



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 41

Tenancy Bonds

WORKING PAPER

JUNE 1974

INTRODUCTION

The Law Reform Commission has been asked to inquire into the law and practice relating to tenancy bonds between landlord and tenant.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on the paper are invited and should be submitted to the Commission by 30 August 1974.

Copies of the paper are being sent to the

Chief Justice and Judges of the Supreme Court
Judges of the District Court
Law Society of W.A.
Magistrates' Institute
Law School of the University of W.A.
Solicitor General
Under Secretary for Law
Land Agents Supervisory Committee
Commissioner of Titles
Commissioner of Police
Real Estate Institute of W.A.
Estate Agents Association of Australia
Institute of Chartered Accountants in Australia
Australian Society of Accountants
Citizens Advice Bureau of W.A. (Inc.)
Council of Social Services of W.A. Inc.
State Housing Commission
Commissioner for Consumer Protection
State Minister for Housing
Commonwealth Minister for Housing
The Public Trustee
Private Trustee Companies
Commonwealth Commissioner for Law and Poverty
Law Reform Commissions and Committees with whom this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper.

The research material on which the paper is based is at the offices of the Commission and will be made available on request.

TABLE OF CONTENTS

	Paragraphs
TERMS OF REFERENCE	1
THE LAW AND PRACTICE IN WESTERN AUSTRALIA	2 - 11
THE LAW IN OTHER JURISDICTIONS	12 - 15
Australia	12 - 14
Other jurisdictions	15
RECENT PROPOSALS FOR REFORM IN WESTERN AUSTRALIA AND ELSEWHERE	16
DISCUSSION	17 - 41
(a) <i>Should the use of tenancy bonds be prohibited</i>	17 - 18
(b) <i>Should the use of tenancy bonds be controlled by legislation</i>	19 - 41
(i) the amount of the bond money	20 - 21
(ii) who is to hold the bond money	22
(iii) interest on the bond money	23
(iv) the matters for which bond money may be applied	24 - 28
(v) the method of dealing with disputes	29 - 38
(vi) other matters	39 - 41
CONCLUSION	42
APPENDIX I (General information obtained by the Commission on the use of tenancy bonds in W.A.)	
APPENDIX II (Proposals for reform in W.A.)	
APPENDIX III (Proposals for reform in other jurisdictions)	
APPENDIX IV (The law in some other countries)	

TERMS OF REFERENCE

1. "To inquire into the law and practice relating to bonds between landlord and tenant."

THE LAW AND PRACTICE IN WESTERN AUSTRALIA

2. It is common in this State for a landlord to require a tenant to pay to the landlord or his agent a sum of money known as a tenancy bond (sometimes also known as an indemnity bond or security deposit) prior to or at the time of the commencement of the tenancy. The bond money is usually held either by the landlord or his agent until the termination of the tenancy, when it is repayable to the tenant after deducting any expenses incurred or damages suffered by the landlord as a result of any breach of the agreement by the tenant; for example, arrears of rent or costs of repairs to the premises for damage caused by the tenant, or costs of cleaning the premises after the tenant has vacated them.

3. It is not possible to assess the exact extent to which tenancy bonds are used in this State. The 1971 Commonwealth Census disclosed that, for that year there were 62,525 dwellings in this State which were occupied by tenants of private landlords, and 23,874 dwellings in this State which were occupied by tenants of government authorities.

Surveys undertaken by the Council of Social Services of W.A. (Inc.), the State Housing Commission, the Real Estate Institute of W.A. and this Commission have indicated that most private landlords require tenancy bonds for dwellings, the amount of the bond generally being between two and four times the amount of the weekly rent. Tenancy bonds are also sometimes required for leases of non-residential premises.

The State Housing Commission normally obtains a tenancy bond of \$10 for each residential premises it rents.

The Commission understands that the amount of bond money held by or on behalf of private landlords at anyone time in this State is at least three million dollars.

4. Inquiries made by the Commission indicate that disputes are common between landlords and tenants over tenancy bonds, particularly in the case of residential tenancies.

Many complaints have been received by the Consumer Protection Bureau, the Land Agents Supervisory Committee of W.A., the Citizens Advice Bureau of W.A. (Inc.) and other bodies. The matters most frequently in dispute appear to be -

- (a) whether the premises were left in a clean condition and in good repair;
- (b) whether the lawns and gardens were properly tended and the grounds left free from rubbish;
- (c) whether any lack of repair existed before the commencement of the tenancy or whether it was caused by the tenant;
- (d) whether any lack of repair exceeded fair wear and tear, and whether the tenant was liable for damage caused by fair wear and tear;
- (e) whether the tenant was in arrears of rent and whether the tenant was liable for rent in lieu of notice terminating the tenancy;
- (f) whether the amount charged to the tenant for telephone rent or calls or for excess water, gas or electricity consumed was reasonable, particularly in cases where there was no separate meter to the leased premises;
- (g) whether any chattels which cannot be located at the end of the term were included in the tenancy.

A summary of the information obtained by the Commission in the course of its investigations is contained in Appendix I to this paper.

5. In many of these disputes it is difficult to assess whether the complaints are justified because of the conflicting or inadequate evidence provided. Inquiries made by the Commission reveal that few court actions relating to tenancy bonds are commenced. Difficulties in obtaining legal assistance, fear of complex and costly court proceedings, difficulties in discharging the onus of proof and difficulties associated with shifts by tenants to other towns or States may dissuade them from taking such actions, particularly as the

amount of money involved is usually small. Some tenants may be of limited means and may not be prepared to risk further financial loss in court action.

6. There are no statutory provisions controlling the use of tenancy bonds in this State. If a tenancy bond is required and there is no agent engaged to collect the bond money, the position is governed by the terms of the agreement between the landlord and the tenant. Where an agent is engaged to collect the bond money, he may hold it on behalf of the landlord or as a trustee or as a stakeholder or in some other capacity, depending on the circumstances.

7. The capacity in which the landlord or the agent holds the bond money is, for example, important in the event of the landlord becoming insolvent. If the covenant to repay the bond money merely creates a debt payable by the landlord to the tenant, the bond money will be property distributable in the landlord's bankruptcy. If however, the bond money is held by the landlord as a security (e.g. a pledge) or as a trustee it may not be property distributable in his bankruptcy.

8. It is the practice of some agents to invest bond money and pay the interest or part of the interest to the tenant. In other cases the agent either pays the bond money to the landlord or holds it in trust without receiving interest.

Sometimes the agent may hold the bond money as a stakeholder, in which case the agent himself may be entitled to the interest (*Potters v. Lopperts* (1972) referred to in 122 New L.J. 1013, following *Harington v Hoggart* (1830) 1 B. & Ad., 577).

9. Depending on the terms of the agreement, where a tenant is in default, the amount of the tenancy bond will either be credited against the actual damage suffered by the landlord or it will be forfeited in full to the landlord. Normally the former will be the case, as the tenancy bond is usually treated as an earnest of performance, that is, to be applied in payment of actual damage suffered (*N.L.S. Pty. Ltd. v. Hughes* (1966) 120 C.L.R. 583).

In some cases, however, the amount of the tenancy bond may be a genuine pre-estimate of damage forfeitable in full upon default (*Rayner v. Lyster* (1865) 4 Sup. Ct. Rep. 366, N.S.W.). In other cases, the tenancy bond may be in the form of a penalty, that is, a sum unrelated to any reasonable estimate of damages and forfeitable upon default. (see *Hughes v. Fresh Pack*

Fruit and Vegetable Market Pty. Ltd. and *Levis* [1965] W.A.R. 199 and *Hughes v. N.L.S. Pty. Ltd.* [1966] W.A.R. 100). In the case of penalties, the courts will only permit recovery of actual damage suffered.

10. It would appear that a covenant by a landlord to repay bond money is a personal covenant with the tenant and does not run with the land and is not effected by the provisions of s.78 of the *Property Law Act 1969 (Re Dollar Land Corporation Ltd. & Solomon)* (1963) 39 D.L.R. (2d.) 221, although some decisions in the U.S.A. have held to the contrary). Consequently such a covenant may not bind the assignee of the reversion. For example, a landlord may sell the property without telling the purchaser that he is holding bond money, and the tenant will find that he cannot recover the bond money from the new owner.

11. The *Land Agents Act 1922* has some relevance where an agent is involved in arranging a tenancy. Any person acting as an agent for reward in respect of the leasing or letting of any tenancy of houses or other buildings must be a licensed land agent unless exempted (ss.2 & 3). Section 8 provides that any money paid to an agent in the course of such a transaction must be applied in payment of the charges of and incidental to the transaction that are payable by the person on whose behalf the money is collected, and in payment of the balance to the person legally entitled or authorised to receive same, and until payment, to be paid into a bank trust account. It would appear that this section applies to bond money collected by an agent. If this is so, then provisions as to annual audits and the Fidelity Guarantee Fund would also apply to such money (ss.14G & 26).

THE LAW IN OTHER JURISDICTIONS

Australia

12. In New South Wales, Victoria, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, rent control legislation exists with respect to certain types of residential premises. In each of these jurisdictions there is a prohibition on the payment of any bonus, premium or other sum of money (other than rent), although in some cases it may be made with the consent of the rent fixing authority -

N.S.W. *Landlord & Tenant (Amendment) Act 1948*, s.36;

Victorian *Landlord & Tenant Act 1958*, s.77, although limited to assignments and transfers of leases and consents to subleases;

South Australian *Landlord & Tenant (Control of Rents) Act 1942*, s.100. This act appears to be of limited application;

South Australian *Housing Improvement Act 1940*, s.59(2), although limited to substandard houses;

Tasmanian *Substandard Housing Control Act 1973*, s.13:

Australian Capital Territory *Landlord and Tenant Ordinance 1949*, s.36:

Northern Territory *Landlord and Tenant (Control of Rents) Ordinance 1949*, s.36

It is not clear whether these provisions have the effect of prohibiting the payment of bond money for premises to which the legislation applies. It is noted that the Northern Territory Ordinance has an additional provision expressly prohibiting any payment for a bond or agreement whereby any person pays or agrees to pay any sum of money as evidence of that person's agreement to forbear from any act, deed or conduct (s.36(1)(b)(iii), added by the *Landlord and Tenant (Control of Rents) Ordinance 1970*, No. 14).

13. Apart from the legislation mentioned in the preceding paragraph, there are no statutory provisions in any Australian jurisdiction controlling or prohibiting the use of tenancy bonds. However a Landlord and Tenant (Security Deposits) Bill has been recently introduced into the Victorian Parliament by a private member. The Commission understands that the bill contains provisions dealing with security deposits on similar lines to the Ontario *Landlord and Tenant Act 1970* (see Appendix IV below, but with the additional provision that the person holding the security deposit is deemed to act as a trustee of it.

14. In most Australian jurisdictions, disputes as to tenancy bonds must be litigated in the civil courts in the normal way.

In the Australian Capital Territory, the *Small Claims Ordinance 1974* allows litigants in the Court of Petty Sessions to institute proceedings under this Act for claims (including, apparently, claims relating to tenancy bonds) up to \$1000. The proceedings are simple and informal and the rules of evidence do not apply. Proceedings may be transferred between the small claims division of the court and the ordinary court of petty sessions as directed by the court. An appeal only lies with the leave of the Supreme Court. Parties may be legally

represented but no costs can be awarded and there are no court fees except upon the execution of judgement of the court.

In Both Queensland and Victoria, legislation establishing small claims tribunals have been passed to enable disputes involving the provision by traders for goods and services to consumers where the amount involved does not exceed \$450 (in Queensland) and \$500 (in Victoria) to be dealt with informally and cheaply (Queensland *Small Claims Tribunals Act 1973*, Victorian *Small Claims Tribunals Act 1973*). Decisions of the tribunals are final. It is not clear whether these tribunals have jurisdiction to deal with disputes as to tenancy bonds, although the Commission understands that the Queensland Tribunal has made orders concerning the repayment of tenancy bond money.

Other jurisdictions

15. The position in New Zealand, England, South Africa, Eire, Canada and in some States of the United States of America are set out in Appendix IV below. The Commission wishes to acknowledge the assistance it has received from the Law Reform Commission of British Columbia in its report on *Landlord & Tenant Relationships : Residential Tenancies* (Project No. 12, 1973) in preparing this comparative survey of other jurisdictions.

RECENT PROPOSALS FOR REFORM IN WESTERN AUSTRALIA AND ELSEWHERE

16. (a) **Western Australia**

A number of proposals for reform of the law with respect to tenancy bonds have been made to the Government in recent years. The proposals of the Legal Committee of the State Parliamentary Labor Party, the Council of Social Services of W.A. (Inc.), the Land Agents Supervisory Committee of W.A., a State Housing Commission study committee, a sub-committee of the Consumer Affairs Council, the Australian Labor Party and the interim report to the Commonwealth Commissioner for Law and Poverty are discussed in Appendix II to this paper.

(b) *Elsewhere*

Proposals for reform made in the U.S.A. and Canada are discussed in Appendix III below.

DISCUSSION

(a) *Should the use of tenancy bonds be prohibited*

17. In support of the proposition that the use of tenancy bonds should be prohibited, it is clear that in some cases, the amount of the bond money, when added to other capital sums that a prospective tenant may have to find in advance, such as rent in advance, letting fees, stamp duty, costs of preparing the tenancy agreement, State Electricity Commission deposit and telephone rent, can impose a considerable financial burden on him.

In any event it has been suggested that tenancy bonds serve little practical purpose, because of the practice of many tenants ceasing to pay the rent before the end of the tenancy. It has also been suggested that the need for tenancy bonds can largely be avoided by efficient property management.

On the other hand, it can be argued that the use of tenancy bonds is a proper method of protecting landlords against loss or damage due to the acts or defaults of bad tenants. It can also serve as an effective method of adjusting State Electricity Commission and other accounts payable by the tenant at the end of a tenancy where the account has not at that time been received. If the use of tenancy bonds was prohibited, then unless other charges by landlords were controlled by legislation, landlords might impose additional obligations on tenants, such as higher rents or letting fees and premiums.

18. The Commission is at this stage opposed to a statutory prohibition on the use of tenancy bonds, but would welcome comment.

At the same time, the Commission does not at this stage favour the proposal of the Council of Social Service of W.A. (Inc.) and a subcommittee of the Consumer Affairs Council (see Appendix II below) that the payment of a bond should be mandatory in all cases.

The Commission thinks that the landlord should be free to let his premises without having to insist that the tenant enter into a bond.

(b) *Should the use of tenancy bonds be controlled by legislation*

19. If the use of tenancy bonds is to be permitted, it is necessary to determine whether legislation should be enacted to ensure that the use of tenancy bonds is fair to both landlord and tenant.

The number of complaints received by various authorities (see paragraph 4 above and Appendix I below), particularly from tenants of residential premises, is evidence that in some cases the use of tenancy bonds has not been fair. The principal criticisms of the present practice appear to be based on allegations that -

- (i) the amount of the bond is sometimes excessive having regard to the amount of the rent;
- (ii) the bond money is usually held by the landlord or his agent rather than by an impartial person or body;
- (iii) the tenant often receives no interest on the bond money;
- (iv) the bond money is sometimes appropriated in payment of matters for which the tenant is either not liable or is only in part liable;
- (v) there is no means of effectively and speedily dealing with disputes as to repayment of bond money, having regard to the small amount of money usually involved.

(i) The amount of the bond money

20. A statutory requirement that tenancy bonds be limited to a maximum amount equal to, say, 2 or 4 weeks rent, would prevent landlords insisting upon tenancy bonds of a large amount.

However it could be argued that such a formula may not always be fair due to variations in the nature and conditions of different premises. For example, a higher bond may be justified for a lease of an expensively furnished flat, where the risk of damage is proportionately greater than the increased rent.

21. It has been proposed by the Council of Social Service of W.A. (Inc.) and the Consumer Affairs Council sub-committee that a statutory minimum be imposed on the amount of tenancy bonds, for the reasons given in Appendix II below, but the Commission does not at this stage favour this proposal,

(ii) Who is to hold the bond money

22. As an alternative to a landlord holding bond money on his own account, or his agent holding the bond money on his behalf, legislation could be enacted which would require -

- (a) The landlord or his agent to act as a trustee for the tenant and to place the bond money in a separate trust account to be held pending the determination of the tenant's obligations. This is the case in some Canadian Provinces and States of the U.S.A. (see Appendix IV below).

However, such a requirement may give rise to problems of enforcement. It may be necessary to prescribe criminal penalties for any breach.

- (b) The agent collecting the bond money to act as a stakeholder.

However, not all landlords engage agents and there may be objections to a requirement that they should in all cases be required to do so.

- (c) The Landlord or his agent to pay the bond money to some independent officer called a "rentalsman" whenever a dispute arose, as in Manitoba, Canada (see Appendix IV below).

- (d) That all landlords and their agents pay the bond money to some government department or statutory authority within a limited time after its receipt, as has been proposed by a number of organisations in this State (see Appendix II below). This proposal is discussed further in paragraphs 35-38 below.

(iii) Interest on the bond money

23. It would be possible to enact legislation requiring landlords to pay to tenants interest at the rate of, say, 6% per annum on the bond money, as has been done in a number of Canadian provinces (see Appendix IV below), or alternatively, at the rate of interest paid on savings bank accounts, as in South Africa (see Appendix IV below). Such interest could, unless otherwise agreed, be paid at the end of the tenancy and until then could be compounded annually, or alternatively could be paid annually with an adjusted payment at the end of the tenancy. As has been observed, the agents of some W.A. landlords already pay tenants interest on bond money that is invested by the agents (see paragraph 8 above).

However such legislation would conflict with the various proposals discussed in paragraphs 35-38 below (and see Appendix II below), whereby interest on all tenancy bonds would be applied firstly in payment of the administration costs of the proposed schemes.

(iv) The matters for which bond money may be applied

24. Legislation could be enacted which restricts the application of bond money to the following matters -

- (a) arrears of rent only, as is the case in the Canadian provinces of Ontario, Yukon and British Columbia and as has been suggested in New Brunswick (see Appendices III & IV below);
- (b) those matters that are expressly set out in the legislation, as has been suggested by the Land Agents Supervisory Committee (see Appendix II below). This could either be subject to any agreement of the parties to the contrary, or alternatively could be binding on the parties irrespective of any agreement to the contrary.

A possible list of such matters could include -

- (i) wilful or negligent damage to the premises or any lack of cleanliness of the premises caused by the tenant or his family, servants, agents, or visitors, possibly with the exception of fair wear and tear;
 - (ii) arrears of rent;
 - (iii) outstanding rates, taxes and other assessments and charges for which the tenant is liable;
- (c) any loss or damage suffered by the landlord for which the tenant is liable and for which the tenancy agreement specifically provides that the tenancy agreement specifically provides that the bond money may be applied in payment, as appears to be the intention of the New Zealand legislation (see Appendix IV below).

25. The Commission does not at this stage favour a restriction on the application of bond money to arrears of rent only, as suggested in subparagraph (a) of the preceding paragraph.

However in so far as there may be doubts as to the extent of the obligations of tenants at general law in the absence of express provision in any written agreement (see paragraph 26 below), the suggestion in subparagraph (b) of the preceding paragraph that overriding legislation be enacted would have the merit of removing those doubts with respect to the application of bond money.

26. At general law there is an implied condition that a tenant shall use the premises in a tenant-like manner, and shall not commit voluntary waste, but he is not obliged to "keep the premises wind and water tight", nor to repair damage caused by fair wear and tear where it is only a weekly tenancy (*Warren v. Keen* (1954) Q.B. 15). However the obligations attaching to tenancies which are more substantial than weekly tenancies may be more onerous. Where there is an express covenant to repair, a tenant may be liable for fair wear and tear unless it is expressly excluded (*Clowes v. Bentley Proprietary Limited* [1970] W.A.R. 24).

27. It is noted that a number of Canadian provinces have statutory conditions which cannot be excluded from any tenancy and which set out the obligations of both landlord and tenant (see the addenda to the chart on Canada in Appendix IV below). Similar legislation has been recommended in England (see the final report of the English Leasehold Committee presided over by Lord Justice Jenkins (1950, Cmd. 7982) and the English Law Commission's 1967 working paper No. 8 on the Obligations of Landlords and Tenants).

28. Legislation could also be enacted which would require certain things to be done before the bond money could be applied in the manner suggested in paragraph 24 above. These could include requirements that -

- (a) the landlord should make it known in writing to the tenant that except to the extent that he suffers loss or damage for which the tenant is liable, the tenant will be entitled to a refund in full of the bond money, as in New Zealand (see Appendix IV below);
- (b) the landlord deliver full details in writing to the tenant of the reasons for any intended deduction from the bond money at the end of the tenancy, as is required in some Canadian provinces and some States of the U.S.A. (see Appendix IV below);
- (c) a certificate as to the condition of the premises should be completed and signed by the parties both at the time the tenancy begins and at the time it ends, possibly with copies to be deposited with some government department or statutory authority, as has been advocated by the Council of Social Service of W.A. (Inc.) (see Appendix II below and note the comments of the Land Agents Supervisory Committee in that Appendix).

This proposal may have the merit of overcoming some of the difficulties of proof in disputes over the repayment of bond money. However, it may give rise to problems of enforcement. Even if it was complied with, the standard of preparation of certificates may not always be satisfactory, and the requirement may lead to increased charges to the tenant for the additional work involved. It may be necessary to impose criminal penalties for any failure to comply with

the requirement, and/or to require the completion of the certificate by the landlord as a prerequisite to the retention of all or any part of the bond money.

In any event, a certificate at the end of the tenancy may not be necessary if the landlord was required to give particulars of the reasons for any deduction from the bond money to the tenant within a specified time (see subparagraph (b) above) and if there was a suitable court or tribunal to deal quickly with any disputes that arose (see paragraphs 29-32 below).

(v) The method of dealing with disputes

29. One method of dealing with disputes as to the repayment of bond money could be to streamline the local court procedure such as has been done in the Australian Capital Territory and in England (see paragraph 14 above and Appendix IV below).

30. Alternatively it would be possible to establish a small claims tribunal, the jurisdiction of which would include disputes between landlords and tenants as to tenancy bonds where the claim does not exceed a specified amount (see paragraph 14 above). Such a tribunal may be able to deal with disputes faster than the ordinary civil courts and with less regard to legal technicalities. As it would act informally and as the cost to complainants would be small, this may encourage landlords and tenants with valid claims to seek relief through it, thereby providing a means of solving many tenancy bond disputes.

The establishment of a small claims tribunal with jurisdiction in tenancy matters has been advocated by the study committee of the State Housing Commission (see Appendix II below). It has also been proposed in the Liberal Party Policy Statement for 1974-1977 under the heading "Guarding Civil Liberties".

If such a tribunal is established, and if it is given jurisdiction in disputes relating to tenancy bonds, then the Commission suggests that specific legislation on the subject of tenancy bonds be deferred until the experience of the small claims tribunal in this regard has been assessed.

31. It has been submitted by the Council of Social Service of W.A. (Inc.) and subsequently supported by the Land Agents Supervisory Committee that another method of

adjudicating on landlord and tenant disputes would be to expand the jurisdiction of the latter body to include this function (see Appendix II below).

However the Land Agents Supervisory Committee is at present only concerned with land agents and not with landlords, and has only limited functions in adjudicating upon disputes. For these reasons the Commission is of the opinion that it would be inappropriate for this Committee to deal with disputes as to tenancy bonds.

32. Another alternative method would be to establish the separate statutory position as a "rentalsman", either in the terms of the Manitoba legislation (see Appendix IV below) or as suggested by the subcommittee of the Consumer Affairs Council (see Appendix II below). If this method was adopted, the Commission considers that the "rentalsman" should be legally qualified.

33. In vesting some existing statutory authority such as the Land Agents Supervisory Committee with jurisdiction in such disputes or in creating the post of "rentalsman", it would be necessary to determine whether the function should be -

- (a) to mediate in disputes in an attempt to get the parties to settle; or
- (b) to adjudicate or arbitrate, either compulsorily (as suggested by the Consumer Affairs Council sub-committee, see Appendix II below) or at the request of the parties.

It would also be necessary to decide whether there should be an appeal to a court, either generally or upon a matter of law only.

34. In some Canadian provinces, a prerequisite to the retention of all or part of the bond money by a landlord is, in the absence of the tenant's written agreement, the obtaining of a court order (see Appendix IV below). The Commission does not at this stage favour such a provision.

35. The proposal made by the Council of Social Services of W.A. (Inc.) and the subcommittee of the Consumer Affairs Council that all tenancy bond money should be paid to

the administering authority within a limited time after its receipt and be invested to pay administration costs (see Appendix II below) would involve a substantial administrative task and would add to the costs of administering any scheme. Problems could arise with rapid changes in tenants. To administer such a scheme properly, the authority would require a large clerical and inspecting staff in addition to officers to mediate or adjudicate upon disputes.

Provisions making all information confidential to the authority would also seem necessary.

36. It would not be possible to estimate accurately the costs of administering such a scheme and possibly the interest derived from the investment of bond money may not be adequate for this purpose. The introduction of the scheme might even discourage the collection of bond money, unless this was otherwise mandatory (see paragraph 18 above).

37. On the other hand it is possible that such a scheme, if administered properly, could be an effective means of reducing the number of disputes concerning tenancy bonds. The authority could also be given other functions in landlord and tenant matters, such as determining eviction proceedings, although such matters are outside the Commission's terms of reference.

38. The Commission is at this stage tentatively of the view that the problems arising from the use of tenancy bonds in this State are not of themselves sufficient to justify the introduction of the scheme referred to in paragraph 35 above but would welcome comment. The Commission is not aware of any other jurisdiction where such a scheme has been established, although it notes that the Law Reform Commission of British Columbia has recently recommended a similar scheme and a bill proposing to give effect to that recommendation has been prepared (see Appendices III & IV below).

(vi) Other matters

39. If legislation is to be enacted with respect to tenancy bonds, the Commission would suggest that it be limited to residential tenancies only. The Commission is not aware of any evidence that would suggest that the use of tenancy bonds for other types of tenancies has given rise to any problems on a major scale.

40. In any legislation, it would be necessary to determine whether covenants for the repayment of bond money should run with the land, that is, whether purchasers of premises subject to continuing tenancies should assume responsibility for the performance of such covenants (see paragraph 10 above). If it is decided that such covenants should run with the land then it may be desirable to require landlords disposing of premises to pay bond money to the purchasers with notice to the tenants, or to pay it to the tenants, as in some States of the U.S.A. (see Appendix IV below).

41. It would also be necessary in any legislation to include transitional provisions with respect to bond money already held at the time the legislation came into force.

CONCLUSION

42. The Commission would welcome comments on any of the following matters as well as any other matters coming within the terms of reference -

- (A) Should the use of tenancy bonds be prohibited by legislation? (see paragraphs 17 & 18 above). If not, then
- (B) Should the use of tenancy bonds be controlled by legislation? (see paragraph 19 above). If so, then
 - (i) Should there be a statutory maximum and/or minimum on the amount of a tenancy bond, and if so, how should the amount or amounts be calculated? (see paragraphs 20-21 above);
 - (ii) Who should hold bond money, and in what capacity should it be held? (see paragraph 22 above);
 - (iii) Should interest tenants on bond money, and if so, at what rate and when should it be payable? (see paragraph 23 above);
 - (iv) To what matters (if any) should the application of bond money be restricted? (see paragraphs 24-27 above);

- (v) Should a landlord be required -
 - (a) to notify a tenant of his rights to repayment of bond money? (see paragraph 28(a) above);
 - (b) to deliver to the tenant full details in writing of any proposed deduction from the bond money? (see paragraph 28(b) above);
 - (c) To arrange the completion, both at the beginning and at the end of a tenancy, of a certificate as to the condition of the premises? (see paragraph 28(c) above);

- (vi) Should disputes as to the repayment of bond money be dealt with -
 - (a) by the local court;
 - (b) by a small claims tribunal;
 - (c) by expanding the jurisdiction of the Land Agents Supervisory Committee; or
 - (d) by establishing the position of "rentals man" either in the terms of the Manitoba legislation, or as suggested by the Consumer Affairs Council subcommittee? (see paragraphs 29-32 and Appendices II & IV below);

- (vii) If the Land Agents Supervisory Committee or a "rentalsman" is to have jurisdiction in such disputes, what should be the functions of that Committee or "rentalsman" and should there be a right of appeal? (see paragraph 33 above);

- (viii) Should the landlord be required to take action within a limited time before he can retain all or any part of the bond money without the tenant's written consent? (see paragraph 34 above);
- (ix) Should it be a requirement that all tenancy bond money be paid to an administering authority within a limited time after receipt, the interest to be used to pay administration expenses? (see paragraphs 35-38 above);
- (x) Should legislation be limited to residential tenancies only, or should it include other types of tenancies? (see paragraph 39 above);
- (xi) Should covenants for the repayment of bond money run with the land? (see paragraph 40 above);
- (xii) What transitional provisions are necessary for bond money held at the commencement of any legislation? (see paragraph 41 above).

APPENDIX 1 – Working Paper

GENERAL INFORMATION OBTAINED BY THE COMMISSION ON THE USE OF TENANCY BONDS IN W.A.

Land Agents Supervisory Committee of W.A.

The Commission made a survey of all complaints received by the Land Agents Supervisory Committee for 1972 and 1973 which related to tenancy bonds. The following summarises the information obtained -

	Number of complaints	
	1972	1973
Complaints made by tenants	18	17
Complaints made by landlords	<u>2</u>	<u>3</u>
	<u>20</u>	<u>20</u>
Complaints against agent	15	13
Complaints against landlord	3	4
Complaints made by landlord against agent	<u>2</u>	<u>3</u>
	<u>20</u>	<u>20</u>
Complaints involving disagreement over condition of rented premises	12	7
Complaints due to delay in returning bond money	1	5
Cases where bond money was retained because of arrears of rent	4	9
Cases where the claim for arrears of rent was disputed	3	6
Cases where the claim was for arrears in other charges e.g. electricity	3	6

It appeared to the Commission's staff that two of the complaints in both 1972 and 1973 may have been justified while four complaints for 1972 and seven complaints for 1973 may not have been justified. In the other cases, the information was insufficient for the Commission's staff to assess whether or not the complaint was justified.

Note: in some cases, there were several matters of complaint relating to the same tenancy.

Consumer Protection Bureau

The Commission made enquiries at the Consumer Protection Bureau about the number of complaints received in respect of tenancy bonds. The Bureau said that from July 1973 to February 1974, it had received 92 complaints in landlord and tenant matters. The Bureau did not keep separate figures of the number of these complaints that related to tenancy bonds, but it estimated that about 80% of them would be so related. The majority of the complaints were against landlords who did not engage agents. The most common causes of complaint related to cleaning charges, allegations of damage to the premises, claims as to rental arrears and refusals to return bond money without giving any reason.

Citizens Advice Bureau

The Citizens Advice Bureau told the Commission that over a three month period in 1973, it had conducted twenty one interviews with respect to tenancy bonds and had received ninety five inquiries about the same matter.

In the great majority of cases, the complaint was that the tenant could not get all or part of his bond money refunded. The reason given by the landlord was usually that the premises were left damaged or unclean. In some cases the cause of the complaint was that the bond money had been retained without the landlord giving any reason. In a few cases it was alleged that the landlord had refused to refund the bond until the premises were re-let.

Most complaints were against landlords who did not engage agents and against land agents who were not members of the Real Estate Institute of Western Australia.

The Real Estate Institute of Western Australia

In 1973 the Institute carried out a survey of its members on a number of matters including problems associated with tenancy bonds. The following is an extract from the Institute's report -

"BONDS

The usual amount charged as security deposit ranged from \$40.00 (or approximately two times the weekly rent) to \$100.00 (or approximately four times the weekly rent).

The minimum bond required was nil. The maximum bond required was \$1000.00 on a fully furnished, exclusive home.

An average of all suggested minimum rates produced a figure of \$51.70. An average of all suggested maximum rates produced a figure of \$151.40. It was recognised, however, that the value of furnishings in any flat or house could cover a very wide range, and therefore to set a maximum bond was very difficult, if not impossible.

Twenty per cent of the agents would, under special circumstances, allow tenants to pay the bond on terms. However, where terms were available, the tenant's character and reliability were unquestionable.

Seven of the agents were investing bond money on behalf of the tenant in special accounts with building societies or other financial institutions, and found that tenants were more cooperative and satisfied with the agent's services, knowing that they could receive full bond plus interest upon the termination of tenancy.

In almost all cases a full bond was returned to the tenant upon vacation. Where this was not possible, specific reasons were stated for a bond retention. They are as follows:

Repairs	Telephone
Cleaning	Missing chattels
Rent arrears	Garden maintenance
Gas	Stamp duty
Electricity	Excess Water."

The Institute has recently prepared a standard set of forms for use by its members including an "instructions to act as managing agent", an "application for tenancy", a "rental agreement" and an "inspection sheet of state of repair of property" for completion and signature both at the commencement and the termination of the tenancy.

Law Reform Commission Survey

The Commission undertook a Limited survey, by means of a questionnaire, of seventeen firms or companies which are frequently engaged in letting premises in W.A. Thirteen replies were received. Broadly the replies indicated that almost all tenancy bonds that were collected were

for residential premises, the average bond being about \$60. Where an agent was involved, the bond money was usually held in trust or invested to earn interest. The percentage of tenancies where there was a dispute as to the return of the bond money was small, although in many cases part of the bond money was appropriated in payment of State Electricity Commission and other accounts.

Council of Social Service of W.A. (Inc.)

The Council conducted a survey of landlord and tenant problems prior to the preparation of its report in 1971 (see Appendix II below). Details of this survey can be obtained from the office of the Commission.

APPENDIX II – Working Paper

PROPOSALS FOR REFORM IN WESTERN AUSTRALIA

State Parliamentary Labor Party

1. In 1971, the Legal Committee of the State Parliamentary Labor Party recommended to the State Government that legislation be enacted to create a landlord and tenant bond fund. It proposed that all bond money be paid into this fund, with, penalties in default, and that the fund be administered either by the Land Agents Supervisory Committee, the State Housing commission or some similar authority. The fund would be invested to pay all administration costs. The authority would adjudicate on any disputes that arose.

Council of Social Service of W.A. (Inc.)

2. In the same year, the Council of Social Service of W.A. (Inc.) released for public comment a report on tenant landlord relations. The report advocated legislation under which -

- (a) A solicitor and valuer would be added to the membership of the Land Agents Supervisory Committee.
- (b) All bond money would be paid to that Committee and be invested to pay administration costs.
- (c) A mandatory tenancy bond equal in amount to a minimum of three weeks rent would be paid by every tenant to his landlord or his agent before the commencement of the tenancy and be lodged with the Land Agents Supervisory Committee within seven days of the commencement of the tenancy.

The Commission understands that this proposal would require a bond to be paid irrespective of whether the parties desired otherwise. The reasons given in support of this proposal are that it would -

- (i) protect the landlord, particularly since there can be delay in obtaining an order for recovery of possession of premises pursuant to Part IV of the *Local Courts Act 1904* and since most household insurance policies do not cover loss or damage due to malicious acts or theft by tenants; and
 - (ii) ensure that all landlords and tenants contribute to the cost of administering the tenancy bond fund by using the interest on the fund to defray administration costs (see also paragraphs 4 & 5 of this Appendix below).
- (d) A "Certificate of Condition of Rental Premises" would be completed and signed by both parties or their agents at the commencement of the tenancy and lodged with the Committee.
- (e) At the end of the tenancy the original certificate would be used to record details as to the condition of the premises at that time.
- (f) The valuer on the Committee would then arbitrate on any disputes that arose and his decision would be final.
- (g) The State Electricity Commission would install separate electricity and gas meters to all individual units of accommodation, to avoid arguments as to apportionment - see paragraph 4(f) of the working paper above. (It is not clear from the proposal whether the costs of installation were to be paid by the State Electricity Commission or the landlord).

Land Agents Supervisory Committee

3. Also in 1971, the Attorney General asked the Land Agents Supervisory Committee for its views on the subject of tenancy bond. The Committee, in reply, in the main supported the recommendations outlined in the preceding paragraph and also suggested as a stop gap measure that -

- (a) the legislation be limited to residential tenancies;
- (b) the collection of tenancy bond money be prohibited unless a condition report is completed and signed by the parties within a period of three days after the tenant occupies the premises;
- (c) the distribution of tenancy bond money be prohibited unless a similar condition report is completed and signed by the parties within a period of three days before and after the end of the end of the tenancy;
- (d) charges against the bond money be limited to -
 - (i) damage to premises other than fair wear and tear;
 - (ii) arrears of rent;
 - (iii) outstanding charges for electricity, gas, rates, taxes and excess water for which the tenant is liable;
- (e) where deductions from the bond money are proposed, the condition report should disclose the reason for the deductions and the landlord should, at the time the report is prepared, direct the attention of the tenant to this disclosure;
- (f) the tenant should receive a copy of each condition report.

State Housing Commission

4. The Attorney General also asked for the views of the State Housing Commission on the subject of tenancy bonds. Accordingly in 1973 a study committee of that Commission produced a report which was sent to the Attorney General. The report expressed caution about implementing the recommendations of the Council of Social Service of W.A. (Inc.), because of the study committee's inability to obtain reliable evidence about the number of cases of misappropriation of bond money presently occurring, but suggested that if the Council's recommendations were adopted the State Housing Commission would be best equipped to administer the scheme.

As alternative schemes, the State Housing Commission report suggested -

- (a) the establishment of a post of arbitrator with functions similar to those of the "rentalsman" in Manitoba, Canada (see Appendix IV below);
- (b) the establishment of a small class court to adjudicate on disputes as to tenancy bonds; or
- (c) the enactment of a requirement that all private landlords be registered and come under the supervisory control of the Land Agents Supervisory Committee or other authority.

Of these alternatives, the report favoured the establishment of a small claims court.

Consumer Affairs Council

5. In 1973, a subcommittee of Consumer Affairs Council, after holding meetings with interested groups, circulated amongst them proposals for a new Landlord - Tenant Act which in part dealt with tenancy bonds. The proposals with respect to tenancy bonds were basically the same as those contained in the legislation in Manitoba, Canada (see Appendix IV below) with the following variations -

- (a) Tenancy bonds would be required from all tenants of an amount equal to between two and four weeks rent.
- (b) All bond money would be paid to the "rentalsman" at the commencement of the tenancy instead of at the time any dispute arose.
- (c) Interest on bond money would be used to pay for the costs of administering the scheme instead of being paid to the tenant.
- (d) Where a dispute arose as to the return of bond money, the parties would be obliged to accept the "rentalsman" as arbitrator and his decision would be final. If the arbitration was not completed within 30 days, the landlord would be

required to initiate court action within a further ten days after receiving notification from the "rentalsman" of the failure to complete the arbitration, otherwise the bond money must be returned to the tenant.

Australian Labor Party State Conference

6. At the W.A. State Conference of the Australian Labor Party in 1973, a motion was carried proposing legislation -

- (a) requiring a mandatory tenancy bond equal to two weeks rent, payable at the beginning of the tenancy;
- (b) requiring the landlord or his agent to deposit the bond money with a building society within seven days of its receipt, and subject to (c) below, to be repaid to the tenant in full with interest within seven days after the end of the tenancy;
- (c) restricting the application of the bond money to arrears of rent only;
- (d) requiring cleaning expenses and loss due to accidental damage to be borne by the landlord, but without limiting the landlord's general law rights of action against the tenant;
- (e) specifying the obligations of landlords and their agents with respect to the repair and maintenance of premises; and
- (f) giving the Local Court jurisdiction in landlord-tenant disputes arising from the legislation, but subject to the existing rights of appeal.

Commonwealth Commission of Enquiry into Poverty

7. In 1973, the Commonwealth Commission of Enquiry into Poverty commissioned a study on residential landlord-tenant relationships. In February 1974, Mr. A.J. Bradbrook prepared an interim report on this subject for the Commissioner for Law and Poverty and this

report was released for public comment. It advocated uniform legislation in Australia for residential tenancies. With respect to tenancy bonds, it was proposed that -

- (a) The maximum amount of a tenancy bond should be the equivalent of two weeks rent.
- (b) Tenancy bond money should be held by a third party, possibly a Residential Tenancies Board. Alternatively the landlord should hold the bond money as trustee for the tenant.
- (c) Bond money should be invested in an interest bearing account at a bank, and the interest paid to the tenant. Mr. Bradbrook has since suggested that this should only apply to tenancy bonds exceeding \$100.
- (d) Bond money should be repaid to the tenant in full within seven days of the end of the tenancy unless the tenant consents in writing to any deduction or the landlord applies for a court order authorizing the deduction.

Alternatively, if the bond money is to be held by a Residential Tenancies Board, that Board should send a notice to the landlord at the end of the tenancy advising of its intention to refund the bond money in full to the tenant unless the landlord obtains the tenant's written consent to a deduction or unless the landlord files a claim with the Board within seven days.

APPENDIX III - Working Paper

PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

1. The U.S.A. National Conference of Commissioners on Uniform State Laws in 1972, recommended the enactment of a uniform residential landlord and tenant Act, a summary of which is contained in Appendix IV below.

The Commission is not aware whether any State has adopted this Act.

2. The Law Reform Division of the Department of Justice New Brunswick, in a 1973 working report on landlord and tenant law, has suggested the enactment of legislation with respect to residential tenancies to provide that -

- (a) security deposits be limited to the equivalent of the rent ,for a one week or one month rent period;
- (b) deposits be held against non-payment of rent only;
- (c) interest at a fixed rate on deposits be paid to the tenant annually unless he otherwise agrees. The report suggested a fair rate in the circumstances was 6% per annum.
- (d) deposits be held in a separate trust account and be repaid with interest within 15 days after the termination of the tenancy; and
- (e) covenants for the repayment of deposits run with the land.

3. The Law Reform Commission of British Columbia in its 1973 report on *Landlord and Tenant Relationships : Residential Tenancies* (Project No. 12) considered there were shortcomings in the present law. In particular it suggested that the statutory requirement under which landlords could not retain any part of the security deposit without a court action (see Appendix IV below) was not being complied with by many landlords, and thus tenants were forced to take court action for recovery. On the other hand, some landlords were repaying the

deposit in full rather than going to the trouble of taking court action even when there was some justification for retention. The Commission recommended that all deposits be paid to a "rentalsman", who would hold them as trustee, but using the interest thereon for administration costs. The onus would then be upon the landlord to seek payment of all or part of the deposit within 15 days after the termination of the tenancy, otherwise it would be repaid to the tenant. If the landlord did make a claim, then the rentalsman would determine the matter.

The report also advocated that a maximum rent deposit equal in amount to the first month's rent and a separate maximum damage deposit equal in amount to one half of the first month's rent be permitted.

APPENDIX IV – Working Paper

THE LAW IN SOME OTHER COUNTRIES

New Zealand

- (i) *Tenancy Act 1955* (which imposes rent control with respect to certain types of houses).

It is an offence to require or accept any consideration from a tenant other than rent (s.32). The tenant may recover any payment made in contravention of the Act within twelve months of the payment or may deduct the payment from any rent payable to the landlord within that twelve month period (s.33).

- (ii) *Rent Appeal Act 1973* (which applies with some exceptions, to all dwelling houses except those covered by the *Tenancy Act 1955* or the *Housing Act 1955*).

It is an offence for any person being landlord or acting on behalf of a landlord who -

- " (a) At or before the beginning of any tenancy of a dwelling house stipulates for or demands in respect of the tenancy the payment from any tenant or prospective tenant on account of rent in advance of a sum which, together with any payment by way of security for the performance by the tenant of his obligations as the tenant exceeds the equivalent of 1 month's rent; or
- (b) Stipulates for or demands or accepts from the tenant or prospective tenant of the dwelling house any sum as security for the performance by the tenant of his obligations as the tenant unless -
- (i) The sum does not exceed the equivalent of 1 month's rent; and
- (ii) The sum may be applied by or on behalf of the landlord only if the landlord suffers loss or damage through the failure of the tenant to perform any of his obligations as the tenant; and

- (iii) The landlord has made it known to the tenant in writing that, except to the extent that the landlord so suffers loss or damage, the tenant will be entitled to have that sum refunded to him in full when he vacates the premises." (s.21).

England

The *Rent Act 1968*, which imposes rent control for certain types of residential premises, prohibits any payment of any premium or the making of any loan as a condition of the grant, renewal or continuance of any tenancy to which the Act applies (s.85 and see ss. 86, 87, 90 & 91). Premiums are defined as including "any fine or other like sum and any other pecuniary consideration in addition to rent" (s.92). It would appear that a returnable deposit paid by a tenant to a landlord is a premium and is within the prohibition even if interest on it is payable to the tenant (*Macdonald v. Laing* (1954) S.L.T. (Sherriff's Court) 77, and also the decision of the Southampton City Magistrate's Court in *Southampton City Council v. Silk Estates (Developments) Ltd.* (1967) 203 Estates Gazette 727).

The view has also been expressed that it is unlawful for a landlord to require a tenant to deposit a sum with an independent stakeholder as security for any default by the tenant in his obligations (see (1968) 118 New L.J. 4).

The fact that an unlawful premium is required or paid probably does not render the tenancy invalid (*Grace Rymer Investments Ltd. v. Waite* [1958] Ch. 831). The tenant may recover an illegal premium by court order upon the conviction of a person in respect of illegal premiums (ss.85(4), 87(5), or by taking court action for recovery (s.90).

In addition, the *Rent Act* also prohibits, with respect to certain types of premises, any requirement that rent shall be payable -

- (1) before the beginning of the rental period in respect of which it is payable; or
- (2) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months) (s.91).

The tenant may recover any illegal advance payment of rent in a similar manner to that of premiums or he may deduct the illegal advance from any rent payable by him.

Most civil actions for small claims are instituted in the County Court. Pursuant to amendments made in 1973 to the *County Court Rules*, the registrar can, on the request of either party and where the amount of the claim does not exceed £75, refer disputes to an arbitrator. The arbitrator is usually the registrar of the court, although the parties may agree upon another suitable person. Disputes as to tenancy bonds can be dealt with in this way. The procedure is simple and informal and in most cases no legal costs can be awarded.

South Africa

The *Rents Act 1950* impose rent controls with respect to dwellings and other places of residence occupied or used before the 1st June 1966 in areas where a rent board is constituted.

No person may demand or accept from a lessee or prospective lessee of a controlled dwelling -

- (a) more than one month's rent in advances; or
- (b) a deposit in addition to rent exceeding an amount equal to one month's rent -
 - (i) in respect of light, gas, water or sewerage, Where those services are not included in the rent; and
 - (ii) in respect of any damage to the dwelling or any loss of keys, for which the lessee may become liable (s.25(2)).

The deposit must be invested with a building society in such manner as the lessor thinks fit and must be repaid by the lessor to the lessee when the latter vacates the dwelling, together with interest thereon at the same rate as that earned from deposits in a savings account in the post office savings bank, less the actual amount of the damage to the dwelling and the actual cost of replacing lost keys (s.25(2) proviso (b)).

Should the lessor and lessee fail to agree on the amount of the damage or on the cost of replacement of lost keys, the lessor must forthwith submit an application to the rent board for the determination of the lessee's liability. The rent board's determination is final (s.25(2) proviso (c)).

If the rent board is of the opinion that the lessor has unreasonably failed, after demand, to refund the deposit or to submit an application for the determination of the lessee's liability, it may allow interest on the deposit at a rate not exceeding 8½% per annum as from the date of demand to date of payment (s.25(2) proviso (d)).

Any person who contravenes s.25 commits an offence (s.25(3)).

It is also unlawful for the lessor of a controlled dwelling to require or accept or for the lessee to offer, in consideration of the grant, renewal or continuation of the tenancy, any bonus, premium or other like sum in addition to rent (s.25(1)).

The rent board is under a duty to receive and investigate any written complaint as to the refusal of a lessor to refund a deposit (s.5(1)(a)).

Eire

The *Rent Restriction Act 1960*, which imposes rent controls for dwellings, provides in s.46 that any deposit given as security for rent for controlled dwellings which is not an "approved deposit", is recoverable on demand from the person to whom the rent was last paid. An approved deposit is one -

- (a) that does not exceed a sum equivalent to three month's rent; and
- (b) for which the amount is either recorded in the rent book (if the agreement is oral) or recorded in the written agreement.

There is an implied term on the sale of controlled dwellings that the vendor will give the purchaser any information he has regarding any deposit made by a tenant.

The Act also make it an offence to require, as a condition of the grant, renewal or continuance of a tenancy of any controlled dwelling (other than a tenancy of 14 years or more), the payment of any fine or premium or other valuable consideration In addition to rent (s.42).

Canada and United States of America

Two charts follow which summarise the law in Canada and in some States of the U.S.A. These charts were prepared by the Law Reform Commission of British Columbia.

Addenda to the chart on Canada

The Newfoundland Landlord and Tenant (Residential Tenancies) 1972 Bill has become an Act (1973, No. 54) and the Saskatchewan Residential Tenancies Bill has also become an Act (1973, c.83).

In the case of British Columbia, the details in the chart are taken from the *Landlord and Tenant Act 1960*, as amended in 1970, c.18. A Bill introduced in that jurisdiction in 1974 entitled the Landlord and Tenant Act, Bill 105, proposes the repeal of the two earlier Acts in so far as they relate to residential tenancies. In its place it proposes enactment of new provisions in terms similar to the recommendations of the report of the Law Reform Commission of British Columbia (see Appendix III above).

With respect to security deposits, the Bill's provisions vary from these recommendations in that instead of permitting separate rent and damage deposits, it is proposed that a single maximum security deposit equal in amount to one month's rent be permitted. Such a deposit should be applied to both arrears of rent and damages.

Statutory Conditions

In the provinces of British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan, the legislation contains statutory conditions which set out the obligations on both landlord and tenant for the maintenance and repair of the premises.

Security deposits to be held in trust

In the provinces of Alberta, Prince Edward Island and Saskatchewan, the legislation expressly provides that the landlord or his agent is to hold the security deposit in trust for the tenant, subject to the Act. The provinces of Newfoundland and Nova Scotia merely specify that the security deposit is to be held in trust by the landlord.

CANADA

For the sake of compactness the following abbreviations have been used: l-landlord; t-tenant t.a.-tenancy agreement

Province	Maximum Amount	Interest	Return of Deposit	Allowable Uses for Deposit	Landlord's Procedure to Retain Part of the Deposit for Allowable Use	Tenant's Procedure to Complain of Landlord's Retention	Penalty for Contravention of Act	Special Provisions
Alberta ⁸	Agreed in t.a...	6%/yr or agreed; paid annually or when agreed in t.a.; landlord may retain interest or profit greater than this.	Within 10 days of delivery of possession on the expiration or termination of tenancy	Anything in t.a.	Give t. a statement plus balance within 10 days of termination, stating reasons for retention; if damage is allowable use, give estimate and balance within 10 days, final account within 30 days	Claim to Small Claims Court with a statement of account or without a statement of account.	Summary conviction and a maximum fine of \$100	Cannot be waived.
British Columbia	Rent for 1 month unless municipal by-law allows more (applies to all new or renewed t.a.)	6%/yr paid annually or 15 days after termination of tenancy.		Last month's rent under the t.a.		Claim in Small Claims Court	Summary conviction and a fine less than \$1,000	Judge making conviction can order the deposit or interest or any part repaid; cannot be waived.
	Deposits other than for rent taken before Part II; no maximum.	6%/yr	Within 15 days of termination or renewal; may apply to a judge for an extension (see sec.38)	Anything in t.a.; damaged caused by t.	Get tenant's consent in writing; if t. refuses after written notice, apply to a Judge in Small Claims Court.			
Manitoba ⁹	½ month's rent	4%/yr. Minimum; paid with	Within 7 days of expiration or termination of t.a.	Arrears in rent; damaged caused by t.	Notify t. and rentalsman of reasons for retention and forward deposit and interest to	Complaint to rentalsman	Summary conviction and a fine to a	

		return of deposit			rentalsman, who tries to get an agreement; rentalsman can act as arbitrator if parties consent; if so, his decision is final; if no agreement within 30 days, rentalsman notifies l. and t.; l must bring action within 10 days or t. gets whole deposit.		maximum of \$1,000	
Newfoundland ¹⁰	½ month's rent	6%/yr	Within 10 days of termination unless there is a complaint	Damage that is t.'s responsibility	Consent of t. in writing; or complain to Court within 15 days of termination; give notice to t. 5 days before complaint made	Complaint to Magistrate within 15 days; give notice to l. 5 days before complaint	Summary conviction and a maximum fine of \$400 (4 months in default)	
Northwest Territories ¹¹	½ month's rent	4%/yr paid with return of deposit	Within 10 days of delivery of possession	Anything in t.a.	As in Alberta	As in Alberta		Cannot be waived
Nova Scotia ¹²	½ month's rent	As in Newfoundland	As in Newfoundland	As in Newfoundland	As in Newfoundland if deposit more than \$100; to Residential Tenancies Board if under \$100	Complain to Magistrate or Residential Tenancies Board depending on amount of deposit		
Ontario ¹³	As in B.C. with no local option previous deposits other than for rent	6%/yr paid annually 6%/yr	As in B.C.	Last month's rent Anything in t.a.	As in B.C.; apply to Judge of County or District Court	t. can sue l. in Divisional Court for improper retention	Summary conviction to maximum fine of \$1,000	Cannot be waived

Price Edward Island ¹⁴	1 month's rent	As in Alberta	Within 10 days of deliver of possession	Anything in t.a.	As in Alberta			
Saskatchewan ¹⁵	lesser of ½ month's rent and \$75	5%/yr or rate fixed by Lieutenant-Governor-in-Council paid as it reaches \$10	Within 10 days of termination of tenancy		Serve notice of claim on t. within 5 days of termination of tenancy or service of notice to quit; if t. does not consent within 5 days, l. delivers deposit and all information to Rental Board within another 5 days and applies to Judge for a hearing appointment; l. serves copy of appointment on Board and t.; gets Court order and delivers to Board and t. and Board pays money according to order		If l. fails to apply to Judge or to serve notice of appointment, his claim is barred.	New landlord is subject to the Act for all deposits held by original l. (trusts vest in him), old l. must transfer deposits.
Yukon ¹⁶	As in Ontario Previous deposits other than for rent	5%/yr paid annually or within 15 days of termination 5%/yr		Last month's rent Anything in t.a.	As in B.C.			

⁸ *Landlord and Tenant Act* R.S.A. 1970 c. 200.
⁹ *An Act to amend the Landlord and Tenant Act*, S.M. 1970, c.106; *am* S.M. 1971, cl 35.
¹⁰ *Landlord and Tenant (Residential Tenancies) Act*, Bill 77 (1972).
¹¹ *An ordinance to Amend the Landlord and Tenant Ordinance*, N.W.T.O. 1972, c. 20.
¹² *Residential Tenancies Act*, S.N.S. 1971, c. 74; S.N.S. 1973, c. 70.
¹³ *The Landlord and Tenant Act* R.S.O. 1970, c 236.
¹⁴ *An Act to Amend the Landlord and Tenant Act*, S.P.E.I. 1972, c 25.
¹⁵ *Residential Tenancies Act*, 1973, Bill 71.
¹⁶ *An Ordinance to Amend the Landlord and Tenant Ordinance*, Y.O. 1972 (1st sess.) c. 20.

UNITED STATES

Place	Definition of Security Deposit	Maximum Amount	Interest	Nature and Handling of Deposit	Disposition on Termination of Tenancy	Disposition on Termination of Landlord's Interest	Penalty for Contravention of Act	Special Provisions
California ¹	Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part, including an advance payment of rent, made to secure the execution of a rental agreement (does not include advance payment unless primary purpose is security)			Nothing in Act (cases not sure if trust or pledge)	Claim reasonable amount for any purpose for which payment was made (rent, repair, cleaning); return remainder within 2 weeks	l. or agent shall, within reasonable time, transfer deposits for l.'s successor and notify t. (transferee then has all rights and obligation of a l.); or return to t.	Bad faith retention – damages less than \$200 plus actual damage to t.	t. has highest claim on deposit other than a trustee in bankruptcy.
Colorado ²	Any advance or deposit of money, the purpose of which is to secure the performance of a rental agreement				Return to t. within 1 month, l. can extend to 60 days by agreement; retain for non-payment of rent, abandonment, non-payment of utility charge, repair work beyond normal wear and tear, cleaning contracts of t.'s; send statement and balance to t. within 1 month; if no written statement within that time, l. forfeits rights to withhold or to sue t. for damages to premises (no counter claim)	As in California, but applies to anyone who holds deposit.	Wilful retention in violation of Act; l. liable for three times amount wrongfully withheld and costs; t. has obligation to give notice to l. if intend to file legal proceedings at least 7 days before;	Sections are to be "liberally construed to get the intent for proper administration of security deposits and to protect the interests of landlords and

Colorado ² (cont)							wrongful is presumed, t. must prove wilful (likely a voluntary act for which good faith error is not a defence) ³	tenants"; cannot waive.
Delaware ⁴	If a residential lease in any building with more than one unit shall require lessee to provide any deposit to lessor to be held for the term of the lease or part thereof, such deposit is a security deposit		Interest of the account to t. on termination if t. has paid all rent due for the full term.	Placed in separate escrow account by l.	If t. fails to pay all rent due or prematurely terminates, l. can apply security deposit to rent due under lease and return rest (problem because act says purpose of deposit is to compensate l. for actual damage caused to lease premises; within 15 days of termination, l. must give t. an itemized list of damages, an estimate of repairs and the balance; if t. accepts balance, this constitutes agreement on damage as specified; if l. fails to give notice, constitutes agreement that no damage is done; l. must immediately remit full amount to t.		If l. fails to remit within 30 days of termination t. can get two times deposit plus interest	If t. does not provide l. with forwarding address, l. is not responsible.

¹ California *Civil Code*, § 1951.7, 1950.5 (Supp. 1973). See also Bosshardt, *The Rental Security Deposit in California* (1971), 22 *Hastings L.J.* 1373.

² For the sake of compactness the following abbreviations have been used: l-landlord; t-tenant t.a.-tenancy agreement

³ Colo. Rev. Stat. Ann. § 58-1-26 to 58-1-28 (Supp. 1971)

³ see Reimer, *Comment on Security Deposits* (1972/3), 49 *Den Law J.* 453, 457.

⁴ 25 *Del Code Ann.* § S112 (Supp. 1970)

Place	Definition of Security Deposit	Maximum Amount	Interest	Nature and Handling of Deposit	Disposition on Termination of Tenancy	Disposition on Termination of Landlord's Interest	Penalty for Contravention of Act	Special Provisions
Florida ⁵	Money deposited advanced by t. on a contract as security for the performance of the contract (does not include advance payment of rent)		5%/yr; not required if held in trust and not commingled; if such funds are deposited, t. gets minimum of 75% of interest on account	Held in trust by l.; no commingling with other funds of l. or l. shall post surety bond with Clerk of Circuit Court in total amount of security deposit of \$50,000, whichever is less; the bond is conditional on the faithful compliance by l. with the provisions of Act and shall run to the state for the benefit of any t. injured by l.'s violation	15 days after t. vacates for termination of lease or for other reasons to return deposit and interest or give t. a notice of intent to impose a claim; if t. does not request within 15 days, l. may deduct claim and remit balance to t.			Cannot be waived; applicable to l. with less than 5 housing units; also not applicable where deposit may be treated as advance rent or where amount of rent or deposit is regulated by law or rules or regulations of a public body; no duty to invest
Hawaii ⁶	Money deposited by t. with l. to reimburse t.'s default for failure to pay rent, return keys, clean units; compensate for damage caused by t. who wrongfully quits			Can commingle funds	Notify in writing at end of t.a. (unless t. has wrongfully quit) and gives grounds for retention and evidence of costs; deposit to be returned or notice given within 14 days of termination; if no notice in time, l. must return all; if t. quits wrongfully, l. can keep all (presumed if away 30 days without	l.'s successor bound by Act; l. remains liable for security deposit as well	Wrongful and wilful retention by l., t. gets three times security deposit plus costs; wrongful retention by l., security deposit plus	t. has prior claim to any creditor of l. including a trustee in bankruptcy, even if funds are commingled; no attorneys allowed in

<p>Illinois⁷</p>	<p>Deposit to secure payment of rent or compensation for damage</p>		<p>4%/yr. If deposit held more than six months, to be paid within 30 days of each 12 month period of tenancy by cash or credit unless t. is in default under terms of lease</p>		<p>notice); if disagree, either party can commence action in Small Claims Court</p>		<p>costs to t.; correct retention by l., security deposit plus costs to l.</p>	<p>action Only applies if l. has more than 25 units; not applicable to public housing; also not applicable in a community under 500,000 population</p>
<p>Louisiana⁸</p>	<p>Any advance of deposit of money furnished by t. to l. to secure performance of any part of a written or oral t.a.</p>				<p>Return within 1 month of termination; l. may keep all that is reasonably necessary to remedy a default of t. or to remedy unreasonable damage to premises; must give statement within one month.</p>		<p>Wilful failure to comply; t. can get actual damage or \$200, whichever is greater; failure to remit within 30 days of written demand by t. shall constitute wilful failure; Court can award costs</p>	<p>Cannot waive</p>
<p>Maryland⁹</p>	<p>Any payment of money, including payment of last</p>	<p>2 months; rent or \$50 (greater</p>	<p>3%/yr. If deposit more than or equal</p>	<p>Deposit in account devoted exclusively to</p>	<p>Cannot be forfeited for breach except in amount of actual damage; return</p>	<p>Binding on successor; free from</p>	<p>If not returned or account not given, t. has</p>	<p>t. can within 15 days of occupation,</p>

	month's rent in advance, given to l. by t. in order to protect l. against non-payment of rent or damage	amount) per unit regardless of number of tenants	to \$50; accrues at six month intervals	security deposits within 30 days of receipt	balance within 45 days of end of tenancy; can withhold for unpaid rent, damage due to breach of lease, damage to leased premises; give list of damage and actual cost to t. within 30 days, failure to do so; l. forfeits right to withhold any part for damage	attachments by l.'s creditors	action for three times amount withheld plus fees; if l. charges more than allowed, t. can get three times extra plus costs on an action during tenancy or within two years of termination; \$25 fine if l. does not give receipt	request a list of all existing damage (if not done, l. liable to three times deposit in damage); can not be waived.
Massachusetts ¹⁰	All funds received from t. in advance for any purpose whatsoever in excess of monthly rent	2 months' rent	5%/yr. At end of year if tenancy greater than 1 year		Return within 30 days; can deduct damage, unpaid rent, and tax increases (if part of agreement; must itemize damage and costs)		If l. fails to return, liable for twice amount owed plus interest at 5% from time due	Cannot waive
Minnesota ¹¹					Return deposit (damage or security) within 31 days after t. vacates or give written statement		If t. wins action, he gets costs and deposit	
Pennsylvania ¹²				Held in escrow	Within 30 days of termination or surrender, give list of damage to t. plus balance and interest; if not done, right to withhold for damage forfeited; can keep for non-payment of rent or breach of any other		If wrongfully withheld l. liable for twice the amount over actual damage	Cannot waive; only residential tenancies; t. must give new address or l. relieved of liability.

<p>New Jersey ¹³</p>	<p>Money or other security deposit or advanced on an agreement as security for performance or to be applied to pay on agreement when due (includes advance rent ¹⁴)</p>	<p>1½ month's rent</p>	<p>Bank interest minus 1% for l. for administration; credited towards payment of rent due on renewal or anniversary of lease</p>	<p>Money and interest remain property of t.; trustee; no commingling with funds of l.; must deposit in bank or savings association in interest – bearing account; notify t. of bank and total amount of account; all such deposits may be in one account</p>	<p>condition by t.; l. must prove actual damage Within 30 days of expiration, give t. the amount and interest; charges expended in accordance with the terms of the agreement in an itemized deduction.</p>	<p>Within 5 days, l. shall (a) transfer deposit and interest (net) to transferee and notify t.; (b) return amount (net) to t.; (c) retain amount and notify t. of transfer and the fact that the former l. has the deposit; if (a) or (b), l. is no longer liable</p>	<p>If t. wins an action for return, gets two times amount withheld plus costs; anyone who consents to or is a party to an unlawful diversion of a trust fund is subject to a fine of minimum of \$200 and (or) 30 days' maximum imprisonment</p>	<p>Claim in Small Claims or County District Court if less than \$500; t can enforce trust or file criminal complaint for diversion; no right to have deposit applied for default in rent; if l. bankrupt because a statutory trust, cannot waive, must be more than two units for act to apply</p>
<p>New York ¹⁵</p>	<p>As in New Jersey</p>			<p>As in New Jersey except no duty to deposit in bank if l. has less than 6 units</p>		<p>As in New Jersey</p>	<p>Failure to comply is a misdemeanour</p>	<p>Cannot waive</p>
<p>Model Residential Landlord Tenant Code ¹⁶</p>	<p>All funds paid for the purpose of securing performance of lease agreement</p>			<p>Held and administered for benefit of t.; quasi-trust; cannot be reached</p>	<p>Claims funds reasonably necessary to give relief for non-payment of rent; damage that is t.'s responsibility; tenant</p>	<p>t.'s claim is greater than any creditor including a trustee in</p>	<p>Misdemeanour penalty; t. gets one half of penalty</p>	

<p>Uniform Code 17</p>		<p>1 month's rent</p>	<p>Not required</p>	<p>by creditors, but can be commingled</p>	<p>absence, misuse, abandonment (this is maximum, can agree on less); l. must remit within 2 weeks of time rental agreement would have terminated had all the parties performed perfectly; exception if l. in process of repair; can wait until cost is ascertained</p> <p>Must give notice to keep for accrued rent or actual damage within 14 days of termination and delivery of possession and demand by t.</p>	<p>bankruptcy; successor not liable if l. absconds; l. must transfer deposit or return to t. to remove his liability and give rights and obligations to transferee or remove them all</p> <p>holder bound; t.'s interest is greater than other creditors</p>	<p>If not returned in time t. gets two times amount plus costs and amount due</p>	
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5 Fla.Stat. Ann. § 83.261 (Supp. 1972).
6 Hawaii Rev. Law § 521-44 (Supp. 1972).
7 Ill. Rev. Stat., c.74, §§ 91-93 (Supp. 1972).
8 La. Rev Stat., §§ 9:3251-:3254 (Supp. 1972).
9 Md. Ann Code, art 53, §§ 41-43 G (Supp. 1972).
10 Mass. Ann. Laws, c, 186, §§ 15B (Supp. 1972).
11 Minn. Stat. Ann §§ 504.19 (Supp. 1972).
12 68 Pa. Stat. Ann §§ 250.512 (Supp. 1972).
13 N.J. Rev. Stat., §§ 2A: 6-43; 46:8-19, -26 (Supp. 1972).
14 *Brownstone Arms v. Asher*, 121 N.J. Super 401; 297 A2d 219 (1973).
15 N.Y. Gen Obligations §§ 7-101 to -105 (McKinney Supp. 1972). See also Benesch, *Right of Landlord to Commingle Security Deposits* (1959), 14 N.Y.U. Intra L. Rev. 212
16 Research Project of the American Bar Foundation, 1969, A.B. Foundation Chicago.
17 *Uniform Landlord and Tenant Relationship Act.*

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