord shall not exercise a right to increase the rent unless he gives the tenant at least 60 days' notice in writing of the increase.

The phrase 'tenancy agreement' is defined in s. 2 as 'an agreement, whether or not in writing and whether express or implied, under which a

[36] For cases on the meaning of 'comparable' in s. 64(1)(e) of the Landlord and Tenant Act 1958 and s. 21(1)(e) of the Landlord and Tenant (Amendment) Act 1948 (N.S.W.), see *Sandhurst & Northern District Trustees Executors & Agency Co. Ltd v. Auldridge* [1952] V.L.R. 488; *De Iacovo v. Lacanale (No. 2)* [1958] V.R. 7; *Hume Investments Pty Ltd v. Zucker* [1958] V.R. 623; *Wiseman v. Vaughan* (1961) 78 W.N. (N.S.W.) 988.

[37] See *Palmer v. Peabody Trust* [1975] Q.B. 604; *Metropolitan Property Holdings Ltd v. Finegold* [1975] 1 All E.R. 389.

[38] Landlord and Tenant Act 1958, s. 32(4). Only one week's notice may be given if the tenant is in arrears of rent for at least four weeks.

[39] *Willshire v. Dalton* (1948) 65 W.N. (N.S.W.) 54; *Precious v. Reedie* [1924] 2 K.B. 149; *Amad v. Grant* (1947) 74 C.L.R. 327, 348; *Turner v. York Motors Pty Ltd* (1951) 85 C.L.R. 55, 73, 91.

[40] Bradbrook, *op. cit. supra* n. 1, 47; Sackville, *op. cit. supra* n. 1, 85-86.

[41] Clause 74(1) of the 1978 Bill proposed that not more than one rent increase should be permitted each twelve months.

person lets premises as a residence'. This definition is wide enough to encompass all types of agreements, whether legal or equitable, oral or written, or fixed term or periodic in nature. It also includes overholding tenancies as these are based on the implied intention of the parties, and can thus be said to amount to an agreement.[42]

Section 62 is significant in that it applies similar rules to all categories of tenancies, regardless of whether they are fixed term or periodic tenancies. In this respect, s. 62 is consistent with ss. 114-123, which stipulate the valid grounds for terminating tenancies and which also apply similar rules to all categories of tenancies. The effect of these provisions is that although the 1980 Act does not abolish the historical distinction between fixed term and periodic tenancies, and between the various categories of periodic tenancies, much of the significance of the former distinction has disappeared. There are only two practical effects of the distinction between fixed-term and periodic tenancies under the new legislation. First, neither party can terminate a fixed term agreement other than for a breach of agreement until the end of the term.[43] In the case of periodic tenancies, the tenant can give 28 days' notice[44] and the landlord can give six months' notice[45] at any time during the tenancy. Secondly, in the case of fixed term tenancies rent increases can only be made under s. 62 if the agreement contains a right to review the rent. Based on the wording of the section, no increase can be made in the absence of a right to review. On the other hand, periodic tenancies can be subject to rent increases at any time provided that the requirements of s. 62 are satisfied.

Unlike the new laws on repairs and excessive rents, the new legislation is clear and well-drafted. No amendments to s. 62 should be necessary.

4. *Security Deposits*

No common law rules existed on security deposits because deposits were not commonly demanded by landlords until the 1960s. In addition, there was no statutory regulation of the taking of deposits. Thus, prior to the new legislation there was no maximum limit imposed on the amount of deposit which could lawfully be demanded, there were no rules as to the entitlement of either party to interest, and no rules as to the use of the money during the tenancy. Although the landlord was obliged to return the deposit at the end of the tenancy, the expense and time involved for the tenant in pursuing his claim before the magistrates' court was out of proportion to the amount of money in dispute. In many instances tenants failed to pursue their lawful claims, and allegations abounded that some

[42] See *Wedd v. Porter* [1916] 2 K.B. 91; *Oakley v. Monck* (1866) L.R. 1 Exch. 159, 167.
[43] Residential Tenancies Act 1980, ss. 115(2)(b), 123(2)(b).
[44] *Ibid.* s. 115(1).
[45] *Ibid.* s. 123(1).

unscrupulous landlords withheld security deposits for invalid or insignificant reasons knowing that the tenant would be unlikely to take his claim to court.[46]

The aim of the new legislation is to establish a system of control over the important issues of security deposits causing concern, while at the same time endeavouring to minimize the occurrence of disputes in the future.

The most far-reaching and controversial aspect of the new legislation on security deposits is the right of election given to tenants to choose between the payment of a security deposit and the payment of premiums in respect of a contract of insurance relating to the performance of the tenant's obligations under the tenancy agreement. This reform emanates from a recommendation of the Community Committee on Tenancy Law Reform in 1978.[47] The Committee proposed that security deposits should be abolished and replaced by a scheme of State controlled insurance of premises against damage and cleaning costs. It was envisaged that the scheme would be administered and underwritten by the State Government Insurance Office. Premiums would be fixed by the S.G.I.O. according to the annual rental and where claims were made by landlords, premises would be inspected, if necessary, and claims assessed by S.G.I.O. assessors.

The insurance option was not included in the original 1978 draft of the Bill and was only added in the final 1980 draft after strong representations were made by tenants' pressure groups. The right of election is contained in s. 70, which states:

> (1) Subject to sub-section (2) and section 71, a person shall not, in respect of a tenancy agreement under which the amount of rent payable in respect of one week is not more than $100 or, where a greater amount is prescribed for the purposes of this section, that greater amount, demand or accept —
>
> (a) a security deposit the total amount of which exceeds —
>
> (i) unless an order is in force in respect of the premises under section 71, the amount of rent payable under the tenancy agreement in respect of one month; or
>
> (ii) where an order is in force in respect of the premises under section 71, the maximum amount of the security deposit determined under that order; or
>
> (b) the payment of amounts in respect of a contract or contracts of insurance relating to the performance of the tenant's obligations in respect of the tenancy agreement where the amount or total amounts of the sum or sums assured under the contract or contracts exceeds the maximum amount that may be demanded or received as a security deposit in respect of the tenancy agreement —
>
> and shall not demand or accept both such a security deposit and payment of such amounts in respect of a contract of insurance.
>
> Penalty: $500.
>
> (2) Where, in respect of a tenancy agreement, the landlord demands a security deposit in compliance with sub-section (1), the tenant is entitled to elect to pay, in lieu of the security deposit, an amount or amounts in respect of a contract of insurance relating to the performance of the tenant's obligations in respect of the tenancy agreement, being a contract under which the amount of the sum assured is the amount of the security deposit demanded by the landlord.

[46] See Bradbrook, *op. cit. supra* n. 1, ch. 7.
[47] Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 48-51.

(3) Where the tenant under a tenancy agreement makes an election under sub-section (2), the landlord may demand or accept amounts in compliance with paragraph (b) of sub-section (1) and shall not demand or receive a security deposit in respect of the tenancy agreement.
Penalty: $500.
(4) A landlord shall not refuse to enter into a tenancy agreement by reason that the tenant makes an election under sub-section (2).
(5) Sub-section (1) does not apply in respect of a tenancy agreement relating to premises that, immediately before the agreement was entered into, were the landlord's principal place of residence, being a tenancy agreement that states that fact and that the landlord intends to resume occupancy of the premises upon termination of the tenancy agreement.

It is apparent that many of the recommendations of the Community Committee were not put into effect. Thus, security deposits have not been abolished, and there is no involvement in the legislation by the S.G.I.O. More significantly, however, the existing form of the legislation is loosely worded and ill-considered. First, the Act does not specifically state which party has the right to enter into the contract of insurance. Presumably (although not necessarily) this right vests in the landlord as under s. 70(3) he can demand that the premiums be paid to him. Secondly, the Act provides no details as to the acceptable terms of the policy and does not supply a list of authorized insurers. The effect of these omissions is to undermine the effectiveness of the insurance option from the tenant's standpoint. It is submitted that at the very least the legislation should extend to tenants the same safeguards given to hirers of goods under s. 20 of the Hire Purchase Act 1959.[48] Section 70 is so loosely worded that it has even been suggested that landlords could destroy the value of the insurance option by forming their own insurance companies and charging premiums equal to the amount of security deposit demanded. This practice is not prohibited by the Residential Tenancies Act, but in fact would infringe s. 21 of the Insurance Acts 1973 (Cth), which provides that only a Lloyd's underwriter or a body corporate shall carry on insurance business and that no body corporate shall carry on insurance unless it is authorized under the Act.

It is too early to determine the frequency with which the insurance option will be exercised. It is anticipated that the option will be exercised infrequently as unlike the insurance premiums the security deposit is always refundable, provided that the premises have not been damaged. The

[48] Section 20 states in part:
(2) An owner shall not require a hirer to insure any such risk with any particular insurer.
(3) An owner shall not refuse to enter into a hire-purchase agreement with a person who effects insurance of the goods for the period of the agreement against such risks and subject to such terms conditions and exceptions as are required by the owner in the names of the owner and the hirer with an authorized insurer if the owner has no other grounds upon which the owner could reasonably refuse to enter into the agreement.
(4) An owner shall not require a hirer to obtain insurance against risks or subject to terms conditions and exceptions which the owner does not require if he arranges the insurance.

Government also has a vested interest in promoting the payment of security deposits as the operation of the Act will be largely funded from interest paid on the investment of the money held on deposit.[49]

The new legislation regulates for the first time in Victoria the maximum amount of the deposit. Earlier evidence adduced by the Poverty Enquiry showed that not only the incidence of landlords demanding deposits had increased, but also the amounts which were being demanded. The result of this development was that low-income tenants were being progressively excluded financially from occupancy.[50] In s. 70(1), cited above, the legislature has imposed a maximum limit of one month's rent. This limit is subject to a number of exceptions. First, it is inapplicable in cases where the tenant elects to pay the premiums on an insurance policy. Secondly, there is an exception where the rent payable exceeds $100 per week.[51] The philosophy behind this limitation appears to be that the security deposit legislation is primarily designed to benefit low-income tenants. Thus, the prevalent attitude of the legislature was apparently that those tenants who can afford to pay $100 per week rent are in a position to negotiate freely the amount of the deposit. It was also considered that premises where the rent exceeds $100 per week may contain valuable paintings or antiques, which may justify a higher deposit. While these arguments are tenable, it is submitted that this exception should be removed from the legislation. The Residential Tenancies Act was designed as a comprehensive code of the rights and duties of all landlords and tenants. Other rights contained in the legislation are conferred on all tenants, and there is no logical reason for limiting this particular right to low-income tenants. The argument relating to valuable possessions is also unconvincing as it is always open to any landlord to apply to the Tribunal for permission to charge an increase in the deposit. This is in fact the third exception. Section 71 states:

> (1) A landlord under a tenancy agreement or proposed tenancy agreement who wishes to demand or accept a security deposit the amount of which exceeds the amount that under section 70 he is permitted to demand or accept —
>
> (a) may request the Director to determine the maximum amount of the security deposit; or
>
> (b) may make application to the Tribunal for an order determining the maximum amount of the security deposit —
>
> that he is permitted to demand or accept in respect of the tenancy agreement or proposed tenancy agreement.
>
> (2) Subject to sub-section (3), the Director, on receiving a request under sub-section (1) and after consideration of —
>
> (a) the character, condition or quality of any goods, furniture or fittings let or provided under the tenancy agreement and
>
> (b) the character and condition of the rented premises;
>
> may, if he is of the opinion that the maximum amount of the security deposit ought reasonably to be increased, determine the maximum amount of the security

[49] Residential Tenancies Act 1980, s. 68(3).

[50] Bradbrook, *op. cit. supra* n. 1, 41-43; Sackville, *op. cit. supra* n. 1, 68-69.

[51] Cf. Residential Tenancies Act 1978-1981 (S.A.) s. 32, which does not contain a similar exception. This exception was not recommended by either the Poverty Enquiry or the Community Committee on Tenancy Law Reform.

deposit that may be demanded or accepted in respect of the tenancy agreement or proposed tenancy agreement.
(3) The Director may not make a determination under sub-section (2) in relation to a security deposit in respect of a tenancy agreement if the Tribunal has made an order under this section in respect of that tenancy agreement or proposed tenancy agreement.
(4) The Tribunal, on receiving an application under sub-section (1) in relation to a security deposit in respect of a tenancy agreement or proposed tenancy agreement, whether or not a request has been made to, or a determination made by, the Director, may, after consideration of —
(a) the character, condition or quality of any goods, furniture or fittings let or provided under the tenancy agreement; and
(b) the character and condition of the rented premises — if it is of the opinion that the maximum amount of the security deposit ought reasonably to be increased, make an order determining the maximum amount of the security deposit that may be demanded or accepted in respect of that tenancy agreement or proposed tenancy agreement.

Strangely, the effect of s. 71 is that the landlord can make a request to either the Director or the Tribunal. Both have co-equal original jurisdiction on this matter, although the Tribunal can act on appeal from a negative ruling made by the Director. Fourthly, under s. 70(5) the maximum level of security deposits does not apply to premises which constitute the landlord's principal place of residence.

The effectiveness of the legislation imposing a maximum limit on the amount of the security deposit is safeguarded by two other provisions. Section 72 provides that no more than one security deposit is payable in respect of any continuous occupation by one tenant. Section 74 prohibits the demanding of a guarantee for the performance of any of the tenant's obligations in respect of the tenancy agreement. A penalty of $500 is stipulated.

The legislation has also sought to clarify the status of the deposit and the use to which it may lawfully be put during the tenancy. Prior to the new Act, the landlord could legally put the money into his general funds or invest it for a profit. The status of the deposit was stated by Barwick C.J. in *N.L.S. Pty Ltd v. Hughes*[52] to be 'an earnest of performance which, on default, may be retained and credited against the damage suffered'. Section 66 establishes the landlord as a trustee of the deposit. The section states:

A landlord under a tenancy agreement who receives a security deposit in respect of the tenancy agreement holds the security deposit upon trust for the tenant subject to and in accordance with this Act.

Henceforth, pursuant to s. 67(1) the landlord must pay the security deposit into an approved trust account maintained by him at an approved institution before the end of the third business day after the day on which the security deposit is received. This money must remain in the trust account until it is paid out in accordance with the Act.

The greatest number of disputes on security deposits has arisen in the past in relation to the retention by the landlord of all or part of the deposit. Many allegations have been made that some landlords regularly

[52] (1966) 120 C.L.R. 583, 589.

withhold security deposits either on no ground at all or on distorted or manufactured grounds. Certainly the incidence of the withholding of deposits has been high. A study undertaken for the Poverty Enquiry of a sample of 85 private tenants in Fitzroy and Collingwood who had paid a deposit under their previous tenancy found that 33 (38.8 per cent) suffered some deduction, and the alarmingly high number of 21 (24.7 per cent) received nothing back at all from the landlord. The *Legal Needs of the Poor* study found that in 85 cases where a deposit had been paid, 16 incurred a partial or total deduction. At least 12 of these tenants considered the outcome unfair.[53] According to the Community Committee on Tenancy Law Reform, the return of security deposits is 'widely and rightly regarded as a major area of exploitation and discontent in landlord-tenant relations'. The Committee added that there are few tenants who have never experienced a problem with bonds.[54]

The legislature has endeavoured to prevent this alleged exploitation by enacting s. 77. This section provides that, subject to three exceptions, the landlord must repay the deposit to the tenant within fourteen days after the tenant abandons or delivers up vacant possession of the premises. The first exception is where the tenant agrees not earlier than 30 days before the termination date of the tenancy that the landlord is entitled to the whole or any part of the security deposit (s. 77(1)(b)). The second exception applies where the tenant abandons or delivers up vacant possession of the premises leaving unpaid rent. In this case, the landlord is entitled to withhold the deposit to the extent of the arrears of rent (s. 77(1)(c)). The third exception is that within fourteen days after the tenant abandons or delivers up vacant possession of the premises the landlord may apply to the Residential Tenancies Tribunal for an order entitling him to retain the deposit on any of the following grounds, listed in s. 77(3)(a):

(i) damage caused to the rented premises by the tenant or by a person coming on to the rented premises with the tenant's consent;
(ii) the failure by the tenant to keep the rented premises in a reasonably clean condition;
(iii) the abandonment of the rented premises by the tenant;
(iv) the liability of the landlord for charges payable by the tenant that are or may be recoverable by the person to whom they are owed from the landlord;
(v) any act or omission of the tenant or a person coming on to the rented premises with the tenant's consent that occasioned the loss of goods belonging to the landlord.

One useful feature of s. 77(3) is that the onus of proof is on the landlord to prove his entitlement to the deposit. Under common law, if the landlord refused to return the deposit, an action for the return of the money had to be brought by the tenant. This effectively placed the onus of proof on the tenant. On the other hand, it is submitted that the section is deficient

[53] M. Cass and R. Sackville, *Legal Needs of the Poor*, A.G.P.S., Canberra, 1975, 16-17.
[54] Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 46.

in that it does not include unpaid rent as one of the grounds in s. 77(3) for which the landlord must seek the approval of the Tribunal before he is entitled to withhold the deposit. There would seem to be no logical reason for differentiating between unpaid rent, where the landlord is entitled to withhold the deposit without the sanction of the Tribunal, and cases of damage, uncleanliness and other grounds, where the Tribunal's sanction is required. The potential for abuse of the system would seem to be equal in all cases.

An interesting feature of the new legislation is that it establishes a new method of minimizing the number of disputes which arise between landlords and tenants over the return of the deposit. The new method also simplifies the resolution of any dispute which does arise. The legislature has prescribed a form called a 'Condition Report', which both parties must complete at the commencement of a tenancy. Section 73 states:

> (1) Where the landlord under a tenancy agreement requires the tenant to pay a security deposit the landlord shall, not later than the next business day after the day on which it is agreed that the tenant is to enter into occupation of the rented premises, give to the tenant two copies of a report in the prescribed form, signed by or on behalf of the landlord, as to the state of repair and general condition of the rented premises as at that day.
> Penalty: $200.
> (2) Where the tenant receives copies of a report under sub-section (1), he shall return one of the copies to the landlord signed by or on behalf of the tenant or with an endorsement so signed to the effect that the tenant agrees, or disagrees, with the report as a whole or with specified parts of the report.
> Penalty: $200.
> (3) Where a copy of a report under sub-section (1) is returned to the landlord signed, or with an endorsement signed, under sub-section (2), the report is a report to which section 89 applies.

Section 89 reads:

> Where a report as to the state of repair and general condition of rented premises under a tenancy agreement as at a particular time has been prepared in writing or not for the purposes of section 73 and —
> (a) is signed by or on behalf of the landlord; and
> (b) is signed by or on behalf of the tenant, or includes an endorsement so signed to the effect that the tenant agrees with the report as a whole, or with specified parts of the report —
> a statement in the report (other than a statement with which, under the endorsement, the tenant does not agree) as to the state of repair or general condition of the premises or any part of the premises is conclusive evidence for the purposes of this Act of that state of repair or general condition, subject only to any state of repair or general condition that could not reasonably have been discovered upon a reasonable inspection of the premises.

The effect of ss. 73 and 89 is that in any later dispute between the parties concerning the return of the deposit, where the landlord argues under s. 77 that he is entitled to retain all or part of the deposit because of damage caused by the tenant, the condition report will constitute conclusive evidence as to the state of repair at the commencement of the tenancy if the parties agreed in the condition report as to the condition. This provision can be regarded as an important safeguard for both parties. In addition, it simplifies the problem of proof for the landlord and reduces the length of the hearing before the Tribunal. If the parties are unable to agree at the commencement

of the tenancy as to the condition of the premises then the condition report is of little or no evidentiary value in relation to a later dispute. In this case it may be thought to be an unnecessary inconvenience. However, it may be anticipated that the incidence of disputes arising at the commencement of the tenancy will be comparatively rare. This has been the experience in the Province of Manitoba, which was the first common law jurisdiction to establish by legislation in 1970 the requirement of a condition report.[55]

The final issue relates to the deposit of the security deposit. As already stated, s. 67 requires the landlord to pay the deposit into an approved trust account maintained by him at an approved institution. This procedure can be contrasted with that established recently in New South Wales and South Australia. In New South Wales, where the Landlord and Tenant (Rental Bonds) Act 1977 established specific reforms in this area of law, the deposit must be deposited with the Rental Bond Board. In South Australia, which in other respects has similar legislation on deposits to that in Victoria, the Residential Tenancies Act 1978-1981, s. 32(2), requires the tenant to deposit the money with the Tribunal itself. The advantage of the Victorian procedure is that it avoids the need for the State Government to appoint extra administrative staff to handle the deposit and withdrawal of the deposits. On the other hand, for a number of reasons the Victorian procedure is less attractive. First, the salaries of the extra staff required would form only a small percentage of the total interest earned from an investment of the deposits.[56] Secondly, extra funds could be generated if the deposits were paid to a government agency. This would result from a co-ordinated investment programme which could be undertaken by an agency. In addition, a higher rate of interest should be earned if the deposits are invested in bulk. Thirdly, under the New South Wales and South Australian procedures the tenant would know the whereabouts of his deposit and would be protected against any possible misappropriation by the landlord of the deposit. In the latter case, a tenant could lose the deposit if the landlord became judgment proof through insolvency.

5. *The tenant's right to assign or sublet*

Under common law, in the absence of a special agreement to the contrary a tenant had the right to dispose of his interest to a third party, either by assigning his term or by creating a sublease without obtaining the

[55] A compulsory 'Condition Report' was first established in Manitoba in 1972. It was prescribed by the Manitoban Lieutenant Governor in Council by regulation, pursuant to the Landlord and Tenant (Amendment) Act, Stats. Man. 1970, c. 106, s. 118(1).

[56] An unreported study undertaken in June 1978 by the Centre for Urban Research and Action for the Community Committee on Tenancy Law Reform found that at that time $42 million was held by Victorian landlords and estate agents by way of security deposit. Information supplied by Mr M. Salvaris, Victorian Council of Social Service.

consent of the landlord.[57] However, this common law right was seldom exercisable by tenants as special agreements to the contrary were invariably included in covenants in the printed forms of residential lease originally in use. In this situation, the landlord had an absolute right to refuse consent and could refuse consent on arbitrary grounds. A further relevant common law rule was that a valid proprietary interest passed to the assignee or subtenant even if the assignment or sublease was expressly prohibited by the terms of the tenancy agreement, although the landlord would be entitled to sue the original tenant for damages for breach of covenant and would be entitled to exercise a right of forfeiture if such a right were included within the agreement.[58]

A safeguard against landlords unreasonably withholding their consent was provided for tenants under s. 144(1) of the Property Law Act 1958. This sub-section reads:

> In all leases containing a covenant, condition or agreement against assigning, underletting or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such consent shall not be unreasonably withheld and that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; . . .

Again, residential tenants seldom received any benefit from this section as all printed lease forms circulating in Victoria prior to the introduction of the new legislation expressly excluded the operation of the section.

The previous law was considered by the Poverty Enquiry[59] and the Community Committee on Tenancy Law Reform to be biased in favour of landlords. As stated by the Community Committee:

> The argument advanced by landlords is that the agreement they entered into was with a particular tenant and they have no opportunity to ensure that the new tenant will be a good tenant. Yet the same argument could be advanced on behalf of tenants: a tenant may have entered into a twelve month lease confident that the owner is a 'good landlord' who will treat him fairly and look after the premises, to find halfway through the tenancy that the owner has sold to another person quite unknown to the tenant and whose attitude and treatment of tenants are entirely different.[60]

The Residential Tenancies Act 1980 declares that s. 144 of the Property Law Act does not apply to residential tenancy agreements,[61] and has replaced the common law rules by a new s. 108. This section reads in part:

> (1) A tenant under a tenancy agreement shall not assign or sub-let the whole or any part of the rented premises without the consent to the landlord.
> (2) A landlord under a tenancy agreement shall not unreasonably withhold his consent to an assignment or sub-letting of the whole or any part of the rented premises.

[57] *Doe d. Mitchinson v. Carter* (1798) 8 Term Rep. 57, 60; 101 E.R. 1264, 1266; *Church v. Brown* (1808) 15 Ves. Jun. 258, 264; 33 E.R. 752, 754.
[58] See *Massart v. Blight* (1951) 82 C.L.R. 423.
[59] Bradbrook, *op. cit. supra* n. 1, 17-19; Sackville, *op. cit. supra* n. 1, 77-78.
[60] Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 58.
[61] Residential Tenancies Act 1980, s. 9(2). Note that s. 144(1) still applies to rented premises outside the scope of the Residential Tenancies Act.

> (3) Where a landlord under a tenancy agreement withholds his consent to an assignment or sub-letting of the whole or any part of rented premises and the tenant believes the consent is unreasonably withheld, the tenant may apply to the Tribunal for a determination that the consent of the landlord is not required.
> (4) Where, on an application under sub-section (3), the Tribunal having heard the landlord and the tenant, determines that the consent of the landlord to an assignment or sub-letting of the whole or any part of rented premises is not required, the assignment or sub-letting may be effected without that consent.
> (5) An assignment or sub-letting of the whole or any part of rented premises made without the consent of the landlord is void unless, on an application under sub-section (3), the Tribunal has determined that the consent is not required.

Section 108 imposes two major changes in the law. First, under sub-section (5) any assignment or sub-lease without the consent of the landlord is void, rather than valid but subject to forfeiture as under common law. Secondly, the clause 'unless the lease contains an express provision to the contrary' in s. 144(1) of the Property Law Act has been omitted in the new legislation. Henceforth, every tenancy agreement is subject to a term that the consent of the landlord shall not be unreasonably withheld. Thus, there is no further scope for the principle of freedom of contract in this matter.

On the whole, the section achieves an even-handed approach between the parties. The legislation improves the position of the landlord in that he will no longer have to exercise a right of forfeiture if the tenant assigns or sub-lets without consent but can treat the purported assignment or sub-lease as void. The legislation also improves the position of the tenant in that the landlord can no longer arbitrarily refuse his consent, and any refusal can be challenged before the Tribunal.

It is submitted that the only deficiency in s. 108 relates to the onus of proof. Under s. 108, the onus of proof that the landlord's refusal to consent is unreasonable rests on the tenant. The first draft Bill in 1978 reversed this onus of proof. Clause 164 of the 1978 Bill, the forerunner to s. 108, contained the following additional sub-clauses:

> (5) Where a landlord withholds his consent to a proposed assignment or sub-letting, he shall be presumed to have unreasonably withheld his consent unless he proves otherwise.
> (6) Where in proceedings under this Act a person alleges that an assignment or sub-letting was without the landlord's consent, the onus of proving that allegation shall lie upon him.

It is suggested that these sub-clauses should be reinstated as additional sub-sections to s. 108 in a later amending Act. The addition of these sub-clauses would more accurately reflect the intention behind s. 108(1) and (2) that a tenant should have the basic right to dispose of his interest to a third party provided that the legitimate interests of the landlord are protected. In addition, on the question of proof it would be simpler for the landlord than the tenant to discharge the necessary onus in light of the fact that the landlord's reasons for objecting to the proposed assignment or sub-lease may be personal in nature.

6. *Quiet enjoyment*

The common law covenant of quiet enjoyment will be implied in all leases by reason of the existence of the landlord-tenant relationship.[62] The implied covenant may be excluded by an express covenant of quiet enjoyment, but only if the two covenants are *in pari materia*.[63] The basis of the covenant was explained by Pearson, L.J. in *Kenny v. Preen*:

> [Its] basis . . . is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. I think the word 'enjoy' used in this connexion is a translation of the Latin word 'fruor' and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it.[64]

This covenant was the traditional common law remedy available to tenants who were subjected to harassment by their landlords. A breach of the covenant would lead to liability for damages[65] and an injunction could be issued restraining further breaches.

The need to provide a tenant with a remedy in cases of harassment has not diminished with the passage of time. The harassment may take several forms. It may consist of threats or actual cases of physical violence, threats of physical eviction, knocking on the front door repeatedly to intimidate the tenant, or withdrawing services essential for the comfort and normal functioning of the tenant's household, such as the electricity, gas and hot water supplies. The *Legal Needs of the Poor* survey, conducted on behalf of the Poverty Enquiry in 1974, reported many cases of alleged harassment by landlords.[66] The Australian Council of Social Service has stated that harassment of protected tenants in New South Wales is quite common.[67] The Tenants' Advice Service in Victoria also has many cases on file where landlords have allegedly engaged in this form of conduct.

Unfortunately, the scope of the covenant was narrowly limited at common law with the result that many forms of harassment are not covered by the remedy. First, it has been consistently held that a landlord is not liable for interference with the tenant's possession caused by the exercise

[62] *Budd-Scott v. Daniell* [1902] 2 K.B. 351; *Lavender v. Betts* [1942] 2 All E.R. 72. Griffith C.J. stated in *Moore and Scroope v. The State of Western Australia* (1907) 5 C.L.R. 326, 333, that the word 'demise' imports a covenant for quiet enjoyment. Note that the covenant will not be implied where there is only an agreement for a lease: *Pinn v. Barbour* (1870) 1 V.R. (L.) 136.

[63] *Miller v. Emcer Products Ltd* [1956] Ch. 304, 322.

[64] [1963] 1 Q.B. 499, 511.

[65] Punitive or exemplary damages will not be rewarded for a breach of this covenant as the claim is contractual rather than tortious: *Kenny v. Preen* [1963] 1 Q.B. 499. See also *Liddle v. Cunningham* (1874) 5 A.J.R. 120. However, if the landlord's acts constitute a separate tort then punitive or exemplary damages may be awarded: see *Drane v. Evangelou* [1978] 1 W.L.R. 455; *Lavender v. Betts* [1942] 2 All E.R. 72. *Conodate Investments v. Bentley Quarry Engineering Co.* (1970) 216 E.G. 902 held that the quantum of the loss is calculated at the date when the tenant's possession is first threatened.

[66] Cass and Sackville, *op. cit. supra* n. 48, ch. 3.

[67] A.C.O.S.S., *Study on Landlord-Tenant Relations*, 1974, unpublished, at p. 16.

of a 'title paramount'.[68] Secondly, the landlord is not liable unless he personally committed or authorized other persons claiming title through him to commit the harassing act. Thus, for example, the covenant will not assist a tenant who has had his enjoyment of the premises interfered with by other unruly tenants of the same landlord unless the landlord authorized the other tenants to commit the acts of disturbance. This proposition was established by the English Court of Appeal in *Malzy v. Eichholz*,[69] where Lord Cozens-Hardy M.R. stated:

> I apprehend there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment . . . merely because he knows of what is being done and does not take any steps to prevent what is being done. There must be something much more than that. There must be something which can fairly amount to his doing the act complained of or allowing the act complained of, either by actual participation by himself or his agents, or by what Lord Collins called active participation in that which was complained of.[70]

Finally, it is at least arguable that there can be no breach of the covenant unless the act complained of amounts to a 'direct, physical interference' with the premises. Thus, for example, in *Browne v. Flower*[71] a tenant's action for damages for breach of the covenant failed where the landlord erected an external staircase which passed the tenant's bedroom windows and so destroyed his privacy. The reason for this decision was that the staircase did not physically interfere with the demised premises. However, the most recent authority on this point, *Kenny v. Preen*[72] suggests that this final restriction on the scope of the covenant may no longer apply. In this case, the tenant's complaint related to a series of letters, in which the landlord threatened to evict the tenant physically and to throw her property into the street, and visits by the landlord to the premises, when he regularly shouted threats to her and knocked on the door demanding that she quit the flat. The Court of Appeal unanimously held on these facts that the covenant had been breached. All three judges held that the necessary physical element was present. This formed the complete *ratio* of the judgment of Donovan L.J., but only a part of the *ratio* of the judgments of Pearson and Ormerod L.JJ. The latter judges held that there would have been a breach of the covenant even in the absence of any physical element. Pearson L.J. stated:

> [T]here was a deliberate and persistent attempt by the landlord to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, and tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference

[68] *Jones v. Lavington* [1903] 1 K.B. 253; *Markham v. Paget* [1908] 1 Ch. 697.
[69] [1916] 2 K.B. 308.
[70] *Ibid.* 315.
[71] [1911] 1 Ch. 219. Cf. *Owen v. Gadd* [1956] 2 Q.B. 99; *Chapman v. Honig* [1963] 2 Q.B. 502.
[72] [1963] 1 Q.B. 499.

> with the tenant's possession and enjoyment. No case of this kind has ever been considered by the courts before, and I do not think the dicta in the previous cases should be read as excluding a case of this kind where a landlord seeks, by a course of intimidation, to 'annul his own deed', to contradict his own demise, by ousting the tenant from the possession which the landlord has conferred upon her.[73]

It remains to be seen whether the Australian courts will adopt this more enlightened reasoning of the English Court of Appeal.

Regardless of whether *Kenny v. Preen* represents good law, the common law covenant for quiet enjoyment is clearly an inadequate protection for tenants against acts of harassment. For this reason, it was generally assumed that the new legislation would provide more adequate safeguards. Sadly, it is in this area that the Residential Tenancies Act is most deficient. Clause 129 of the first draft of the Bill in 1978 would have abolished the probable requirements that the interference with the premises be direct and physical and that the landlord is only liable if he personally commits or authorizes other persons claiming title through him to commit the harassing act. Only the exception relating to the exercise of a title paramount would have remained. A penalty of $1,000 for a breach of the covenant was proposed. In addition to being liable under the proposed extended statutory covenant of quiet enjoyment, the landlord would also be liable under cl. 129(2) if he did not 'take all reasonable action to ensure that there is no interference by him with the tenant's peace and privacy in the use of the rented premises'.

The landlords' pressure groups achieved a great success in securing the removal of the proposed covenant relating to peace and privacy and all of the proposed statutory changes to the common law covenant of quiet enjoyment. Section 92 reads:

> A landlord under a tenancy agreement shall take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.

Thus, at best, the Act merely restates the position at common law and gives no extra protection to tenants. It does not even go as far as other existing Victorian landlord-tenant legislation, as s. 104(1) of the Landlord and Tenant Act 1958, which applies to premises prescribed under Part V of that Act, gives significantly increased rights in this area to tenants.[74] It may even be argued that the new statutory covenant is weaker than the common law covenant. It is at least arguable that where it operated, the

[73] *Ibid.* 513.

[74] Section 104(1) reads:

> A person shall not, without the consent of the lessee of prescribed premises, or without reasonable cause (proof whereof shall lie upon the defendant) do or cause to be done any act, or omit or cause to be omitted any act whereby the ordinary use of enjoyment by the lessee of the premises or of any goods leased forthwith, or of any conveniences usually available to the lessee, or of any services supplied to or provided in connection with the premises is interfered with or restricted.

A penalty of $1,000 is provided (s. 117). Similar legislation exists in New South Wales: see Landlord and Tenant (Amendment) Act 1948 (N.S.W.), ss. 81(1), 95(3).

common law covenant imposed an absolute liability on the landlord, whereas the new statutory requirement merely requires the landlord to 'take all reasonable steps'.

It is considered unfortunate that the tenants' pressure groups directed their major lobbying efforts at other aspects of the changes to the 1978 Bill and largely overlooked this particular problem. Further change is clearly needed to achieve a fair balance between the rights and duties of the parties. It is submitted that s. 47 of the Residential Tenancies Act 1978-1981 (S.A.) should be copied in the Victorian legislation. This section reads:

> (1) It shall be a term of every residential tenancy agreement —
> (a) that the tenant shall have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title to that of the landlord;
> (b) that the landlord shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises;
> and
> (c) that the landlord shall take all reasonable steps to enforce the obligation of any other tenant of the landlord in occupation of adjacent premises not to cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.
> (2) A landlord who breaches the term prescribed by paragraph (b) of subsection (1) of this section in circumstances that amount to harassment of the tenant shall, in addition to any civil liability that he might incur by so doing, be guilty of an offence and liable to a penalty not exceeding one thousand dollars.
> (3) In this section 'premises' includes everything provided with the premises (whether under the residential tenancy agreement or not) for use by the tenant.

This form of legislation would abolish all the existing limitations on the quiet enjoyment remedy, including the limitation respecting persons claiming through title paramount, and would extend the remedy to all cases of harassment. Such a reform would not adversely affect the interests of a responsible landlord.

7. *Statutory Standard Form of Tenancy Agreement*

The fundamental principle underlying the attitude of the common law towards tenancy agreements is freedom of contract.[75] This principle assumes that both parties are free to negotiate suitable terms and embody those terms in a contract of lease. Implicit in this principle is the proposition that the landlord and tenant have equal bargaining strength, and that the tenant, if he is not satisfied with the terms proposed by the landlord, can effectively bring about a modification of these terms.

Unfortunately, this principle is not based on reality in the residential tenancy context. In practice, the ability of the tenant to negotiate a fair lease has in the past been compromised by the almost universal standard forms of tenancy agreement used by estate agents and landlords. The bias

[75] This attitude is typified by the following dictum of Erle C.J. in the context of the law of repairs: 'Fraud apart, there is no law against letting a tumbledown house' (*Robbins v. Jones* (1863) 15 C.B. (N.S.) 221, 240; 143 E.R. 768, 776).

of these agreements in favour of landlords has been discussed elsewhere.[76] The agreements have been referred to as 'contracts of adhesion',[77] in that any attempt by the tenant to suggest a modification to the lease is likely to be met by the comment that the lease is a standard form and must be adhered to.

Several alternative methods of overcoming this problem have been considered in recent years. The Poverty Enquiry discussed five possible alternatives: first, requiring that certain onerous terms be printed in a prominent manner and that the tenant indicate in writing his acceptance of these terms; secondly, empowering the court to declare unenforceable any unconscionable or oppressive term in a tenancy agreement;[78] thirdly, requiring administrative approval of all tenancy agreements before they can be enforced between the parties; fourthly, introducing a statutory standard form of tenancy agreement to apply in all cases, but leaving the parties free to add to the compulsory terms of the agreement; and fifthly, providing by legislation that certain terms are deemed to apply to all residential tenancy agreements, notwithstanding any contrary agreement between the parties.[79] The Enquiry favoured the idea of a statutory standard form of tenancy agreement, but, in light of the fact that many tenancies are concluded without the intervention of either solicitors or agents, recommended that the obligation to use the leases containing the standard statutory terms should be imposed only when a written agreement is prepared by a solicitor or a written agreement is entered into after an agent has arranged the tenancy on behalf of the landlord, or where a printed form of agreement is used.[80] The Community Committee came down strongly in favour of a compulsory statutory standard form of tenancy agreement in all cases. The Committee stated:

> The [agreement] should set out the principal rights and duties of the landlord and the tenant under the Act and should distinguish carefully between major terms (of which breach would entitle termination of tenancy) and minor terms; and it should be printed by the Government and widely available at bookshops, stationers and post offices, either free or for a small charge.[81]

[76] See Bradbrook, *op. cit. supra* n. 1, ch. 10; Sackville, *op. cit. supra* n. 1, 89-90; Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 55-57. The standard forms of tenancy agreements used by the various State public housing authorities are similarly biased: see Bradbrook, 'The State Housing Commissions and their Tenants: The Need for Legislative Control' (1976) 10 *M.U.L.R.* 409. This problem also arises overseas: see Schoshinski, 'Public Landlords and Tenants: A Survey of the Developing Law' [1969] *Duke L.J.* 399; Bell, 'Standard Form Leases in Wisconsin' [1966] *Wisconsin L. Rev.* 583; Arbittier, 'The Form 50 Lease: Judicial Treatment of an Adhesion Contract' (1963) 111 *U. Pennsylvania L. Rev.* 1197; Mueller, 'Residential Tenants and Their Leases: An Empirical Study' (1970-71) 69 *Michigan L. Rev.* 247.

[77] See, for example, Arbittier, *op. cit. supra* n. 71.

[78] See Residential Tenancies Act 1980, s. 7(3); Residential Tenancies Act 1978-1981 (S.A.), s. 92.

[79] Bradbrook, *op. cit. supra* n. 1, 65-67; Sackville, *op. cit. supra* n. 1, 89.

[80] Sackville, *op. cit. supra* n. 1, 90. Cf. Bradbrook, *op. cit. supra* n. 1, 67.

[81] Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 56.

The Victorian Government committed itself at an early stage to the need for a standard form of agreement even before it had examined the possible alternatives. A written undertaking was given by the Premier to the Administrator of the Tenants' Union of Victoria in March 1976 that a standard form would be included in any new residential tenancies legislation. This undertaking featured prominently in the 1976 election campaign waged by Mr B. Dixon M.P. in the seat of St. Kilda, which has the highest concentration of private tenancies in the State. A standard form agreement was not included in the 1978 and 1979 drafts of the Residential Tenancies Bill, but after concerted lobbying on this issue by tenants' pressure groups provision for such an agreement was contained in the Act.

Unfortunately, the last-minute insertion of the section prescribing a standard form tenancy agreement has produced internal inconsistencies in the Act and shows all the signs of hasty draftsmanship.

Sections 85(1), 85(2) and 142 should be read together:

> 85. (1) Where a tenancy agreement is in writing, it shall be in or to the effect of the prescribed standard form.
>
> (2) A landlord or a tenant shall not prepare or authorize to be prepared, a tenancy agreement in writing in a form that is not in or to the effect of the prescribed standard form.
>
> Penalty $200.
>
> . . .
>
> 142. A term of a tenancy agreement (including a term that is not set out in the tenancy agreement but is incorporated in the tenancy agreement by another term of the agreement) that purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying —
>
> (a) the application to that agreement of all or any of the provisions of this Act; or
>
> (b) the exercise of a right conferred by such a provision — is void.

These sections seem to indicate that strong measures are intended to ensure that the prescribed standard form is strictly adhered to. Any alterations to the prescribed form will be void and will attract a $200 penalty.

However, these sections have to be read in the light of ss. 85(3) and 151(2):

> 85. (3) Where a tenancy agreement is entered into in writing in a form that is not in or to the effect of the prescribed standard form, the tenancy agreement is not, except as provided in section 142, illegal, void or unenforceable by reason only of the operation of this section.
>
> . . .
>
> 151. (2) Strict compliance with forms prescribed by the regulations is not necessary and substantial compliance is sufficient.

These latter sections seem to indicate that the prescribed standard form does not after all have to be rigidly adhered to. Substantial compliance will be sufficient and any changes made to the prescribed form will not necessarily be void or unenforceable.

These sections have been described elsewhere as being 'among the weakest statutory requirements to appear in Victorian legislation'.[82] It is difficult to predict how these sections will be reconciled in the absence of a

[82] Wallace, 'Victorian Tenancy Law Reform: Government Produces Final Draft' (1980) *5 Legal Services Bulletin* 265, 268.

judicial determination. The absurd position has now seemingly been reached that a landlord may make changes which may be legal and enforceable to the prescribed form under s. 85(3) yet incur a penalty of $200 under s. 85(2) for so doing.

The writer tentatively suggests that the sections may be reconciled as follows. In any dispute between the parties as to the enforceability of the terms of a tenancy agreement, if the agreement is not exactly in the prescribed form the terms included in the agreement must be examined individually by the Tribunal or court. The terms which purport to exclude, restrict or modify the application to the agreement of any of the rights conferred by the Act or the exercise of a right conferred by such a provision (for example, a term imposing a duty to repair on the tenant, contrary to s. 97) must be distinguished from the other, less important terms which do not have this effect (for example, a term that the tenant is not allowed to keep pets on the premises). The former terms will be void (s. 142) and the landlord will be liable to a penalty (s. 85(2)). The latter terms will valid (s. 85(3) and s. 151(2)) and no penalty will be imposed.

In drawing this distinction it seems that the Government did not appreciate the true significance of a statutory standard form of tenancy agreement. The Government seems to have assumed that the terms of any prescribed standard form would be all-embracing and would establish an inflexible rule on every aspect of the tenancy agreement. However, this was never the intention. Some degree of flexibility is always necessary. To take an obvious example, problems of high-rise dwellings tend to differ in many ways from those of houses; thus, a clause requiring the tenant to cut the grass and attend to the trees and shrubs would be completely redundant for most flat-dwellers. This need for flexibility is recognized in the present prescribed form, which includes comparatively few printed terms and leaves a considerable space for additional terms. Had the Government realized that any standard form would allow for additional clauses provided that these did not infringe the basic rights contained in the Act, it is probable that s. 85(3) would not have been included in the legislation and that s. 151(2) would have been said not to apply to this particular form. Even in the absence of these two sections the landlord's right to insert additional clauses would be preserved because any such clauses would form part of the agreement itself and thus would not infringe s. 85(2).

A more fundamental issue is whether a prescribed standard form of tenancy agreement is necessary at all. The main reasons advanced in the past in favour of such an agreement is the need to protect the tenant from entering into a harsh and oppressive agreement in which his basic rights are contracted away and the need to inform the tenant of his rights under the relevant legislation. Both these reasons are of great significance, but in the Victorian context both are satisfactorily dealt with in other respects. The role of protecting the tenant's legal rights is carried out by the Act

itself. As already noted, the various rights given to the tenant in the Act are protected by s. 142, which declares any purported exclusion, restriction or modification to be void. The role of informing the tenants is covered by s. 87, which provides for a statement of rights to be given by the landlord to the tenant. This section reads:

> (1) A landlord under a tenancy agreement shall give to the tenant not later than the day on which it is agreed that the tenant is to enter into occupation of the rented premises —
>
> (a) advice in or to the effect of the prescribed form as to the rights and obligations of landlords and tenants under tenancy agreements;
>
> (b) a statement in writing of the landlord's full name and address for service of documents; and
>
> (c) if there is an agent acting on behalf of the landlord, a statement in writing of the agent's full name and address for service of documents and the agent's telephone number (if any).
>
> (2) Without affecting the landlord's obligation under paragraph (a) of sub-section (1), the landlord may give the tenant a document to the effect of the prescribed form mentioned in that paragraph expressed in a language spoken by the tenant, other than the English language.
>
> (3) If while a tenancy agreement is in force, there is a change in any of the particulars mentioned in paragraphs (b) and (c) of sub-section (1), the landlord shall, before the expiration of fourteen days after the change, give notice in writing of the change to the tenant.
>
> Penalty: $200.

It is submitted that the statement of rights is far more effective in informing tenants of their rights than the prescribed tenancy agreement. First, the statement of rights must be given to all residential tenants, whether their agreement is written or oral, whereas the prescribed form of agreement is only used in the case of a written agreement. Secondly, the form of statement which has been prescribed under s. 87(1)(a) has been drafted in simple English and the layout has been designed to make the document intelligible to the public at large. In contrast, the standard form of tenancy agreement is in the form of a legal document.

For these reasons, the standard form of tenancy agreement would appear to be unnecessary and redundant.[83] This has been the attitude taken in South Australia, where the Residential Tenancies Act 1978-1981, which in many other respects has been closely copied by the Victorian Act, makes no mention of a prescribed agreement. It is accordingly suggested that s. 85 be abolished in its entirety.

8. *Discrimination*[84]

The Community Committee documented in its report many studies which have shown that discrimination in the provision of rental housing has

[83] This opinion is not shared by tenants' pressure groups. Their argument is that if s. 85 were repealed, the problem would still remain that unfair tenancy agreements would be offered to tenants for signature. Most disadvantaged tenants could be persuaded that they were bound by the document they signed, and would in any case often be unable to determine whether the document was at variance with the statutory statement of rights. It would be unrealistic to expect that such tenants would challenge such unfair terms before the Tribunal.

[84] For a detailed discussion of this matter, see MacCallum and Bradbrook, 'Discrimination against Families in the Provision of Rented Accommodation' (1978) 6 *Adelaide L. Rev.* 439.

frequently occurred in Victoria in the past and has become a serious housing problem. The report draws attention to five types of discrimination, which the Committee considered should be specifically prohibited in any new residential tenancies legislation. These five types are: discrimination against families with children; discrimination against people receiving pensions or other Government allowances; and discrimination on the grounds of marital status, sex and race.[85] In contrast, the Poverty Enquiry concentrated only on the matter of discrimination against families with children and its recommendation for the introduction of sanctions against discriminatory practices was confined to this context.[86]

On this matter, the Government appears to have given preference to the Poverty Enquiry report as only discrimination against children is covered in the Act. Possibly the reason for this is that three of the other forms of discrimination are covered by other legislation: discrimination on the grounds of marital status or sex in the provision of housing is prohibited under s. 27 of the Equal Opportunity Act 1977, while racial discrimination is outlawed in this context by the Racial Discrimination Act 1975 (Cth).

Section 88 of the Residential Tenancies Act 1980 states:

> (1) Subject to sub-section (2) a person shall not refuse, or instruct or permit his agent to refuse, to let premises to another person under a tenancy agreement on the ground that the other person intends to live on the premises with a child.
> Penalty: $200.
> (2) Sub-section (1) does not apply in respect of —
> (a) premises proposed to be let by a public statutory authority or a body corporate, being premises in respect of which the authority or body is receiving financial assistance for the provision of housing for lone persons or childless couples under an Act or an Act of the Parliament of the Commonwealth;
> (b) premises that are the principal place of residence of the person refusing, or instructing or permitting his agent to refuse, to let the premises; or
> (c) premises that by reason of their design or location are unsuitable or inappropriate for occupation by a child.
> (3) Where a person claims that premises are not, by reason of their design or location, unsuitable or inappropriate for occupation by a child, he may make application to the Tribunal for a determination of the matter.

This legislation is not novel, as similar legislation has existed since 1948 in New South Wales in respect of prescribed premises.[87] Similar legislation applying to all residential rented premises was also introduced in South Australia under s. 58 of the Residential Tenancies Act 1978-1981.

Unfortunately, four problems exist with the present form of the Victorian legislation. First, s. 88 imposes the onus of proving the discrimination on the tenant. Unless the landlord admits to the discrimination, it will be virtually impossible for the tenant to discharge this burden. If the landlord simply denies that the existence of children was the reason for his refusing to enter into a tenancy agreement, the tenant will be obliged to prove a particular state of mind on the part of the landlord and will only be able to rely in most cases on circumstantial evidence. In most cases, a landlord

[85] Community Committee on Tenancy Law Reform, *op. cit. supra* n. 2, 52-55.
[86] Bradbrook, *op. cit. supra* n. 1, 52-53; Sackville, *op. cit. supra* n. 1, 75-76.
[87] Landlord and Tenant (Amendment) Act 1948 (N.S.W.) s. 38.

who wishes to discriminate would be able to manufacture a false, but plausible reason which the tenant would be unable to disprove. This deficiency could be overcome by the addition of the following two subsections, which are presently enacted in the Landlord and Tenant (Amendment) Act 1948 (N.S.W.) s. 38:

> (1) 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.
> (2) In any prosecution for an offence arising under subsection four of this 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.

Secondly, the legislation does not make discriminatory advertising an offence but merely makes it an offence to 'refuse, or instruct or permit his agent to refuse, to let premises'. By advertising, the landlord may be able to discriminate without breaching the legislation. Thus, by inserting an advertisement stating 'No children allowed' families with children will be deterred from applying for a tenancy. In this case, the landlord cannot be said to have 'refused to let' the premises. This problem appears to have been overlooked by the legislature.

Thirdly, the $200 penalty prescribed in s. 88(1), which was reduced from $1,000 in c. 123(1) of the 1978 Bill, may well be too low to act as a deterrent against discrimination. Bearing in mind the difficulty of proof already adverted to, some landlords who wish to exclude children illegally from the premises may decide to disregard the legislation.

Fourthly, s. 88(3) by implication permits the landlord to decide whether or not the premises are unsuitable or inappropriate for occupation by a child and leaves it to the prospective tenant who is denied a tenancy on the ground that he has one or more children to challenge the legality of the landlord's decision. It is very doubtful whether any prospective tenant would undertake the burden of initiating a complaint, especially in light of the low penalty provided in s. 88(1). There will be a strong temptation for landlords to discriminate illegally in the reasonable expectation that a prosecution is unlikely to be instituted, and if it is instituted, is unlikely to be successful.

For these various reasons, any later amendment to the Residential Tenancies Act will need to pay careful attention to the proven deficiencies of s. 88. It would seem that this section will require substantial redrafting if it is to be effective.

C. *Conclusion*

The background to the development of the Residential Tenancies Act shows that landlord and tenant law reform is an extremely divisive issue

both socially and politically, and that consensus amongst politicians and the public at large is almost impossible to obtain. In this context, the Victorian legislature should be commended for producing such a comprehensive revision of the landlord and tenant laws.

However, on the whole the Act falls short of the claim made by the Victorian Attorney-General that it is 'highly polished' and 'carefully balanced'. The Act is 'highly polished' in the sense that numerous drafts of each section were considered and amended over a three-year period, but as this article has shown, there are a number of serious deficiencies in drafting. Certain parts of the Act can be said to be 'carefully balanced'. These occur in area where the greater attention was given by the various lobby groups and the legislature. Thus, for example, the new legislation relating to repairs and security deposits accurately reflects the legitimate interests and expectations of both landlords and tenants. However, other areas which received less detailed consideration (for example, quiet enjoyment and discrimination) have been treated quite inadequately. In these respects, little (if any) worthwhile change has been achieved. In other areas (for example, the prescribed form of tenancy agreement) the complexity of the legal issues coupled with a genuine desire on the part of the Government to do justice to both landlords and tenants has led to confused and unsatisfactory legislation.

Any new legislation of this complexity invariably calls for an amending Act to be introduced within two to three years of its introduction to improve the operation and effectiveness of the new laws. This has been the South Australian experience in the context of residential tenancies, where the Residential Tenancies Act 1978 was significantly amended in 1981.

The need for an amending Act to the Victorian Residential Tenancies Act can be confidently forecast even at this early stage in the life of the new legislation. In relation to the rights and duties of the parties, the amendment should contain the following changes, which have been argued for in this article:

Repairs

(1) The landlord should be under a duty in s. 97 to repair 'facilities' as well as the rented premises.

(2) The maximum level of re-imbursement permitted to the tenant under the urgent repairs provision in s. 99 should be increased to a suggested maximum of $500.

(3) Section 98(1) should recast to remove possible ambiguities in its interpretation.

(4) The tenant should not be permitted to apply to the Tribunal under s. 101 for an order authorizing him to pay the rent into the Rent Special Account until an order for repairs has been made under s. 100.

Excessive Rents

(5) Section 63 should be redrafted to enable the tenant to apply for an order declaring the rent excessive if the rent is excessive at the commencement of the tenancy.

(6) The ambiguities in the wording of the various factors listed in s. 63(2) for the Tribunal to take into account when considering whether the rent is excessive should be removed.

Rent Increases

No changes are necessary.

Security Deposits

(7) Tenants electing to enter into a contract of insurance instead of paying a security deposit should be given similar protection to that possessed by hirers under s. 20 of the Hire Purchase Act 1959.

(8) The exception contained in s. 70(1) giving landlords the right to charge an indeterminate sum by way of security deposit if the rent payable in respect of the premises exceeds $100 per week should be removed.

(9) Landlords should not be permitted to withhold the repayment of all or part of the security deposit under s. 77 if the tenant quits the premises leaving rent unpaid without first obtaining the consent of the Tribunal. This could be achieved by deleting s. 77(1)(c) and adding the same wording as an extra sub-clause (vi) to s. 77(3)(a).

(10) Sections 67 and 69 should be redrafted to require the landlord to pay the rent into the Tribunal rather than into an approved trust account maintained by the landlord at an approved institution.

(11) Additional subsections should be added to s. 108 to place the burden of proving that the landlord's refusal to consent was unreasonable on the landlord rather than the tenant.

Quiet Enjoyment

(12) Section 92 should be repealed and replaced by a more comprehensive section similar to s. 47 of the Residential Tenancies Act 1978-1981 (S.A.).

Statutory Standard Form of Tenancy Agreement

(13) EITHER

The prescribed form of tenancy agreement should be abolished. In this case, s. 85 should be completely repealed.

OR

The issue of whether changes may be made by the parties to the prescribed form should be clarified by repealing s. 85(3) and by rewording

s. 151(2) to ensure that it has no application to the form prescribed under s. 85(1).

Discrimination

(14) The burden of proof in s. 88(1) should be placed on the landlord rather than the tenant.

(15) The offence contained in s. 88(1) should be expanded to include the prohibition of discriminatory advertising.

(16) The penalty in s. 88(1) should be increased from $200 to a suggested maximum of $1,000.