

# MONASH UNIVERSITY FACULTY OF LAW

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### **‘Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home’**

#### **Introduction**

The subject of this lecture is the fundamental importance of the human right to adequate housing and home and the protection which public housing tenants have or lack under Australian law from forced eviction. We are not talking about tenants comprising a (so-called) typical family, with one and a half breadwinners, the children at school and everyone 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. 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. I will not discuss homelessness, on which there is a growing literature,<sup>2</sup> but rather 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.

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<sup>2</sup> Dianne Otto, ‘Homelessness and Human Rights’ (2002) 27(6) *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(1) *Melbourne Journal of International Law* 139; Symposium, ‘Housing, Homelessness and Human Rights’ (2004) 10(2) *Australian Journal for Human Rights* 1; Dianne Otto and Philip Lynch, ‘Housing, homelessness and human rights’ (2004) 10(2) *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(2) *Australian Journal of Human Rights* 27; Philip Lynch, ‘Homeless, Poverty and Discrimination’ (2005) 10(1) *Deakin Law Review* 233; Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) (see especially ch 7: ‘Homelessness as a Violation of Human Rights’); Chris Povey, *Investigating tenancy sustainment programs and approaches in relation to clients at risk of homelessness* (Winston Churchill Memorial Trust, 2011).

## Public housing demographics

In mid-2009, over 325,000 households lived in public housing across Australia<sup>3</sup> and over 38,000 other households lived in community housing.<sup>4</sup> Over 175,000 households were on waiting lists for public housing<sup>5</sup> and some 50,000 were on waiting lists for community housing.<sup>6</sup> This is a sizeable 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.<sup>7</sup> In Victoria that figure is over 65 per cent.<sup>8</sup> 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 it will increase by 75 per cent from 2001 to 2016 and by over 118 per cent for those aged more than 85 years.<sup>9</sup>

Many public housing tenants come from culturally and linguistically diverse backgrounds. Nationally, close to one-third of tenants were born overseas and one in ten speak a language other than English at home.<sup>10</sup> In Victoria, those figures are even higher.<sup>11</sup>

A significant section 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.<sup>12</sup> In Victoria, this represented over 1,300 Aboriginal households within mainstream public housing. Over 1,350 more Indigenous people were living in homes provided by Aboriginal Housing Victoria.<sup>13</sup>

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<sup>3</sup> Australian Institute of Health and Welfare, *Public rental housing 2008-09* (2010) 2.

<sup>4</sup> Australian Institute of Health and Welfare, *Community housing 2008-09* (2010) iv.

<sup>5</sup> Above n 3, 2.

<sup>6</sup> Above n 4, iv.

<sup>7</sup> Australian Institute of Health and Welfare, *2007 National Social Housing Survey, Public Housing National Report* (2007) 137.

<sup>8</sup> Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (2010) 11.

<sup>9</sup> Sean McNelis, Caroline Neske, 'Older people in public housing: policy and management issues', Australian Housing and Urban Research Institute, Research and Policy Bulletin No 109 (2009) 1.

<sup>10</sup> Above n 7, 139.

<sup>11</sup> Department of Human Services, Victorian Government, *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 Australia and 14.5 per cent of households having a preferred language other than English, spanning 91 different language groups'.

<sup>12</sup> Above n 7, 138.

<sup>13</sup> Above n 8, 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.<sup>14</sup> This was not always the case. Between 1996 and 2006 there was a 70 per cent increase in the number of tenants receiving a disability pension.<sup>15</sup> 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. The inquiry found that, as at mid-2009, 60 per cent of public housing tenants in Victoria received less than \$500 a week.<sup>16</sup>

Unsurprisingly, many public housing tenants are unemployed. The 2007 national survey found that only 23 per cent are employed full-time or part-time.<sup>17</sup> The same survey found that, of those who are unemployed, 75 per cent are actually unable to work.<sup>18</sup> That figure was only 43 per cent in 1981.<sup>19</sup>

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'.<sup>20</sup> Recently a Victorian Parliamentary committee 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'.<sup>21</sup>

This is evident when we examine who is entering public housing. Of new public housing tenancies allocated in the year ending 30 June 2009, over 13,400 (or 65 per cent) had special needs.<sup>22</sup> Two-thirds were in the category of 'greatest need'.<sup>23</sup> People who meet the criteria of 'greatest need' include those who are homeless or whose

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<sup>14</sup> Above n 7, 137.

<sup>15</sup> Above n 11, 16.

<sup>16</sup> Above n 8, 15.

<sup>17</sup> Above n 7, 129.

<sup>18</sup> Ibid 133.

<sup>19</sup> Keith Jacobs et al, 'What future for public housing? A critical analysis', Australian Housing and Urban Research Institute, Research Paper (2010) 2.

<sup>20</sup> Ibid.

<sup>21</sup> Above n 8, 17.

<sup>22</sup> Above n 3, 15.

<sup>23</sup> Ibid 17.

health is compromised by their current accommodation.<sup>24</sup> Of new community housing tenancies allocated in the same year, over one third were homeless at the time of allocation.<sup>25</sup>

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, third, of 'constructive' importance because of their 'role in the genesis of values and priorities'.<sup>26</sup> 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.<sup>27</sup>

He writes:

What people can 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.<sup>28</sup>

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 lecture, 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. 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 and offer some

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<sup>24</sup> Ibid 26.

<sup>25</sup> Above n 4, iv.

<sup>26</sup> 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 91, Centre for Analysis of Social Exclusion, London School of Economics, January 2005).

<sup>27</sup> Amartya Sen, 'Human Rights and Capabilities' (2005) 6 *Journal of Human Development* 151, 153: capability is 'the opportunity to achieve valuable combinations of human functionings - what a person is able to do or be'.

<sup>28</sup> Sen, above n 26, 5; see also Martha Nussbaum, *Women and Human Development* (Cambridge University

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

### **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 books<sup>29</sup> and articles<sup>30</sup> 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'<sup>31</sup> and 'identity',<sup>32</sup> 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

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Press, 2000) 90-91.

<sup>29</sup> See eg Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007); Lorna Fox O'Mahony and James Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate, 2011); David Cowan, *Housing Law and Policy* (Cambridge University Press, 2011).

<sup>30</sup> See eg Margaret Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957; Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580; Kristen Adams, 'Do We Need a Right to Housing?' (2009) 9(2) *Nevada Law Journal* 275.

<sup>31</sup> Radin, above n 30; see also Margaret Radin, *Reinterpreting Property* (The University of Chicago Press, 1993) ch 1.

is so whether the landlord is a private or public landlord and 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 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 Angela has written, '[t]he ache for home lives in all of us, the safe place where we can go as we are and are not to be questioned'.<sup>33</sup> 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

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<sup>32</sup> Fox, *Conceptualising Home*, above n 29, 167-173.

<sup>33</sup> *All Gods Children Need Travelling Shoes* (Virago Press Limited, 1987). I thank Paula Gerber for bringing this quotation to my attention.

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 lecture to explain how, beginning with the *Universal Declaration of Human Rights*.<sup>34</sup>

## **The human right to adequate housing and home**

### ***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.

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 been made specifying the human right to adequate housing in particular terms and establishing means for implementing it.<sup>35</sup> The two most

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<sup>34</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>35</sup> 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) art 28(1), (2)(d).

important are the *International Covenant on Economic, Social and Cultural Rights*<sup>36</sup> and the *International Covenant on Civil and Political Rights*,<sup>37</sup> 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’.<sup>38</sup>

Although human rights are understood to be indivisible,<sup>39</sup> 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 justiciable duties.<sup>40</sup> It is becoming increasingly clear that this is an inadequate way of understanding the scope of many human rights protections,<sup>41</sup> such as those afforded to public housing tenants against forced eviction. 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’.<sup>42</sup>

It will be convenient to examine the scope of these rights separately. But my end-point will be that they combine to offer indivisible protection for public tenants from

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<sup>36</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>37</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>38</sup> Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 263.

<sup>39</sup> See Ida Koch, *Human Rights as Indivisible Rights* (Martinus Nijhoff, 2009) ch 1.

<sup>40</sup> See Annemarie Devereux, ‘Australia and the Right to Adequate Housing’ (1991) 20(2) *Federal Law Review* 223, 232-234; Andrew Byrnes, ‘Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation’ (2010) 33(1) *University of New South Wales Law Review* 193, 191-201; Andrew Byrnes, ‘The Protection and Enjoyment of Economic, Social and Cultural Rights’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights* (Thomson Reuters, 2012, forthcoming) [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, 2010).

<sup>41</sup> Byrnes, ‘Second-Class Rights Yet Again’, above n 40, 200; Sandra Fredman, *Human Rights Transformed* (Oxford University Press, 2009) ch 1.

<sup>42</sup> Fredman, above n 41, 9.

forced eviction, against which their legal rights under Australian law may then be compared.

### ***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 State 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 State 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.

The obligations of a state to give effect to the human rights in this covenant are 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 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.<sup>43</sup>

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.

Under article 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'.

Article 28 provides that the provisions of the covenant 'shall extend to all parts of federal States without any limitations or exceptions'. 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.<sup>44</sup>

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<sup>43</sup> The general nature and scope of the obligations under this clause 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(2) *Human Rights Quarterly* 156; Dianne Otto and David Wiseman, 'In search of "effective remedies": applying the International Covenant on Economic, Social and Cultural Rights in Australia' (2001) 7(1) *Australian Journal of Human Rights* 5, 12-22.

<sup>44</sup> Otto and Wiseman, above n 43, 14.

This human right to adequate housing is one of the most important human rights in international law.<sup>45</sup> The scope of the right is discussed extensively by legal scholars<sup>46</sup> and has been explained in a number of authoritative international instruments and reports, most notably the Vancouver Declaration on Human Settlements<sup>47</sup> and the UN High Commissioner for Human Rights' Fact Sheet No 21,<sup>48</sup> as well as the Limburg Principles<sup>49</sup> and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>50</sup> 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'.<sup>51</sup>

As to the obligations to respect, protect and fulfil:

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.<sup>52</sup>

As to the obligations of conduct and result:

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<sup>45</sup> On the development of the human right to housing, see generally Scott Leckie, *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing Under International Human Rights Law* (International Institute for Environment and Development, 1992); in the Australian context, see Dan Nicholson, *The Human Right to Housing In Australia* (Centre on Housing Rights and Evictions, 2004); on the content and source of the right, see P Kenna, 'Housing and Human Rights' in Susan Smith (ed), *The International Encyclopaedia of Housing and Home* (Elsevier, 2012).

<sup>46</sup> See Devereux, above n 40, 234-239; McRae and Nicholson, above n 2, 37-38; Padraic Kenna, 'Globalization and Housing Rights' (2008) 15(2) *Indiana Journal of Global Legal Studies* 397, 436-454; Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 114-115.

<sup>47</sup> *The Vancouver Declaration On Human Settlements*, adopted at the United Nations Conference on Human Settlements (Habitat I), Vancouver, Canada (31 May 1976 to 11 June 1976).

<sup>48</sup> Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 21, The Right to Adequate Housing* (revised ed, November 2009).

<sup>49</sup> *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, Economic and Social Council, Commission on Human Rights*, 43<sup>rd</sup> sess, Provisional Agenda Items 8 and 18, UN Doc E/CN.4/1987/17 (8 January 1987) annex.

<sup>50</sup> Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (22-26 January 1997).

<sup>51</sup> *Ibid* [6]-[8].

<sup>52</sup> *Ibid* [6].

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.<sup>53</sup>

As to the margin of discretion:

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.<sup>54</sup>

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

General Comment No 4<sup>55</sup> 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. In relation to security of tenure, the comment recognises the variety of forms which that tenure may take,<sup>56</sup> 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 ...<sup>57</sup>

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<sup>58</sup> of that committee discusses when the human right to housing will be breached by a forced eviction. Consistently with the approach adopted in relation to the scope of the human right to home in art 17(1) of the

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53 Ibid [7].

54 Ibid [8].

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

56 Ibid [8(a)].

57 Ibid.

58 *General Comment No 7: The right to adequate housing (Art 11.1): forced evictions*, UN Committee on

*International Covenant on Civil and Political Rights*, the committee states that the expression ‘forced eviction’ seeks to ‘convey a sense of arbitrariness and of illegality’.<sup>59</sup> 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’.<sup>60</sup> It adds this important qualification: ‘[i]n 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 the principles of reasonableness and proportionality’.<sup>61</sup> In reference to legal protection, the committee goes on to emphasise that ‘[a]ppropriate 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’.<sup>62</sup>

The Human Rights Council has appointed a special rapporteur on the human right to adequate housing. In 2006, the 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.<sup>63</sup>

Mr Kothari went on to report that ‘[n]o laws exist in Australia setting forced evictions in accordance with international human rights standards’.<sup>64</sup> As we will see, that is still largely the case today.

### ***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:

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Economic, Social and Cultural Rights, 16<sup>th</sup> sess, UN Doc E/1998/22 (20 May 1997).

<sup>59</sup> Ibid [3]; see further McBeth, Nolan and Rice, above n 46, 97.

<sup>60</sup> Ibid [11].

<sup>61</sup> Ibid [14].

<sup>62</sup> Ibid [15].

<sup>63</sup> 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)*, Human Rights Council, 4<sup>th</sup> sess, Provisional Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (11 May 2007) [67] (footnote omitted).

<sup>64</sup> Ibid [69].

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ...

Both Victoria<sup>65</sup> and the Australian Capital Territory<sup>66</sup> have general human rights Acts which include provisions based on this article.

According to legal scholars,<sup>67</sup> the international jurisprudence and General Comment No 16 of the Human Rights Committee,<sup>68</sup> 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.<sup>69</sup> The rights ensure that everybody can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in a democratic society. The rights protect those attributes which are private to all individuals, that domain which may be called their home, those 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 living civil life.<sup>70</sup> 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.

These same international sources help us to understand what amounts to an ‘interference’ with the right to home.<sup>71</sup> The question is approached in a ‘simple and

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<sup>65</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

<sup>66</sup> *Human Rights Act 2004* (ACT) s 12(a).

<sup>67</sup> See generally Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2<sup>nd</sup> revised ed, 2005) 377 ff; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 476-478, 488-493; McBeth, Nolan and Rice, above n 46, 96-98.

<sup>68</sup> *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*, UN Human Rights Committee, 32<sup>nd</sup> sess (8 April 1988).

<sup>69</sup> The discussion here is based on *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010) [29] (Bell J).

<sup>70</sup> 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.

<sup>71</sup> The discussion which follows is based on *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010) [34] (Bell J).

untechnical' manner.<sup>72</sup> Every invasion of the home sphere which occurs without the consent of the individual affected represents interference.<sup>73</sup> Evicting or seeking to evict someone living in public housing is interfering with the human right to home.<sup>74</sup> Any attempt to do so, directly or indirectly or by process of law, is also interference.<sup>75</sup> Serving a notice to quit and bringing possession proceedings is interference.<sup>76</sup> Where a family is living in the premises, such actions also interfere with the human right to family.<sup>77</sup> 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,<sup>78</sup> undertaking enforcement measures,<sup>79</sup> and withdrawing a permission already held, rendering them homeless.<sup>80</sup>

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 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.<sup>81</sup> Interference can be arbitrary although it is lawful.<sup>82</sup>

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 be analysing 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.

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<sup>72</sup> *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 992 [12] (Lord Bingham).

<sup>73</sup> Nowak, above n 67, 400.

<sup>74</sup> *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 995 [23] (Lord Bingham); *Kay v Lambeth London Borough Council* [2006] 2 AC 465, 490-91 [28] (Lord Bingham).

<sup>75</sup> *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1010-11 [70] (Lord Hope, citing *Lambeth London Borough Council v Howard* (2001) 33 HLR 636, 644 [30] (Sedley LJ)).

<sup>76</sup> *McCann v United Kingdom* [2008] ECHR 385 (13 May 2008) [47].

<sup>77</sup> *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1010-11 [70] (Lord Hope, citing *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 70 [67] (Lord Woolf CJ)).

<sup>78</sup> *Buckley v United Kingdom* (1997) 23 EHRR 101, 114 [60], 119 [81].

<sup>79</sup> *Chapman v United Kingdom* (2001) 33 EHRR 18, 422 [78].

<sup>80</sup> *Connors v United Kingdom* (2005) 40 EHRR 9.

<sup>81</sup> *Patrick's Case* [2011] VSC 327 (19 July 2011) [80]-[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); cf *WBM v Chief Commissioner of Police* [2010] VSC 219 (28 May 2010) [51]-[57] (Kay J).

<sup>82</sup> *Patrick's Case* [2011] VSC 327 (19 July 2011) [85] (Bell J).

### *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 that reasonable legislative and other measures be taken within available resources toward progressive realisation of the right. Section 26(3) prohibits eviction and home demolition without court order after consideration of all the circumstances and also prohibits legislating for arbitrary evictions.

Landmark cases in the Constitutional Court of South Africa have identified the scope of the government’s obligation to realise the right.<sup>83</sup> It has a negative and a positive dimension.

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’.<sup>84</sup>

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 the government to account for the manner in which it seeks to pursue the achievement of social and economic rights.<sup>85</sup>

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’.<sup>86</sup> Because available resources are limited and demand exceeds supply, it is constitutionally permissible for housing policies to ‘differentiate between categories of people and to prioritise’, but rationally, reasonably and not arbitrarily.<sup>87</sup> Whether the state has complied with its positive obligation of progressive realisation

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<sup>83</sup> See especially *The 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’*).

<sup>84</sup> *Mazibuko v City of Johannesburg* [2010] 4 SA 1, 16-7 [47] (O’Regan J, the other members of the court all concurring) (*‘Mazibuko’*).

<sup>85</sup> *Ibid* 20 [58] (O’Regan J, the other members of the court all concurring).

<sup>86</sup> *Ibid* 17 [48] (O’Regan J, the other members of the court all concurring).

<sup>87</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2012] 2 SA 104, 130-31 [86]-[88] (Van der Westhuizen J, the other members of the court all concurring).

is justiciable in the court,<sup>88</sup> but in a way which respects the division of functions between the court and the government under South Africa's democratic constitutional arrangements.<sup>89</sup>

Other cases in the court have concerned the forced eviction of squatters from land.<sup>90</sup> The settled position is that eviction can only be carried out by court order after considering all the circumstances<sup>91</sup> 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.<sup>92</sup>

In relation to home as a civil and political right, the European jurisprudence shows how it too is protected in the eviction context. Similar 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*<sup>93</sup> provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) prohibits interference with that right by a public authority unless (among

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<sup>88</sup> In *Mazibuko* [2010] 4 SA 1, 22 [67], O'Regan J (the other members of the court concurring) said:

[T]he 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 the government takes no steps to realise the rights, the courts will require the 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.

<sup>89</sup> In *Mazibuko* (Ibid 20 [61]), O'Regan J (the other members of the court concurring) also said :

[O]rdinarily 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.

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

<sup>91</sup> *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2 (13 March 2012) [33].

<sup>92</sup> *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998* (South Africa) (known as the '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 *Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad* 50.

<sup>93</sup> *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).

other things) it is 'in accordance with the law and is necessary in a democratic society'. That convention has been domesticated 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;<sup>94</sup> planning and like decisions refusing to allow gypsies, travellers and Roma permission to occupy land<sup>95</sup> or remain living in a community settlement;<sup>96</sup> the eviction of public tenants following service of a notice to vacate<sup>97</sup> or at the end of the tenancy;<sup>98</sup> and, the judicial sale of the apartment home of a person with a mental disability.<sup>99</sup>

The principles applied by the court in the public housing context were summarised in 2011 in *Kay v United Kingdom*.<sup>100</sup> Interference will be necessary in a democratic society if it answers a 'pressing social need' and is 'proportionate to the legitimate aim pursued'.<sup>101</sup> 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.<sup>102</sup> A wide 'margin of appreciation' is afforded to local authorities in the member states in the administration of their housing systems.<sup>103</sup> 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'.<sup>104</sup> Those principles apply whether or not the person is in lawful occupation. In a Hamlyn Lecture, Lord Bingham of Cornhill said that the great strength of this jurisprudence 'lies in its recognition of the paramount importance to some people, however few, in

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<sup>94</sup> *Gillow v United Kingdom* (1989) 11 EHRR 335.

<sup>95</sup> *Buckley v United Kingdom* (1997) 23 EHRR 101; *Chapman v United Kingdom* (2001) 33 EHRR 18; *Connors v United Kingdom* (2005) 40 EHRR 9.

<sup>96</sup> *Yordanova v Bulgaria* [2012] ECHR 758 (24 April 2012).

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

<sup>98</sup> *Ćosić v Croatia* (2011) 52 EHRR 39.

<sup>99</sup> *Zehentner v Austria* (2011) 52 EHRR 22.

<sup>100</sup> (2012) 54 EHRR 30.

<sup>101</sup> *Ibid* [65].

<sup>102</sup> *Ibid* [67].

<sup>103</sup> *Ibid* [66].

<sup>104</sup> *Ibid* [74].

some circumstances, however rare, of their home, even if their right to live in it has under domestic law come to an end'.<sup>105</sup>

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 Lords<sup>106</sup> and in the Supreme Court<sup>107</sup> which replaced it. By the time that *Hounslow London Borough Council v Powell*<sup>108</sup> 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. 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.<sup>109</sup>

### **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 the individual, 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

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

<sup>106</sup> *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.

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

<sup>108</sup> [2011] 2 AC 186.

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 law, 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. 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,<sup>110</sup> which is not insignificant, the obligations which they create become domestically enforceable only by incorporation into Australian law, usually by legislation. There is important federal legislation in relation to the funding of public housing<sup>111</sup> 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.

### **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.

#### ***Australian Capital Territory***

Under the *Housing Assistance Act 2007* (ACT), housing assistance is administered by the Housing Commissioner (pt 3). The ACT has enacted the *Human Rights Act 2004*

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<sup>109</sup> Ibid.

<sup>110</sup> The authorities are collected in *DPP (Vic) v Ty [No 3]* (2007) 18 VR 241, 244 [48]-[49] (Bell J).

<sup>111</sup> See the *Housing Assistance Act 1996* (Cth), whose objects include 'providing 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)), and the *Supported Accommodation Act 1994* (Cth), which is directed at funding transitional accommodation for the homeless.

(ACT) based on the *International Covenant on Civil and Political Rights*. The commissioner is a public authority under that Act (s 40) and is therefore bound to act compatibly with its human rights (s 40B(1)), unless a contrary law requires otherwise (s 40B(2)).<sup>112</sup>

Provision of housing assistance is discretionary and based on the commissioner's statutory capacity to prescribe operational guidelines (s 21 of the *Housing Assistance Act*). In respect of most decisions, including decisions to refuse to provide and to cancel assistance, there is administrative-based internal review<sup>113</sup> and also full legislative-based external review on the merits (ss 31A-31C, sch 1). That external review is provided by the ACT Civil and Administrative Tribunal established under the *ACT Civil and Administrative Tribunal Act 2008* (ACT). By reasons of the provisions of the *Human Rights Act*, internal and external review decisions must be compatible with human rights.<sup>114</sup>

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* allows the tenant to rely on their human rights in 'legal proceedings', which includes eviction proceedings in the 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 v Michael Watson*,<sup>115</sup> the service sought eviction of the tenant after the expiry of a tenancy in respect of fixed-term crisis

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<sup>112</sup> 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 v Michael Watson* [2010] ACAT 74 (29 October 2010) [73] (Jann Lennard, Senior Member) ('*Canberra Fathers*'). The position is the same in Victoria under the Charter: *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) [150] (Bell J).

<sup>113</sup> *Housing Assistance Public Rental Housing Assistance Program 2010 (No 1)* (ACT) cl 13. See also Community Services, *Review of Decision – important information from Housing ACT* (7 December 2011) ACT Government

<[http://www.dhcs.act.gov.au/\\_\\_data/assets/pdf\\_file/0003/25617/Review\\_of\\_Decision\\_CSD.pdf](http://www.dhcs.act.gov.au/__data/assets/pdf_file/0003/25617/Review_of_Decision_CSD.pdf)>.

<sup>114</sup> 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.

<sup>115</sup> *Canberra Fathers* [2010] ACAT 74 (29 October 2010) (Jann Lennard, Senior Member).

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 alternative affordable public housing and face breaking up the family unit in order to obtain adequate but separate housing.<sup>116</sup>

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

### ***New South Wales***

Under the *Housing Act 2001* (NSW), public housing is administered by the New South Wales Land and Housing Corporation (pt 3). The corporation has power to control, manage and lease land (s 18(a) and (b)). Eligibility for housing is discretionary and the guidelines are not statutory.<sup>117</sup> There is no general human rights legislation in New South Wales.

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.<sup>118</sup> 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 agreement (s 84(1)) and a periodic tenancy at the end of 90 days (s 85(2)). On the landlord's application for a termination order, the tribunal has no discretion to refuse to make the order (ss 84(3) and 85(3)). The tribunal previously had power to consider the 'circumstances of the case', including

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<sup>116</sup> Ibid [72].

<sup>117</sup> See *Residential Tenancies Act 2010* (NSW) s 144.

<sup>118</sup> Family and Community Services, Housing NSW, *Clients Service Delivery and Appeals Policy* (14 September 2011) NSW Government <<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 pt 7 (s 149(4)-(7)) of the *Residential Tenancies Act 2010* (NSW).

hardship to the tenant, which was used on a discretionary basis to refuse an order against public housing tenants.<sup>119</sup>

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 assessment (ss 143-147) or based on a failure to accept alternative housing (ss 148-151). The tribunal's jurisdiction is not to conduct merits review; it must terminate the tenancy agreement if the specified grounds are established (ss 147 and 151). Human rights considerations are not specifically relevant.

Notably, the *Residential Tenancies Act* 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 grounds of breach by the tenant (s 87), but in social housing cases the tribunal may take the circumstances into account (s 152). It may consider the seriousness of the breach and its adverse effects on others, the history of the tenancy and the landlord's responsibility towards other tenants (s 152(1)(a)-(e)). 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,<sup>120</sup> which allows human rights considerations to be taken into account.

### ***Northern Territory***

Public housing in the Northern Territory is administered by the Chief Executive Officer (Housing) under the *Housing Act 1998* (NT). The functions of the officer

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<sup>119</sup> See generally *Roads and Traffic Authority v Swain* [1997] NSWSC 181 (7 May 1997) (Meagher JA, Priestley and Cole JJA agreeing) (New South Wales Court of Appeal). 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: cf *NSW Land & Housing Corporation v Street* [2003] NSWCTTT 403 (24 April 2003) [34], [36] (K Leotta, Member) (order for possession made) and *NSW Land & Housing Corporation v Peters* [2007] NSWCTTT 681 (21 November 2007) 8-9 (John Ringrose, Member) (order for possession not made).

<sup>120</sup> *NSW Land & Housing Corporation v Marshall* [2012] NSWCTTT 24 (12 January 2012) (D Turley, Member) (tenant made arrangements to make up long-outstanding arrears); *NSW Land & Housing Corporation v Outram* [2012] NSWCTTT 224 (8 June 2012) (Ms Katherine Ross, Member) (termination not ordered in respect of tenancy of mentally ill tenant for serious but isolated breach not likely to reoccur); *NSW Land & Housing Corporation v Rafrat* [2012] NSWCTTT 225 (8 June 2012) (FE Gray, Member) (termination not ordered in respect of tenancy of wife with four children when it was the husband's breach).

include providing, and assisting in the provision of, residential accommodation (s 15(a)). For those purposes, powers to acquire, hold and lease property are conferred (s 16(1) and (2)(a), (e) and (n)).

The power of the officer to provide housing assistance is a power to provide prescribed housing assistance (ss 22 and 24(1)). Under the *Housing Regulations 1998* (NT), the officer may let a dwelling to an eligible person (reg 4(1)). An eligible person is someone of limited means who is not adequately housed (reg 3). Preference is given to persons experiencing a housing crisis, like the homeless (reg 4(3)).

The Northern Territory has a two-tier appeals process which is administrative, not legislative.<sup>121</sup> 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.

Under the *Housing Act*, housing assistance is provided as leasehold property and the officer is therefore a landlord. Consistent with that private law foundation, the *Housing Act* (s 34) makes the *Residential Tenancies Act 1991* (NT) apply to premises provided as housing assistance, as it does to private residential premises.

The *Residential Tenancies Act* also has a two-tier decision-making process. Under the first tier, the Commissioner of Tenancies (who is the Commissioner of Consumer Affairs) (s 13) has the power to hear and determine applications, including applications for orders for possession following a landlord's notice of termination (s 104(1)). Under the second tier, the Magistrates Court may hear and determine appeals from decisions of the commissioner (s 150(1)). Appeals are by way of appeal de novo and further evidence may be admitted (s 150(2)).

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

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<sup>121</sup> There is legislative review of certain specified decisions by the officer under pt 6 of the *Housing Act*.

appear to be the norm.<sup>122</sup> A landlord (including the officer) may terminate a periodic tenancy on 42 days' written notice (s 89) and a fixed term tenancy on 14 days' notice before the expiry date (s 90). No reason need be given. On the expiry of the notice, the tenant ceases to be entitled to possession (s 103) and the commissioner or the court may make an order for possession on the landlord's application (s 104(1) and (2)). 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' (s 105(1)), but do not appear to have a discretion to refuse to make the order. The previous legislation conferred no discretion in no-cause evictions.<sup>123</sup>

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 premises clean (s 51(1)(a)) or by causing a nuisance to neighbours (s 54(b))). 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 (s 96A)). Then the landlord may apply to the commissioner or the court for an order of possession (s 100A(1)).

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.<sup>124</sup> In *Brown and Lemmers v Elenis and Elenis*,<sup>125</sup> 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 the circumstances peculiar to that case. Such matters might

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<sup>122</sup> 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.

<sup>123</sup> *Shepherd v Chief Executive Officer (Housing)* [1990] NTSCCA 128 (24 November 1999) [11]-[17] (Martin CJ, Mildren and Bailey JJ agreeing); see also *Mason v Northern Territory Housing Commission* (1997) 114 NTR 1, 8 (Supreme Court of the Northern Territory) (Bailey J); *Chief Executive Officer (Housing) v Binsaris* [2002] NTSC 9 (5 February 2002) [20]-[22] (Bailey J).

<sup>124</sup> Section 100A and related provisions were enacted by the *Residential Tenancies Act Amendment Act 2005* (NT).

<sup>125</sup> [2007] NTMC 4 (19 January 2007) [13] (Magistrate S Oliver) ('*Brown and Lemmers*'). The previous legislation operated differently: *Mason v Northern Territory Housing Commission* (1997) 114 NTR 1, 8 (Supreme Court of the Northern Territory) (Bailey J); *Chief Executive Officer (Housing) v Binsaris* [2002] NTSC 9 (5 February 2002) [20]-[22] (Bailey J).

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.<sup>126</sup>

Although *Brown and Lemmers* 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<sup>127</sup> and the commissioner<sup>128</sup> have 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. The commissioner has refused to order possession against a tenant who has tried their 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.<sup>129</sup>

### **Queensland**

Public housing in Queensland is administered under the *Housing Act 2003* (Qld) by the chief executive (s 11), whose responsibilities include the provision of public housing and related programs (s 11(1) and (2)). The chief executive has general and specific powers (s 12), including the power to acquire, lease and sell land (s 12(2)(b)).

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.<sup>130</sup> There is a legislation-based system of internal

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<sup>126</sup> *Brown and Lemmers* [2007] NTMC 4 (19 January 2007) [13].

<sup>127</sup> Cf *Chief Executive Officer (Housing) v Coonan* [2010] NTMC 30 (13 April 2010) (where 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).

<sup>128</sup> *Chief Executive Officer (Housing) v Warnir and 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 and Kanari* [2008] NTRTCmr 24 (30 December 2008); *Chief Executive Officer (Housing) v Brady and Richards* [2008] NTRTCmr 27 (17 March 2009).

<sup>129</sup> *Chief Executive Officer (Housing) v Sinclair* [2010] NTRTCmr 34 (23 April 2010).

<sup>130</sup> Department of Communities, *Common Eligibility Criteria* (March 2010) Queensland Government <<http://www.communities.qld.gov.au/resources/housing/community-programs/common->

review of decisions (pt 6), including eligibility decisions (s 63(a)(i)). The review is carried out by the chief executive or by another officer who did not make the original decision (s 67(2) and (4)).

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 (s 280). The allowed period to remedy the breach must be no less than seven days in most cases (s 328(1)). If the breach is not remedied, the landlord may serve a notice requiring the tenant to leave the premises (s 281(1)). These provisions are procedurally prescriptive and must be followed.<sup>131</sup>

If the tenant fails to leave, the landlord may apply to the Queensland Civil and Administrative Tribunal for an order for possession (293(1)). Making the order is discretionary, not mandatory.<sup>132</sup> The tribunal can make the order if the breach and failure to remedy are established and ‘the breach justifies terminating the agreement’ (s 337(2)(c)). In determining that matter, the seriousness of the breach and other appropriate orders may be considered (s 337(3)(a) and (f)). This consideration has been used by the tribunal in refusing to order eviction of tenants of public housing.<sup>133</sup> In *State of Queensland Housing and Homelessness Services v Pham*,<sup>134</sup> 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.<sup>135</sup>

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<sup>131</sup> *Big4 Brisbane Northside Caravan Village v Schliebs* [2012] QCAT 277 (29 June 2012) [23] (Wilson J, president).

<sup>132</sup> *Madsen v Wiltshire* [2010] QCATA 11 (30 April 2010) [9]-[12] (President).

<sup>133</sup> See eg *Department of Communities, Housing and Homelessness Services v Kairouz* [2010] QCAT 355 (13 July 2010) [11] (Adjudicator Bill Lemass) (‘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’).

<sup>134</sup> [2011] QCAT 540 (8 November 2011) (Adjudicator Bill Lemass) (although external parts of property were completely overgrown and other breaches were established, termination was not justified and remedy orders were made instead).

<sup>135</sup> *Ibid* [19].

Where a breach of a tenant's obligation under the Act is alleged, the application for possession can be made without notice (s 335(1)). 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 (s 296(1)), the order can be made simply because the breach is established (s 344(1)). If the breach is behaving objectionably (s 297), whether the behaviour justifies terminating the tenancy must be considered (s 345(1)(b)).

Application for possession without reason must also follow a specified notice to leave and application procedure (s 291). A landlord who is entitled to possession can simply choose to seek possession without giving a reason rather than relying on a ground which has to be established.<sup>136</sup> 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) (s 329(2)(k)) and for a periodic tenancies it is two months (s 329(2)(j)). Notice of termination without reason cannot be given in retaliation against a tenant who has asserted their rights (ss 291(3) and 292).<sup>137</sup> 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' (s 341(2)). 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 (ss 289 and 290). 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 (s 340). That power appears to be discretionary.

### ***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*

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<sup>136</sup> *Remely v O'Shea* [2007] QSC 225 (28 August 2007) [44] (Dutney J) (under the equivalent provision in the former legislation).

<sup>137</sup> The scope of the protection against retaliatory eviction is discussed in *Bamfield v Zanfan Pty Ltd* [2010] QCATA 1 (22 February 2010) [15]-[25] (President).

*Australian Co-operative and Community Housing Act 1991* (SA). Under the former, the function of the trust is to assist people to obtain housing (s 5), subject to the control and direction of the minister (s 8). Under the latter, the functions of the minister and the trust are to achieve that aim through co-operative and community housing (ss 6A and 16).

The functions of the trust may be performed by 'acting as a landlord of public housing' (s 5(1)(a)(i) of the *South Australian Housing Trust Act*) and managing the various forms of public housing (s 5(1)(a)(ii)). It is given all the powers of a natural person (s 6), including the power to acquire and lease property (ss 7(1)(a) and 21(1)(b)).

There is an internal and external appeal review system in relation to most decisions affecting a person's eligibility for public housing<sup>138</sup> and also in respect of some disputes involving co-operative and community housing.<sup>139</sup> The internal review system is legislative and provided by the appeals unit of the department.<sup>140</sup> The external review system is also legislative.<sup>141</sup> The review is provided by the Housing Appeal Panel, which is independent of the department and comprised of persons appointed by the minister.<sup>142</sup> There is no internal or external review of decisions, including termination and eviction decisions, where the matter is before the Residential Tenancies Tribunal.<sup>143</sup>

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 (s 80(1)), including for failing to pay the rent (s 80(2)). After serving the

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<sup>138</sup> *South Australian Housing Trust Act* s 32A(1) (definition of 'reviewable decision').

<sup>139</sup> *South Australian Co-operative and Community Housing Act* s 84(1).

<sup>140</sup> *South Australian Housing Trust Act* s 32C(1); see also *South Australian Co-operative and Community Housing Act* s 84(9)(a).

<sup>141</sup> *South Australian Housing Trust Act* pt 3A; see also *South Australian Co-operative and Community Housing Act* s 84(a1).

<sup>142</sup> *South Australian Housing Trust Act* s 32B.

<sup>143</sup> *South Australian Housing Trust Act* s 32A(2)(c); see also *South Australian Co-operative and Community Housing Act* s 84(10), (11)(b).

notice, the landlord can then obtain an order of possession from the tribunal (s 93(1)). However, the tribunal may refuse to make an order, and reinstate the tenancy, if it is 'just and equitable' to do so (s 80(5)). 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.<sup>144</sup>

In certain specified circumstances, for example, where the tenant has committed a serious breach of the tenancy (s 87(1)), has used the premises for illegal purposes or caused or permitted a nuisance (s 90(1)), 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 discretionary, not mandatory.<sup>145</sup> 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 (s 87(1)). In public housing cases, the tribunal takes into account the impact of eviction on vulnerable tenants and their children,<sup>146</sup> even though the breach was quite serious.<sup>147</sup>

Notice of termination can also be served without specifying a ground (s 83(1)), unless the tenancy is a fixed term tenancy (s 83(2)). 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.<sup>148</sup> It can suspend the operation of an order for possession in cases of 'severe hardship' (s 93(4)).<sup>149</sup>

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<sup>144</sup> See eg *South Australian Housing Trust v J* [2007] SARTT 21 (20 September 2007) (PM Patrick, Presiding Member) (where property dirty inside and out, tenant ordered to carry out a thorough clean and tidy-up).

<sup>145</sup> *South Australian Housing Trust v T* [2007] SARTT 11 (22 November 2007) (T Rymill, Member); *South Australian Housing Trust v Branson* [2009] SARTT 18 (16 September 2009) (P Patrick, Presiding Member); *South Australian Housing Trust v Uren* [2010] SARTT 9 (23 March 2010) (PV Carey, Member).

<sup>146</sup> See *South Australian Housing Trust v T* [2007] SARTT 11 (22 November 2007) (T Rymill, Member) (where nuisance alleged but situation had improved, termination not ordered against sick tenant with needful children); *South Australian Housing Trust v Uren* [2010] SARTT 9 (23 March 2010) (PV Carey, Member) (termination not ordered where old and frail tenant could not stop disruptive people attending the premises).

<sup>147</sup> *South Australian Housing Trust v Branson* [2009] SARTT 14 (16 September 2009) (P Patrick, Presiding Member) (termination not ordered against tenant who spat in face of housing officer (but tenancy converted to six months' probationary tenancy: *South Australian Housing Trust v Branson* [2009] SARTT 18 (16 September 2009) (P Patrick, Presiding Member)).

<sup>148</sup> As in *Blind Welfare Association of SA v Pearce* [2010] SARTT 10 (15 March 2010) (P Patrick, Presiding Member) ('*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.

<sup>149</sup> That power was exercised in *Pearce*: *ibid*.

From decisions of the tribunal there is a right of appeal to a judge of the District Court (s 41(1)). The judge may re-hear and re-decide the case (s 41(2)), although the power is exercised cautiously.<sup>150</sup>

### *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 (s 4(1)). The director has the power to acquire land (s 11(1)) and lease any dwelling-house 'on such terms and conditions as he sees fit' (s 16(1)). Eligibility for public housing is based on administrative criteria which are targeted at those most in need.<sup>151</sup>

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, and there are no restraints on the director being able to do so.<sup>152</sup> 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 well-being status of the tenant household, linkages to support services and the availability of alternative housing'.<sup>153</sup>

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<sup>150</sup> See *White v South Australian Housing Trust* [2009] SADC 98 (10 September 2009) [31], [27]-[49] (His Honour, Judge Soulio).

<sup>151</sup> Housing Tasmania, *Public Housing Eligibility Policy* (July 2008) Department of Health and Human Services  
<[http://www.dhhs.tas.gov.au/\\_\\_data/assets/pdf\\_file/0008/59138/Pol\\_pheligibility\\_July\\_2008.pdf](http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0008/59138/Pol_pheligibility_July_2008.pdf)>.

<sup>152</sup> Housing Tasmania, *Customer Feedback and Review Policy* (July 2010) Department of Health and Human Services, 4 <[http://www.dhhs.tas.gov.au/\\_\\_data/assets/pdf\\_file/0005/59117/POL\\_-\\_Customer\\_Feedback\\_and\\_Review\\_July\\_2010\\_v2.0\\_ABOUT\\_HOUSING.pdf](http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0005/59117/POL_-_Customer_Feedback_and_Review_July_2010_v2.0_ABOUT_HOUSING.pdf)>.

<sup>153</sup> Housing Tasmania, *Eviction Policy* (August 2008) Department of Health and Human Services, 1 <[http://www.dhhs.tas.gov.au/\\_\\_data/assets/pdf\\_file/0007/59119/Pol\\_evict\\_Aug\\_2008\\_V1.2.pdf](http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0007/59119/Pol_evict_Aug_2008_V1.2.pdf)>.

Public housing tenancies come under the *Residential Tenancy Act 1997* (Tas) (s 5(1)) 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 (s 42(1)(a)), caused a nuisance (s 42(1)(g)) or without reason where a fixed term agreement has expired less than 28 days previously (s 42(1)(b)). Application may then be made to the tribunal for an order for possession (s 45(1)). Where the notice was properly given, the tribunal has no discretion to refuse to make an order.<sup>154</sup> 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 (s 41(1)). In such cases, the tribunal's powers appear to be discretionary (s 41(2)('may')).

### ***Western Australia***

Public housing in Western Australia is administered under the *Housing Act 1980* (WA) by the State Housing Authority (s 6(1)) whose functions include the leasing of houses and the provision of assistance to enable people to obtain accommodation (s 4(ca) and (c)). The authority is subject to the control and direction of the responsible minister (s 11(1)). It has the power to lease land and buildings on such terms and conditions as it sees fit (s 25(1)).

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.<sup>155</sup>

The *Residential Tenancies Act 1987* (WA) covers public housing tenancies.<sup>156</sup> Applications for termination and possession orders are heard and determined by the Magistrates Court (s 12A(1)).

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<sup>154</sup> *Logan v Director of Housing* (2004) 13 Tas R 324, 327-28 [11] (Blow J).

<sup>155</sup> Department of Housing, *Department of Housing Appeals Mechanism* (September 2011) Government of Western Australia, [9] <[http://www.housing.wa.gov.au/HousingDocuments/HAM\\_Policy.pdf](http://www.housing.wa.gov.au/HousingDocuments/HAM_Policy.pdf)>.

<sup>156</sup> See the definition of 'residential tenancy agreement' in s 3.

A landlord may serve a notice of termination of at least seven days on a tenant for breaching the agreement (s 62(1) and (2)) and of at least 60 days where no cause is relied on (s 64(1) and (2)). Then the landlord can make application for termination and possession orders (s 71(1)). If satisfied that the notice is technically compliant, the court must make the order (s 71(2)), but may suspend it for up to 30 days on grounds of relative hardship (s 71(3)(a)) and refuse to make orders in certain limited circumstances, as where the tenant has remedied an isolated breach (s 71(3)(b)). 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 tenancy (s 72(1)) or has caused serious damage to property or injury to a person (s 73(1)). For expired fix term tenancies, there are the same limited powers of suspension and refusal (see s 72(3)).

### ***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 (ss 9 and 10). The director's powers include the acquisition, disposal, development and management of land (ss 14 and 15)<sup>157</sup> and entering into residential leases (s 14(1)(g)).

Eligibility for housing is according to discretionary criteria.<sup>158</sup> 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.<sup>159</sup>

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<sup>157</sup> 'Land' is defined in s 4(1) to include buildings and other structures.

<sup>158</sup> Department of Human Services, *Allocations Manual* (April 2012) State Government of Victoria, chs 3-10 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual>>.

<sup>159</sup> Department of Human Services, *Business Practice Manual: Housing Appeals: Version 4.2* (June 2011) State Government of Victoria, 4-8 <[http://www.dhs.vic.gov.au/\\_\\_data/assets/pdf\\_file/0010/564841/4-Housing-Appeals\\_V4.2-June.pdf](http://www.dhs.vic.gov.au/__data/assets/pdf_file/0010/564841/4-Housing-Appeals_V4.2-June.pdf)>.

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.<sup>160</sup> It is unlawful for a public authority to act incompatibly with the human rights specified in the Charter, unless a contrary law requires otherwise (s 38(1) and (2)). That unlawfulness can be relied on in judicial review and like proceedings in the Supreme Court of Victoria (s 39(1)).<sup>161</sup> 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.<sup>162</sup>

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 (for example) the tenant owes at least 14 days' rent to the landlord (s 246(1)) or uses the premises for an illegal purpose (s 250(1)), the landlord may serve a notice to vacate within 14 days on the tenant (ss 246(2), 248(2) and 246(3)). The director is given express power to serve a notice to vacate within 14 days where the tenant engages in drug-related conduct (s 250A(1) and (2)) or commits a prescribed offence (s 250B(1) and (2)) on the premises or in a common area, or knowingly obtains a tenancy on the basis of false or misleading eligibility information (s 252(1) and (2)).<sup>163</sup>

Where (for 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 (ss 207 and 208). An example of a duty provision is the provision requiring the tenant not to use the premises in a manner which causes a nuisance (s 60(1)). If the breach of duty notice is not complied with, the landlord may apply to the tribunal for a compensation and compliance order (s 209). If the tribunal makes an order (s 212) and the tenant

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<sup>160</sup> *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) [150] (Bell J); *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010) [25] (Bell J).

<sup>161</sup> *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).

<sup>162</sup> *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) [48] (Warren CJ), [98] (Maxwell P), [281] (Weinberg JA).

<sup>163</sup> 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 (s 262(1) and (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 (s 262A(1) and (2)).

fails to comply, the landlord may serve a notice to vacate within 14 days (s 248(1) and (2)).

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 (s 261(1) and (2)). The notice period is 60 or 90 days, depending on the term (s 261(3)). The director (and private landlords) without specifying a reason may also serve on a periodic tenant a notice to vacate within 120 days (s 263(1) and (2)). Notices under these provisions have no effect if they are retaliatory (s 266(2)) but can only be challenged within a specified time (s 266(3)). The time can be extended.<sup>164</sup>

On application by the director or other landlord for an order of possession (s 322), the tribunal must make the order where the director was entitled to give the notice to vacate on the ground relied on (s 330(1)(a)), 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 (s 331(1)). 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 (s 332(1)(a)), the tribunal must not make an order where it 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.

There is no exception where the director has served 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 (s 352(1) and (2)).

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

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

### **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, and presumably arbitrary, in those circumstances, which comes close to human rights justification 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 are 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 is the ultimate responsibility of duly elected governments and parliaments. But this dissonance cannot be resolved without, and should be resolved with, 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.

## **Conclusion**

Forced eviction of vulnerable people raises profoundly important social, ethical and legal issues which, in this lecture, 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. The state and territory legal systems permit forced eviction of public housing tenants without reason. Tenants on fixed term tenancies have security of tenure during the term of the tenancy but can be evicted on notice without reason at the expiry of the term. Those on periodic tenancies can be evicted on notice without reason at the expiry of the notice. Except in the Australian Capital Territory and Queensland, the courts and tribunals have no discretion to take individual circumstances into account in determining whether or not to make an eviction order. Only in the Australian Capital Territory must the tenant's human rights expressly be taken into account. In the other states and territories, the public housing landlord does not have to justify, and is not accountable for, the eviction in human rights terms.

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 those issues are not justiciable and the court or tribunal must make an order evicting the tenant.

Why is this so? Australia does not have a national bill of rights. The Australian Capital Territory and Victoria have such legislation, but only in the former does it apply in eviction proceedings. As regards the forced eviction of public housing tenants, the administration of public rental housing in the states and territories is premised on the private law categorisation of the dwelling as the property of the state and the relationship of the parties as landlord and tenant. These legal categories do not take proper account of the human rights which are engaged. 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 lecture, 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.