COMMENT

RESIDENTIAL LANDLORD-TENANT LAW REFORM IN TASMANIA

A. *INTRODUCTION*

After many years of neglect, there has been a recent spate of interest in law reform circles given to the need for reform of the residential landlord and tenant laws. Since 1974 comprehensive analyses of the deficiencies of the present laws have been undertaken by the Commonwealth Commission of Inquiry into Poverty,[1] the Law Reform Committee of South Australia (35th Report) and the Community Committee in Victoria. In addition, recent reforms have been enacted in South Australia, Western Australia, Queensland and New South Wales.[2]

Tasmania has been the last State to involve itself in this law reform process. However, in November 1976, the Tasmanian Law Reform Commission was given the reference:

> To investigate and report to the Attorney-General on the common law and statute law in Tasmania relating to residential landlord and tenant law, and in particular to investigate and report on —
> (i) any changes to be made in the law; and
> (ii) the establishment of a special tribunal to informally deal with disputes arising between landlords and tenants in respect of residential tenancy matters.

The Commission established a Committee to report on the reference. Its Report was received in August 1977 and formed the basis of the Commission's Report to the Attorney-General in December 1977.

B. *THE STRENGTHS OF THE REPORT*

1. *The Resolution of Disputes*

The most far reaching recommendation is that the existing system of judicial resolution of disputes should be replaced by a one-man Residential Tenancies Tribunal to be appointed for each of the three major Tasmanian regions (paras. 8, 41). The proposed Tribunals would be given power, 'to make orders for possession of premises, to award damages for breach of covenant, to assess and order payment of arrears of rent, to determine the disposition of security deposits and generally to make such

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1 See A. J. Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (1975); and R. Sackville, *Law and Poverty in Australia,* Ch. 3, (1975).

2 *Residential Tenancies Act* 1978 (S.A.); *Residential Tenancies Act* 1975 (Qld.); *Landlord and Tenant (Rental Bonds) Act* 1977 (N.S.W.); *Small Claims Tribunals Act Amendment Act* 1975 (W.A.)

other orders as may be necessary to give effect to the provisions of the new legislation' (para. 41). In addition, the establishment of a Rentalsman, who would be attached to the staff of the Consumer Protection Council, is envisaged. The primary role of the proposed Rentalsman would be to conciliate with the consent of the parties in any dispute which may arise between landlord and tenant. He would also have certain administrative functions in connection with the Report's other recommendations: for example, he would receive rents as a stakeholder where a landlord breaches his covenant to repair; he would receive and disburse security deposits; he would receive and investigate complaints by tenants or landlords; and would receive and file copies of Notices to Quit and allocate return dates for the Summons for Possession (para. 41).

The advantages of the proposed Tribunals over the existing court structure would be numerous. Proceedings would be cheap and speedy, the existing courts would be relieved of part of their heavy case-loads, and the persons constituting the Tribunals would develop an expertise in landlord-tenant matters. It is to be hoped that the Tribunals would conduct hearings during the evenings as well as during normal working hours so that neither party would lose wages because of the need to take time off from work: in this way, the parties (especially indigent tenants) would be more likely to make use of the Tribunals.

It is submitted that two minor weaknesses exist in the recommendation for the establishment of Tribunals. First, the Committee gave no consideration to the issue of whether a right of appeal should be allowed from a decision of the Tribunal to the Supreme Court. While a right of appeal on a question of fact would be clearly unworkable, a strong argument can be made in favour of appeals on questions of law both on the ground of the inevitable disputes which would arise as to the proper interpretation of any new landlord-tenant legislation and on the ground of the common anxiety in legal circles about giving tribunals immunity from external control Secondly, the recommendation that either party should be entitled to be represented before the Tribunal by a legal practitioner is considered unfortunate. Even though it is provided that neither party should be entitled to recover his costs from the opposing unsuccessful party, this proposal will inevitably act to the detriment of tenants. In view of the cost of legal representation and the short-term nature of the average residential lease, in the vast majority of cases it would not be financially worthwhile for any tenant to seek legal representation. Thus, it is far more likely that landlords rather than tenants will employ counsel, and while a Tribunal may be relied upon to assist an unrepresented tenant in presenting his case, he would clearly be at a distinct disadvantage in appearing in person. It would have been better if the Committee had followed the precedent set in the various State Small Claims Tribunals and had prohibited legal representation.

2. *Introduction of Contractual Principles*

Largely for historical reasons, a lease has traditionally been regarded at common law as an estate in land rather than a contract for services. Following the lead of the Law Reform Committee of South Australia and the Commonwealth Commission of Inquiry into Poverty, the Committee debated the possible application to residential landlord and tenant law of three contractual principles. It recommended the adoption of the principles of frustration of contract (para. 52) and mitigation of damages (para. 54) but rejected the application of the principle of the interdependence of covenants (para. 53). It is submitted that the Committee was correct in each instance.

(a) *Interdependence of Covenants*

This principle, established by Lord Mansfield in 1773 in *Kingston* v. *Preston*,[3] provides that if a material covenant is breached by one party the other party is relieved of his obligations under the contract. The application of this principle to landlord-tenant law seems superficially appealing. Thus, at present, if a landlord fails to perform any of his covenants, the tenant is not entitled to withhold his rent in order to bring pressure to bear on the landlord. The only remedy is for the tenant to sue for damages, which in most cases he is unlikely to do in view of the legal expenses involved. However, on further consideration, it will be seen that the doctrine is too vague and uncertain in its application to warrant its introduction to landlord-tenant law. The problem would be to determine which covenants in a lease are sufficiently important that their breach would entitle the innocent party to repudiate the lease.[4] A tenant wishing to take advantage of any legislation by repudiating the lease would have to take a gamble that the court would agree with the correctness of his action in the event of a legal challenge by the landlord. The very vagueness of the doctrine would cause litigation to proliferate, would encourage the use of self-help remedies which in other contexts the courts have frowned upon, and would lead to the necessity for legal advice, which would be unprofitable for either party in view of the short duration of most residential tenancies and the relatively modest sums of money in dispute.

(b) *Frustration of Contract*

One of the most anachronistic and objectionable aspects of current landlord-tenant law is that in the absence of an express covenant to the contrary, the principle of frustration of contract is inapplicable.[5] Thus, at common law, if the premises are expropriated by a government

3 (1773) 2 Doug. 689, 99 E.R. 437.

4 See the comments of Jordan C.J. in *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.)* Ltd. (1938) 38 S.R. (N.S.W.) 632, at pp. 641-2 as to the operation of the doctrine in other areas of law in Australia.

5 *Minister of State for the Army* v. *Dalziel* (1943-44) 68 C.L.R. 261; *Thearle* v. *Keeley* (1958) 76 W.N. (N.S.W.) 48.

authority during the term of a lease or are destroyed by fire, flood or storm the obligations imposed on both parties still remain despite the fact that the premises have become incapable of occupation or totally uninhabitable.

The Committee sensibly recommended that the principle should be generally applicable rather than limited to cases of destruction by the natural elements, and that partial uninhabitability should result in a rent reduction, to be determined by the Rentalsman.

(c) *Mitigation of Damages*

The effect of the present law is that if a tenant vacates or abandons the premises before the expiry of his lease the landlord is under no duty to mitigate his damages by attempting to find a new tenant to take over the premises, but is entitled simply to claim each payment of rent as it falls due. This law is particularly harsh on tenants who may be obliged to move for any justifiable reason and places them in a worse position than other defaulting parties to a contract.

The Committee stated that it found the operation of this law unreasonable, and following the lead of the Queensland legislature[6] recommended that the principle of mitigation of damages should be applied to landlord-tenant law. Although this change could conceivably be made by the common law case law process, the Supreme Court of the Northern Territory in the recent case of *Maridakis* v. *Kouvaris*[7] indicated its unwillingness to do so, and consequently legislation would seem essential.

3. *Security of Tenure*

The Committee made three separate recommendations which would cumulatively increase dramatically a tenant's security of tenure. First, the Committee recommended that if in any proceedings for possession by a landlord it appears to the Tribunal that notice to quit was given in retaliation for the tenant's complaint about the landlord to a government instrumentality or the tenant's attempts to enforce some legal right against the landlord, the notice to quit should be declared invalid. If a notice is served within three months of a complaint or attempt to enforce a right, a presumption that the notice was given in retaliation should exist unless the landlord proves to the contrary (para. 37).

The Committee recognised that without any statutory prohibition of retaliatory eviction any attempts to increase the remedies available for the tenant against a landlord would be pointless. The only regret is that the Committee did not extend the period of presumption of retaliation from three to six months. Any vindictiveness felt by a landlord against a tenant could well extend beyond three months, and once the burden of proof falls on the tenant it would be extremely difficult for him to prove that a notice to quit was given for retaliatory motives.

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6 *Residential Tenancies Act* 1975 (Qld.), s. 16.

7 (1975) 5 A.L.R. 197.

Secondly, the Committee recommended the overthrow of the common law position that in the case of a periodic tenancy no reason need be given by a landlord for a notice to quit (paras. 10-11). In the opinion of the Committee, while the right of the landlord to regain possession must not be unduly circumscribed, this common law position should give way to a recognition of the importance to the tenant and his family of the premises as their home. The Committee recommended a list of ten acceptable grounds for a notice to quit, the most significant being: fourteen days arrears of rent; breach of covenant by the tenant; illegal use or occupation of the premises; that the landlord reasonably requires the premises for occupation by himself or his immediate family; that the landlord has agreed to sell the property and deliver up vacant possession; that the landlord requires the property for the purpose of reconstruction, demolition or removal; and that the tenant has failed to comply with an order of the Tribunal respecting his occupation of the premises (para. 11). This list is modelled on the rather more extensive lists of acceptable reasons enacted in the *Landlord and Tenant Act* 1958 (Vic.) s. 82 (6) and the *Landlord and Tenant (Amendment) Act* 1948-1969 (N.S.W.) s. 62 (5). However, the Victorian and New South Wales legislation applies only to the comparatively small number of prescribed premises, whereas the proposed Tasmanian legislation would have universal application. One desirable feature of the Committee's recommendations is that it is proposed that if the tenant challenges the notice to quit the Tribunal should have a discretion to refuse to make or to postpone an order for possession. This provision would circumvent the problem which has arisen in Victoria whereby if a repair order is imposed on a landlord by the Housing Commission the landlord can use this very fact as an excuse to give the tenant a notice to quit under the 'reconstruction' ground.[8] Without this provision, the same problem could arise when the Tasmanian Housing Department declares a house substandard under s. 4 of the *Substandard Housing Control Act* 1973.

Thirdly, the Committee recommended that a minimum of two months' notice should be required of a landlord in respect of all periodic tenancies (para. 34) and four weeks' notice in respect of fixed term tenancies (para. 36). Again, these proposals mark a radical departure from entrenched common law positions. They are welcome in that they respond realistically to the needs of tenants. The common law rule that the notice to quit must be equal to the length of the period (*i.e.* a week's notice in the case of a weekly tenancy and a month's notice in the case of a monthly tenancy) took no account of the purpose behind the requirement of a notice to quit, namely to enable the tenant to find alternative accommodation. Opinions may differ as to what is a reasonable period for a notice to quit, but it is clear that the time taken by a tenant to find alternative accommodation is not going to depend on

8 See Bradbrook, 'An Empirical Study of the Need for Reform of the Victorian Rent Control Legislation' (1975) 2 *Monash University L. Rev.* 82, at p. 96.

the nature of his existing tenancy. On balance, two months would seem a reasonable period of notice. Having made its recommendation concerning periodic tenancies, the Committee realised the necessity of requiring a notice to quit in the case of fixed term tenancies to prevent a landlord circumventing the law by letting his premises for short fixed terms.

By way of counterweight to these proposals, the Committee sought to streamline the procedure for recovery of possession from defaulting or overholding tenants. It adopted the proposal of the Poverty Inquiry that the notice to quit and summons for possession should be combined (para. 33). Under this system the notice to quit would specify the date upon which possession is required, the date upon which application would be made to the Tribunal for an order for possession if the premises are not vacated, and the grounds upon which the notice proceeds. The landlord would also be required to file his notice to quit with the Rentalsman who would allocate a return date before the Tribunal. This reform will be welcomed by landlords, as the existing procedure for recovery of possession takes at least ten weeks from the date of first defaul. During this period the tenant continues to occupy the premises without paying rent, and in many cases this rent is irrecoverable by the landlord as the tenant either absconds or is effectively judgment-proof through lack of funds.[9]

4. *Protection of the Tenant's Right to Privacy*

A recurring problem reported by the Poverty Inquiry and various tenants' organizations is that of unauthorized entry into the demised premises during the term of the lease. Although at common law the tenant has the right to sue the landlord for damages for trespass, this remedy is impracticable owing to the legal expenses involved and the difficulty of proving that damage has occurred.

This problem has already been touched upon by some Australian legislation.[10] However, any such legislation has been designed to protect the interests of landlords rather than tenants, by giving the landlord minimum entry rights into the premises in the absence of any express covenants. The Committee has sensibly adopted the proposal that the landlord should only be entitled to enter in five very limited circumstances: in an emergency; during reasonable hours to show the premises to a prospective tenant; during reasonable hours to inspect the state of the premises upon giving notice to the tenant; upon giving reasonable notice to permit a valuer or tradesman to enter for the purpose of appraisal or making repairs; or if the landlord believes on reasonable grounds that the premises have been abandoned (para. 13). The Committee also recommended that the parties should not be able to contract out of such statutorily defined circumstances. Unfortunately the effect

9 See Bradbrook, *supra* n. 1, at pp. 70-71.

10 See, e.g., *Landlord and Tenant Act* 1958 (Vic.), s. 111; *Real Property Act* 1886-1972 (S.A.), s. 125.

of the proposed legislation will likely be weakened as the Committee did not propose that any breach should be regarded as an offence punishable by a fine. Rather surprisingly, no remedy at all is provided for any breach.

C. *THE WEAKNESSES OF THE REPORT*

1. *Lack of an Advisory Bureau*

The necessity of an advisory and information service for landlords and tenants has been recognized in many quarters. The Canadian Council on Social Development once commented:

> One of the real barriers to the effective exercise of tenant rights is a lack of adequate information about the provisions of the law and its remedies. This is a problem that affects not only tenants but also small landlords. Many denials of tenant rights have probably taken place because of a 'collection of ignorance'. Specialised agencies in the area of landlord-tenant relations... need to make information and advice one of their primary functions... We believe that there is no substitute for... community information services that provide precise information about landlord-tenant laws along with information about other aspects of housing and social programs.[11]

In recent years, three Canadian provinces (Ontario, British Columbia and Nova Scotia) have established by legislation an advisory bureau whose functions are, *inter alia*, to advise landlords and tenants on tenancy matters and to disseminate information.[12] Following this lead, the Poverty Inquiry recommended that Residential Tenancies Boards be established with one of their responsibilities being to provide free advice on landlord-tenant matters to all interested parties who approach it and of disseminating information on current market trends and conditions in the private rental housing sector.[13]

Sadly, the Committee declared itself unanimously opposed to the creation of a Residential Tenancies Board (para. 40). Five reasons were advanced by the Committee: cost; the existence of a Tenants' Union which would duplicate many of the Board's functions; that free or subsidized legal assistance is available to impecunious persons; that elsewhere in its Report the Committee proposed that tenants be given a summary of the main sections of any new legislation at the commencement of a new tenancy; and that the proposed Rentalsman in fulfilling his role as a conciliator would inevitably be required to give information and advice upon many aspects of the legislation. While the problem of cost must be recognized, the other reasons reveal a lack of understanding by the Committee of the true functions of any Residential Tenancies Board. The Board would be neutral and would have the

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11 M. Audain and C. Bradshaw, *Tenant Rights in Canada,* (1970), at pp. 36-37.

12 *Landlord and Tenant Act,* R.S.O. 1970, c. 236, s. 109 (3); *Landlord & Tenant (Amendment) Act,* Stats, B.C. 1970, c. 18, s. 66 (3); *Residential Tenancies Act,* Stats. N.S. 1970, c. 13, s. 11 (3).

13 Bradbrook, *supra* n. 1, at pp. 11-13; Sackville, *supra* n. 1, at pp. 60-62.

function of assisting both landlords and tenants alike, whereas the role of the Tenants' Union is partisan. Even from the standpoint of tenants, the quality of the information service provided by a voluntary tenants' union must inevitably fall well short of that provided by a Board. The references by the Committee to the Rentalsman and the availability of legal aid also show that the Committee was considering only the question of advice to be given once a dispute between the parties has arisen, whereas the function of the Boards would be expressly to prevent disputes arising in the first place.

2. *Rent Control*

At present the only form of rent control applicable in Tasmania exists under the *Substandard Housing Control Act* 1973 as a sanction against speculative investment in substandard housing. Under s. 4, where the Director of Housing is satisfied that a house is undesirable or unfit for human habitation he may serve notices on the interested parties stating his intention to declare the house substandard and inviting them to make representations to him on this matter. After 30 days from the initial notice the Director may register with the Recorder of Titles a notice declaring the premises substandard, whereupon a maximum rental may be applied.

The main reported weaknesses in this Act are delays in the enforcement of the legislation due to the chronic shortage of housing inspectors and to the alleged over-generosity of the Director of Housing in allowing owners extra time to effect repairs.[14] The inevitability of delay would often induce a tenant to seek alternative accommodation rather than to continue to live in substandard accommodation. This problem of delay has been the cause of the failure of the South Australian *Housing Improvement Act* 1940-1973, upon which the Tasmanian legislation is based, as it has been shown to take on average well in excess of one year for rent control to be applied,[15] which is small comfort to a residential tenant who would seldom have a lease exceeding one year in duration. The fact that as of January 1977 only 42 premises had been declared sub-standard in Tasmania after 3½ years of operation of the Act[16] would indicate the difficulties encompassed.

At no stage in its Report did the Committee even touch on the problem of delays, but chose instead to focus on the need for a distinction to be drawn between the remedies to be applied where housing is merely substandard as opposed to unfit for human habitation (para. 4). It is to be regretted that the Committee directed its attention to the detailed classifications in the Act rather than the broader issue of the viability of the whole system of rent control.

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14 See Bradbrook, 'The Role of the State Government Agencies in Securing Repairs to Rented Housing' (1977) 11 *Melbourne University L. Rev.* 145 at pp. 151-154.

15 Bradbrook, *supra* n. 1 at pp. 29-31.

16 Information supplied by the Substandard Housing Section, Housing Department of Tasmania.

The Committee also proposed a system of rent control whereby a tenant would have the opportunity of challenging any rent which could be regarded as harsh or excessive before the Rentalsman and ultimately the Tribunal which would be empowered to make a binding adjudication (paras. 4-6). Unfortunately, the details of the operation of this proposed legislation were not discussed by the Committee. Thus, there is no indication as to how long a binding adjudication would be effective. It is also unclear whether the system envisages that the Rentalsman would investigate the validity of the tenant's claim and report his findings and recommendation to the Tribunal. If this is the case, the legislation may be workable, but if the tenant is expected to conduct his case of his own initiative it may confidently be anticipated that this legislation will be totally ineffective. This proposal appears to be based on the recently repealed *Excessive Rents Act* 1962 (S.A.), under which only one application was heard between 1962 - 1978. The failure of this legislation resulted from the need for the tenant to obtain a professional valuation and to compensate the valuer for the time spent before the court. This expenditure could seldom be justified in the light of the size of the rent reduction ordered.[17]

It is to be hoped that the Tasmanian legislature, if it decides to proceed with this form of rent control, learns from the South Australian experience.

3. *Obligations to Repair*

The Committee recommended that landlords should have an obligation 'to provide a dwelling, its fixtures and chattels in a condition fit for human habitation and in good repair', while tenants 'should be required to care for the dwelling fixtures and chattels and make good any damage done by the tenant, his family or other persons invited on to the premises' (para. 18).

This proposed redefinition of repair obligations follows closely the earlier recommendations of the Poverty Inquiry and the Law Reform Committee of South Australia and would seem to be a sensible and necessary reform. However, confusion will undoubtedly arise as the Committee failed to indicate whether the existing common law principles on repair should be repealed or would remain to supplement the new proposed legislation. Since the 1843 decision in *Smith* v. *Marrable*,[18] there has been an implied condition that furnished premises are fit for human habitation at the commencement of a lease. Any breach of this condition entitles a tenant to quit the premises, if he so desires. In many cases, tenants would consider this a more valuable remedy than the right to sue for damages or to pay their rent to the Rentalsman. This implied condition was not even mentioned by the Committee, however. Similarly, no mention was made of the implied covenants by a tenant

17 Bradbrook, *supra* n. 1 at pp. 104-106.

18 (1843) 11 M. & W. 6; 152 E.R. 693. See also *Sarson* v. *Roberts* [1895] 2 Q.B. 395; *Pampris* v. *Thanos* [1968] 1 N.S.W.R. 56.

not to commit waste and not to use the premises in a tenant-like manner (sometimes referred to as an obligation to keep the premises wind and watertight). It is by no means clear from its Report whether the Committee intended these obligations to be co-extensive with their proposal that a tenant must 'care for the dwelling', and in fact there is no indication that the Committee even realized that the implied covenants exist.

By way of enforcement, it was proposed that a tenant alleging a breach of his landlord's repair obligations should be entitled to pay his rent to the Rentalsman if within fourteen days of a request so to do the landlord did not commence repairs. The rent would not be disbursed until after the Rentalsman's ruling on the dispute (para. 19). Again, while this proposal makes excellent sense, it is unclear whether this remedy is designed to supplement or replace the right recently recognized by the Queensland Supreme Court in *Knockholt Pty. Ltd.* v. *Graff*[19] for a tenant to withhold his rent and to plead a right of set-off if the landlord later sues for recovery of possession on the ground of non-payment of rent.

4. *Discrimination*

In recent years there has been reported an increasing incidence of discrimination practised by landlords against prospective tenants, who may be refused a tenancy on the ground that they have children. A survey of a sample of tenanted dwellings in the inner Hobart area undertaken by the Tenants' Union of Tasmania in 1977 found that 48 per cent of tenants having children believed that they had experienced discrimination in gaining access to rented premises because of the children.[20] Another study was conducted in 1976 by Dr. Trevor Lee, who examined the advertisements in the Hobart *Mercury* for two successive Saturdays. Although only 6 per cent of the advertisements specifically excluded families with children, many other personal specifications could be seen as euphemisms for 'no children'.[21]

One of the most disappointing features of the Committee's Report is that it dismisses in very cursory fashion the need for anti-discrimination legislation to protect families with children seeking rented accommodation, despite the fact that such legislation already exists in New South Wales, South Australia and the Australian Capital Territory.[22]

The Committee gave three major reasons for this recommendation (para. 65), none of which it analysed in detail. First, it stated that 'such

19 [1975] Qd. R. 88.

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

21 T. R. Lee, *Choice and Constraints in the Housing Market: The Case of One-Parent Families in Tasmania.* (Paper presented to the S.A.A.N.Z. Conference, La Trobe University, August 1976).

22 *Landlord and Tenant (Amendment) Act* 1948-1969 (N.S.W.), s. 38; *Landlord and Tenant Ordinance* 1949-1973 (A.C.T.) s. 38; *Residential Tenancies Act* 1978 (S.A.), s. 58.

legislation could result in a diminution of construction of houses suitable for families'. While it is essential that the financial position of the landlord be safeguarded, the system of security deposits, already in almost universal use in Tasmania, is designed to protect the landlord against the possibility of damage caused to the premises by the tenant or his family. So long as these security deposits remain lawful, it is submitted that there is no valid reason to suppose that developmental capital will be diverted to other investment sources.

Secondly, the Committee considered it 'not unreasonable that landlords should exclude children from certain types of existing accommodation, for example, expensively furnished flats, flats with restricted bedroom accommodation, flats or units forming part of a "special area" complex . . .' While this is a legitimate argument, the Committee seems to have overlooked the possibility that certain types of accommodation unsuitable for families could be exempted from the operation of any anti-discrimination legislation. It would surely not be extending the role of the proposed Rentalsman too far to establish a system whereby landlords who believe they have legitimate grounds for excluding families could apply to the Rentalsman for a certificate of exemption.

Finally, 'the Committee doubted whether even a carefully drawn piece of legislation relating to landlords and prospective tenants could effectively prevent discrimination when there are apparently so many applicants for each vacant residential unit'. Presumably, the Committee was mindful of the ineffectiveness of the present New South Wales legislation in curbing this form of discrimination. However, the major factors contributing to the failure of the New South Wales legislation are lack of publicity by the Government of the existence of the law and its method of enforcement, and the complete lack of an enforcement agency to police the legislation.[23] There is no reason to suppose that if an enforcement agency is established and its existence publicized, that this form of anti-discrimination legislation would be less effective than any other anti-discrimination legislation. Again, the office of Rentalsman could be modified to act as an appropriate enforcement agency.

5. *Public Housing Tenancies*

As the Housing Department is the largest single landlord in Tasmania, it is disappointing that the Committee devoted only two paragraphs of its Report to a discussion of public housing tenancies (paras. 45-46). Its one recommendation, that the Housing Department should be bound by the same rules and procedures as apply to private tenancies, is to be welcomed. However, no attention at all was given by the Committee to two more substantive reforms suggested by the Poverty Inquiry, viz. that there should be established by legislation a statutory standard form of lease for public tenancies and there should be a Housing Department Appeals Board.

23 Information supplied by Mr. J. Morgan, former Rent Controller, N.S.W.

Although it was reasonable in the case of private tenancies for the Committee to reject a statutory standard form of lease on the ground that it would be impracticable and undesirable to attempt to draw up an all-embracing lease, the Committee failed to realize that different circumstances apply in the case of public tenancies. There is no worry over the attraction of private investment, and there are no residual rights of owners that need protection. The only type of flexibility that would be required in public tenancies is a differentiation between the clauses that are applicable to the various categories of accommodation: for example, certain clauses that are relevant to houses would obviously be inappropriate for flats (*e.g.* the obligation to keep the garden in good condition). This problem could be solved by having one lease form for flats, one for cottages and one for old people's accommodation, differing only where necessary because of the nature of the premises.

The Appeals Board was recommended by the Poverty Inquiry out of a recognition of the fact that some problems faced by tenants and prospective tenants are unique to public accommodation.[24] For example, two areas where insufficient protection exists against possible abuse of power by the Housing Department are appeals against a refusal by the Department to admit a person to the waiting list for accommodation and against a refusal to house an applicant out-of-priority in alleged cases of emergency. Although these and other issues could conceivably be handled by the Rentalsman, it is submitted that it would on balance be preferable to establish a body that would specialize in Housing Department's tenants' problems. The important point, however, is that a formal avenue of appeal must exist.

D. *OTHER RECOMMENDATIONS*

The Committee made a number of other recommendations too numerous to canvass in detail.

Security deposits would be made unlawful in respect of substandard housing (para. 25), and in other respects would be limited to a maximum of three weeks' rent (para. 24). The deposit would be paid to a Rentalsman for keeping during the lease and would be returned to the tenant without deduction unless the landlord makes a claim to be entitled to all or part of the money within seven days of the tenant vacating the premises (para. 23).

The anachronistic remedies available to a landlord of peaceful entry (para. 35) and distress (paras. 43-44) would be outlawed on the ground that self-help remedies should not be permitted. In the latter respect, the only surprise is that distress has lasted so long; in most other States it has long been illegal.[25]

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24 Bradbrook, *supra* n. 1 at pp. 115-116; Sackville, *supra* n. 1 at pp. 100-101.

25 See *Landlord and Tenant Amendment (Distress Abolition) Act* 1930 (N.S.W), s. 2; *Landlord and Tenant Act* 1958 (Vic.), s. 12; *Property Law Act* 1974-1975 (Qld.), s. 103; *Distress for Rent Abolition Act* 1936-1941 (W.A.) s. 2.

Finally, the Committee recommended that all tenancy agreements should be in writing (para. 27). This reform would be unique in Australia and would necessitate a marked departure from the current rental practice. Indeed, so common and well respected has the institution of oral leases traditionally been that they have always been admitted as an exception to the Statute of Frauds. If this reform is introduced, it is to be hoped that the legislation will be framed so as to penalize the landlord for offering an oral lease rather than declaring any oral lease void; if this is not done, many tenants will be deprived of their security of tenure.

E. *SUMMARY*

The weaknesses in the Report should not detract from its significance as the first major re-evaluation of the residential landlord-tenant laws ever undertaken in Tasmania. To date, the applicable law consists merely of common law supplemented by antiquated legislation copied largely from the U.K. Parliament. In this light, if the Report is implemented, much will have been achieved towards making the law attune to modern-day realities. The major regret is that much research work is left undone. However, if the legislature is prepared to supplement the Committee's Report with other materials on this subject produced elsewhere in Australia and overseas, Tasmanian landlord-tenant law may yet develop a comprehensive and balanced set of rights and duties.

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