LAW REFORM

TENANCY LAW REFORM: A RENTAL BOND BOARD FOR VICTORIA

The Residential Tenancies Act 1980 (Vic.) allows landlords to demand a bond as security against rent arrears or damage caused by the tenant. Section 67 of the Act requires a landlord to lodge any bond taken in a government-approved trust account within three days of receipt, to be held until such time as a claim is made validly upon the bond. During the tenancy, any interest earned on the bond moneys is paid into the Residential Tenancies Fund, administered by the Ministry of Consumer Affairs.

The Act contains little to safeguard tenants when it comes to payment and recovery of security deposits or bonds. A review of the existing Act together with comments on the recently introduced Rental Bond Board Bill 1991 are presented below.

Retention of the bond

Under the Residental Tenancies Act 1980 (Vic.) a landlord is only entitled to retain bond money if the tenant has agreed within the last thirty days of the tenancy or if rent has accrued due and is unpaid on the day the tenancy terminates. Otherwise the landlord must either refund bond money or serve notice on the tenant of his or her intention to make a claim on the bond and apply to the Residential Tenancies Tribunal within fourteen days after the tenant moves out (s. 77). The maximum penalty for non-compliance with s. 77 is $1,000. Nevertheless, it remains one of the most flouted provisions of the Act and, since the introduction of the Act over 10 years ago, only four people have been prosecuted for breaching s. 77. Similarly, breaches relating to non-lodgement of bonds in approved trust accounts and failure to provide appropriate documentation at the commencement of a tenancy carry maximum penalties ranging from $100 to $500. Breaches are widespread, however, and relatively few prosecutions have occurred. As sanctions these measures are tokens and as deterrents they are ineffective.

It has been the experience of the Tenants Union of Victoria that tenants find their bond retained by the landlord at the end of the tenancy, without recourse to the Tribunal and without valid reason. Legal action to recover the money can take weeks or even months, which can cause extreme hardship to tenants who usually have to pay a new bond and rent in advance on moving into a new rental property. The fact that a landlord has fourteen days in which to return bond moneys is in itself problematic and disadvantages tenants who have caused no damage or loss to the landlord.

The Rental Bond Board Bill 1991

The recently introduced Rental Bond Board Bill 1991 will go a long way towards remedying these long-standing problems. It provides for the introduction of a Board to act as an independent custodian of all residential bonds. Part two establishes the Board as a body corporate (clause 7) with five members and a chairperson. The members would include representatives from all relevant interest groups, the Ministries of Consumer Affairs and Planning and Housing, Treasury, the Real Estate Institute of Victoria and the Tenants Union of Victoria (clause 10).

Part three establishes the Tenancy and Residency Fund, which is effectively divided into two separate accounts, one for the lodgement of bond monies and the other to consist of all interest earned and all fees and penalties arising from the Residential Tenancies Act, the Rooming Houses Act and the Caravan Park and Moveable Dwellings Act (Parts 2-5). The existing Residential Tenancies Fund would merge into this account pursuant to Clause 91. Part three also provides for payments by the Board towards the cost of administering the Board and the Tribunal and for the surplus to be expended at the joint direction of the Minister of Consumer Affairs and the Minister administering the Housing Act 1983, for specified purposes. Generally, these can be described as funding of bodies engaged in the provision of information, educative programs and research concerning tenancy issues, and funding for housing projects. Additionally, clause 27 allows for the indexation of bonds in order to preserve their value. This has advantages for landlords, who will be able to claim against the increased bond held in the Fund, as well as the obvious advantage to tenants. Such indexation is not possible under the current bond arrangements.

Part four sets out the requirements for lodgement of bonds with the Board. The Bill includes a number of clauses which attempt to ensure maximum compliance in respect of lodgement. These include a maximum penalty of $5,000 for breach (clause 33), notification of lodgement to the tenant and the provision of information to the tenant about his or her rights under the Bond Board legislation (clause 35). Presently, Victorian tenants are often unaware of the requirements relating to lodgement of bonds, do not receive adequate details on receipts and are usually unable to check whether a landlord has lodged the bond in a government approved trust account. A greater level of compliance would in turn mean a greater amount of funds available for investment. In addition, the fact that all bonds will be lodged in one fund will mean that expanded investment opportunities are available to the Board.

One of the greatest potential advantages for tenants comes in the area of return of bonds, but there are some inadequacies in the Bill which need to be addressed. The Bill retains in essence the existing legislative guidelines as to when a landlord is entitled to claim and the time limits which apply. Clause 41 deals with consensual claims and allows for immediate payment out. If the landlord wishes to make a claim on the bond, he or she must lodge an application with the Board within fourteen days after the tenancy terminates or seven days in the case of a rooming house. Clause 42 directs the Board to make payment to a landlord, where the landlord claims that rent has accrued due and is unpaid at the end of the

tenancy (except where the tenant has lodged a claim for return of the bond, in which case the matter must be referred to the Tribunal). Clause 43 enables the landlord to make a claim for loss or damage against the bond in circumstances which are identical to those presently set out in s. 77(3) of the Residential Tenancies Act. Upon receipt of an application under Clause 43 the Board would refer the matter to the Tribunal, notify the tenant and return to the tenant any amount of the bond which is not subject to the landlord's claim. The tenant has fourteen days to lodge an objection, whereupon the matter would be heard and determined by the Tribunal. Clause 44 gives the tenant the reciprocal right to apply for return of their bond and, in much the same way, the landlord is given the opportunity to object and have the matter determined by the Tribunal.

These procedures should in the main decrease delays in return of bonds to tenants. They will remove the existing temptation for landlords and agents simply to keep the bond purely because they retain physical control of it in circumstances in which an application to the Tribunal is required. The problem of enforcing any Tribunal order relating to repayment of the bond by the landlord to the tenant is also removed. Further, it should be noted that pursuant to Clause 49 a tenant is entitled to apply to the Board and be paid the amount of his or her bond, even if the landlord has failed to deposit the bond with the Board. The Board is then entitled to take action against the landlord to recover the amount of the bond.

The Bill fails, however, to provide for the automatic return of the bond to the tenant in circumstances where the landlord has taken no action and failed to make any application to retain the bond within the fourteen day time limit after the tenancy has terminated. It is the view of the Tenants Union of Victoria that in such circumstances the tenant should be entitled to apply and provision should be made to allow the Board to make an automatic payment out to the tenant. That is, the process should be akin to that outlined for landlords under clause 42. The Bill as it currently stands only allows the tenant to make a claim pursuant to clause 44. This effectively gives the landlord a second opportunity to claim against the bond, by lodging a notice of objection and having the matter referred to the Tribunal. Unless a tenant lodges a claim immediately after the tenancy terminates, this will result in the same kinds of delays that exist under the present system. It should be noted that deterrents exist to prevent either a tenant or a landlord from making improper claims. Clause 57 makes it an offence to make a false or fraudulent misrepresentation to the Board.

The current trust account system offers no benefits to tenants or landlords who comply with the legislation. It is only those who flout the system who gain, to the detriment of tenants. The Bond Board proposal offers some real advantages to both parties, in particular to tenants. This should be the real focus of any legislation dealing with this area, given that residential bonds are and remain tenants' money until a Tribunal has otherwise determined. The administration of bonds, and the purposes to which any money earned in interest are put, must ultimately be to the benefit of tenants both individually and collectively.

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LAW REFORM ROUND-UP

The following is not a comprehensive list of law reform activities, but a means of drawing attention to some issues of interest in Victoria, interstate and overseas.

Victoria
Victorian Law Reform Commission

Codes of Practice
Discussion Paper No. 20 September 1990.

Competition Law: The Introduction of Restrictive Trade Practices Legislation in Victoria
Discussion Paper No. 22 April 1991.

Public Drunkenness Supplementary Report
Report No. 32 May 1990.

Access to the Law — the structure and format of legislation
Report No. 33 May 1990.

Mental Malfunction and Criminal Responsibility
Report No. 34 November 1990.

Radical restructuring of the way courts deal with mentally ill and disabled defendants is called for in this report. The system of detaining a person found not guilty on the ground of insanity is described as 'fatally flawed'. People were held in prisons rather than appropriate facilities, with decisions being made by the bureaucracy rather than the courts, and decisions about eventual release are part of the political process, rather than being made by a review board. The report raises serious issues of the rights of mentally ill and disabled people coming before the criminal courts and questions the use of prison for such people. The report recommends that decisions about release should be made by a special release board headed by a Supreme Court Judge. A study of people held 'at the Governor's pleasure' since 1964 reveals that prisoners get lost in the system, the longest serving detainee having died recently at the age of 102, after being held for over 50 years.

The Commission rejected the idea of introducing an additional defence of diminished responsibility on the grounds that it would be too complex. Instead, it recommends the issue be dealt with through adjustments in sentencing.

It will always be difficult to reconcile civil liberties with the need to protect the community from dangerous offenders. While society seems to give mixed messages about the objectives of the system — whether punishment, treatment or

protection — this report goes some of the way towards making the administration of criminal justice in this extremely difficult and controversial area more humane.

Review of the Law of Rape
Progress Report No. 1 December 1990.

Review of the Law of Rape
Progress Report No. 2 April 1991.

Law Reform Agenda
Publication of the Law Reform Commission of Victoria No. 3 March 1991.

It was noted that the Victorian Attorney-General, Jim Kennan Q.C., has directed the Victorian Law Reform Commission to report to him on the extent to which the drafting and administration of the law could be made easier and more efficient by the development of expert systems.

New South Wales
New South Wales Law Reform Commission:

Community Law Reform Program
Neighbour and Neighbour Relations
Discussion Paper No. 22 April 1991.

The discussion paper focuses on neighbour disputes caused by noise, trees, easements for joint services and access for the purpose of maintaining fixtures and services. The issues of dispute resolution and the availability of appropriate remedies and forums to deal with conflicts between neighbours are also considered. The Commission has presented some preliminary suggestions for reform of the existing dispute resolution mechanisms, and is currently calling for submissions detailing strategies for dealing more effectively with the problems identified.

Criminal Procedure: Police Powers of Detention and Investigation After Arrest
Report No. 66 December 1990.

Western Australia
Law Reform Commission of Western Australia

Report on Medical Treatment for the Dying
Project No. 84 February 1991.

The Commission was asked to review the criminal and civil law on the obligation to provide medical or life supporting treatment to persons suffering conditions which are terminal or recovery from which is unlikely and, in particular, to

consider whether medical practitioners or others should be permitted or required to act upon directions by such persons against the artificial prolongation of life. A Discussion Paper was issued in June 1988, following which comments were received from a large number of people. A Report emerging from this consultation process has now been published.

Commonwealth of Australia
Australian Law Reform Commission

Choice of Law Rules
Discussion Paper No. 44, July 1990.

Ireland
Law Reform Commission of Ireland

Two reports received from Ireland make a significant contribution to the way in which the sexual abuse of children and the mentally handicapped can be approached by the legal system. It is useful to read them with the Victorian Law Reform Commission's Discussion Papers Numbers 9 and 12, in mind: these covered the same topics.

Report on Child Sexual Abuse
Report No. 32 September 1990.

The proposals range over three broad areas: civil law, criminal law and the law of evidence. The civil law proposals generally pursue the policy of compulsory reporting and investigation of suspected child abuse, together with barring and protection orders. In criminal law, it is proposed to create a new offence of 'child sexual abuse'. There is an attempt to adjust the age limits at which heterosexual intercourse becomes criminal 'to take account of the social conditions today' by, in the case of girls above the age of 15, 'criminalising the abuse of authority or trust by an older person rather than sexual intercourse between young people of the same age.' It is proposed that there should be the same protection against both homosexual and heterosexual exploitation of the young. Use of closed circuit television, video recordings and skilled interviewers is proposed for the giving of evidence.

Finally, it is proposed that 'courts should sit in the smallest and brightest courtoom available and dispense with the wearing of wigs and gowns. Special waiting room facilities should be provided with toys, books and games available for children.'

Report on Sexual Offences Against the Mentally Handicapped
Report No. 33 September 1990.

The report initially outlines the shortcomings of the existing legislation, notably the restricted and discriminatory provisions which make sexual intercourse with

females an offence but do not mention other exploitative sexual activity with males or females.

Evidentiary matters are dealt with and the Report recommends that a person should be permitted to testify if he or she can give an intelligible account of events, rather than having to understand the significance of an oath. Here, too, use of closed circuit television, video recordings and skilled interviewers is proposed for the giving of evidence.

The principal recommendations are that it should be an indictable offence for any person to have unlawful sexual intercourse with another person who is at the time of the offence a person with a mental handicap or suffering from mental illness which in either case is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation. A further offence is created of committing acts of anal penetration or 'other exploitative sexual activity' with such a person. The emphasis of recommendations is to make exploitation, rather than sexual activity, the underlying rationale of the offence. Thus it is not proposed to limit the freedom of persons with mental handicap to engage in sexual activity unless the acts in question constitute an offence by virtue of some other provision of the law. Accordingly, higher penalties are proposed for offences committed by persons in charge of, or employed in, mental institutions, or where the accused person had the care or charge of the complainant.

New Zealand
New Zealand Law Commission:

A New Interpretation Act: To Avoid 'Prolixity and Tautology'
Law Comission Report No. 17 December 1990.

Evidence Law: Principles of Reform — A Discussion Paper
Preliminary Paper No. 13.

Evidence Law: Codification — A Discussion Paper
Preliminary Paper No. 14.

Evidence Law: Hearsay — A Discussion Paper
Preliminary Paper No. 15.

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