

PROTECTING PUBLIC HOUSING TENANTS IN AUSTRALIA FROM FORCED EVICTION: THE FUNDAMENTAL IMPORTANCE OF THE HUMAN RIGHT TO ADEQUATE HOUSING AND HOME*

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The tenure of most public housing tenants in Australia is precarious because it can be terminated without cause, raising the spectre of forced eviction. In that context, this article examines the fundamental importance of the human right to adequate housing and home. After first grounding the debate in the idea of home rather than traditional property law, this article examines the scope of the human right to adequate housing and home afforded under international law. The international position is then contrasted with a comprehensive review of the public housing regimes in each Australian state and territory. The article concludes by exploring the dissonance between international obligations and domestic law, and contends that it can only be resolved by enlarging the frame of reference of housing policy, administration and law to encompass human rights and by reforming state and territory law and administration in respect of public rental housing in accordance with the human right to adequate housing and home, as has been done in the Australian Capital Territory.

I INTRODUCTION

The subject of this article is the fundamental importance of the human right to adequate housing and home, and the nature of the protection from forced eviction afforded to public housing tenants under Australian law. The tenants in question generally do not comprise a (so-called) typical family, for instance, a family with one and a half breadwinners, with children at school, and in which everyone is able-bodied and in reasonable health. For many years, public housing in Australia has been targeted at the most disadvantaged in our community — people with disabilities, single parents (especially mothers), the elderly and others wholly or mainly dependent on welfare and income support. The forced eviction of vulnerable people like these raises profoundly important social, ethical and legal issues which I want to identify and discuss through the lens of human rights.

* A version of this article was presented as the Costello Lecture at Monash University Law School on 18 September 2012.

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I will not discuss homelessness, on which there is a growing literature,¹ but rather confine myself to protection from forced eviction as an aspect of the human right to adequate housing and home, which deserves the same attention. Before doing so, let us look more closely at the people concerned.

II PUBLIC HOUSING DEMOGRAPHICS

In mid-2009, over 325 000 households lived in public housing across Australia² and nearly 38 000 other households lived in community housing.³ Over 175 000 households were on waiting lists for public housing⁴ and nearly 50 000 were on waiting lists for community housing.⁵ This is a significant proportion of the Australian community.

Delving beneath these raw statistics, who are these people? We know that public housing tenants are generally older. Nationally, 78 per cent are aged 45 years or more.⁶ In Victoria, that figure is over 65 per cent.⁷ It is thought that demand for public housing from the elderly will increase. A 2009 study by the Australian Housing and Urban Research Institute predicted that demand will increase by 75 per cent from 2001 to 2016, and by 118 per cent for those aged more than 85 years.⁸ Many public housing tenants come from culturally and linguistically diverse backgrounds. Nationally, close to one third of tenants were born overseas and one in 10 speak a language other than English at home.⁹ In Victoria, those figures are even higher.¹⁰

- 1 Dianne Otto, 'Homelessness and Human Rights: Engaging Human Rights Discourse in the Australian Context' (2002) 27 *Alternative Law Journal* 271; Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139; Dianne Otto and Philip Lynch, 'Housing, Homelessness and Human Rights' (2004) 10 *Australian Journal of Human Rights* 1; Rowan McRae and Dan Nicholson, 'No Place Like Home: Homelessness in Australia and the Right to Adequate Housing' (2004) 10 *Australian Journal of Human Rights* 3; Philip Lynch, 'Homelessness, Poverty and Discrimination: Improving Public Health by Realising Human Rights' (2005) 10 *Deakin Law Review* 233; Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) ch 7; Chris Povey, *Investigating Tenancy Sustainment Programs and Approaches in Relation to Clients at Risk of Homelessness* (Winston Churchill Memorial Trust, 2011).
- 2 Australian Institute of Health and Welfare, *Public Rental Housing 2008–09* (2010) 2.
- 3 Australian Institute of Health and Welfare, *Community Housing 2008–09* (2010) iv.
- 4 Australian Institute of Health and Welfare, *Public Rental Housing*, above n 2, 2.
- 5 Australian Institute of Health and Welfare, *Community Housing*, above n 3, iv.
- 6 Roy Morgan Research, Australian Institute of Health and Welfare, *2007 National Social Housing Survey: Public Housing National Report* (November 2007) 137.
- 7 Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (2010) 11.
- 8 Sean McNelis and Caroline Neske, 'Older People in Public Housing: Policy and Management Issues' (Research and Policy Bulletin No 109, Australian Housing and Urban Research Institute, February 2009) 1.
- 9 Roy Morgan Research, *National Social Housing Survey*, above n 6, 139.
- 10 Department of Human Services (Vic), *Final Report: Support for High-Risk Tenancies Strategic Project* (2006) 40: 'public housing [in Victoria] is a culturally rich population with approximately 35.5 per cent of household heads born in countries other than [sic] Australia and 14.5 per cent of households having a preferred language other than [sic] English, spanning 91 different language groups'.

A significant number of public housing tenants are Indigenous. In 2007, six per cent of tenants in mainstream public housing across Australia identified as Aboriginal or Torres Strait Islander, and many more lived in Indigenous-specific social housing.¹¹ In Victoria, this represented over 1 300 Aboriginal households within mainstream public housing.¹² Over 1 350 more Indigenous people were living in homes provided by Aboriginal Housing Victoria.¹³

We know that public housing tenants are increasingly on very low incomes. According to a national survey of public housing tenants in 2007, 85 per cent listed their primary source of income as a disability pension, aged pension or other government benefit.¹⁴ This was not always the case. Between 1994 and 2006, there was a 70 per cent increase in the number of tenants receiving a disability pension.¹⁵ The recent parliamentary inquiry into public housing in Victoria noted that the narrowing of eligibility criteria has meant that, increasingly, only the very poorest among us are being allocated public housing.¹⁶ The inquiry found that, as at mid-2009, 60 per cent of public housing tenants in Victoria received less than \$500 a week.¹⁷

Unsurprisingly, many public housing tenants are unemployed. That figure was 43 per cent in 1981.¹⁸ The 2007 national survey found that only 23 per cent are employed full-time or part-time.¹⁹ The 2007 survey found that, of those who are unemployed, 75 per cent are actually unable to work.²⁰ Over a quarter of surveyed people said that the need or desire to stay home to take care of children had some influence on their unemployment.²¹ Two thirds of public housing tenants are women,²² most of whom are single parents.

Since the 1990s, all Australian states and territories have dealt with rising demand for public housing mainly by adjusting allocation rather than increasing supply. This has resulted in the progressive concentration of disadvantaged people in public housing. This trend is now referred to as ‘residualisation’.²³ A Victorian parliamentary committee recently acknowledged that, with the increased targeting of allocations since the 1990s, ‘people living in public housing have increasingly experienced homelessness, mental illness, disability, family violence and alcohol and/or drug dependence’.²⁴

11 Roy Morgan Research, *National Social Housing Survey*, above n 6, 138.

12 Family and Community Development Committee, above n 7, 13.

13 Ibid.

14 Roy Morgan Research, *National Social Housing Survey*, above n 6, 137.

15 Department of Human Services (Vic), *Support for High-Risk Tenancies*, above n 10, 16.

16 Family and Community Development Committee, above n 7, 15.

17 Ibid 15–16.

18 Keith Jacobs et al, ‘What Future for Public Housing? A Critical Analysis’ (Research Report, Southern Research Centre, Australian Housing and Urban Research Institute, February 2010) 7.

19 Roy Morgan Research, *National Social Housing Survey*, above n 6, 129.

20 Ibid 133.

21 Ibid 134.

22 Ibid 138.

23 Jacobs et al, above n 18, 24.

24 Family and Community Development Committee, above n 7, 17.

This is evident when we examine the people who are entering public housing. Of new public housing tenancies allocated in the year ending 30 June 2009, over 13 400 (or 65 per cent) residents had special needs.²⁵ Two thirds were in the category of ‘greatest need’.²⁶ People who meet the criteria of ‘greatest need’ include those who are homeless or whose health is compromised by their current accommodation.²⁷ Of new community housing tenancies allocated in the same year, over one third were homeless at the time of allocation.²⁸ It can be seen that public housing tenants are highly marginalised and amongst the most vulnerable people in society. Their human rights are imperilled by their circumstances.

As part of his celebrated contribution to economics and human rights, the Nobel Prize winning economist Amartya Sen argues that human rights are first of ‘intrinsic importance’, second of ‘consequential’ importance because they provide ‘political incentives for economic security’ and lastly of ‘constructive’ importance because of their ‘role in the genesis of values and priorities’.²⁹ Professor Sen links human rights with the need for people to have freedom to develop, that is, to develop their inherent capability to be someone and do things of worth, as they themselves would judge.³⁰ He writes:

What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.³¹

These opportunities, liberties and conditions are the subject of the economic, social and cultural rights and the civil and political rights, and include the human right to adequate housing and home.

In this article, after discussing the idea of housing and home as articulated in the modern legal and social discourse, I will explain the scope of these rights as adopted by the United Nations in 1966 and since ratified by Australia and most other countries.³² Focusing on forced eviction, I will compare how human rights are protected in public housing cases in comparable jurisdictions. On that foundation, I will examine the extent to which human rights are protected by the public housing and residential tenancies legislation in the states and territories

25 Australian Institute of Health and Welfare, *Public Rental Housing*, above n 2, 15.

26 *Ibid* 16.

27 *Ibid* 26.

28 Australian Institute of Health and Welfare, *Community Housing*, above n 3, iv.

29 Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) 246. See also Polly Vizard, ‘The Contributions of Professor Amartya Sen in the Field of Human Rights’ (Case Paper No 91, Centre for Analysis of Social Exclusion, London School of Economics, January 2005).

30 Amartya Sen, ‘Human Rights and Capabilities’ (2005) 6 *Journal of Human Development* 151. Sen writes that ‘capability’ is ‘the opportunity to achieve valuable combinations of human functionings — what a person is able to do or be’: at 153.

31 Sen, *Development as Freedom*, above n 29, 5. See also Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 90–1.

32 See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976) (‘ICCPR’); *International Covenant on Social and Economic Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).

and offer some explanation for the deficiencies. In conclusion, I will argue for an enlarged frame of reference and for the reform of the law and administration of public rental housing to encompass the human right to adequate housing and home.

III THE IDEA OF HOME

The idea of home has profound social and cultural importance. In recent years, it has attracted substantial scholarly attention in the social and legal sciences. A number of books³³ and journal articles³⁴ have been published which have carefully analysed the role of the home in promoting individual, family and community wellbeing. Influential scholars have emphasised the importance of the home to our sense of ‘personhood’³⁵ and ‘identity’,³⁶ that is, having identity and standing in society as someone of individual worth. Existing legal categories and principles have been criticised for failing fully to recognise and protect home-based interests. Residential tenancy law is one of those categories.

Traditionally, the common law has seen a residential tenancy in terms of freedom of contract and property rights. The parties freely enter into a contract of tenancy on the agreed terms; the tenant acquires exclusive possession for the term of the tenancy and the landlord retains the right to ownership or ultimate possession. The relationship between the owner and the occupier is that of landlord and tenant. The purpose of the law is to protect the property interests of the landlord as owner (or person entitled to ultimate possession) and the tenant as the person entitled to temporary exclusive possession. Absent legislation, the law recognises and regulates the legal relationship of the parties on that basis.

Those traditional features of the common law of residential tenancy have a positive significance in human rights terms which should not be overlooked. In particular, a tenant’s right to exclusive possession underwrites their occupation of the rented premises as a home. But the focus of this law is not on the premises as a home. That is so whether the landlord is a private or public landlord, and whether the tenant is a private or public tenant. Moreover, the legal status of the tenant does not improve with the length of their tenure and is not affected by the state of their social or physical need. As we will see, in most jurisdictions in Australia, a public periodic tenant can be evicted without cause on a few months’ notice even where they have lived in the home for years and they are elderly or in

33 See, eg, Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007); Lorna Fox O’Mahony and James A Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate, 2011); David Cowan, *Housing Law and Policy* (Cambridge University Press, 2011).

34 See, eg, Margaret Jane Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957; Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29 *Journal of Law and Society* 580; Kristen David Adams, ‘Do We Need a Right to Housing?’ (2009) 9 *Nevada Law Journal* 275.

35 Radin, ‘Property and Personhood’, above n 34. See also Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) ch 1.

36 Fox, *Conceptualising Home*, above n 33, 167–73.

ill health. A tenant on a fixed term tenancy can be evicted at the end of the term on the same basis.

Yet, to a tenant — particularly a public housing tenant who has lived or expects to live in the dwelling for a long time — their home is much more than a property interest in temporary possession. The relationship between a person and their home is individual and subjective. The home is a place of belonging, comfort and security. There can be no domestic life without a home. It is a private place for nurturing oneself, a spouse or partner perhaps, children and other loved ones. It is where we can truly be ourselves with family and friends and they can be themselves with us. As Maya Angelou has written, '[t]he ache for home lives in all of us, the safe place where we can go as we are and not be questioned'.³⁷ There is a powerful emotional dimension to the idea of home. A quality of human beings is that we put down roots in, and develop a strong sense of attachment to, our home. Grief — as genuine and sincere as any other grief — is a recognised psychological reaction to the trauma of losing a home.

So, however much we can agree that a home is shelter, a dwelling and a place to inhabit, it is much more than that. It is the primary location of individual physical existence which is indispensable for human flourishing in every respect, including participation in work and education and in cultural, social and religious life.

Of course, because the home is so central to a person's life, the consequences of loss of home extend beyond the termination of the tenancy. Forced eviction disrupts individual, family and community life, the health and schooling of children and the capacity of people to work and attend important appointments. Stable and secure housing helps in the support of vulnerable people and families. The loss of the home can be catastrophic for the continuation of the helping relationship. Forced eviction shifts the burden, which is far greater because of the crisis, onto other agencies, such as those assisting the homeless.

We can see, therefore, that there is more to the idea of home than freedom of contract and property rights. As regards forced eviction, important individual, social and community interests are at stake going beyond those which can be articulated in traditional legal terms. Human rights law allows this to be done, and it is the function of the next part of this article to explain how, beginning with the *Universal Declaration of Human Rights*.³⁸

37 Maya Angelou, *All God's Children Need Traveling Shoes* (Random House, 1986) 196. I thank Dr Paula Gerber for bringing this quotation to my attention.

38 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

IV THE HUMAN RIGHT TO ADEQUATE HOUSING AND HOME

A The Universal Declaration of Human Rights

As stated in the preamble of the *Universal Declaration of Human Rights*, and repeated or necessarily implied in all international and national human rights instruments since, human rights derive from the inherent dignity of the human person.

Article 25(1) declares:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.³⁹

This is a declaration of the human right to adequate housing in the context of a broader right to an adequate standard of living and economic security. It emphasises the importance of housing to the wellbeing of individuals and families, not housing as a species of property.

Following the declaration of this general standard, a number of conventions and covenants have expressed the human right to adequate housing in particular terms and established specific means for implementing it.⁴⁰ The two most important documents are the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, both of which have been ratified by Australia. A leading text describes these covenants as ‘the bedrock of the international normative regime for human rights’.⁴¹

Although human rights are understood to be indivisible,⁴² the economic, social and cultural rights have been seen to involve positive but non-justiciable duties, while the civil and political rights have been seen to involve negative and

39 Ibid art 25(1).

40 See, eg, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iii); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 14(2)(h); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 27; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 28(1), (2)(d).

41 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2008) 263.

42 Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) ch 1.

justiciable duties.⁴³ It is becoming increasingly clear that this is an inadequate way of understanding the scope of many human rights protections,⁴⁴ such as those afforded to public housing tenants against forced eviction.

Further, as will become apparent, there is considerable overlap between the human right to adequate housing which is specified in the *International Covenant on Economic, Social and Cultural Rights* and the freedom from unlawful and arbitrary interference with family and home which is specified in the *International Covenant on Civil and Political Rights*. Both of these covenants make provision for human rights protection from forced eviction in ways which give rise to duties both of restraint and of obligation, so collapsing, in the words of Professor Sandra Fredman, ‘the artificial distinctions between civil and political rights on the one hand and socio-economic rights on the other’.⁴⁵

It will be convenient to examine the scope of these rights separately. But my endpoint will be that they combine to offer indivisible protection for public tenants from forced eviction, against which their legal rights under Australian law may then be compared.

B The International Covenant on Economic, Social and Cultural Rights

Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* also specifies the human right to housing in a broader context:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁴⁶

The obligation of a state to give effect to the human rights in this covenant is specified in art 2(1), which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

43 Annemarie Devereux, ‘Australia and the Right to Adequate Housing’ (1991) 20 *Federal Law Review* 223, 223–4; Andrew Byrnes, ‘Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation’ (2010) 33 *University of New South Wales Law Journal* 193, 193–201; Andrew Byrnes, ‘The Protection and Enjoyment of Economic, Social and Cultural Rights’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 125, 130–3 [6.30]. See also the lively debate on the nature and justiciability of these rights between the two authors in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing, 2011).

44 Byrnes, ‘Second-Class Rights Yet Again?’, above n 43, 200; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) ch 1.

45 Fredman, above n 44, 9.

46 ICESCR art 11(1).

resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁷

This is an obligation of progressive realisation which, in the case of a developed country like Australia, is not impeded by a lack of resources.

Article 2(2) states a non-discrimination principle.⁴⁸

Under art 4, the rights specified in the Covenant are not absolute, but

the State may subject [the] rights only to such limitations as are determined by law [and] only in so far as this may be compatible with the nature of [the] rights and solely for the purpose of promoting the general welfare in a democratic society.⁴⁹

Article 28 provides that the provisions of the Covenant ‘shall extend to all parts of federal States without any limitations or exceptions’.⁵⁰ In consequence, while the Federal Government is legally accountable for fulfilling Australia’s human rights obligations under international law, the operation of the laws of the states and territories must be taken into account.⁵¹

This human right to adequate housing is one of the most important human rights in international law.⁵² The scope of the right is discussed extensively by legal scholars⁵³ and has been explained in a number of authoritative international instruments and reports, most notably the *Vancouver Declaration on Human Settlements*⁵⁴ and the UN High Commissioner for Human Rights’ *Fact Sheet*

47 Ibid art 2(1). The general nature and scope of the obligations under art 2(1) are discussed in Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the *International Covenant on Economic, Social and Cultural Rights*’ (1987) 9 *Human Rights Quarterly* 156; Dianne Otto and David Wiseman, ‘In Search of “Effective Remedies”’: Applying the *International Covenant on Economic, Social and Cultural Rights* to Australia’ (2001) 7(1) *Australian Journal of Human Rights* 5, 12–22.

48 ICESCR art 2(2).

49 Ibid art 4.

50 Ibid art 28.

51 Otto and Wiseman, above n 47, 14.

52 On the development of the human right to housing, see generally Scott Leckie, International Institute for Environment and Development, *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law* (1992). In the Australian context, see Dan Nicholson, Centre on Housing Rights and Evictions, *The Human Right to Housing in Australia* (2004). On the content and source of the right, see P Kenna, ‘Housing and Human Rights’ in Susan J Smith et al (eds), *International Encyclopedia of Housing and Home* (Elsevier Science, 2012) 703.

53 See Devereux, above n 43, 234–9; McRae and Nicholson, above n 1, 37–9; Padraic Kenna, ‘Globalization and Housing Rights’ (2008) 15 *Indiana Journal of Global Legal Studies* 397, 436–54; Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 114–15.

54 *Report of Habitat: United Nations Conference on Human Settlements*, UN Doc A/CONF.70/15 (31 May 1976, adopted 11 June 1976).

No 21,⁵⁵ as well as the *Limburg Principles*⁵⁶ and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* ('*Maastricht Guidelines*').⁵⁷ All of these emphasise the importance of security of tenure and protection from forced eviction as an element of the right to adequate housing.

As explained in the *Maastricht Guidelines*, the obligation of a state to observe the economic, social and cultural rights embodies obligations to 'respect, protect and fulfil', obligations of both 'conduct and result' and a 'margin of discretion'.⁵⁸ As to the obligations to respect, protect and fulfil, the *Guidelines* say:

The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties ... The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.⁵⁹

As to the obligations of conduct and result, it is said that:

The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right ... The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.⁶⁰

Lastly, as to the margin of discretion, the *Guidelines* say:

As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations ... The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question.⁶¹

The United Nations has a committee system operating under both the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. The committees regularly issue General

55 Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 21: The Human Right to Adequate Housing* (1st revised ed, November 2009).

56 *Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights*, UN ESCOR, 43rd sess, Provisional Agenda Items 8 and 18, UN Doc E/CN.4/1987/17 (8 January 1987) annex.

57 The *Maastricht Guidelines* are extracted in Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 24th sess, Provisional Agenda Item 3, UN Doc E/C.12/2000/13 (2 October 2000) 16–24.

58 *Ibid* 17–18 [6]–[8].

59 *Ibid* 17 [6] (emphasis altered).

60 *Ibid* 17–18 [7] (emphasis altered).

61 *Ibid* 18 [8].

Comments about the human rights in the covenants. These comments are not binding but are persuasively authoritative.⁶²

General Comment No 4 of the Committee on Economic, Social and Cultural Rights contains a detailed analysis of the scope of the human right to housing in art 11 of the *ICESCR*.⁶³ In relation to security of tenure, the Comment recognises the variety of forms which that tenure may take,⁶⁴ then goes on to state this fundamental principle:

Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection ...⁶⁵

The meaning is clear: legal protection of security of tenure and of freedom from forced eviction is an element of the human right to adequate housing.

The later *General Comment No 7* of that Committee discusses when the human right to housing will be breached by a forced eviction.⁶⁶ Consistently with the approach adopted in relation to the scope of the human right to home in art 17(1) of the *International Covenant on Civil and Political Rights*, the Committee states that ‘the term “forced evictions” ... seeks to convey a sense of arbitrariness and of illegality’.⁶⁷ It acknowledges that some evictions ‘may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause’.⁶⁸ It adds this important qualification:

In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.⁶⁹

In relation to legal protection, the Committee goes on to emphasise that:

Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights.⁷⁰

62 The International Court of Justice has said, for example, that the comments of independent treaty-monitoring bodies should be ‘ascribed great weight’: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) (Merits)* [2010] ICJ Rep 639, 664 [66]–[67]. On the Human Rights Committee, see *PJB v Melbourne Health* [2011] VSC 327 (19 July 2011) [67]–[72] (‘Patrick’s Case’).

63 UN Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991).

64 *Ibid* [8(a)].

65 *Ibid*.

66 UN Committee on Economic, Social and Cultural Rights, *General Comment No 7: The Right to Adequate Housing (Art 11.1): Forced Evictions*, 16th sess, UN Doc E/1998/22 (20 May 1997).

67 *Ibid* [3]. See also McBeth, Nolan and Rice, above n 53, 97.

68 *General Comment No 7*, UN Doc E/1998/22 [11].

69 *Ibid* [14].

70 *Ibid* [15].

The Human Rights Council has appointed a special rapporteur on the human right to adequate housing. In 2006, the then rapporteur, Miloon Kothari, conducted an extensive mission to Australia on which he reported in 2007. In that report, Mr Kothari said:

Forced evictions are considered to be a gross violation of a wide range of human rights under international law and are evidence of a systematic disregard for recognized human rights standards. Increasingly, in jurisdictions where the right to adequate housing is justiciable, domestic courts are finding the prohibition of forced evictions to be an integral element of this right. Evictions push people into homelessness, inadequate housing conditions and poverty, and affect almost exclusively the poorest, socially and economically most vulnerable and marginalized sectors of society.⁷¹

Mr Kothari went on to report that '[n]o laws exist in Australia setting forced evictions in accordance with international human rights standards'.⁷² As we will see, that is still largely the case today.

C The International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* recognises the human right to home, also in a broader context. Article 17(1) provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'. Both Victoria⁷³ and the Australian Capital Territory⁷⁴ have general human rights Acts which include provisions based on this article.

According to legal scholars,⁷⁵ the international jurisprudence and *General Comment No 16* of the UN Human Rights Committee,⁷⁶ the purpose of the right to freedom from arbitrary or unlawful interference with privacy, family, home and correspondence is to:

protect and enhance the liberty of the person — the existence, autonomy, security and wellbeing of every individual in their own private sphere. The [right ensures] people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective

71 Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia (31 July to 15 August 2006)*, UN GAOR, 4th sess, Provisional Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (11 May 2007) 19 [67] (citations omitted).

72 *Ibid* 19 [69].

73 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

74 *Human Rights Act 2004* (ACT) s 12(a).

75 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2nd revised ed, 2005) 377–9, 385–92; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 476–8, 488–93; McBeth, Nolan and Rice, above n 53, 96–8.

76 UN Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (8 April 1988).

participation in democratic society. [The right protects] those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication ... with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement.⁷⁷

The link made by Professor Sen between the freedom to develop the capability to be someone and do things of worth, and human rights, is here very evident.⁷⁸

These same international sources help us to understand what amounts to an 'interference' with the right to home. The question is approached in a 'simple' and 'untechnical' manner.⁷⁹ Manfred Nowak said of art 17(1): 'Every invasion of [the home] sphere ... that occurs without the consent of the individual affected ... represents interference'.⁸⁰ As was explained further in *Director of Housing v Sudi (Residential Tenancies)*:

Evicting or seeking to evict someone living in social housing is interfering with the human rights relating to their home. Any attempt to do so, directly or indirectly or by process of law, constitutes such interference. Serving a notice to quit and bringing possession proceedings constitute such interference ... Where a family is living in the premises, such actions also constitute an interference with the human rights relating to their family. Other decisions which deprive a person of, or impair their capacity to live in, their home also constitute an interference, such as denying them planning permission, and undertaking enforcement measures, and withdrawing a permission already held, rendering [them] homeless.⁸¹

Finally, it is becoming clearer when, in human rights terms, interference with the home is to be regarded as arbitrary. An interference with the human right to home will be arbitrary when,

in the particular circumstances applying to the individual, [it is] capricious, unpredictable or unjust and also ... [when] in those circumstances, [it is] unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful.⁸²

77 *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010) [29] (Bell J) (citations omitted). In *Patrick's Case* [2011] VSC 327 (19 July 2011) [55], I made these further observations about the significance of the human right to home:

The purpose of the human right against arbitrary or unlawful interference with the home is the protection of the security and autonomy of the person in their home. It is in their home that a person is able to be themselves in the private and personal sense. That is fundamentally important for the person's social and family life and the attainment of their full potential as an individual.

78 Sen, 'Human Rights and Capabilities', above n 30, 153.

79 *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 992 [12] (Lord Bingham).

80 Nowak, above n 75, 400 quoted in *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010) [34].

81 [2010] VCAT 328 (31 March 2010) [34] (Bell J) (citations omitted).

82 *Patrick's Case* [2011] VSC 327 (19 July 2011) [85] (Bell J). See also *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [103]–[121] (Warren CJ, Hansen JA agreeing), [202]–[205] (Bell AJA); *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [198]–[199] (Tate JA).

That is the scope of the human right to adequate housing and home under the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*. This is not the place to comprehensively analyse the ample jurisprudence which has developed on the application of these rights in human rights adjudication. However, I will refer to some of the decided cases and the principles which are applied in order to illustrate the central propositions which need to be understood.

D Illustrating Human Rights Adjudication in Cases Involving Housing and Home

In relation to adequate housing as a social right, the South African jurisprudence illustrates how it is protected in the eviction context. Section 26(1) of the *Constitution of the Republic of South Africa Act 1996* (South Africa) specifies ‘the right to have access to adequate housing’. Section 26(2) requires the State to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the] right’. Section 26(3) prohibits eviction and home demolition without court order made after consideration of all the circumstances and also prohibits legislation permitting arbitrary evictions.

Landmark cases in the Constitutional Court of South Africa have identified the scope of the government’s obligation to realise the right, and have found that it has a negative and a positive dimension.⁸³ On the negative side, ‘[t]he state bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights’.⁸⁴ On the positive side, the obligation is one of progressive realisation by legislative and administrative measures. This is the general principle:

Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.⁸⁵

In implementing this principle, there is no minimum core or threshold and no ‘directly enforceable obligation upon the State to provide every citizen with a house immediately’.⁸⁶ Because available resources are limited and demand exceeds supply, it is constitutionally permissible for housing policies to ‘differentiate between categories of people and prioritise’, but rationally, reasonably and

83 See especially *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46 (Constitutional Court) (‘*Grootboom*’); *Minister of Health v Treatment Action Campaign [No 2]* [2002] 5 SA 721 (Constitutional Court) (‘*Treatment Action Campaign No 2*’).

84 *Mazibuko v City of Johannesburg* [2010] 4 SA 1, 16–17 [47] (O’Regan J, with whom all other members of the Court agreed) (Constitutional Court) (‘*Mazibuko*’).

85 *Ibid* 20 [59] (O’Regan J, the other members of the Court all concurring).

86 *Ibid* 17 [48] (O’Regan J, the other members of the Court all concurring).

not arbitrarily.⁸⁷ Whether the state has complied with its positive obligation of progressive realisation is justiciable in the court,⁸⁸ but in a way which respects the division of functions between the court and the government under South Africa's democratic constitutional arrangements.⁸⁹

Other cases in the Court have concerned the forced eviction of squatters from land.⁹⁰ The settled position is that eviction can only be carried out by court order after considering all the circumstances⁹¹ but a landowner cannot be expected to house unlawful occupiers indefinitely. These principles are reflected in legislation preventing the eviction of unlawful occupiers from their home unless the court concludes that it would be just and equitable to do so after considering all the circumstances.⁹²

In relation to home as a civil and political right, the European jurisprudence shows how it too is protected in the eviction context. Similarly to art 17(1) of the *International Covenant on Civil and Political Rights*, art 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.⁹³ Article 8(2) prohibits interference with that right by a public authority unless (among other things) it is 'in accordance with the law and is necessary in a democratic society'. The terms of that convention have been

87 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2012] 2 SA 104, 130–1 [86]–[88] (Constitutional Court) (Van der Westhuizen J, with whom all other members of the Court agreed).

88 In *Mazibuko* [2010] 4 SA 1, 22 [67], O'Regan J (the other members of the Court concurring) said: the positive obligations imposed upon government by the social and economic rights in our *Constitution* will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign (No 2)*, the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

89 *Ibid* 20 [61], O'Regan J also said: ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.

90 *Grootboom* [2001] 1 SA 46 (Constitutional Court); *Port Elizabeth Municipality v Various Occupiers* [2005] 1 SA 217 (Constitutional Court); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* [2008] 3 SA 208 (Constitutional Court); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2010] 3 SA 454 (Constitutional Court).

91 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] 3 SA 531, 544 [33] (Constitutional Court).

92 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* (South Africa) ('*PIE Act*') ss 4, 6. For a practical account of the impact of this and related legislation on the administration of public housing at the local level, see J van Wyk, 'The Role of Local Government in Evictions' (2011) 14(3) *Potchefstroom Electronic Law Journal* 49.

93 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8(1).

enacted domestically in the United Kingdom in the *Human Rights Act 1998* (UK) c 42. There is a large body of case law in the European Court of Human Rights at Strasbourg, as well as the courts of the United Kingdom, about the scope of the protections afforded by this right.

The cases decided by the Strasbourg court have arisen in a variety of contexts, including the eviction of public tenants who did not fall within new eligibility rules;⁹⁴ planning and like decisions refusing to allow gypsies, travellers and Roma permission to occupy land⁹⁵ or remain living in a community settlement;⁹⁶ the eviction of public tenants following service of a notice to vacate⁹⁷ or at the end of the tenancy;⁹⁸ and the judicial sale of the apartment home of a person with a mental disability.⁹⁹

The principles applied by the court in the public housing context were summarised in *Kay v United Kingdom*.¹⁰⁰ Interference will be necessary in a democratic society if it answers a ‘pressing social need’ and is ‘proportionate to the legitimate aim pursued’.¹⁰¹ Whether interference is so justified raises a question of procedure as well as substance, for the decision-making process must be ‘fair and such as to afford due respect to the interests safeguarded to the individual’ by the right.¹⁰² A wide ‘margin of appreciation’ is afforded to local authorities in the Member States in the administration of their housing systems.¹⁰³ But a court eviction order will not be justified, and will be in breach of human rights, unless, in the proceeding, it was possible to challenge the decision of the public authority ‘on the basis of the alleged disproportionality of that decision in light of personal circumstances’.¹⁰⁴ Those principles apply whether or not the person is in lawful occupation. In a Hamlyn Lecture, Lord Bingham said that the great strength of this jurisprudence ‘lies in its recognition of the paramount importance to some people, however few, in some circumstances, however rare, of their home, even if their right to live in it has under domestic law come to an end’.¹⁰⁵

As regards the eviction of public housing tenants, the Strasbourg jurisprudence has affected the operation of residential tenancy law in the United Kingdom. The principles have been developed in a series of cases in the House of Lords¹⁰⁶ and

94 *Gillow v United Kingdom* (1987) 109 Eur Court HR (ser A).

95 *Buckley v United Kingdom* [1996] IV Eur Court HR 1272; *Chapman v United Kingdom* [2001] I Eur Court HR 43; *Connors v United Kingdom* (2005) 40 EHRR 9.

96 *Yordanova v Bulgaria* (European Court of Human Rights, Chamber, Application No 25446/06, 24 April 2012).

97 *McCann v United Kingdom* (2008) 47 EHRR 40; *Kay v United Kingdom* (2012) 54 EHRR 30.

98 *Čosić v Croatia* (2011) 52 EHRR 39.

99 *Zehentner v Austria* (2011) 52 EHRR 22.

100 (2012) 54 EHRR 30.

101 *Ibid* 1081 [65].

102 *Ibid* 1082 [67].

103 *Ibid* 1081–2 [66].

104 *Ibid* 1083–4 [74].

105 Tom Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press, 2010) 80.

106 *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] 2 AC 465; *Doherty v Birmingham City Council* [2009] 1 AC 367.

in the Supreme Court¹⁰⁷ which replaced it. By the time that *Hounslow London Borough Council v Powell*¹⁰⁸ was decided in 2011, it was not in doubt that, where the matter was seriously arguable, the tenant or occupier must have the opportunity to resist an eviction order on the ground that it was not a proportionate means of achieving a legitimate aim, even where the tenancy had come to an end and the occupation was not lawful.¹⁰⁹ The judgments in that case contain a detailed analysis of the way in which the proportionality assessment can be carried out by considering the individual circumstances without undermining the orderly administration of the public housing system.¹¹⁰

E Summary

From this review it can be seen that the international human rights framework recognises the profound importance of adequate housing and the home for the personal, family, social and economic life of the individual. In human rights terms, having a home is an indispensable prerequisite for the dignity and wellbeing of individuals, and their effective participation in civil society, in every respect. Security of tenure and protection from forced eviction are part of the human right to adequate housing and home and has a procedural and substantive dimension.

The human right to adequate housing and home is not absolute and can be limited by law, subject to a strict standard of demonstrable justification. Security of tenure can be provided in various forms. The right to be protected from forced eviction is not a right to protection from all evictions whatsoever and eviction may be justified, for example, on the grounds of persistent non-payment of rent and damaging the property, depending on the individual circumstances. To be compatible with human rights, the eviction order must not be arbitrary, unreasonable or disproportionate in the circumstances and must only be made according to a procedure which is fair, affords due respect to the interests safeguarded to the individual and allows the reasons for the eviction to be objectively tested. Balance, justification and accountability are central concepts.

Australia does not have a national bill of rights. Under our dualist legal system, ratification of treaties and covenants like the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* does not make them directly enforceable as domestic law.

107 *Manchester City Council v Pinnock* [2011] 2 AC 104; *Hounslow London Borough Council v Powell* [2011] 2 AC 186.

108 [2011] 2 AC 186.

109 *Ibid* 197 [7]. Lord Hope (Lord Phillips, Lord Roger, Lord Walker, Baroness Hale, Lord Brown and Lord Collins agreeing) said that the authorities:

provided a clear and constant line of jurisprudence to the effect that *any* person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to question the proportionality of the measure and to have it determined by an independent tribunal (emphasis added).

The context shows that his Lordship recognised that this principle applied even where the person did not have the lawful right to occupy the premises: at 197 [6].

110 *Ibid* 197 [6].

Although the treaty or covenant may inform the interpretation of legislation, the development of the common law and the exercise of administrative and judicial discretions,¹¹¹ which is not insignificant, the obligations which they create become domestically enforceable only by direct incorporation into Australian law, usually by legislation. There is important federal legislation in relation to the funding of public housing¹¹² but not the regulation of residential tenancy, public or otherwise. To consider the extent to which the international human right to housing and home of public tenants is protected, it is therefore necessary to examine their legal rights under state and territory law.

V LEGAL RIGHTS OF PUBLIC HOUSING TENANTS UNDER STATE AND TERRITORY LAW

What follows is a review of the legal rights of public housing tenants under the housing and residential tenancy legislation of the states and territories, beginning with the Australian Capital Territory. My object is to determine whether their human right to protection from forced eviction is respected and, if so, to what extent.

A Australian Capital Territory

Under the *Housing Assistance Act 2007* (ACT), housing assistance is administered by the Housing Commissioner.¹¹³ The ACT has enacted the *Human Rights Act 2004* (ACT) based on the *International Covenant on Civil and Political Rights*. The Commissioner is a public authority under that Act¹¹⁴ and is therefore bound to act compatibly with human rights,¹¹⁵ unless a contrary law requires otherwise.¹¹⁶

Provision of housing assistance is discretionary and based on the Commissioner's statutory capacity to prescribe operational guidelines.¹¹⁷ In respect of most decisions, including decisions to refuse to provide and to cancel assistance, there is administrative-based internal review¹¹⁸ and also full legislative-based external

111 The authorities are collected in *DPP (Vic) v Ty [No 3]* (2007) 18 VR 241, 244 [48]–[49] (Bell J).

112 See *Housing Assistance Act 1996* (Cth), whose objects include 'provid[ing] financial assistance to the States for the purpose of ensuring that people can obtain housing that is affordable, secure and appropriate to their needs': s 4(1); *Supported Accommodation Assistance Act 1994* (Cth), which is directed at funding transitional accommodation for the homeless.

113 *Housing Assistance Act 2007* (ACT) pt 3.

114 *Human Rights Act 2004* (ACT) s 40.

115 *Ibid* s 40B(1).

116 *Ibid* s 40B(2). The ACT Civil and Administrative Tribunal has decided that not-for-profit providers of social housing are also public authorities and so bound: *Canberra Fathers and Children Services Inc & Michael Watson* [2010] ACAT 74 (29 October 2010) [73] (Senior Member Lennard). The position is the same in Victoria under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'): *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025 (9 October 2009) [143]–[166] (Bell J).

117 *Housing Assistance Act 2007* (ACT) s 21.

118 *Housing Assistance Public Rental Housing Assistance Program 2010 (No 1)* (ACT) cl 30. See also ACT Government, Community Services, *Review of Decision — Important Information from Housing ACT*.

review on the merits.¹¹⁹ That external review is provided by the ACT Civil and Administrative Tribunal established under the *ACT Civil and Administrative Tribunal Act 2008* (ACT). As a result of the provisions of the *Human Rights Act 2004* (ACT), internal and external review decisions must be compatible with human rights.¹²⁰

Where the Commissioner wants to evict the tenant for breaching the agreement, application may be made under the *Residential Tenancies Act 1997* (ACT). However, s 40C(2)(b) of the *Human Rights Act 2004* (ACT) allows the tenant to rely on their human rights in ‘legal proceedings’, which includes eviction proceedings in the ACT Civil and Administrative Tribunal. Therefore, when eviction is being sought, the Tribunal must take into account the impact of eviction on the tenant’s human rights, including the freedom from arbitrary interference with home. If eviction would, in the circumstances, be unreasonable and disproportionate in the human rights sense, it will not be ordered.

So, in *Canberra Fathers and Children Services Inc & Watson*,¹²¹ the service sought eviction of the tenant after the expiry of a tenancy in respect of fixed term crisis accommodation. The Tribunal refused to grant the order because it would breach the tenant’s human rights. It held:

Protecting the human rights of those members of society who are in vulnerable positions or at risk of harm is an important value. The Watsons are a family at risk of homelessness from eviction from crisis accommodation in circumstances where they cannot afford private rental, have a considerable waiting period for alternate affordable public housing and face breaking up the family unit in order to obtain adequate but separate housing.¹²²

This is the most developed human rights protection from forced eviction anywhere in Australia.

B New South Wales

Under the *Housing Act 2001* (NSW), public housing is administered by the New South Wales Land and Housing Corporation.¹²³ The corporation has power to control, manage and lease land.¹²⁴ Eligibility for housing is discretionary and the guidelines are not statutory.¹²⁵ There is no general human rights legislation in New South Wales.

119 *Housing Assistance Act 2007* (ACT) ss 31A–31C, sch 1.

120 In *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84 (12 October 2007) [52] (Higgins CJ), the Supreme Court upheld a decision of the tribunal to reinstate the provision of housing assistance because it was the human rights compatible decision.

121 [2010] ACAT 74 (29 October 2010) (Senior Member Lennard).

122 *Ibid* [72].

123 *Housing Act 2001* (NSW) pt 3.

124 *Ibid* ss 18(a)–(b).

125 See *Residential Tenancies Act 2010* (NSW) s 144.

There is a two-tier system of review on the merits in respect of most decisions, including eligibility and termination decisions. This system has been established administratively, not by legislation.¹²⁶ Internal review is available at the first tier and external review by the Housing Appeals Committee is available at the second tier. The Committee's power is recommendatory, not determinative. The final decision rests with the corporation.

Public housing tenancies are covered by the *Residential Tenancies Act 2010* (NSW). Under that Act, a landlord can give a notice without reasons terminating a fixed term tenancy at the end of the term of the agreement¹²⁷ and a periodic tenancy at the end of 90 days.¹²⁸ On the landlord's application for a termination order, the Consumer, Trader and Tenancy Tribunal has no discretion to refuse to make the order.¹²⁹ The Tribunal previously had power to consider the 'circumstances of the case', including hardship to the tenant, which was used on a discretionary basis to refuse an order against public housing tenants.¹³⁰

Under the *Residential Tenancies Act 2010* (NSW), there is also a legislative system of review of certain public and social housing decisions. In such cases, the review powers are exercised by the Consumer, Trader and Tenancy Tribunal, which has established a social housing division. Under pt 7, the tenant may seek review of a termination decision based on an ineligibility assessment¹³¹ or based on a failure to accept alternative housing.¹³² The Tribunal's jurisdiction is not to conduct merits review; it must terminate the tenancy agreement if the specified grounds are established.¹³³ Human rights considerations are not specifically relevant.

Notably, the *Residential Tenancies Act 2010* (NSW) gives additional powers to the Tribunal where a landlord under a social housing agreement seeks to terminate the tenancy on grounds of breach. The Tribunal has a general power to terminate a tenancy agreement on application by the landlord on grounds of breach by the tenant.¹³⁴ In exercising that power, the Tribunal has discretion to take into account, but is not limited to, the nature of the breach, any previous breaches, any steps taken by the tenant or landlord to remedy the breach and the

126 Family and Community Services, Housing NSW, *Clients Service Delivery and Appeals Policy* (25 March 2013) <<http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/Clients+Service+Delivery+and+Appeals+Policy.htm>>. There is, however, legislative recognition of first-tier review in particular cases in the *Residential Tenancies Act 2010* (NSW) ss 149(4)–(7).

127 *Residential Tenancies Act 2010* (NSW) s 84(1).

128 *Ibid* s 85(2).

129 *Ibid* ss 84(3), 85(3).

130 See generally *Roads and Traffic Authority v Swain* (1997) 41 NSWLR 452 (Meagher JA, Priestley and Cole JJA agreeing). The Tribunal used this power in deciding whether to refuse to make orders for possession against public housing tenants in cases where it was not justified in all of the circumstances even when breach was established: *NSW Land and Housing Corporation v Street (Tenancy)* [2003] NSWCTTT 403 (24 April 2003) [34], [36] (Member Leotta), where an order for possession was made. Cf *NSW Land and Housing Corporation v Peters (Tenancy)* [2007] NSWCTTT 681 (21 November 2007) (Member Ringrose), where an order for possession was not made.

131 *Residential Tenancies Act 2010* (NSW) ss 143–47.

132 *Ibid* ss 148–51.

133 *Ibid* ss 147, 151.

134 *Ibid* s 87(4).

previous history of the tenancy.¹³⁵ In determining whether or not to terminate a social housing tenancy agreement, the Tribunal must take into account, but is not limited to,¹³⁶ the seriousness of the breach and its adverse affects on others, the history of the tenancy and the landlord's responsibility towards other tenants.¹³⁷ Human rights as such are not specifically relevant. But the Tribunal uses these discretionary powers to refuse to terminate the tenancies of vulnerable tenants where this is not justified in the circumstances,¹³⁸ which allows human rights considerations to be taken into account.

C Northern Territory

Public housing in the Northern Territory is administered by the Chief Executive Officer (Housing) under the *Housing Act 1982* (NT). The functions of the Officer include providing, and assisting in the provision of, residential accommodation.¹³⁹ For those purposes, powers to acquire, hold and lease property are conferred on the Officer by the legislation.¹⁴⁰

The power of the Officer to provide housing assistance is a power to provide prescribed housing assistance.¹⁴¹ Under the *Housing Regulations 1983* (NT), the Officer may let a dwelling to an eligible person.¹⁴² An eligible person is someone of limited means who is not adequately housed.¹⁴³ Preference is given to persons experiencing a housing crisis, like the homeless.¹⁴⁴

The Northern Territory has a two-tier appeals process which is administrative, not legislative.¹⁴⁵ Most decisions can be appealed, including eligibility and cancellation or termination decisions. The first tier is internal merits review by a complaints and appeals unit, whose powers are recommendatory. The second tier is to an independent appeals board appointed by the responsible minister. The function of the board is to determine whether the decision is fair, reasonable and made within the relevant policy and regulations.

135 Ibid ss 87(5)(a)–(e).

136 Ibid s 152(2).

137 Ibid ss 152(1)(a)–(e).

138 *NSW Land and Housing Corporation v Marshall (Social Housing)* [2012] NSWCTTT 24 (12 January 2012) (Member Turley), where the tenant made arrangement to make up long outstanding arrears; *NSW Land and Housing v Outram (Social Housing)* [2012] NSWCTTT 224 (8 June 2012) (Member Ross), where termination was not ordered in respect of the tenancy of a mentally ill tenant for a serious but isolated breach not likely to reoccur; *NSW Land and Housing v Rafrat (Social Housing)* [2012] NSWCTTT 225 (8 June 2012) (Member Gray), where termination was not ordered in respect of the tenancy of a wife with four children when the husband caused the breach.

139 *Housing Act 1982* (NT) s 15(a).

140 Ibid ss 16(1), (2)(a), (e), (n).

141 Ibid ss 22, 24(1).

142 *Housing Regulations 1983* (NT) reg 4(1).

143 Ibid reg 3.

144 Ibid reg 4(3).

145 There is legislative review of certain specified decisions by the officer under the *Housing Act 1998* (NT) pt 6.

Under the *Housing Act 1982* (NT), housing assistance is provided as leasehold property and the officer is therefore a landlord. Consistent with that private law foundation, s 34 of the *Housing Act 1982* (NT) makes the *Residential Tenancies Act 1999* (NT) apply to premises provided as housing assistance, as it does to private residential premises.

The *Residential Tenancies Act 1999* (NT) also has a two-tier decision-making process. Under the first tier, the Commissioner of Tenancies (who is the Commissioner of Consumer Affairs)¹⁴⁶ has the power to hear and determine applications, including applications for orders for possession following a landlord's notice of termination.¹⁴⁷ Under the second tier, the Magistrates Court may hear and determine appeals from decisions of the commissioner.¹⁴⁸ Appeals are by way of appeal de novo and further evidence may be admitted.¹⁴⁹

Security of tenure can be considered in two categories: eviction without cause and eviction for cause. Eviction without cause is permitted in the case of periodic and fixed term tenancies. In the Northern Territory, as in Australia generally, fixed term and periodic tenancies appear to be the norm.¹⁵⁰ A landlord (including the Officer) may terminate a periodic tenancy on 42 days' written notice.¹⁵¹ A landlord who wants to ensure the termination of a fixed term tenancy on the expiry date may serve a 14 day notice to terminate on that particular date.¹⁵² No reason need be given. On the expiry of the notice, the tenant ceases to be entitled to possession¹⁵³ and the Commissioner or the Court may make an order for possession on the landlord's application.¹⁵⁴ The Commissioner and the Court have a power to suspend the operation of an order for possession for a period in cases of 'severe hardship',¹⁵⁵ but do not appear to have a discretion to refuse to make the order. The previous legislation conferred no discretion in no-cause evictions.¹⁵⁶

As to eviction with cause, a landlord (including the Officer) may apply for an order for possession where the tenant breaches the tenancy (for example, by not paying the rent) or their statutory obligations (for example, by not keeping the

146 *Residential Tenancies Act 1999* (NT) s 13.

147 *Ibid* s 104(1).

148 *Ibid* s 150(1).

149 *Ibid* s 150(2).

150 In all of the reported decisions under the legislation of the Commissioner of Tenancies and the Magistrates Court of the Northern Territory, the tenancies have been fixed or periodic. A number of those decisions are referred to below.

151 *Residential Tenancies Act 1999* (NT) s 89.

152 *Ibid* ss 90, 101.

153 *Ibid* s 103.

154 *Ibid* ss 104(1)–(2).

155 *Ibid* s 105(1).

156 *Shepherd v Chief Executive Officer (Housing)* (1999) 154 FLR 162, 163–5 [11]–[17] (Martin CJ, Mildren and Bailey JJ agreeing). See also *Mason v Northern Territory Housing Commission* (1997) 6 NTLR 152, 158–9 (Bailey J); *Chief Executive Officer (Housing) v Binsaris* [2002] NTSC 9 (5 February 2002) [20]–[22] (Bailey J).

premises clean¹⁵⁷ or by causing a nuisance to neighbours.¹⁵⁸ First the landlord must serve a notice of intention to terminate for failing to remedy the breach (for example, by failing to pay overdue rent).¹⁵⁹ Then the landlord may apply to the commissioner or the court for an order of possession.¹⁶⁰

Importantly, in that kind of case, the power of the Commissioner or the Court to order a tenant to give up possession for failing to remedy a breach is discretionary, not mandatory. Human rights consequences do not specifically count, but the overall circumstances must be considered. That was established by the Magistrates Court in 2007, soon after the provisions were enacted.¹⁶¹ In *Brown v Elenis*,¹⁶² Magistrate Oliver held that it was not enough only to establish that the tenant had failed to remedy a breach. The Commissioner or the Court could determine

that in the circumstances an order for termination of the tenancy agreement should not be made because of circumstances peculiar to that case. Such matters might include for example that the rental monies that were in arrear have now all been paid, the frequency of the failure to pay rental monies on time, and, any circumstances which explain or mitigate the failure to pay the rental monies due on the occasion in question. Only following a consideration of all of those circumstances can the objective of the Act to fairly balance the rights and duties of tenants and landlords be properly achieved.¹⁶³

Although *Brown v Elenis* has not yet been approved by the Supreme Court, it has been frequently applied by the Magistrates Court and the Commissioner in public housing cases. For example, that Court has refused to exercise the discretion to evict because of the consequences for a tenant and her children¹⁶⁴ and the Commissioner¹⁶⁵ has made orders for possession against tenants causing serious nuisance to neighbours, not simply on proof of that breach without remedy, but after careful consideration of all of the circumstances. In one notable case, the Commissioner refused to order possession against a tenant who had tried their

157 *Residential Tenancies Act 1999* (NT) s 51(1)(a).

158 *Ibid* s 54(b).

159 *Ibid* s 96A.

160 *Ibid* s 100A(1).

161 Section 100A and related provisions were enacted by the *Residential Tenancies Act Amendment Act 2005* (NT).

162 [2007] NTMC 4 (23 January 2007) [13] (Magistrate Oliver). The previous legislation operated differently: *Mason v Northern Territory Housing Commission* (1997) 6 NTLR 152, 158–9 (Bailey J); *Chief Executive Officer (Housing) v Binsaris* [2002] NTSC 9 (5 February 2002) [20]–[22] (Bailey J).

163 *Brown v Elenis* [2007] NTMC 4 (13 January 2007) [13].

164 *CEO Housing v Coonan* [2010] NTMC 30 (19 April 2010). In this case, despite the discretion to evict being enlivened, the Magistrate decided not to evict because the behaviour was unusual and the consequences of eviction for Ms Coonan and her seven children would be severe.

165 *CEO Housing v Warnir* [2008] NTRTCmr 6 (28 March 2008); *Chief Executive Officer (Housing) v Hampton* [2008] NTRTCmr 25 (19 December 2008); *Chief Executive Officer (Housing) v Kanari* [2008] NTRTCmr 24 (30 December 2008); *Chief Executive Officer (Housing) v Brady* [2008] NTRTCmr 27 (17 March 2009).

hardest to make up the rent owing, taking into account the consequences of eviction, being:

the extreme hardship which would occur if this young mother and her two small children were put out on the street in a rental market that is, to say the least, extremely harsh on such persons. Rents are known to be some of the highest in the country and there is extremely limited housing available. There are virtually no emergency arrangements that could be availed of in this City and an order to dispossess this tenant would have, in my view, been disastrous both to her, her rental reputation and her two small children.¹⁶⁶

D Queensland

Public housing in Queensland is administered under the *Housing Act 2003* (Qld) by the chief executive,¹⁶⁷ whose responsibilities include the provision of public housing and related programs.¹⁶⁸ The chief executive has general and specific powers,¹⁶⁹ including the power to acquire, lease and sell land.¹⁷⁰

Eligibility for housing is based on discretionary criteria which are administrative, not legislative. The system assumes the power of the chief executive to control and manage public housing as property. Assistance is targeted at those most in need and there is an income and asset test.¹⁷¹ There is a legislation-based system of internal review of decisions,¹⁷² including eligibility decisions.¹⁷³ The review is carried out by the chief executive or by another officer who did not make the original decision.¹⁷⁴

Public housing tenancies are covered by the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). As a landlord, the chief executive may seek termination and possession of the tenancy for cause or without reason.

Applications for possession for cause may be made with or without notice. Where a breach of a term of the tenancy is alleged, the landlord must serve a notice to remedy breach on the tenant.¹⁷⁵ The allowed period to remedy the breach must be no less than seven days in most cases.¹⁷⁶ If the breach is not remedied, the landlord

166 *Chief Executive Officer (Housing) v Sinclair* [2010] NTRTCmr 34 (23 April 2010).

167 *Housing Act 2003* (Qld) s 11.

168 *Ibid* ss 11(1), (2).

169 *Ibid* s 12.

170 *Ibid* s 12(2)(b).

171 Department of Communities, Queensland Government, *Common Eligibility Criteria: March 2010* (2010) <<http://www.communities.qld.gov.au/resources/housing/community-programs/common-eligibility-criteria.rtf>>.

172 *Housing Act 2003* (Qld) pt 6.

173 *Ibid* s 63(a)(i).

174 *Ibid* ss 67(2), (4).

175 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 280.

176 *Ibid* s 328(1).

may serve a notice requiring the tenant to leave the premises.¹⁷⁷ These provisions are procedurally prescriptive and must be followed.¹⁷⁸

If the tenant fails to leave, the landlord may apply to the Queensland Civil and Administrative Tribunal for an order for possession.¹⁷⁹ Making the order is discretionary, not mandatory.¹⁸⁰ The Tribunal can make the order if the breach and failure to remedy are established and ‘the breach justifies terminating the agreement’.¹⁸¹ In determining that matter, the seriousness of the breach and other appropriate issues may be considered.¹⁸² This consideration has been used by the Tribunal in refusing to order eviction of tenants of public housing.¹⁸³ In *State of Queensland Housing and Homelessness Services v Pham*, the Tribunal took into account that evicting the tenant from public housing would render a family homeless:

I have considered that there is a very real prospect of the [tenant] as a single mother with 2 children, aged 9 and 7, becoming homeless as a relevant consideration when exercising this discretion. I have also considered the potential future burden that this [tenant] will be upon the state in its manifestation as other agencies and also charitable organisations when considering what an equitable order would be.¹⁸⁴

Where a breach of a tenant’s obligation under the Act is alleged, the application for possession can be made without notice.¹⁸⁵ The Tribunal will determine the application depending on the nature of the established breach. For example, if the breach is damaging the property or injuring a landlord or neighbour,¹⁸⁶ the order can be made simply because the breach is established.¹⁸⁷ If the breach is behaving objectionably,¹⁸⁸ whether the behaviour justifies terminating the tenancy must be considered.¹⁸⁹

Application for possession without reason must also follow a specified notice to leave and application procedure.¹⁹⁰ A landlord who is entitled to possession can simply choose to seek possession without giving a reason rather than relying on

177 Ibid s 281(1).

178 *Big4 Brisbane Northside Caravan Village v Schliebs* [2012] QCAT 277 (29 June 2012) [23] (Wilson P).

179 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 293(1).

180 *Madsen v Wiltshire* [2010] QCATA 11 (30 April 2010) [9]–[12] (Wilson P).

181 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 337(2)(c).

182 Ibid ss 337(3)(a), (f).

183 See, eg, *Department of Communities, Housing and Homelessness Services v Kairouz* [2010] QCAT 355 (13 July 2010) [9] (Adjudicator LeMass). The Tribunal commented that ‘the very real prospect of the [tenant], as a single mother with an ill child, becoming homeless ... is a relevant consideration when exercising the discretion’: at [11].

184 [2011] QCAT 540 (8 November 2011) [19] (Adjudicator LeMass). Although external parts of property were completely overgrown and other breaches were established, termination was not justified and remedy orders were made instead.

185 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 335(1).

186 Ibid s 296(1).

187 Ibid s 344(1).

188 Ibid s 297.

189 Ibid s 345(1)(b).

190 Ibid s 291.

a ground which has to be established.¹⁹¹ The notice period for the termination of a fixed term tenancy without reason is the end of the term or two months (whichever is later)¹⁹² and for a periodic tenancy, it is two months.¹⁹³ Notice of termination without reason cannot be given in retaliation against a tenant who has asserted their rights.¹⁹⁴ The landlord may then make application for an order for possession. Where an order for possession is sought in reliance on a notice given without reason, the Tribunal must first be satisfied that it 'is appropriate to make the order'.¹⁹⁵ This provision has not yet been considered by the courts, but it appears to give the Tribunal potentially important discretion in deciding whether to make an order, including discretion to consider hardship to vulnerable public housing tenants and human rights issues.

There are particular provisions governing supported and affordable housing tenancies. If the tenant's entitlement to the assistance ends, the landlord may serve a notice to leave.¹⁹⁶ If the tenant does not leave, the landlord can make application for an order of possession, which the Tribunal can make on that ground alone.¹⁹⁷ That power appears to be discretionary.

E South Australia

Public housing is administered by the responsible minister and the South Australian Housing Trust under the *South Australian Housing Trust Act 1995* (SA) and the *South Australian Co-operative and Community Housing Act 1991* (SA). Under the former, the function of the Trust is to assist people to obtain housing,¹⁹⁸ subject to the control and direction of the minister.¹⁹⁹ Under the latter, the functions of the minister and the Trust are to achieve that aim through cooperative and community housing.²⁰⁰ The functions of the Trust may be performed by 'acting as a landlord of public housing'²⁰¹ and managing the various forms of public housing.²⁰² It is given all the powers of a natural person,²⁰³ including the power to acquire and lease property.²⁰⁴

191 *Remely v O'Shea* [2007] QSC 225 (28 August 2007) [44] (Dutney J), pursuant to the equivalent provision in the former legislation.

192 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 329(2)(k).

193 *Ibid* s 329(2)(j).

194 *Ibid* ss 291(3), 292. The scope of the protection against retaliatory eviction is discussed in *Bamfield v Zanfan Pty Ltd* [2010] QCATA 1 (22 February 2010) [16]–[25] (Wilson P).

195 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 341(2).

196 *Ibid* ss 289–90.

197 *Ibid* s 340.

198 *South Australian Housing Trust Act 1995* (SA) s 5.

199 *Ibid* s 8.

200 *South Australian Co-operative and Community Housing Act 1991* (SA) ss 6A, 16.

201 *South Australian Housing Trust Act 1995* (SA) s 5(1)(a)(i).

202 *Ibid* s 5(1)(a)(ii).

203 *Ibid* s 6.

204 *Ibid* ss 7(1)(a), 21(1)(b).

There is an internal and external appeal review system in relation to most decisions affecting a person's eligibility for public housing²⁰⁵ and also in respect of some disputes involving cooperative and community housing.²⁰⁶ The internal review system is legislative and provided by the appeals unit of the department.²⁰⁷ The external review system is also legislative.²⁰⁸ The review is provided by the Housing Appeal Panel, which is independent of the department and comprised of persons appointed by the minister.²⁰⁹ There is no internal or external review of decisions, including termination and eviction decisions, where the matter is before the Residential Tenancies Tribunal.²¹⁰

A written or oral tenancy agreement in respect of public housing is covered by the *Residential Tenancies Act 1995* (SA). The rights and duties of the trust and the tenant are those of ordinary landlord and tenant. Therefore the trust can make application to terminate the tenancy and have the tenant evicted in the circumstances specified in that Act.

The landlord can give notice to terminate the tenancy for breaching the tenancy agreement,²¹¹ including for failing to pay the rent.²¹² After serving the notice, the landlord can then obtain an order of possession from the Tribunal.²¹³ However, the tribunal may refuse to make an order, and reinstate the tenancy, if it is 'just and equitable' to do so.²¹⁴ In making this determination, there is clearly considerable scope to take human rights considerations into account, as in cases where the Tribunal has made remediation rather than possession orders against public tenants.²¹⁵

In certain specified circumstances, for example, where the tenant has committed a serious breach of the tenancy,²¹⁶ has used the premises for illegal purposes or caused or permitted a nuisance,²¹⁷ the landlord can also make application directly to the Tribunal for an order of possession. According to the jurisprudence of the Tribunal, the power to make an order for possession in breach cases is

205 Ibid s 32A(1) (definition of 'reviewable decision').

206 *South Australian Co-operative and Community Housing Act 1991* (SA) s 84(1).

207 *South Australian Housing Trust Act 1995* (SA) s 32C(1). See also *South Australian Co-operative and Community Housing Act 1991* (SA) s 84(9)(a).

208 *South Australian Housing Trust Act 1995* (SA) pt 3A. See also *South Australian Co-operative and Community Housing Act 1991* (SA) s 84(a1).

209 *South Australian Housing Trust Act 1995* (SA) s 32B.

210 Ibid s 32A(2)(c). See also *South Australian Co-operative and Community Housing Act 1991* (SA) ss 84(10), (11)(b).

211 *Residential Tenancies Act 1995* (SA) s 80(1).

212 Ibid s 80(2).

213 Ibid s 93(1).

214 Ibid s 80(5).

215 See, eg, *South Australian Housing Trust v J* [2007] SARTT 21 (20 September 2007) (Presiding Member Patrick), where the property was dirty inside and out, and the tenant was ordered to carry out a thorough clean and tidy-up.

216 *Residential Tenancies Act 1995* (SA) s 87(1).

217 Ibid s 90(1).

discretionary, not mandatory.²¹⁸ Where a breach of the tenancy is the ground which is established, the Tribunal must not make an order terminating the tenancy unless ‘the breach is sufficiently serious to justify’ that course.²¹⁹ In public housing cases, the Tribunal takes into account the impact of eviction on vulnerable tenants and their children,²²⁰ even where the breach is quite serious.²²¹

Notice of termination can also be served without specifying a ground,²²² unless the tenancy is a fixed term tenancy.²²³ The Tribunal has no power to interfere with a landlord’s decision to serve such a notice and must make the order of possession however harsh are the circumstances.²²⁴ It can suspend the operation of an order for possession in cases of ‘severe hardship’.²²⁵ From decisions of the Tribunal there is a right of appeal to a judge of the District Court.²²⁶ The judge may re-hear and re-decide the case,²²⁷ although the power is exercised cautiously.²²⁸

F Tasmania

Public housing in Tasmania is administered under the *Homes Act 1935* (Tas) (an interesting title for that era) by the Director of Housing, subject to the direction of the responsible minister.²²⁹ The Director has the power to acquire land²³⁰ and lease any dwelling house ‘on such terms and conditions as he sees fit’.²³¹ Eligibility for public housing is based on administrative criteria which are targeted at those most in need.²³²

218 *South Australian Housing Trust v T* [2007] SARTT 11 (22 November 2007) (Member Rymill); *South Australian Housing Trust v Branson* [2009] SARTT 18 (16 September 2009) (Presiding Member Patrick); *South Australian Housing Trust v Uren* [2010] SARTT 9 (23 March 2010) (Member Carey).

219 *Residential Tenancies Act 1995* (SA) s 87(1).

220 See *South Australian Housing Trust v T* [2007] SARTT 11 (22 November 2007) (Member Rymill), where nuisance was alleged but the situation had since improved, and termination was not ordered against the sick tenant with needful children; *South Australian Housing Trust v Uren* [2010] SARTT 9 (23 March 2010) (Member Carey), where termination was not ordered where the old and frail tenant could not stop disruptive people attending the premises.

221 *South Australian Housing Trust v Branson* [2009] SARTT 14 (16 September 2009) (Presiding Member Patrick), where the termination was not ordered against a tenant who spat in face of a housing officer. However, the tenancy was subsequently converted to six months’ probationary tenancy: *South Australian Housing Trust v Branson* [2009] SARTT 18 (16 September 2009) (Presiding Member Patrick).

222 *Residential Tenancies Act 1995* (SA) s 83(1).

223 *Ibid* s 83(2).

224 See *Blind Welfare Association of SA Inc v Pearce* [2010] SARTT 10 (15 March 2010) (Presiding Member Patrick) (*‘Pearce’*), where the Tribunal had to make an order for possession against a blind tenant with limited income after the association decided not to renew her fixed term tenancy.

225 *Residential Tenancies Act 1995* (SA) s 93(4). This power was exercised in *Pearce* [2010] SARTT 10 (15 March 2010).

226 *Residential Tenancies Act 1995* (SA) s 41(1).

227 *Ibid* s 41(2).

228 See *White v South Australian Housing Trust* [2009] SADC 98 (10 September 2009) [31], [27]–[49] (Judge Soulio).

229 *Homes Act 1935* (Tas) s 4(1).

230 *Ibid* s 11(1).

231 *Ibid* s 16(1).

232 Housing Tasmania, Department of Health and Human Services, *Public Housing Eligibility Policy* (2008).

There is an internal review system. It is administrative, not legislative. Applications are considered by the Housing Review Committee. A wide range of rental housing decisions may be reviewed, including those based on eligibility assessments. The committee cannot review decisions where legal action has been commenced by the Director of Housing, and there are no restraints on the Director being able to do so.²³³ There is no external review system. There is no general human rights legislation.

The Director has a well-developed eviction policy. It recognises the significant negative impact of eviction on tenants and their families. Eviction is purportedly reserved for cases of serious breach or grievous misbehaviour and as a matter of last resort, after taking into account 'the circumstances of the breach, the health and wellbeing status of the tenant household, linkages to support services and the availability of alternative housing'.²³⁴

Public housing tenancies come under the *Residential Tenancy Act 1997* (Tas)²³⁵ and the Director has all the powers of a private landlord. As such, the Director can serve a notice to vacate where the tenant has breached the agreement,²³⁶ caused a substantial nuisance²³⁷ or without providing reasons where a fixed term agreement has expired less than 28 days previously.²³⁸ Application may then be made to the Tribunal for an order for possession.²³⁹ Where the notice was properly given, the Tribunal has no discretion to refuse to make an order.²⁴⁰ A landlord can also apply directly to the Tribunal for an order for termination of the agreement and possession where, for example, the tenant has seriously damaged the premises or injured a neighbour.²⁴¹ In such cases, the Tribunal's powers appear to be discretionary.²⁴²

G Western Australia

Public housing in Western Australia is administered under the *Housing Act 1980* (WA) by the State Housing Authority²⁴³ whose functions include the leasing of houses and the provision of assistance to enable people to obtain

233 Housing Tasmania, Department of Health and Human Services, *Customer Feedback and Review* (2010) 4.

234 Housing Tasmania, Department of Health and Human Services, *Managing Access and Applications Policy* (2008) 1.

235 *Residential Tenancy Act 1997* (Tas) s 5(1).

236 *Ibid* s 42(1)(a).

237 *Ibid* s 42(1)(g).

238 *Ibid* s 42(1)(b).

239 *Ibid* s 45(1).

240 *Logan v Director of Housing* (2004) 13 Tas R 324, 327–8 [11] (Blow J).

241 *Residential Tenancy Act 1997* (Tas) s 41(1).

242 *Ibid* s 41(2). This provision states that the court 'may order' that the residential tenancy agreement is terminated. If the reasoning in *Logan v Director of Housing* (2004) 13 Tas R 324, 327–8 [11] (Blow J) is applicable, the power will not be discretionary.

243 *Housing Act 1980* (WA) s 6(1).

accommodation.²⁴⁴ The State Housing Authority is subject to the control and direction of the responsible minister.²⁴⁵ It has the power to lease land and buildings on such terms and conditions as it sees fit.²⁴⁶

There is a two-tier internal review system for rental housing eligibility and like decisions. It does not apply to eviction decisions. A first-tier review is carried out by a senior officer who was not involved in the original decision. A second-tier review is carried out by a regional appeals committee comprised of one such officer and two community representatives. Review decisions under both tiers must apply stated policy but are determinative.²⁴⁷

The *Residential Tenancies Act 1987* (WA) covers public housing tenancies.²⁴⁸ Applications for termination and possession orders are heard and determined by the Magistrates Court.²⁴⁹ A landlord may serve a notice of termination of at least seven days on a tenant for breaching the agreement.²⁵⁰ Unless the tenancy is for a fixed term,²⁵¹ it may be terminated on 60 days notice without cause.²⁵²

Then the landlord can make application for termination and possession orders.²⁵³ If satisfied that the notice is technically compliant, the court must make the order,²⁵⁴ but may suspend it for up to 30 days on grounds of relative hardship²⁵⁵ and refuse to make orders in certain limited circumstances, such as where the tenant has remedied an isolated breach.²⁵⁶ There is no discretion to refuse to make orders where the landlord has served a no-cause notice of termination.

A landlord may also apply to the court for orders of termination and possession without serving a notice of termination where, for example, the tenant has not vacated the premises after the expiry of a fixed term tenancy²⁵⁷ or has caused serious damage to property or injury to a person.²⁵⁸ For expired fixed term tenancies, there are the same limited powers of suspension and refusal.²⁵⁹

244 Ibid ss 4(ca)–(c).

245 Ibid s 11(1).

246 Ibid s 25(1).

247 Department of Housing (WA), *Department of Housing Appeals Mechanism* (2011) preamble, 2.

248 *Residential Tenancies Act 1987* (WA) s 3 (definition of ‘residential tenancy agreement’).

249 Ibid s 12A(1).

250 Ibid ss 62(1)–(2).

251 Ibid s 64(3).

252 Ibid ss 64(1)–(2).

253 Ibid s 71(1).

254 Ibid s 71(2).

255 Ibid s 71(3)(a).

256 Ibid s 71(3)(b)(ii).

257 Ibid s 72(1).

258 Ibid s 73(1).

259 Ibid s 72(3).

H Victoria

Public housing is administered under the *Housing Act 1983* (Vic) by the Director of Housing, subject to the direction and control of the responsible minister.²⁶⁰ The Director's powers include the acquisition, disposal, development and management of land²⁶¹ and entering into residential leases.²⁶²

Eligibility for housing is according to discretionary criteria.²⁶³ There is a two-tier review system which is administrative, not legislative. The first tier is internal review and the second is independent review by the Housing Appeals Unit. The role of the unit is to determine whether housing policies and procedures were correctly applied. Appealable matters include eligibility and allocation decisions, rental rebate assessments, car parking allocation and requests for special maintenance. Eviction decisions are not appealable.²⁶⁴

As already noted, Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which is based on the *International Covenant on Civil and Political Rights*. The Director is a public authority under the *Charter*.²⁶⁵ It is unlawful for a public authority to act incompatibly with the human rights specified in the *Charter*, unless a contrary law requires otherwise.²⁶⁶ That unlawfulness can be relied on in judicial review and like proceedings in the Supreme Court of Victoria.²⁶⁷ But the Victorian Civil and Administrative Tribunal does not have the jurisdiction to consider the human rights in the *Charter* when determining an application made by the Director for an order for possession against a public tenant.²⁶⁸

Residential tenancies, including public tenancies, are covered by the *Residential Tenancies Act 1997* (Vic). The Act makes provision for the eviction of tenants according to a number of processes. Where (to give one example) the tenant owes at least 14 days' rent to the landlord²⁶⁹ or uses the premises for an illegal purpose,²⁷⁰ the landlord may serve a notice to vacate within 14 days on the tenant.²⁷¹ The director is given express power to serve a notice to vacate within 14 days where

260 *Housing Act 1983* (Vic) ss 9–10.

261 *Ibid* ss 14–15. 'Land' is defined in s 4(1) to include buildings and other structures.

262 *Ibid* s 14(1)(g).

263 Department of Human Services (Vic), *Allocations Manual* (2012) chs 3–10.

264 Department of Human Services (Vic), *Business Practice Manual: Housing Appeals* (2012) 7–9 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/business-practice-manual/housing-appeals>>.

265 *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025 (9 October 2009) [150] (Bell J); *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010) [25] (Bell J).

266 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38(1)–(2).

267 *Ibid* s 39(1). See, eg, *Patrick's Case* [2011] VSC 327 (19 July 2011) [296]–[299] (Bell J); *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) [94]–[98] (Maxwell P).

268 *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) [48] (Warren CJ), [98] (Maxwell P), [281] (Weinberg JA).

269 *Residential Tenancies Act 1997* (Vic) s 246(1).

270 *Ibid* s 250(1).

271 *Ibid* ss 246(2), 250(2).

the tenant engages in drug-related conduct²⁷² or commits a prescribed offence on the premises or in a common area,²⁷³ or knowingly obtains a tenancy on the basis of false or misleading eligibility information.²⁷⁴

Where (to give another example) the tenant is in breach of a duty provision, the landlord may give a notice requiring the tenant to remedy the breach and pay compensation.²⁷⁵ An example of a duty provision is the provision requiring the tenant not to use the premises in a manner which causes a nuisance.²⁷⁶ If the breach of duty notice is not complied with, the landlord may apply to the Tribunal for a compensation or compliance order.²⁷⁷ If the tribunal makes an order²⁷⁸ and the tenant fails to comply, the landlord may serve a notice to vacate within 14 days.²⁷⁹

As may private landlords, without specifying a reason the Director may serve a notice requiring a tenant to vacate at the end of, and terminating, a fixed term tenancy.²⁸⁰ The notice period is 60 or 90 days, depending on the term.²⁸¹ The Director (and private landlords) without specifying a reason may also serve on a periodic tenant a notice to vacate within 120 days.²⁸² Notices under these provisions have no effect if they are retaliatory²⁸³ but can only be challenged within a specified time.²⁸⁴ The time can be extended.²⁸⁵

On application by the Director or other landlord for an order of possession,²⁸⁶ the Tribunal must make the order where the Director was entitled to give the notice to vacate on the ground relied on,²⁸⁷ subject to certain specified exceptions. There are two main exceptions which are relevant here. The first is that, where the ground of the application is rental arrears and arrangements have been made, or can be made, avoiding financial loss to the landlord, the Tribunal may dismiss or adjourn the application.²⁸⁸ The second is that, where the ground is the tenant's failure to comply with an order of the Tribunal requiring the tenant to remedy the breach of a duty provision, the Tribunal must not make an order where it

272 Ibid ss 250A(1)–(2).

273 Ibid ss 250B(1)–(2).

274 Ibid ss 252(1)–(2). Under other provisions which are not yet in operation, the director may also serve a notice to vacate within 90 days where the tenant no longer meets the eligibility criteria (ss 262(1)–(2)) and within 30 days where the premises constitute transitional housing and the tenant has unreasonably refused to seek, or has refused a reasonable offer of, alternative accommodation (ss 262A(1)–(2)).

275 *Residential Tenancies Act 1997* (Vic) ss 207–8.

276 Ibid s 60(1).

277 Ibid s 209.

278 Ibid s 212.

279 Ibid ss 248(1)–(2).

280 Ibid ss 261(1)–(2).

281 Ibid s 261(3).

282 Ibid ss 263(1)–(2).

283 Ibid s 266(2).

284 Ibid s 266(3).

285 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 126(1).

286 *Residential Tenancies Act 1997* (Vic) s 322.

287 Ibid s 330(1)(a).

288 Ibid s 331(1).

is satisfied that the failure was trivial or the breach has been remedied as far as possible, there will not be any further breach of the duty and it was not a reoccurrence of a previous breach.²⁸⁹

There is no exception where the Director has served a notice to vacate without specifying a reason. If the Director serves such a notice and makes application for an order of possession and the formality requirements have been complied with, the Tribunal has no discretion to refuse to make the order. Human rights considerations are not relevant or justiciable. The Tribunal must make the order whether or not the Director has, under the *Charter*, acted unlawfully in seeking to have the tenant evicted. It does have power to postpone the issue of a warrant of possession for up to 30 days on grounds of hardship.²⁹⁰

Having now identified the legal rights of public tenants under state and territory legislation, it is possible to consider the extent to which the human right to adequate housing and home is protected in cases of forced eviction.

VI EXTENT OF PROTECTION OF PUBLIC HOUSING TENANTS FROM FORCED EVICTION

We have seen that, in Australia, security of tenure and eviction comes within the state and territory residential tenancies legislation governing the relationship between landlords and tenants. Except in the Australian Capital Territory, in eviction proceedings the public housing provider is not treated as a public authority with human rights obligations and the tenant is not treated as a bearer of human rights. That is the genesis of the problem. In human rights terms, the public housing provider is a public authority which is obliged to respect the tenant's human right to adequate housing and home and the tenant is a bearer of that right.

It should be acknowledged that, under all of the various Acts, a measure of human rights protection is afforded to public housing tenants. Self-help eviction is prohibited. Eviction is subject to requirements of due notice and can be carried out only on the official order of the relevant court or tribunal once the grounds or entitlement to possession have been properly established.

Where the eviction is sought on the grounds of the tenant's breach of duty or non-payment of rent, most (but not all) jurisdictions confer discretion on the court or tribunal to take the tenant's individual circumstances into account, including the impact of the eviction on them and their family. This indirectly allows human rights to be considered. The discretion is likely to be exercised favourably to tenants where the breach or non-payment was isolated, has been remedied and is not likely to be repeated. Forced eviction is likely to be seen to be unreasonable,

289 Ibid s 332(1).

290 Ibid ss 352(1)–(2).

and presumably arbitrary, in those circumstances, which comes close to human rights proportionality analysis. However, even this indirect and partial human rights protection from forced eviction is disparate, not universal.

I turn now to the most serious deficiency in the state and territory laws in human rights terms. The legislation in all the states and territories allows the public housing provider, as a landlord, to give notice to vacate within a specified time without giving any reason. A public housing landlord can use this power to terminate a fixed term tenancy at the end of the term, or a periodic tenancy (one for an unfixed term) at the end of the notice period. In all but two jurisdictions, unless the tenant proves that the giving of the notice was retaliatory, the court or tribunal has no discretion to take the tenant's circumstances into account and must make the order evicting the tenant, although it may defer the execution of the order on grounds of hardship. Only in the Australian Capital Territory can the order be refused on express human rights grounds. That is because the human rights legislation there permits reliance on human rights in legal proceedings, including eviction proceedings, in the ACT Civil and Administrative Tribunal. The equivalent legislation in Victoria is more limited and does not permit reliance on human rights in such proceedings. In Queensland, the Tribunal must be satisfied that it is appropriate to make the order.

It should also be acknowledged that, in all jurisdictions, a wide range of (but not all) public housing decisions are amenable to merits review. Where available, these mechanisms amount to procedural human rights protections. In most jurisdictions, the arrangements are administrative, not legislative. In all jurisdictions, there is a two-tier review process. The first is internal review by a different local officer and the second is external review by an independent officer, appeals unit or tribunal. Review is only available in respect of specified decisions, especially those concerned with eligibility for public housing and entitlement to certain benefits. In most jurisdictions, review of decisions to terminate a tenancy and issue eviction proceedings is not available.

In respect of the forced eviction of public housing tenants, there are only limited human rights protections built into the state and territory residential tenancy systems, except in the Australian Capital Territory and to some extent Queensland. The security of tenure of most public housing tenants in Australia is precarious. The main difficulty is forced eviction without reason. Those on fixed term tenancies have security of tenure during the term of the tenancy but are liable to be evicted on notice without reason at the expiry of the term. Those on periodic tenancies are liable to be evicted on notice without reason at the expiry of the notice. Except in the Australian Capital Territory and to some extent Queensland, when a public housing landlord seeks an order for possession on this basis, the courts and tribunals do not have discretion to take the human rights of the tenant into account in determining whether or not to make the order. Whether the eviction would be in breach of human rights is not justiciable. The public housing landlord does not have to justify the eviction, and is not accountable for seeking the eviction, in human rights terms. The order must be made even though it would breach the human rights of the tenant.

Why is this so? Australia does not have a national bill of rights. Only the Australian Capital Territory and Victoria have general human rights legislation. The *Human Rights Act* in the Australian Capital Territory applies, but the *Charter* in Victoria does not apply, in eviction proceedings in the respective tribunals. As regards the forced eviction of public housing tenants, the administrative and legislative arrangements in Australia are generally based on the categorisation of the rented premises as the property of the state and the relationship of the parties as landlord and tenant, with no or only limited recognition or protection of the human rights which are engaged.

The result is three-fold dissonance: first, between Australia's international human rights obligations and the domestic arrangements for the forced eviction of public housing tenants; second, between adequate housing and home as a fundamental human right of the tenant and the rented premises as property owned by the state; and third, between the human rights obligations of the state as a public authority and its entitlement to deal with state-owned property as it sees fit. Australian housing policy, law and administration are the ultimate responsibility of duly elected governments and parliaments. But this dissonance cannot be resolved without, and should be resolved by, enlarging the frame of reference to encompass human rights. Therefore, state and territory law and administration in respect of public rental housing should be reformed in accordance with the human right to adequate housing and home, as in the Australian Capital Territory.

VII CONCLUSION

Forced eviction of vulnerable people raises profoundly important social, ethical and legal issues which, in this article, I have identified and discussed through the lens of human rights. I argue that we should think carefully about the idea of home in human rights terms as the frame of reference within which to consider this subject.

Protection from forced eviction is an element of the human right to adequate housing and home under the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, to which Australia is a party. Under the right to adequate housing and home, the primary role of government in designing and administering an eligibility system is respected. Everyone is not entitled to a free home from the government. But, once public housing is provided to a tenant, it cannot be taken away without demonstrable justification and transparent accountability. In particular, eviction of tenants must not be arbitrary, unreasonable or disproportionate in the particular circumstances, must only be carried out according to a procedure which is fair and affords due respect to their individual human rights and allows the reasons for the eviction to be examined.

The concept of 'home' is of growing importance in the law. Home is a lot more than shelter. Home is a place of security, belonging and comfort. There can be no domestic life without a home. A home is indispensable for human flourishing

in every respect, including participation in work and education and in cultural, family and community life. A home is essential for the development of human capabilities and the maintenance of individual health and wellbeing. Loss of home has catastrophic consequences for individuals and families, especially children. Loss of home impacts negatively on most other human rights. People at risk of homelessness are amongst the most vulnerable in our society. The human rights of the homeless are imperilled by their circumstances. The human right to adequate housing and home gives expression to these important values and interests in ways that traditional legal categories do not.

When examined against the human right to adequate housing and home, I argue that the disparate residential tenancy laws of the states and territories are seriously deficient in that they do not adequately protect the security of tenure of public housing tenants, who may be forcibly evicted without cause. Those on fixed term tenancies — a minority — have security of tenure during the term of the tenancy but are liable to forced eviction without cause thereafter. Those on periodic tenancies — the majority — are in the most precarious position. They have security of tenure only during a modest notice period and are liable to forced eviction on the expiry of that period. Courts and tribunals in Australia (except in the Australian Capital Territory and Queensland) do not have discretion to refuse to make an eviction order on the basis of individual circumstances. Only in the Australian Capital Territory must a public housing landlord reconcile a proposed eviction with its human rights obligations towards the tenant. Forced eviction may be arbitrary, unreasonable or disproportionate in the circumstances. It may be in definite breach of the human rights of the tenant. Yet, if the landlord has met the formal requirements, those issues are not justiciable and the court or tribunal must make an order evicting the tenant.

At the national level, Australia does not have a bill of rights or legislative protection against forced eviction of public housing tenants in breach of the human right to adequate housing and home. Uniquely in Australia, such protection is provided by human rights legislation in the Australian Capital Territory. It is not provided by similar legislation in the State of Victoria, which does not apply to eviction proceedings in the tribunal concerned, or in the other states or the Northern Territory. With the exception of the Australian Capital Territory, the legal framework for the administration of public rental housing in the Australian states and territories is generally based on the categorisation of the relevant rights and interests by reference to the private law of property and contract. Therefore, the dwelling is seen to be the property of the state and the relationship between the parties is seen to be that of landlord and tenant. These private legal categories do not take proper account of the human right to adequate housing and home which a public housing landlord is bound to respect under international law. In human rights terms, the dwelling is not just property but a home. The public housing provider is not just a landlord but a public authority with human rights obligations. The tenant is not just a renter but a person of inherent value and worth, of potential and capability and a bearer of human rights. In this article, I acknowledge the ultimate responsibility of democratically elected governments and parliaments for Australian housing policy, administration and law, but argue

for enlarging the frame of reference to encompass human rights and the reform of state and territory law and administration in respect of public rental housing in accordance with the human right to adequate housing and home, as in the Australian Capital Territory.